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JOINT STANDING COMMITTEE ON TREATIES

Reference: Australia's relationship with the World Trade Organisation

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JOINT COMMITTEE ON TREATIES

Friday, 9 March 2001

Members: Senator Coonan *(Chair)*, Senator Cooney *(Deputy Chair)*, Senators Bartlett, Ludwig, Mason, Schacht and Tchen and Mr Adams, Mr Baird, Mr Bartlett, Mr Byrne, Mrs Elson, Mr Hardgrave, Mrs De-Anne Kelly, Mr Andrew Thomson and Mr Wilkie

Senators and members in attendance: Senators Coonan, Cooney and Tchen and Mr Adams and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

- opportunities for community involvement in developing Australia's negotiating positions on matters with the WTO;
- the transparency and accountability of WTO operations and decision making;
- the effectiveness of the WTO's dispute settlement procedures and the ease of access to these procedures;
- Australia's capacity to undertake WTO advocacy;
- the involvement of peak bodies, industry groups and external lawyers in conducting WTO disputes;
- the relationship between the WTO and regional economic arrangements;
- the relationship between WTO agreements and other multilateral agreements, including those on trade and related matters, and on environmental, human rights and labour standards; and
- the extent to which social, cultural and environmental considerations influence WTO priorities and decision making.

WITNESSES

Committee met at 9.10 a.m.

HOOKE, Mr Mitchell Harry, Chief Executive, Australian Food and Grocery Council

HOWARD, Mr Lyall James, Director, Trade and Quarantine, National Farmers Federation

PLOWMAN, Ms Kathleen, Acting CEO, Pork Council of Australia

WARREN, Mr Matthew John, Assistant Director, Policy, Australian Food and Grocery Council

CHAIR—Good morning everyone. I declare open this day of panel discussions on Australia's relationship with the World Trade Organisation. The committee decided to hold panel discussions rather than a formal public hearing today in order to expand on the evidence we have already received through both written submissions and at previous public hearings. Today we are holding three panel sessions on: firstly, agriculture; secondly, culture and intellectual property; and, thirdly, lawyers and the WTO. We are planning a further panel session on environment, human rights and labour issues to be held in early April.

At the start of each panel session today I will ask each participant to make a short opening statement of around five minutes or so outlining what you believe are the relevant issues surrounding Australia's relationship with the World Trade Organisation. We will then move to a free flowing discussion involving the committee and all panel participants. By that I mean you can discuss things with each other if you wish.

I would like to advise all participants that, although the committee does not require you to give evidence under oath, today's hearings are in fact legal proceedings of the parliament and warrant the same respect as proceedings of the House and of the Senate. So whilst they are informal they do have that caveat. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Mr Howard, would you like to lead off by opening this session?

Session 1—Agriculture

Mr Howard—At the Outlook Conference in Canberra last week ABARE's leading trade analyst, Ivan Roberts, said:

> The problem of agricultural protectionism has only been seriously addressed once.
>
> And that was in the Uruguay Round, which concluded in the mid-1990s. 'You'd have thought that the result would have been large reductions in agricultural protection,' said Mr Roberts. But as the speaker before him—the head of agriculture policy at the OECD—said, 'You'd be wrong.' Just five years after Uruguay, agricultural support is as high as it was in the mid-1980s and that period had the highest levels of support in the past half century. So how is it that support could be back to record levels when everyone had agreed to cuts? The answer, said Mr Roberts, is in the small print of the Uruguay agreement. 'It is full of loopholes and things that are not quite what they seem,' he said.

On hearing this, it should come as no surprise to members of this committee that NFF's members are getting aggravated. They want to grow their businesses and they want to attract investment into agriculture. But poor access to overseas markets and a trading environment that

is corrupted by subsidies and surpluses is holding them back. These are global problems, and they have to be addressed at a global level. The forum for doing this is the WTO. But, 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.

Our strategy last time around was to work with a coalition of like-minded countries called the Cairns Group. This was a good strategy because on our own we do not have a lot of weight. The Cairns Group continues to be very effective as an outside voice for change and as a coordinating group in Geneva. But Australia understands that other countries do not give much thought to outside opinion. Countries have constituents and interest groups to think of and they are not going to give up their domestic policies because outsiders tell them to. Negotiators in Geneva receive their instructions from capitals, so the extent to which they can offer up their agricultural policies in the WTO is shaped by domestic politics at home.

Therefore, to bring about change, 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 tax payers, 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. We therefore need Cairns Group plus. On its own, outside pressure will not do the job but, combined with the strategy to white-ant the system from the inside, we do have a chance.

The NFF has developed a strategy for this campaign and we published it in this booklet called *Solving the problem: the political economy of agricultural trade reform*. I have enough copies for everyone on the committee. We are now raising the funds to get on with it. Because we are operating through different channels to the government, we are making sure that we coordinate this strategy with the Department of Foreign Affairs and Trade. But this is still not enough. Last time around the Cairns Group wrong-footed the Europeans and they were forced to reform the common agricultural policy midway through the negotiations. The Japanese also made concessions. This time around the Europeans and the Japanese are on the front foot. The EU completed a second round of CAP reforms before the negotiations started and 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 such as this one from Japan, which is targeted at a general readership to influence public opinion.

NFF believes that the wider public interest and involvement in the new WTO round and the fact that our opponents are aggressively advocating their position around the world means that the old paradigm is too narrow. The old paradigm is that Australia will swing big resources into

the negotiations after the round has started. When the time comes we still need to do that but we also need to do much more now to shape the climate in the lead-up to the negotiations. As a country we have to put more resources into influencing other countries, particularly the developing countries, and we have to do it now. We need a particularly big campaign to influence powerful countries' policies like the 2002 US farm bill because the forces that shape domestic farm policy in America are also at work shaping trade policy. This is a big task but there is a big pay-back.

In 1999, the Department of Foreign Affairs and Trade published a report which put the net benefit to Australia of removing global agricultural protection at $4 billion each year. We will not get everything we want but there are substantial gains for Australia and they are worth backing.

CHAIR—Would you like to table any of those documents?

Mr Howard—Yes, all of them.

CHAIR—We will accept those and make a note of them.

Mr Hooke—The Australian Food and Grocery Council is the peak national body representing Australia's largest manufacturing industry: food, drink and grocery products. We do not represent the retailers, as often misconstrued. The organisation was established some 5½ years ago and now has a membership base that represents about 85 per cent of a $55 billion industry. We have confined our submission to the terms of reference for this inquiry and therefore I will confine my comments accordingly.

The first point I should make is that the growth in food exports in processed foods has tracked the international trend. Few people would be aware that processed products in fact dominate the trade globally in agricultural products. Processed foods now represent about three-quarters of the global trade in agricultural products; that is, for us, about $19.9 billion in 1999-2000 trade in agrifood products of which about two-thirds of that were processed and about 40 per cent of those were highly processed consumer pack products.

We now have a trade surplus, which is a turnaround from being a net importer of processed foods. In the decade to about 1996 or 1997 there was significant growth, running at about 13 per cent compound a year. This growth resembles that of other elaborately transformed manufactures, and in fact is even better than the wine industry when you examine the growth of the highly processed products. We have a trade surplus now in excess of $4½ billion, so we are importing about $1 billion—a bit over that—in terms of highly processed products, and we are exporting about $5.5 billion in consumer pack products—that is, highly processed products. You can double that to $12 billion or $13 billion of totally processed food. This is an industry that is growing, and that is understandable when you look at the domestic market. It is a low inflation environment—and there is nothing like a little bit of inflationary led growth at times—it is a mature market and, apart from cannibalising existing lines, the real sources of growth for our industry are offshore. That is a take-home message within the context of this inquiry.

The reality check on globalisation is nothing new. Many transnational and global companies were doing this long before the term was coined. In fact, Marco Polo made an art form of it, as

you know. We can expect globalisation to continue to be fuelled by the removal of barriers to the flow of information capital, services and goods. It will be driven by rapid technological advances in IT and in biotechnology, as well as in smart packaging and transport—whatever you like. The bottom line is that it is here, it is here to stay and it will continue to test the competitiveness of our industries. It is at the point where the capacity of our businesses to internationalise their operations, whether they are export oriented or not, is as important as their capacity to trade globally.

We are going to see the pressure come on in terms of justifying Australia as a strategic location for the investment in and the manufacture of goods in Australia. We are often taken in by the shrill mantra of Australian owned companies—the debates that are led and perpetuated by the likes of Dick Smith and others—but the Australian owned debate has in fact almost become irrelevant. The question facing this country is whether or not it will be Australian made; and there are many headlines about a branch economy. I think there was also a lovely little quote in the *Bulletin* which said, 'Be careful because Australia could end up like Adelaide: a nice place to live but largely irrelevant.' I would never say something quite as offensive, of course.

CHAIR—Especially if you come from Adelaide.

Mr Hooke—The reality of globalisation therefore means that we must face not only the challenge to internationalise our operations but also this inherent contradiction in meeting the demands of a more discerning and sophisticated consumer for increasingly customised products and services, yet we have the business imperatives for rationalisation of costs through economies of scale. It is a concept known as 'mass customisation'.

The imperative for increased trade reform, as Lyall Howard has pointed out, is very strong. Globally active companies are moving their operations around and locating their businesses where it is strategically opportune to do so, but they are also moving products around the globe with increasing rapidity. That is putting substantial pressure on society, and the situation has arisen where those in society who are in fact the beneficiaries of globalisation and rapid technological improvements are the very ones who are contesting the benefits of globalisation—if you have a full tummy you can actually afford to be marching in the streets. The truly serious, overarching problems therefore facing governments around the globe are not so much the intellectual debates about the value or the worth of trade liberalisation—that was settled 20 years ago—but the real issues are cultural, social, ethical and therefore political.

Governments face this conundrum in how to meet the political imperatives of satisfying consumer interests and community concerns. I underline: consumer interests and community concerns are not always the same. We might like to flesh that out in discussion. They have also got to be cognisant of government's limitations in remedying market failures and the consequences of inappropriate, if not illegitimate, policies in terms of their effect on economic growth, prosperity and social welfare.

We have advocated in our submission to you that there is a necessity for a good understanding of the complementarity between trade, economic environment and social policies and that the intersection is, in fact, one of complementarity and preserving the integrity of both sides of the equation, not compromising the integrity of either. Trade and environment is one of

the classic examples of the potential to get that intersection wrong. Neither will be served by compromising the integrity or the capacity of the other.

We support the World Trade Organisation trading system profoundly. We see a rules based trading system as far more preferable to politically contested value judgments. The Uruguay Round did reinforce a rules based system; it brought agriculture, services and IP into the negotiations. It changed the basis for dispute settlements from one of consensus to adopt to one of consensus to reject, and since then we have seen case law start to establish the basis upon which these rules are interpreted and applied.

But what it did not do was address the problems that beset our industry. In fact, notwithstanding that agriculture was brought into the negotiations comprehensively, processed foods hardly rated a mention. They were not even on the agenda. We still bear the legacy of high tariffs and tariff escalation. In other words, an increasing level of tariff as the product is processed, or industrially transformed. There are non-tariff barriers pervasive through the system and this is notwithstanding, as I said earlier on, that trade in processed food products has increased substantially globally and out of this country, but it is costly. Lack of market access and subsidised competition is denying our industry and Australia the opportunities for further business growth. I go back to the point I made earlier on, that these are the real sources of growth for this industry and therefore, the pull-through benefits to the agricultural raw commodity producers and, subsequently, the pull-through benefits to rural and regional Australia. It is not widely appreciated that the greatest and the fastest rate of growth of employment in rural and regional Australia is in the food processing sector and it is, in fact, responsible for most of the substitution of employment in those regions where there has been a decline in agricultural employment.

Our objectives in a new round, pursuant again to the terms of reference, are that we want a comprehensive round of multilateral trade negotiations. The agriculture negotiations in Geneva are an exercise in semantics until there is a comprehensive round. We want the focus of the new round to be on the core business—the pay dirt for our industry—which is market access and reduced subsidised competition. We do not want to see the chattering classes and the cacophony of protests about all these attendant issues compromise the negotiations. Keen observers of Seattle would know that it was not the street marches; it was the fact that trade and labour, trade and environment, trade and competition and trade and investment were all on the agenda. Competition was too complex, labour was inappropriate for the WTO and the environment was difficult and strongly opposed by the developing countries who saw it as nothing more than a ruse for protectionism, as they did trade and labour. Of course, investment is highly political.

We want the negotiating mandate to cover processed foods literally. There should be a separate negotiating modality within the agriculture negotiations that provides for tariff formulae to address the problems of processed foods. Lyall Howard said it quite rightly, or Ivan Roberts said it quite rightly—and that is, the detail in the Uruguay Round is the problem for our industry and it comes down to one word, aggregation. It appears at every single point and therefore it enables countries to aggregate their product mix such that they can defeat the discipline of the trade rule.

Notwithstanding that the increase in subsidies is on a PSE basis, which means it does not actually differentiate those that are trade distorting and those that are not, the message is clear

from the latest analysis out of the OECD; that is, these people are increasing their protection or they have not decreased it so it has not given the cut that we are all looking for. Seattle was the manifestation of the climate that already exists in trade reform, and it is a political climate, as I said earlier on. The intellectual debate is done. The question now is: how do you get through the problems of addressing the pain of economies in transition, which is always localised and always substantial for the individual, whereas the benefits of globalisation are diffuse?

Our approach to the multilateral round of trade negotiations is as much the same as Lyall Howard's; we will continue to work with our coalition of industry organisations globally. I have been a member of Australia's official delegation to two sets now: Singapore and Seattle. Our role there was one of continuing to work in the corridors to bring our industry along and to ensure that we were part of the equation in terms of where the negotiations could in fact represent or reflect the best interests of our industry. Having said that, it goes to another point that you have raised in your terms of reference; that is, we are wholly and utterly supportive of any group or any party or any body being consulted within the context of the WTO negotiations, but 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.

The WTO is not a deliberative body like many of the organs of the UN; its primary function is to negotiate rules and to enforce them. That is a matter between governments and it is a legal obligation between governments. To the extent that there are consultations with industry groups, they should be within the province of individual signatory countries. That is where the primary responsibility and the national sovereignty rests. Furthermore, there ought to be a requirement on governments to satisfy accreditation criteria. I would recommend Gary Johns's paper *NGO Way to Go* to the committee. I am happy to table it, although it is not my place to do so—it is not my work. It is actually worth reading. He quotes there being 44,000 international NGOs.

Mr ADAMS—How much globalised capital—

Mr Hooke—He has actually got the figures in there. You will find them.

Mr ADAMS—There are two sides to this debate.

Mr Hooke—There are, and I am sure you will bring that up, if you will just permit me to finish. The point is that he makes a clear distinction between those that have a legitimate mandate and those that do not. All we are saying is that governments ought to go through a filter process. If it is good enough for the commission, surely it is good enough for us. My final point, because I can see that you are getting frustrated with my opening remarks, is that—

CHAIR—Just take your time.

Mr Hooke—Thank you.

Mr ADAMS—You make it so simple, Mr Hooke.

CHAIR—We do want to have a discussion but I do not want anyone to feel constrained in putting their main points.

Mr Hooke—You tell me if we are going overboard and I will stop. We also make the point in our submission that the relationship between other bodies, and particularly on multilateral environment agreements, is something that needs to be looked at very carefully. We do not support trade coercion, we do not support extraterritoriality, we do not support any other agreements that usurp the rights and obligations of signatory countries under the WTO. As I said earlier in my opening remarks, we see the necessity for those policies to be complementary, not to undermine the integrity of either.

CHAIR—I suppose it is a matter of how you balance it, isn't it?

Mr Hooke—It is a bit more than that; it is also an issue of understanding that the very success of the WTO may well be its downfall.

CHAIR—Of course it is.

Mr Hooke—Everybody out there is trying to tack on their particular social, political, moral and ethical agenda. The Rio declaration made it very clear: do not use trade sanctions to enforce environmental objectives. That has not been terribly well observed, if at all. There is no argument about the objectives because without the sustainability of the environment, trade is unsustainable and vice versa. We see that getting that intersection right is absolutely critical, but we will not support the rights and obligations of the World Trade Organisation being usurped by other treaties or other environment agreements. This goes to the heart of our position on the biosafety protocol to the UN Convention on Biological Diversity; that is, we have to be absolutely sure that the WTO rules, rights and obligations are preserved and not undermined by another agreement.

In the disputes system I referred to earlier, there has been a fundamental turnaround and we now see case law putting the substance to rules governing international trade law. We are seeing some very important policy principles come out of that, and that is the concept of materiality; that is, no discrimination among like products. It is the physical characteristics of the product that determine the basis upon which trade is or isn't discriminated and not the basis by which it was produced. We do not accept that production and process methods ought to form the basis to discrimination of like products. We have seen that with the turtle excluder devices decision with shrimps, with the tuna and dolphin free nets and the hormone growth promotants. Every single one of those cases maintained very clearly the policy of the concept of materiality which is very important to the WTO.

I referred to consumer concerns and community concepts earlier. I sit on the International Policy Council for Agriculture, Food and Trade. That covers just about every country you can think of. One of the debates there was how to address so-called consumer concerns. As you might expect, my European colleagues continued to get community concerns and consumer concerns confused.

CHAIR—We will elaborate on that later.

Mr Hooke—Animal welfare and the environment are not consumer concerns. If they were, the common agricultural policy would have unravelled 20 years ago.

Senator COONEY—The issue is, though, what do they say when you say they are not relevant?

Mr Hooke—I didn't say they were not relevant.

Senator COONEY—No. I can understand what you are saying, but what Mr Howard was saying is that the WTO system is a pretty imperfect sort of machinery but we have to stick at it just the same. I was wondering whether you were taking up the same position. If you are not, the real issue seems to me that we are reasonably small and we punch above our weight, but the Europeans and the Americans can punch well and truly with their weight and be much more powerful.

Mr Hooke—Can I take that on notice and come back in discussion?

Senator COONEY—Yes.

CHAIR—We might get you to finish up soon, Mr Hooke.

Mr Hooke—Yes. Many of these so-called consumer concerns are built on emotion and differing interpretations of social and moral objectives. We see the Eurocentric line, where they actually have a predisposition to engineering social outcomes consistent with their perceived community expectations. You see that manifest in the famous multifunctionality concepts of agriculture and the twisted precautionary principle—and I would love to get into that later. On our capacity to undertake WTO advocacy, I agree with you, Senator, that we are punching well above our weight. That is largely as a result of the decision to establish the Cairns Group, and I think that will go down as one of the more important developments in Australia's international trade policy work.

It is arguable whether Australian industry, though, and therefore government, has the same degree of focus and utilisation on the existing arrangements, both within Australia and subsequently in accessing the WTO system. 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 our trading partners in the United States, Europe and Canada are travelling. It may well be a legacy of industry and business frustration in the water on stone characteristics of trade reform. There is a reluctance, naturally—again to your point, Senator Cooney—that we are small in comparison with the others and so there is always the potential for restrictive trade reciprocity. 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. It is a legacy of Australia's perceived resource inadequacy in advocating and defending our interests in the WTO. I say perceived because I am not really in a position to make a judgment, but I am encouraged by the fact that DFAT have established a new branch.

I have discussed the involvement of peak bodies and industry groups. I will just make the point again that the WTO is not a deliberative body; that is not its principal activity. We have spoken about the relationship with other organisations and Australia's influence in the WTO. We are punching above our weight, but there is a critical imperative to make sure that tariff peaks, tariff escalation and non-tariff barriers for processed foods are well and truly within our

negotiating mandate. To that extent, we are encouraged by the fact that the Australian government and the Cairns Group put that on the table in Geneva.

Ms Plowman—The Pork Council supports the National Farmers Federation position: what we have got in the WTO is the best we have got, and we need to learn how to use the processes to make sure that it benefits all Australian industries. The pork industry has a vital interest in strengthening Australia's relationship with the WTO. Its future viability depends on an active partnership between the industry and the Australian government to influence the WTO process. The Pork Council is the peak national body representing the interests of Australian pork producers. There are currently 2,600 producers in Australia, producing some five million pigs annually. Our membership, which is voluntary, comprises 80 per cent of national production and ranges from small family farm enterprises to large, vertically integrated operations.

The trade impact of quarantine changes in the past decade has led to fundamental changes in our domestic market, as you will all be aware. 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 its focus and began to develop export awareness and activity. We could say that pork has been the good news story of agriculture, but it has been a very painful adjustment process and there are some good lessons to be learned by the government and industry.

As a growing export industry, the pork industry relies on the framework and rules of the WTO to provide processes to handle potential trade disputes and achieve fairer trade policy practices. The industry is now looking to use the WTO and the SPS agreement in a strategic way to access, develop and defend its export markets. The agreed principles, as embodied in the various trade agreements between member countries and enforced by the WTO, provide not only scope for sustainable export growth but also a defence of our own market from unfair trade practices or unacceptable quarantine risk. I would like to believe that is so; however, in practice that is sometimes different. While, as an industry, we espouse and support free trade, I would question some of the fair trade practices that are being engaged in by our competitors.

Trade disputes are often tightly linked to quarantine practices, an issue of growing concern to Australian agricultural industries in general. 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. Our primary export markets are Singapore and Japan. The Singapore market was built on the fact that we captured it, and we were strategically ready to capture it because our competitor suffered from an outbreak of exotic disease. In turn, there are opportunities in Japan: the FMD outbreak in Taiwan meant it was no longer a major supplier to Japan, and there were subsequent FMD outbreaks in Korea. We trade on our disease free status. It is our competitive advantage in the international arena, and I would suggest that that is true for most agricultural products. When it comes to quarantine status, the pork industry would argue that the world is not a level playing field and that Australia's appropriate level of protection must reflect this.

Australian industry, government and the community acknowledge the value of Australia's unique quarantine status in the world. Australia is relatively free from most of the world's serious pests and diseases, despite the massive increase in international trade and movement of

people, and our quarantine status helps to keep it that way. I point to the recent FMD outbreak in Europe and suggest that this outbreak and its spread have been facilitated by the movement of people, primarily, not so much as a result of the disease spreading of its own volition. It is therefore in Australia's interest to continue to take a very conservative approach to determining the appropriate level of protection. 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.

We believe that Australia should continue to work within the SPS agreement in handling quarantine issues, yet 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 in kind on similar decisions that could affect Australia. Such a policy approach is misguided and out of step with the practices of our trading partners; as they have consistently demonstrated, they will use any legal measure they can to advance their own trade agenda. For example, safeguard measures are regularly used when domestic industries come under serious threat from import surges, such as occurred with lamb imports into the US. Australia needs to take the same pragmatic approach to its own trade agenda.

Australia needs to continue to develop its ability to influence the WTO process. Industry involvement in this is a key to its success. It is imperative that industry and government work in real partnership to facilitate trade, ensuring sustainable export growth and defending domestic markets within the framework of the WTO. We believe that if Australia is to provide real influence on the WTO and build its advocacy it must ensure that there is effective communication and consultation between government and industry—including producers—on trade policy directions, decisions and the potential implications for that industry. This means government allocating the necessary resources to do so.

I frequently get calls from producers who ask, 'When we have moved from a nil risk to a managed risk, what is the percentage basis of this managed risk?' They actually want it quantified. I know and you know, as per the WTO and the SPS agreement, that we cannot just sit down, work out an actual quantifiable risk and say, 'Well, it's two or five per cent.' But the producers out there do not understand that. They want to know why this is occurring. Unfortunately, the message is just not getting through to them. Resources are needed from the government to ensure that that message is adequately and effectively communicated. It is all very well to say to a producer that, overall, the pork industry has benefited from the opening of its market. It has, but try explaining that to people who went out of business, who were forced to the wall. When it is put in very general terms—such as: 'It meant billions of dollars to the industry'—people still want to know how it affects their hip pocket, how it affects their lifestyle and, more importantly, what adjustment is being made to facilitate them either exiting the market or becoming more effective competitors.

One of the industry's prime concerns in opening up this market was that there was no support in place for producers. There have been domestic measures applied for the dairy industry, but no such application for the pork industry. If we are going to compete on a free trade principle, we also need to ensure that that is fair trade. Our product competes with product from Denmark,

which until recently was subsidised by export refunds. The removal of this subsidy is only temporary: as soon as we hit oversupply in Europe again they will replace that export refund.

We also compete with the Canadians, who have a high PSE on their product. And the recent farm bill in the US subsidises the production of soybean which, in turn, drives down feed grain costs and encourages an oversupply of pork production. In fact, unless the US starts to cull its sow herds within the next year, it is going to have to shift more supply into the international market. As an industry, we are expected to compete on a free trade principle. We are happy to do so, but it is not fair—and this is what really irks producers.

I also put to you that the government needs to consider the development of specific resources within the government, such as a specialist office on international law, dedicated solely to WTO issues. The US is able to mobilise vast resources and expertise to deal with specific trade cases. I understand that our resources are restricted: we are only a small country by comparison. But the fact that we export over 65 per cent of our agricultural produce, and that we are reliant on that, should in influence our decisions regarding where resources within government should be applied.

While the pork industry would like to see a more explicit definition of Australia's appropriate level of protection, we also realise that this may work against us. However, I have never seen any research to date which can actually say, 'We've looked at the possibility of doing this, but we've come to the conclusion that it is not in our benefit.' New Zealand is already going down this path; it believes it will benefit the country. I am asking that we also examine whether it would be to our benefit to develop a more explicit definition of ALOP. Quarantine import risk analysis must also be able to go through its full and due process without trade and/or WTO pressures eroding the integrity of Australia's import risk analysis process.

I believe that the pork industry has shown from its turnaround that anything is possible. Certainly the industry is grateful for the assistance that the government has supplied through the National Pork Industry Development Program, which specifically targeted things such as developing our exports. However, we also believe that our industry is a prime case for showing where we can do things better and learning from the past. Thank you.

CHAIR—Is there anything you wanted to say about the dispute settlement system?

Ms Plowman—One thing is that we do not believe that we are adequately resourced as a country in the dispute settlement system. Also, in response to Mitchell's comments, I believe that part of the problem is the need for industry to understand the process for dispute settlement, what it entails. It is also a problem of its own resources and whether it has the resources to engage in the research which is required to back up a dispute claim.

CHAIR—Would your industry body bring forward to the government a complaint if you saw one? Would you be able to provide any research and information?

Ms Plowman—We would; however, that research would be limited by our own financial position. As an industry, we are more cohesive than a lot of other agricultural industries. 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 producers or

ascertaining from them what their position is and where they want to see things go. But, like the government, we are financially constrained.

CHAIR—Thank you all very much for those comprehensive opening statements. You have given us all a lot of fuel to engage in the discussion now.

Senator COONEY—Thank you very much for what I think is a very comprehensive analysis of it all. I know you are closer to this than I am, but you seem to have a picture of a World Trade Organisation that we must stick with—as I think everyone would agree. The problem is that the more powerful countries are able to use that to their advantage, which is to be expected. Do any of you think that we should just go along with the rules, no matter what—Mr Hooke was very big on this—and that we should not look at environmental, quarantine and labour issues, even though others might? Should we be the Gandhi among nations and be absolutely pure because we are small and this is the only way we will get any movement at all? Or do you say that there should be some restraints? Ms Plowman made it quite clear that she thinks—and as presently advised, I would certainly agree—that quarantine should be strict because that is not only the right but the economic thing to do. Should we put any limits at all on the purity of the World Trade Organisation, or should we be a bit more like the powerful players who come in and out, depending on whether it suits them?

Mr Hooke—I would like to make a couple of points of clarification. First of all, I do not and did not say that quarantine ought not be part of the system.

Senator COONEY—I did not say you did.

Mr Hooke—It is fundamental to the sanitary and phytosanitary agreement—I will come back to that. Secondly, the point I made on the environment—which I obviously did not make very clearly—was: it is not that the environment should not be part of the WTO; it already is. Non-trade considerations already figure prominently in the WTO agreements. The exception clauses, at article 20 of the GATT, already allow for countries to exercise their national sovereign rights in making determinations for the protection of plant, animal and human health and the environment, provided they are justified on scientific grounds and provided that the restrictive measure is no more restrictive than that necessary to fulfil a legitimate objective. You can just about drive a bus through that, but the bottom line is that it is there.

Where we have real difficulty is when the WTO is used as a vehicle to force on others—particularly those who may not even be party to the agreement—their social, moral, ethical and environmental dictates. Of course, that is where the developing countries are going. That is why the developing countries, the G77, were so offended and outraged by President Clinton's comments at Seattle.

Senator COONEY—I probably put my question to you badly. The World Trade Organisation, like any world organisation, is run by the powerful nations and they, because of their power, are able to pick from the World Trade Organisation things that advantage them. All four of you have said this and put it well: the powerful are able to come in and out and the less powerful are less able to do so. Do you think there is any margin to do what the major nations do, or have we got to go along with it all and say, 'We cop the good and the bad; they only cop the good'?

Mr Howard—To put it in colloquial terms, there is a one-eyed ref on the field and he is missing a lot of stuff. But, as a small player, we would be a lot worse off if he was not there at all. So what are we going to do? The best thing we can do is to find friends—other small countries.

CHAIR—As someone once described it—and I think this is just wonderful: the bullies will run the school and the little ones had better make mates.

Mr Howard—Exactly. We do that with the Cairns Group and we have to broaden that.

Mr Hooke—But it is important to understand that what Lyall is saying is that you would not have the opportunity to form friends. The Cairns Group was a friend based activity. It has reinforced the rules based system. We know it has got a lot of warts on it. I agree with what Lyall is saying—there are difficulties out there. But the dispute settlement system is just starting to emerge as an opportunity for us to be proactive. The point that has not been made is that there is a difference between tackling legitimate and illegitimate trade barriers. The dispute settlement system is not going to help you get the legitimate trade barriers—they are already ticked off. It is the illegits that you are after.

Senator COONEY—Given that, how well do you think Australia is using the rules and procedures governing the settlement of disputes in the World Trade Organisation? I am just looking at them here now. I have just casually selected this, so I do not expect you to have it before you, but I notice in relation to appellate review that the dispute settlement body shall appoint persons to serve on the appellate body for a four-year term. Do we scrutinise that? I am not saying that we should necessarily have anybody on the appellate body, but are you happy with the way that is scrutinised? I do not mean in terms of the nationality of who goes on it—I do not think that is to the point; I mean in terms of ability and competence and how the appellate body is run. Do you have any thoughts on that? I would think the major nations, such as European Union countries, America and Japan, would have a very keen eye on that.

Mr Howard—One thing we have in this country is an extraordinary depth of trade policy expertise. That is one of the reasons we have been able, as you say, to punch above our weight. There are people such as Professor Kym Anderson from Adelaide University and Professor Jeff Waincymer from Deakin who are on WTO panels. We have that expertise and it is there in the system.

Senator COONEY—If it is rules based, you probably need more than a knowledge about how agriculture works; you probably need knowledge about how the actual procedures of the system work. It is rules based and the rules go on for pages and pages. What it talks about the whole time is how the dispute settlement body is to be elected, how it is to work, how the appellate system is to work, but there are in fact no provisions as to actual trade; it is a matter of procedure. I would be interested to know whether or not we have anybody who is an expert on procedure. As an example, it says that each party to the dispute shall deposit its written submissions with the secretariat for immediate transmission to the panel, and so on.

Mr Howard—I think one of the things you are saying is that the WTO is not the GATT and that, with the dispute settlement system we have now that has teeth, the whole process has become more legalistic than it was for the first 45 years of its existence. The Americans are

good at operating in that system. If you look at the United States Trade Representative Office now you will see that it is full of lawyers. It used to be full of trade policy people. The whole environment is now run by lawyers. Are we good enough to compete in that game? I think we are. The private law firms in this country have noticed that there is big business here and they are getting active; they are forming alliances with US firms. The Department of Foreign Affairs and Trade is putting resources into this. We have recognised that this is the way it is going.

Senator COONEY—The National Farmers Federation would be happy with that process? In a sense, it is a legally based system now with the rules based system.

Mr Howard—That is what has happened. That is the environment we are in and we cannot change that.

Senator COONEY—The reason I asked that, and put it in a fairly oblique way, is that we had some witnesses earlier on—one might have been an associate of yours—who had some concern about lawyers getting into the system. I can understand that. On the other hand, if you are going to have a rules based system you really need them.

Mr Howard—It would be nice if it was left to trade policy people. We were all brought up with 'my word is my bond', and people did a deal on a handshake, but that is not the way it is any more.

Senator COONEY—Right.

Mr Hooke—Let's just explore that a little bit further. Your point is well made, and I agree with what Lyall said. The first point I would make is that we are not in a position to judge the calibre of Australia's representation on those panels. I know some of the people who sit on them, and was pretty encouraged by that, but it would be rather presumptuous of us to make a judgment. The second point is that those panels now are nowhere near as divisive, shall we say—it is now very hard to be disruptive because they have shifted the consensus to adopt to a consensus to reject, which has effectively removed the power of veto for any one panel member. The third point is that we are comfortable with this legalistic, case law type of approach to establish some of the substance to international trade rules up to a point. If a new round is not launched at Qatar, you can bet your bottom dollar that the WTO will continue to become more and more of an international court. That is not good because, just as you were saying in a jocular way, what you will have then is the lawyers starting to take over the system and establish the basis to international trade laws rather than government-to-government negotiations—and that is dangerous. So that is the imperative for the launch of a new round to set the basis for the 137 contracting parties.

Going back to your earlier point about mates in the game, have a look at just how influential the G77 developing countries are now. They were hardly even in the game back in Uruguay; now they are fundamental players. They are understanding and pushing hard on special and differential treatment again. They are understanding that the Lome convention means just staying on the cow's udder forever and a day, and that is no way to go. They are understanding what market access can do for them. They are understanding the difference between self-reliance and self-sufficiency in terms of food security. And they sure as hell now understand the power they have in extracting, from the developed economies, assistance to help them in their

compliance requirements, particularly for some of the more onerous issues of sanitary, phytosanitary and technical barriers to trade agreements.

Senator COONEY—I understand what you are saying about the lawyer based system and the need for trade, but a lot of the issues come down not so much to the principle as to the fact. Nobody is going to say that you should let animals with foot-and-mouth disease into the country; they will say, 'Yes, you should be able to protect your goods and stock from diseases.' So the principle is agreed, but then the fact of whether or not this particular disease is going to affect the pigs in Australia is the issue. What you really want are decision makers and proper evidence before you to see that the system operates correctly. I would have thought that, if you are going to have rules and facts attached, as they must be in these circumstances, you do need lawyers—people who are able to make decisions on proper bases.

Mr Hooke—Yes. There have been three cases: one was in Hungary, another one was in Korea in beef, and there was another one in India. I am optimistic that the lamb thing will come down pretty well—there you are, I am putting the money on the table. It is not perfect, but it is moving in the right direction.

CHAIR—I do not know whether anyone wants to tease this out, but I think the point to make here is that, with the failure of the negotiations, the dispute settlement system has become absolutely the central point here and it is being used as an instrument to further agendas, if you like, to put it broadly. Part of the thinking behind this inquiry was that we needed to understand how our capacity to engage the dispute settlement system worked—as well, of course, as all the other things—bearing in mind that it is absolutely critical that we try to get a new round off the ground. The issue about the dispute settlement system is the jewel in the crown of the WTO. It is what distinguishes it from GATT and it is what attracts all the NGOs anyway, because there really are not other fora that are as effective as the WTO in agitating all these issues. So it is a victim of its own success.

Mr Hooke—Correct.

CHAIR—I think that is one of the issues we have to grapple with here, and we have to understand our capacity, both defensively and proactively, to engage it.

Mr Hooke—I have got to say that when I saw the terms of reference to this inquiry I was none too pleased. I said, 'Here we go again—another blanket inquiry.' We have committed to this because of our respect for the institutions of parliament, but what came out of it as we got into it and started to write this submission was the very point you are making, and all of a sudden we started to twig and to focus. That sounds a bit condescending, I know—forgive me. But the point is, we said, 'Another blanket inquiry to do all this stuff. It's a platform for everyone to have crack at the whole thing.' In fact, some of the beneficial stuff that has come out of it is this focus on Australia's role in the dispute system, our adequacy in that area and our capacity to be proactive. I went through some of the filters for us in terms of legitimate-illegitimate, where we sit, where we are going, what industry knows about it and what they can do about it. But it must be seen within the context of our obligations and our capacity for proper input risk assessment, proper risk management and analysis and appropriate levels of protection to the point that was made under the SPS agreements.

CHAIR—Absolutely. It ultimately might come down to a question with the WTO of just how well it is resourced, who has access to it and how well it is understood. That seems to be an area that has not previously been teased out.

Mr ADAMS—Mr Hooke has made a point about another parliamentary inquiry and this probably will not be the end one because there are a lot of other groups that have concerns about the WTO and, as our democracy operates, we need to have opportunities for people to have input. By discussion and moving through all those avenues like parliamentary inquiries we have an opportunity to let people have their say. Maybe we can find the holes and flaws that exist and work towards repairing them or doing it better. So there are, I believe, a lot of pluses in this inquiry and probably a few future ones.

Mr Hooke—Thank you for pointing that out. By way of response, I have attended every single round table in this place and in others with every single group, some of which have vastly different views from my membership—notwithstanding what my own personal views are; they do not count in the capacity in which I sit here—and have been frustrated, beyond even your belief, at the process. But I have participated in it for the very reasons that you point out.

Mr ADAMS—That makes you a good citizen and I am pleased you do that.

Mr Hooke—Thank you for that compliment.

Mr WILKIE—Ms Plowman, I am curious: you have identified the problem, obviously, particularly in the US where they subsidise the grain and therefore get it cheap and can sell their product. How do you recommend that we deal with that? What sorts of initiatives can we implement?

Ms Plowman—A very good question. As an industry we see our only avenue at this stage is through the WTO process. However, we have all seen that the rate of change for agriculture has been very slow in comparison with other sectors in a global context. We have been looking to a new agricultural round and it has been delayed. I think further delays are a real concern, and we could see that with perhaps more countries looking towards free trade agreements in regional areas, bilateral agreements.

I have no solution to the US position. In pork commodity, if we were allowing US product into this country—US pork, which we do—why is it that, as an industry, we are forced to compete with them when it is subsidised? It is an unfair competitive advantage, it does not provide for the efficient allocation of resources and it is to the detriment of our own industry and resources. The pork industry is a value adding industry right up the chain, so it has important labour and output multiplier effects in regional Australia. Yet we are willing to say, 'Go ahead and compete on a free trade principle.' But that is in terms of it being fair when you are on your own. It is not communicated well to producers.

Mr WILKIE—Do you think the dispute resolution procedures could assist you in this environment?

Ms Plowman—I would like to think it would. Unfortunately, I do not know enough about the dispute resolution procedures. I made the point before that, as an industry, we are not adequately

resourced. I would need to explore that further. But, yes, I believe it would be an avenue. As I understand it, in part of the WTO procedures there are safeguard measures, and they are used in order to ensure that, when we pursue a free trade principle, we are not also damaging our own industry to the benefit of that principle. I do not know if that has been adequately pursued.

Mr WILKIE—I have a more general question, which Lyall and Mitchell might be interested in. What impact on Australia do you see of China having joined the WTO?

Mr Hooke—That is a good question, if I may say so. First of all, it is going to reinforce the reform process already under way in China. Secondly, we need to understand that China has actually done pretty well in terms of growth without being part of the WTO. So we are actually more inclined to have China as part of the show than I suspect China wants to be part of the show.

There are an awful lot of myths floating around about China joining the World Trade Organisation. I was in Beijing late last year at the International Policy Council and met up with a lot of senior officials, and they actually went through those myths. On the relaxation of sanitary controls—that is lip-service because they see that the capacity for enforcing compliance with those is difficult. On increased competition by eliminating state trading monopolies in agricultural trade—they see that as being highly beneficial to their economy in terms of the private sector engaging in trading, and the Chinese farmers will stand to benefit. They see real merit—this is the Chinese themselves—in moving away from those industries where they do not have a comparative advantage to where they do—for example, from grain to horticultural in an agricultural sense. They see themselves having a comparative advantage in grain.

They cannot match the mechanisation of the developed economies, but they see huge comparative advantage and therefore competitive strength—they are not always the same—in the horticultural industries. They have agreed to allow imports under the terms of their entry agreement—they see that as tiny. They see the tariff rate quotas as managing any sudden surge of imports—and the safeguard provisions, which Ms Plowman has addressed admirably. They see the requirement not to have export subsidies as no big deal—they do not have them now, and they are not really interested in them. And they see that the industrialisation of rural and regional China is going to be really and substantially influenced by accession to the WTO.

A point I made earlier about how China has grown its trade without being part of the WTO—it has done that on the basis of its bilaterals and its regionals—and a point made at the ABARE Outlook Conference—I was not there for very long, and it was a very good one—is that the intraregional trade in Asia, including between China and Japan—so it is not only North Asia but also Southern Asia—is far more significant than their interregional trade.

The bottom line is: reinforce the development. It is not a real problem for them. They have got a social issue at home to deal with, and the arguments I have just run through are the ones they are continuing to promote within their own country, that this is actually a good thing for them. It will be good for us in terms of access into those markets. In the processed foods area we have seen an increasing presence in those markets of a lot of Australian consumer products. You can buy confectionery at Beijing airport made in Ballarat; you can get fruit juice from Australia in some of the supermarkets. Five years ago people said, 'Boy, what's this town going to look like when all the bicycles become cars?' People were also saying, 'What's going to

happen when all these wet markets and fresh markets turn into supermarkets?' That is what is happening. That is a convoluted answer to a very good question, but it is not simple.

Mr Howard—There are four points I would like to make. First, it is hard to have a world trade organisation without the biggest country in the world in it, so China has to be there, and that is good. The second point is that we formally classify China as an economy in transition, so as they engage with the world it is good to know that they are going to do so within a framework of rules for international commerce that we are part of. The third point is that they are going to need a lot of capacity building because they do not have the institutions and structures, I do not believe, to live up to a lot of their commitments, so they have a lot of work to do. Finally, how will they behave in Geneva and who will they line up with? Will they see themselves as supporters of the free market, more openness and liberalisation, or will they be a darker force? Who knows. That is going to be the interesting question.

Mr ADAMS—Ms Plowman, the issue of competing with the US and Canada does come down to the cost of grain, of feed, doesn't it? That is what the whole issue is about, whether you are growing salmon or whatever. Mad cow disease has been about what they fed cows. What is happening in Australia to assist the pork industry with lower costs of grain?

Ms Plowman—That is a very good question. We put in a submission on the Wheat Marketing Act, as we believe the combination of the Commonwealth's single desk and the necessary quarantine regulations for wheat puts us in a cost price squeeze on feed grain. Feed grain accounts for 60 to 70 per cent of the cost of our production. Our competitors can buy grain on the international market at world price; we cannot.

Mr ADAMS—How much grain is imported into Australia?

Ms Plowman—Very little. We cannot import grain because of the quarantine restrictions. Our dispute is not with the quarantine restrictions, which we believe are necessary. However, we would have liked to have seen a more balanced approach in the report that came down, and we are waiting hopefully on the government's response to it. One of the principles espoused was an industry-government forum to look at further issues as the review for the Wheat Marketing Board comes up in 2004. We are hoping that as part of that forum the government will recommend that we immediately start looking at measures to assist producers in times of cost price squeeze. We are all aware that Australia suffers from seasonal fluctuations and, because it is such a big country, the cost of transporting grain from one area to another, from east to west, is prohibitive.

Mr ADAMS—But America is pretty big as well.

Ms Plowman—America has the benefit, though, of being able to place part of its pig production right in the middle of the corn belt. And the Canadians have recognised the benefits of value adding to wheat. The benefits of value adding to wheat—because wheat is an ingredient, an input, not a final food—have not been recognised or duly addressed by the grains industry or in the review. So I would say there has been very little assistance in that area.

Mr ADAMS—Is there a great opportunity for your industry to push change in that area?

Ms Plowman—Yes, we see that as a great opportunity to push change, and we will continue to push change in that area. We recognise the value of the single desk to wheat producers. We are not arguing that that should be dismantled in any way. However, if there are premiums that have been recognised by the review committee, we say under the national competition policy that those premiums should be shared. The review committee has said that, as a producer body and as a domestic user of wheat, we have to pay for those premiums, and we do through the cost of our production. Not only do we pay but the rest of the Australian economy pays as well.

Mr Hooke—This question applies across the board. My companies buy raw commodities in Australia too. You know of my former incarnation as chief executive of the Grains Council of Australia. My first point is that we do not import a heck of a lot of grain, but we do in some shortages. We are a net importer of soybean. We do not grow enough soybean in Australia. We are a net importer of maize. The quarantine arrangements used to be within the old seven-mile barrier—or the 20-kilometre barrier or something now—and it had to be processed. Discussions were held some years ago about moving grain up country, particularly for the pet food manufacturers—because corn was used as filler—and for many of the intensive livestock industries. There is no doubt in my mind that the severity of those restrictions was little more than a ruse for protectionism.

The second point is that importing grain is in fact a cost impost, because the price on the domestic market for most grains is export parity, not import parity. Once you start bringing them in at import parity, the domestic producers will push up to that. In fact, it goes the other way. Import does not necessarily mean cheap—quite the opposite. The third point is that I have spent a lot of time in my career defending the single desk arrangement for wheat, and I can look at it pretty objectively. Nobody that I know of in Australia has a problem with Australians arranging their export marketing arrangements to screw their international markets—if you will allow the euphemism. It is when it backfires in the domestic market and we start exporting jobs that you have a problem. If you have an artificially inflated price for a raw commodity in Australia, if you are then trying to compete with an industrially transformed and value added product into third markets with what are then sales of Australia's raw commodities and if there is a subsidy affected price, it tells you that as a country you are going down a one-way track.

Mr ADAMS—I am just not picking up exactly what you are saying to me with that argument. Tell me again.

Mr Hooke—If you have single desk arrangements about cooperative or countervailing power or marketing efficiency in international markets, that is fine. If it backfires that, by virtue of those single desk arrangements, you are either advertently or inadvertently shorting the domestic market because of the inventory control you have over your exports and you are artificially inflating the price domestically yet still selling the same highly substitutable product into third markets, where you are competing with the treasuries of Europe and America, and if you are putting out of business the flour millers, cereal manufacturers or premix bakeries who are trying to compete in that market with foreign millers and producers of the same product who are buying subsidy affected Australian raw commodities, that is not real smart. That is the point I would make on the single desk.

The other fundamental take-home message in all of this is that we like to think we have a comparative advantage in the production of agricultural raw commodities. There is a lot of truth

in that. Some of it is at the expense of the environment, but that is another argument. But we do not necessarily have competitive strength in the industrial transformation value added to those raw commodities. As trade liberalisation progresses—and it is progressing, and there is a fair amount of unilateral disarmament going on out there—and as globalisation intensifies, you will see the differentials in commodity prices pan out, therefore increasingly shifting the determinants of competitiveness to conversion cost efficiency. In that area you come back to some of the other fundamentals in the equation, which are all of the factors that affect your domestic cost structure.

Mr ADAMS—Is that how far advanced you are with skills in the work force, your labour forces, how much technology you have, et cetera?

Mr Hooke—I would never sit here and tell you guys that micro reforms and the application of new technologies have been major sources of labour productivity gains which have underpinned our decade of growth.

Mr ADAMS—On the issue of subsidisation coming into the pork industry, is the Pork Council or your body notified if there are new imports of pork coming into the country? I think Biosecurity Australia monitors that and checks to make sure that it reaches the standards. Do they notify you that there is more coming in? Do you get to know that at all?

Ms Plowman—Yes. We have our own market tracking in conjunction with ABS so that we know exactly how much is coming in. We recently asked ABS to differentiate the product lines that were coming in. They met half of our request, which we were very grateful for. That has shown to us that the imports coming in from Canada and Denmark actually fill different parts of the market which we were not aware of before. That is valuable information.

Mr ADAMS—If you thought there was product coming in that was being subsidised—and I do not know how you would check that; it would be difficult—and you engaged lawyers, what would the cost be for such a small industry as opposed to, say, the red meat industry? What would you think if we settled these disputes by using law firms in the international picture and you briefed them? What would the cost of this be?

Ms Plowman—The cost for our industry to bear would be enormous. We are only small. However, I imagine that, if the industry felt that the damage to our own domestic market and perhaps the flow-on effect to our export markets were significant enough, we would certainly try with all our ability to mobilise those resources and we would most probably go to a voluntary funding of that, where we would ask producers to contribute.

CHAIR—Wouldn't you go to the government first, though? Wouldn't you make a complaint to DFAT?

Ms Plowman—We would make a complaint to DFAT, but it depends how quick they are. Often we need to support our claims as well. We need to have the evidence that it is there.

CHAIR—Could you take us through the process if you made a complaint? What would happen?

Ms Plowman—I have never made a complaint. I am aware that when the market was opened in 1997-1998 the industry did some research into whether it could go into using safeguard measures such as antidumping. I can come back to the committee with some further information if you like.

CHAIR—Yes, that would be good.

Senator COONEY—Getting the resources into research so that you know the facts is a real problem, isn't it? I suppose the scientists are only good if they have facts to work with, plus their ability generally. But how we can get good evidence is a real issue, isn't it?

Ms Plowman—Yes. Last year we identified as an industry that we needed specific expertise in the quarantine trade area. It is not just about finding the money for that expertise; it is about where we go. We have been looking for some time now. We want specific expertise. It is not, to our knowledge, here in Australia. We believe that we have identified this as a strategic priority for our industry. We can see that if we want to use the WTO and play the game to the best of our ability we need that expertise.

CHAIR—Have any of the participants here today brought a complaint to the Dispute Investigation and Enforcement Unit in DFAT?

Mr Hooke—No.

Ms Plowman—No.

CHAIR—Right. No-one has.

Mr ADAMS—We have had representation from a variety of groups about labour and environmental issues and your opposing arguments. The argument has been put to us that some groups get to be a part of our negotiation teams, and Mr Hooke has said that he has been a part of negotiations on a couple of occasions and he opposes NGOs with their moral and ethical positions being there and having input—I think that was the term used—

Mr Hooke—That is not right.

Mr ADAMS—I was wondering how we meet that argument when these groups say, 'There are some people there putting their views on what they think free trade is about and how free trade should be carried on in the world but our views—as legitimate citizens of Australia representing labour and environment groups—are not being put.'

Mr Hooke—A point of order or a point of clarification—I do not know what the processes are: I did not say that they should not be there because I was not there as an official in the negotiations of the WTO. I was there as part of Australia's official delegation. I was not in the green room and I was not in the negotiations. I am not suggesting for one moment that we should be part of the WTO negotiations, per se. That is a government-to-government agreement on a government-to-government basis. That is all I was trying to say. I was making the point that we do not agree with the calls for a number of international NGO organisations to be involved in those negotiations. The WTO is not a deliberative body, with the greatest respect.

Mr ADAMS—I understand that.

Mr Hooke—The second part of the equation is that it is up to the government to make the call on who is on that official delegation. I was neither asked for my view nor did I give it.

Mr ADAMS—That is not really relevant. You were there as the Australian Food and Grocery Council and others did not have any input, and that is their argument.

Mr Hooke—I cannot presume to get into the mind of government but I suspect—

Mr ADAMS—I am not criticising you for being there. You were asked to be there and you can be there—

Mr Hooke—I understand that.

Mr ADAMS—but there is a legitimate argument being put to this committee from these groups saying, 'We have no input but there are other groups.' You made the point that NGOs have their moral and ethical position that they are pushing—right? I would suggest that you are pushing yours as well, and legitimately so. Their argument is, 'We have no input to the process.'

Mr Hooke—Firstly, we are a representative body: we have a charter, a mandate and we have a membership. If you trawl through the NGOs and find those same characteristics then I am with you. If you do not, it begs the question of whether they, in fact, have a mandate and a representative basis, and that was the reason I tabled that paper from Gary Johns. It is an IPA Institute public affairs backgrounder. It makes that argument a heck of a lot better than I ever could. I do, and did, say that we recommend you put through the system, in terms of this whole process of consultation and negotiation within the sovereignty of national governments and the signatories to the code, some form of accreditation process. That is one area where we do have a view. If we are going to sit around the table with all these people, we would actually like to know whom they represent, where they draw their mandate, and whether they fit into the democratic processes.

Secondly, I would not presume to get into the minds of government as to how and why they chose the people they did to go with the Seattle delegation. However, if you want me to hypothesise, it would be on the basis of relevance. There was no doubt that Minister Vaile was well aware of my industry's push, strongly supported by those farmers who understood the pull-through effect, and the argument that we put was that one of the single greatest benefits to Australia in a new multilateral trading negotiation round—if not the greatest—was to do something about processed foods. Clearly, if he accepts that argument and that was to become a part of the negotiations in Seattle in terms of setting a negotiating mandate, he would actually be quite happy to have somebody from industry there to help him.

Mr ADAMS—There is no problem with that; I accept that argument. But what about an NGO representing an environmental group in a region where that capital is going to come in? It will intensify the farming, maybe unsustainably, in that region for 10 years, and then the NGO will say, 'We're moving the capital and going somewhere else in the world,' and leave this country with an environmental issue. They would argue that they have a legitimate reason to put their case on that view.

Mr Hooke—I understand that, and they have put that case many times in negotiations. But back to the point you asked me about—being part of the delegation. The Australian government was not keen about having trade and environment on the agenda. The Australian government was not keen about 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—which is where we were—on something that was not part of the government's policy agenda. As I said, I do not presume to know what the government's position was but I would hypothesise that that was their thinking.

Senator COONEY—The World Trade Organisation is a government-to-government organisation—I understand that—and if a dispute arises it will be put by government. But what I would like to get from you is some other information. I think Mr Adams was onto this too. Say your industry—whether it is the pork industry, the processed food industry, the farming industry or the car industry—is going to be affected by a decision of the World Trade Organisation. I get the feeling, although I could be wrong, that you would say, 'We'll leave it up to the government to push our case.' If I were a member of the pork industry or the food processing industry, particularly the high processing area of the food processing industry, I would be a bit concerned about whether my case was put strongly and accurately. I would not want the government to put facts before the disputes body which were not true. I would want the proper outcome to come from it; that is, that the true facts were established and the proper laws applied. I would be very keen to see that that was done. If I thought that DFAT was not on top of this to the point it should be—and I cannot see how it would be, because nobody in DFAT processes food or raises pork—I would be a bit concerned to see that what DFAT was putting was an accurate picture. I am not sure that you have really addressed that point.

Mr Howard—This is what we are all employed to do. That is what the lobbying market in Canberra is; everyone pushing their interests and government hearing everyone.

Senator COONEY—No, I think you misunderstand what I am saying. Nobody has taken a case before the World Trade Organisation—

CHAIR—Of these.

Senator COONEY—Sorry, of these people here. If it is a rules based organisation and if it is a serious dispute settling organisation, it is going to come to the proper conclusion. It is going to find the facts that really exist in the pork industry or in the processed food industry or in the agricultural industry. You would have to have people who were able to produce accurate evidence. You seem to be saying, 'DFAT'll do that for us. There's no need for us to produce anything. All we have got to do is lobby DFAT. We do not have to produce any evidence.' I do not want any confusion here. I think what you are saying is that the production of evidence is some form of lobbying. That is just not right. If that is what you do think, I think we face a real problem in this area.

Mr Hooke—I agree. There would be. But that is not the case.

Senator COONEY—Can I perhaps test you this way—

Mr Hooke—Can I answer the question?

Senator COONEY—Yes, and then I want to go on with that.

Mr Hooke—Let me give you a take-home message. I reckon DFAT consults with us almost to death; I get sick to death of going along and putting the same sorts of cases. I get driven nuts by the requests for information. It really goes to your question; that is, they do want us there. It depends what your definition of lobbying is.

Senator COONEY—I am not asking that. I am not asking what DFAT does; I am asking what your organisation wants to do about putting evidence before the World Trade Organisation. What do you want to do? I will give you an example. Article 14, as you know, says:

1. The panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

Then it goes on. What does your organisation say about having evidence that is going to be heard in a system of confidentiality rather than in the open and where you do not know what the other side are saying? How do you intend to rebut the evidence that might be led from the United States and Europe? That is not a lobbying process, I suggest to you. It is not a matter of going to DFAT and simply saying, 'We'd like you to take into account what this is doing and what that is doing.'

Mr Hooke—I take your point; I now know where you are coming from and I am clear on it. One, it depends on what your definition of lobbying is. I do not like that word because my organisation has a representative basis. I would hope that, on the basis of the submission that you have here, you would understand that we actually go to facts and material and data. We have continuously made representation to DFAT about the particular circumstances of our processed food and beverages industry. Extrapolating from that to answer your specific question, if we were involved as a party—either in a proactive sense or as a respondent—to a dispute before the WTO, I would want to keep very close contact and liaison with our government negotiators; and I would not expect the process to be entirely open, because no negotiation, dispute panel or process can be totally and utterly successful if it is that open. So we would continue to work with DFAT as we do now and they would reply upon us and/or anybody else. If it were a trade and environment issue or what have you, they would rely on other bodies, I am sure, to put that material to them. My organisation is comfortable with that process.

Having said that, bear in mind that the Australian Food Council as it was then, now the Australian Food and Grocery Council, only came into being in late 1995, and the industry put that together to do much of this sort of work. There was a general recognition in the industry of where the real sources of growth lay and there was a general recognition that processed foods had not even been on the Uruguay Round agenda. A lot of that was because industry had not made its case.

Senator COONEY—I am not putting my question correctly to you and making it clear. This is not a matter of negotiations. Look at the function of the panels under article 11—it is not a function of negotiation at all. Article 11 says:

The function of panels is to assist the DSB—

that is the dispute settlement body—

in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

What that says is: 'Of course you might carry on negotiations and you might settle the case, and you can do that; but, until you settle case, what this panel is going to do, acting under the authority of the DSB, is assess the facts.' There is not going to be any negotiation; it is going to assess the facts. What I am interested to know is: in that process, would you like to be there to produce the facts, not to negotiate, and have experts line up to say how pork might be affected if this happens and how it had been affected, and to say how your processed food is done and how it had been affected? That is the first point. What do you say about that?

Mr Howard—When the government made the decision to go forward with the Korean beef case and the US lamb one, that decision was made jointly with the Cattle Council, the Sheepmeat Council and Meat and Livestock Australia. To even kick that off, those three industries had to agree to put huge resources into getting the evidence that you are talking about, and then they worked with government through the whole process. If you want to get details on how that worked, they would be the best people to talk to about that process. They worked hand in hand all the way through.

Mr Hooke—But to be on the panel, no.

Mr Howard—No, not to be on the panel.

Mr Hooke—But that is the question, that is where this is going—do we think we ought to be?—otherwise I am just missing that point here. We are going to great lengths to tell you that there is a very good relationship on a consultative basis with DFAT. There is a very good understanding by them about seeking the facts of a case from industry organisations, whomever they are, where it is necessary. Are we putting our hand up to be right in there in the process of the panel disputes? No.

Senator COONEY—What I am asking you is what quality assurance, if any, does your organisation apply to the evidence that is brought before these panels, or is it not interested in having quality assurance on the evidence that goes before the panel?

Mr Hooke—We have not had one yet, but, if we did, the quality assurance would be the performance.

Senator COONEY—All right.

Mr Howard—For the examples I gave, Meat and Livestock Australia and the cattle and sheepmeat councils are the experts in those industry sectors, and DFAT relied entirely on their work, their evidence.

Senator COONEY—Have people read through the rules of the World Trade Organisation?

CHAIR—Of the dispute settlement understanding?

Senator COONEY—Yes, that is what I should have said.

Mr Hooke—I am sure I have at some stage.

Senator TCHEN—Ms Plowman expressed some concerns about the lack of clarity in the change in quarantine regime from nil risk to managed risk. I take it that your industry regards the question of quarantine as a matter of serious concern. When Senator Cooney asked Mr Hooke whether he has the same concern about quarantine, Mr Hooke confirmed it in a negative way. From memory, he said, 'I did not say that I am not concerned.' Is that right?

Mr Hooke—I am sorry, could you just run that past me again?

Senator TCHEN—On the question of quarantine, does your industry, your council, regard it as a matter of concern?

Mr Hooke—It comes down to the application. It is a matter of interpretation of application. It is almost going to Senator Cooney's question.

Senator TCHEN—That is right. I am trying to follow that one up because you did not give what to me was a very definite answer. You did not say that you were concerned.

Mr Hooke—Okay, let us pick an example: the import risk assessment for apples from New Zealand. Perhaps I should have thought of that example before for Senator Cooney. That is an example where we were desperately concerned with the import risk assessment. We lobbied or made representation in a comprehensive submission to Biosecurity Australia. We challenged some of their determinations and assumptions and we challenged some of the science and the facts. We proposed a remedy that would not guarantee—there is no such thing as guarantee—but would give a greater degree of risk management and therefore not put at risk the plant health integrity of our apple and pear, or pome fruit, industries. That continues to be a very laborious and intense process.

So, No. 1, we subscribe to the basis of the sanitary and phytosanitary agreement—that is, there ought to be risk assessment. We totally and utterly reject the twist on the precautionary principle that we are seeing from the Europeans. Precaution is inherent in any risk assessment and risk management procedures. You do have subjectivity in this whole process, which is a point Kathleen made very well. It is very difficult to quantify the probabilities in the risk assessments so there will always be subjective judgments about an appropriate level of protection. The import risk assessment that was put to us by Biosecurity Australia in fact had some very flawed risk assessments in that process. It had a high compromised by a low, therefore the whole thing was low, so that bringing it in and having it established could cause problems. We challenged that. We were very much part of the process, Senator Cooney, and we were putting the facts as we saw them and then orchestrating further research work where we did not think they had got it right—either funding it and supporting it ourselves or going back to them and saying, 'This is inadequate, do it again.'

Senator TCHEN—From your industry's point of view, does this concern arise out of consideration of community interests or consideration of consumer interests, given that you said that those two are not always the same thing?

Mr Hooke—Consumer and industry interests.

Mr ADAMS—Your organisation is about the consumer.

Mr Hooke—A lot of my manufacturers process fruit. If they lose the raw commodity basis—

Mr ADAMS—It is a self-interest thing.

Mr Hooke—Yes. But if you don't get it right with your consumer you go out of business.

Senator TCHEN—Given that disease quarantine is another way of looking at it, a more general way of looking at it is prevention of inimical modification of food by a micro-organism. What is your industry's position on modification of food through genetic means and through dietary means?

Mr Hooke—Dietary?

Senator TCHEN—Yes, dietary means.

Mr Hooke—Hormone growth promotants?

Senator TCHEN—Yes. What is your industry's position on those two issues?

Mr Hooke—The Australian Food and Grocery Council's position on genetic modification—

Senator TCHEN—Those issues are also going to WTO consideration. Particularly the Europeans are bringing that in.

Mr Hooke—There are a couple of questions there. Let me go to the back end first, if I may. Help me out here if I am a bit slow. We do not support trade discrimination on the basis of production and process methods. In other words, we support the concept of non-discrimination of like products. We do not support trade discrimination on the basis of whether or not the shrimps were caught with a turtle excluder device or tuna is caught with dolphin free nets.

The same thing would apply to biotechnology. In terms of the hormone growth promotants, it is the same issue. The hormone growth promotants were found by the panel not to substantially alter the characteristics of the product. There was no scientific evidence that was substantiated before that panel that hormone growth promotants materially altered the product and/or presented any safety problems. That was a sound science based decision, and it was upheld that way.

CHAIR—There was just a small problem with enforcement.

Mr Hooke—Yes. There are three options if you are found in breach: you fix it, you pay compensation or you suffer the trade sanctions. Whether or not they stop importing Remy Martin brandy and put 20,000 people out of the cognac industry, I do not know. It may go that way. But, generally speaking, countries are complying with the determinations of the panels.

There are just a few notable exceptions. On those issues, in a trade sense, that is where our organisation sits. In a technical sense, my members do not have a view on biotechnology per se. The companies do, but as an organisation we do not. We contend that the markets should sort that out—we have been through this before, haven't we? Our role, though, was to make sure that there is an appropriate regulatory system: the rules governing the research, development and release of genetically modified organisms; the pre-clearance for the products of that technology; and then an appropriate labelling regime that meets the needs and expectations of consumers in differentiating those products in the market.

Senator TCHEN—Have Ms Plowman and Mr Howard any position on these issues or anything to contribute? I know they are not directly related to the WTO but I am interested to know whether the WTO is bringing the matters in.

Mr Howard—In the interests of time I will not talk at length about biotechnology, but I guess one of the issues is whether the technology can be handled within the existing framework of rules. That is one of the big debates at the moment. We believe that the SPS agreement is perfectly capable of handling this technology and we do not need a new agreement outside the WTO.

Mr Hooke—I agree.

CHAIR—It interests me that in issues such as how you manage the risk the WTO does not, as an organisation, seem to have addressed or discussed whether there needs to be some form of indemnity system so that any member who wants to push their products around the place is required to give some sort of indemnity. For argument's sake, say that Canada, for instance, was wrong about its salmon and it diseased all our stock. Neither the WTO nor the panel pay any compensation, Canada does not pay any compensation and the Australian taxpayer presumably ends up picking up the risk. It seems to me that that is something that might be a future item for discussion. Does anyone have a view about that?

Ms Plowman—I think the Pork Council has a view on what has been happening with FMD in Europe. We have been getting lots of calls from producers about why we continue to allow product in from Europe while this disease continues to spread within the UK. I think it provides an opportunity for us to review our position, perhaps on a case-by-case basis. This particular strain of FMD is very virulent. I put to you that it has not actually been shown to be stable in any way or even to be under firm control when you see how it has spread within the UK and then over to Northern Ireland by wind. Climate conditions in Europe are ripe for its further movement and its continuing survival. So how do you address a producer's concern when product has been coming into the country and puts their livelihood at risk?

I know that Japan and Korea temporarily suspended product coming in from Denmark, Belgium and France for a period of three days. I know that Japan subsequently lifted that ban when the testing of those suspected FMD stock proved negative. As far as Korea is concerned, I have not been advised yet by DFAT whether that ban has been removed. When producers in Australia get a whiff of what is happening overseas with these additional precautionary measures, they ask the same question, 'Why are we not also employing additional precautionary measures?' What we have seen with the spread of exotic disease—typical of classical swine fever outbreaks in the UK last year followed by FMD—begs the question that maybe we do

need to look at this more on a case by case basis and how it would affect the livelihood of producers and the Australian economy if such diseases were to land on our doorstep.

Mr ADAMS—Ms Plowman, this is a little outside this area but it is an issue that has been put to our committee by other people and I would value your views. I will use as an example a food processing factory—because they would use a lot of stainless steel and whatever—being set up in a regional centre. I agree with your submission that as far as the wealth for regional Australia is concerned this sort of thing is one of the great chances we have of building jobs and wealth out there. It has been put to us that what is happening is that when capital comes in through a multinational to build a regional processing plant, when a company goes to build that plant it does not put out tenders to locals; there is no local content if the local councils cannot lay down local content and the government cannot apply it because the WTO does not allow it. This multinational then prefabs all the stainless steel and everything is done in Indonesia and then brought down. Our companies have no chance at all of input. Of course, labour unions argue that it is based on cheap labour and they are not competing on this basis. Have you any comment on that?

Mr Hooke—I do not really know where to start.

Mr ADAMS—The point is whether we are losing sovereignty by accepting WTO rules that say we will have no local content rules requiring that X amount of stuff be sourced from Australia.

Mr Hooke—I understand the question. There are a couple of issues there. One is that once you start trying to change the trading rules to cover that you are getting into the whole area of the intersection of trade and labour policy and you will have developing countries jumping up and down saying, 'That's just the developed economies trying to undermine the exploitation of our comparative advantage.'

The second point is that if goods are coming down here—it would not apply to services—and are being sold to Australia at a value below the normal value in the ordinary course of trade, then they are dumped. And if they have got some government assistance, then they are subsidised and there would be grounds for countervailing action. In the anti-dumping countervailing inquiries—and there has been a plethora of them through this place, as you know—we made a very strong submission—this goes back to Senator Cooney's point about representing the industry—about how there ought to be interim securities. We were finding, particularly in some of the canned fruit and vegetable industries, that shiploads of dumped product were coming into this country. By the time we had gone through the processes of checking out an inquiry, and no application of retrospective duties, there was enough product here to feed the market for the next X number of months, with quite severe economic effects. By the imposition of interim securities at day 61 or 51 or whatever it is, on a prima facie basis of a complaint, then what you have is a kind of half-way house between innocent until proven guilty and guilty until proven innocent. That in itself has done something to mitigate the disruptive economic effects you are talking about. But you are going to the heart of the issue about whether or not you protect Australian industry.

Mr ADAMS—The employers also argued the same point before us. Their point is that they do not have any input and they do not have a chance to even tender for this work. The multinational has resources in Indonesia or somewhere else and just goes there.

Mr Hooke—I am hearing what you are saying.

Mr ADAMS—I realise this is outside your area.

Mr Hooke—It is and it is not. The other thing, of course, is that once that plant is built there an awful lot of people in Australia are providing goods and services to it, in both raw commodity inputs and continuing services. So whilst there may in the first instance be some problems that you allude to—and very few Australians would be anything other than sympathetic to what you are saying—at the end of the day, if it comes down to a question of whether you do or do not have the foreign direct investment, the world is a system of advantages and disadvantages, I suggest.

Senator COONEY—If evidence was given before a panel or a settlement body and it was carelessly given, should the organisation that put that person forward be obliged to pay any loss that follows from the poor evidence that that person gave before the board? To take an example from your area, Ms Plowman, if somebody brought forward an expert who said, 'No, there'll be no danger to the pig industry by allowing in this meat,' but that is wrong and damage flows, should that person or the person behind that witness compensate the pig industry?

Mr Hooke—It would be hell of a disincentive to participate.

Senator COONEY—Of course it would be. It might also concentrate people's minds on giving proper evidence.

Mr Hooke—Absolutely. That is the point.

Senator COONEY—Could you take that on notice?

Mr Hooke—Prevention is better than worrying about the contingent liability.

CHAIR—I need to conclude this session because we have gone slightly over time. Before I do, was there anything that any of the participants wanted to say that they did not have a chance to say in their opening statement or during questions? You can either say it now or provide a fuller answer when you have a look at the transcript, if there is anything you would like to bring to the committee's attention. I thank each of you for coming and giving your time this morning.

Resolved (on motion **Mr Adams**)

The reports tabled by Mr Howard from the National Farmers Federation, *Solving the problem: the political economy of agricultural trade reform* from the Rural Industries Research and Development Corporation, *Global trade reform: maintaining momentum* from the Department of Foreign Affairs and Trade and *WTO agricultural negotiations: negotiating proposal by Japan*, published by the government of Japan, be accepted as evidence to the inquiry.

Resolved (on motion by **Mr Wilkie**):

The report tabled by Mr Hooke from the Australian Food and Grocery Council, *NGO Way To Go: political accountability of non-government organizations in a democratic society* by Gary Johns be accepted as evidence to the inquiry.

[11.18 a.m.]

FARQUHAR, Ms Susan, Director, External Relations, IP Australia

GAILEY, Miss Lynn Elizabeth, Assistant State Secretary, New South Wales Branch, and Federal Policy Officer, Media, Entertainment and Arts Alliance

McCREADIE, Ms Sue, Executive Director, Australian Writers Guild

MORRIS, Ms Megan, General Manager, Film and New Media, Department of Communications, Information Technology and the Arts

Sesson 2—Culture and intellectual property

CHAIR—For those who were not here a little earlier, I should say that we are holding some panel sessions this morning, as you would have known, on agriculture, yours on culture and intellectual property, and another one on lawyers and the WTO. I would like to ask each of you, if you would, to make a short opening statement, around about five minutes. Do not feel constrained if there is something that you really want to tell us outlining what you believe are the relevant issues surrounding what you do with Australia's relationship with the World Trade Organisation. Then we will move to a free-flowing discussion involving all of you and all of us. I am very happy for it to be a round table discussion so do not feel that it just has to be question and answer. If you want to engage each other that is fine. We do not require evidence under oath but theses are legal proceedings of the parliament and they do warrant the same respect as proceedings of the House and Senate, which does mean that false or misleading evidence is a serious matter and may be regarded as contempt of parliament. However it is an informal hearing and we want you to feel that you can engage with us because we often find that that is much more valuable. So, welcome. Would you like to make an opening statement?

Ms Farquhar—Yes. IP Australia is the federal agency responsible for the administration of patents, trademarks and designs. We are a division of the Department of Industry, Science and Resources. My brief comments will merely emphasise points that were made in the submission that IP Australia made to your committee. Firstly, the agreement on trade related aspects of intellectual property rights—the TRIPS agreement—administered by the World Trade Organisation represented a significant development in the international intellectual property scene, in terms of setting world minimum standards for intellectual property protection and providing some means of enforcing the meeting of these standards by member states and resolving disputes. Secondly, effective interrelationships between the WTO and other organisations responsible for the international IP systems, notably the World Intellectual Property Organisation, are essential for the orderly and coherent development of these systems. Finally, close working relationships between the Australian agencies responsible for the administration of the IP systems in this country are essential for continuing the effective representation of Australia's interests in fora such as the WTO. Thank you.

Miss Gailey—I am here representing principally people who work in the arts and entertainment industries and specifically performers and technicians. We would support everything that Susan Farquhar has had to say. We think that solid regimes to protect intellectual

property are crucial. 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. Although it would be wonderful to come to a forum like this and argue industry protection, we are not arguing industry protection on the basis of employment opportunities. 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. Australia is a very small country in the scheme of things, particularly in the English speaking world. Consequently, Australia's cultural products are exposed to fierce competition from industries with which we are not able to compete on a level playing field, principally the United States.

The government has, for a very long time, supported the development and fostering of arts, entertainment and audiovisual industries and continues to do so. It does so through a range of strategies that are complex and that are balanced to ensure that Australian industries are viable so that Australians can see their own stories told and can see their own society reflected back to them but there remains the adequate space for Australians to have access to the cultural product of other countries.

We think it is incredibly important that the government remain able to continue doing that and equally important that it not just remain able to continue the kinds of supports that are currently in place but remain able to respond to changes in the future. We only have to look at the last 20 years. It seems almost incomprehensible that in 1980 we did not have video cassette recorders, CDs and the Internet, and that we were not downloading music off the Net and looking at sitcoms on the Net. What is going to happen in the next 10 to 20 years, let alone the next 50 years, I have absolutely no idea, but I think it remains essential that the government maintains the capacity to respond to change as and when it happens, and it needs to have that capacity available to it legislatively.

Australia's culture is also a very dynamic thing and the face of Australia today is very different from what it was at the beginning of the century. It is not difficult to see that Australia's culture is inadequately represented on, for instance, our television screens. Those not of an Anglo-Celtic background who sat and watched television 10 years ago would have wondered if they were living in the right country, but today things are changing. There is a lag time between the way the culture has been reflected back to the society and what is happening with Australia in terms of its diversity. But things are improving. The government needs to be able to quarantine that space and introduce mechanisms—whether it is through support of writers from non-English speaking backgrounds or through, say, the Australian Film Commission or whatever it might be—to address those cultural concerns. For those reasons we think these industries warrant special consideration, not just in negotiations in respect of the WTO but in all multilateral and bilateral trade negotiations.

Ms McCreadie—I will start with what the Australian Writers' Guild does. We represent performance writers throughout Australia; that is, people who write for film, television, theatre, corporate video and multimedia. What we do not do is represent people who write books—that is a separate organisation. Sometimes there is some confusion.

CHAIR—What is that organisation?

Ms McCreadie—The Society of Authors. Our members do write books sometimes but, in so far as they do, we do not represent them in that capacity. I wanted to make that distinction, because at the heart of what we want to say is that it is very important for any country that it can tell its own stories within its own community and to other communities. We believe the most pervasive and powerful means of delivery or sharing of those stories now is the audiovisual sector.

That sector—I think Lynn made this point—is vulnerable to the extent that the economics of the sector are different from the economics of other sectors. So, when you look at the cost of an imported American program, it can be imported into Australia for $20,000 to $30,000 an hour. That is about a tenth of the cost of producing a program here. The American studios and producers can afford to sell it at that price in the Australian market, because they have already recovered the costs in their home market. The Australian industry, the independent production sector, faces the problem that they have to raise the costs here, so they try to raise the costs through licence fees, perhaps through overseas sales, which is difficult. Therefore, the way the industry has been supported for quite a long time by the Australian government has been through the twin pillars of direct subsidy and Australian content regulation, and because the regulations are there it requires the networks to fill those slots and therefore pay a licence which is a bit closer to the cost of production.

Our concern is that those forms of support that the government has provided for a long period of time are not compromised in any way through trade agreements. I make the point in my submission that we should not view culture as simply another commodity. I have some good quotes from Lord Puttnam here—if you do not mind my quoting another politician. He says:

> Stories and images are among the principal means by which human society has always transmitted its values and its beliefs, from generation to generation and from community to community.

He goes on to make the point that:

> Movies, along with all the other activities driven by stories and the images and characters that flow from them, are now at the very heart of the way we run our economies and live our lives.

And he says that if we damage them we damage the health and vitality of our own society. I think the CER incident demonstrated what happens when culture is not treated separately and there is no special consideration in a trade agreement for that. There has been a lot of debate about the fact that there should have been a cultural exemption in that treaty. Why it was not is a matter for the historians. Our concern is that that episode is not repeated. After the inquiries that followed that incident we got the impression that the government was committed to seeking cultural exemptions in all trade treaties. Within the WTO I guess there is some protection insofar as there are member countries—such as France and Canada—with a very strong sense of their own culture and a very strong view that culture has to be treated separately.

What do we suggest needs to be done? I am not an expert on the WTO and, of course, organisations like ours do not generally get to participate, but it seems there are various options: either maintaining some sort of country specific reservation to do with culture and audiovisual industries, or taking it right off the table, or taking it right off the table and putting it into a separate mechanism or regime, which I understand is what the Canadian government is interested in pursuing. That is basically what I would like to say. As I guess other sectors have said, it is very important to keep us informed of what is going on. Perhaps the CER incident would not have happened if the industry had been a bit more closely involved at the time. I do not think they understood that, in signing that protocol, the Australian content standard was being left as vulnerable as it was to legal challenge.

CHAIR—Wholly unanticipated exposure, perhaps. Ms Morris, do you have an opening statement?

Ms Morris—Yes, thank you. The Australian government recognises the essential role of creative artists and cultural organisations in contributing to the cultural life and identity of the nation. As much artistic endeavour is high risk, the government recognises the need to support and encourage artistic excellence and experimentation. Australia has a small population, giving it a limited domestic market in which to recoup costs and sell cultural services. It is in the national interest for the government to intervene to sustain Australian creative resources that would be severely curtailed or not occur at all without government support.

Within the context of international trade negotiations, the department has largely been focused on audiovisual product—and I will try not to go over the ground already covered by the previous presentations but just make a few short points. Audiovisual content has been a particular concern because of the factors which distinguish it from other cultural goods and services. Firstly, it is the most widely traded cultural product or service, and I note it is actually a growing export for Australia. What is traded is a licence to exploit a piece of intellectual property, rather than an actual physical good. The cost of replicating and distributing an audiovisual product is very small relative to its production cost, making the cost of the rights to broadcast foreign television programs significantly less than the locally produced product. It is for those reasons that in international negotiations we as a portfolio have concentrated on the audiovisual sector. It does not mean we are not interested in other cultural products, but in terms of international trade negotiations it has not arisen as an issue to date.

Government support for the film and television industry is provided through an integrated framework that covers content regulation, direct subsidy, tax concessions, restrictions on the importation of foreign actors, and foreign ownership restrictions. All of these measures are potentially vulnerable to challenges in international trade negotiations. Local content regulation has been a particular focus for the US. I note that local content regulation has been integral to the current level of maturity of the Australian film and television industry and has also grown audience demand for Australian productions. I noted when I looked at the transcript of previous evidence that that point was made quite strongly by the Screen Producers Association when they met with you.

In past consultations the government has adopted a negotiating position which has enabled it to continue to give effect to its cultural and broadcasting policies. Australia made no commitments in the audiovisual sector under the WTO general agreement on trading services in the Uruguay Round of multilateral trade negotiations. Australia also took out a most favoured nation exemption to protect our film coproduction agreements and one to respond to any unreasonable and unfair unilateral actions in the audiovisual sector.

As part of its response to the High Court's decision on Project Blue Sky versus the Australian Broadcasting Authority, the government announced that it would ensure that Australia's cultural objectives for the audiovisual sector are taken into account in negotiating future trade agreements. It was not a commitment to a cultural carve-out but a commitment to take the cultural objectives for the audiovisual sector into account. This commitment will, of course, apply to the proposed free trade agreement with Singapore and the possible agreement with the United States.

While the preservation of Australian cultural distinctiveness is a legitimate and important objective, 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 disadvantage and would work against the national interest in future negotiations. One of the major difficulties that the Department of Foreign Affairs and Trade would see, and we as a portfolio would also see, is an agreed definition of culture. We, within Australia, would have a fairly clear idea of what we would put into that basket. I do not think other countries would agree with the same definition.

I hear a member of the committee say that that is a big statement. It is, and I am not really qualified to talk on trade negotiation per se, but maintaining a reservation on audiovisual industries has provided us with a good outcome in an integrated package of policy for our cultural policies to date. It has worked well and has continued to work well. Unfortunately, I am not empowered to talk about intellectual property issues. I think that you are interested in hearing about intellectual property, but there is no representative here from the intellectual property area of the department. I am more than happy to take anything on notice and get back to you in writing.

CHAIR—Thank you very much. Let us open up the discussion.

Senator COONEY—Everybody would agree that some weight ought to be given to the expression of our culture. As Ms Morris says, there is the issue of defining what culture is. Has anybody got any idea of what they would want written into an agreement about intellectual properly and culture? The World Trade Organisation operates on the basis of an agreement. That agreement having been reached, any disputes that arise under it are to be decided by panels. You would have heard the discussions here before. Have you got any concept of what we would want in the agreement? Would we say that there should be special exemptions for matters of culture? Would we say that it should be all right for a country to subsidise its culture or give special benefits to its own industry? What sort of thing would you like written into the agreement? Have you got any idea about that? Have you got any idea of what we mean by culture? You might want to think about these things. It seems to me that they are the sorts of issues we have got to grapple with at some stage or other.

Miss Gailey—If you were to talk about the arts, entertainment and audiovisual industries, that may go some way towards a definition of culture that we would see as appropriate in the context of the WTO negotiations. Whilst Sue has noted that she does not represent authors—and I do not represent authors either—clearly, Australian literature is a cultural product and it is one that is currently supported by the government and has been for a long time. The support mechanisms that have been provided to books have changed over the years. The book bounty was, as I understand it, dropped about five or six years ago. There is now a package that is a subsidy of around about four per cent for print runs over 1,000 as some kind of recognition of the impact that the GST might have had. The Australia Council and the arts ministries have traditionally supported literature principally by way of providing grants. So I think that is a cultural product and, if you used a definition of arts, entertainment and audiovisual industries, you should be able to capture books within that definition. Certainly, for our constituency, that definition would capture most of our concerns.

Senator COONEY—And would you suggest that there be a provision in any agreement that falls within the World Trade Organisation for the government to be able subsidise those cultural matters? Should they be protected by tariffs or even by quotas or how would you go about protecting—

Miss Gailey—An exclusion is obviously the ideal way to go so that they are clearly off the table. In terms of the way that the government currently provides support it is a very complex web of mechanisms. I have indicated in particular in reference to film and television in the submission that we made that that support—Megan made the same point—includes direct and indirect subsidy, the contents standard on television and the migration regulations that restrict the entry of overseas persons working in any part of the entertainment industry, so the ways in which it has been achieved are quite complex. From our point of view, exempting it entirely is the safest way to go.

Senator COONEY—When you say 'exempting' you mean that it is not subject to the World Trade Organisation at all?

Miss Gailey—An exclusion.

Senator COONEY—I can follow that. Say you moved it out of the World Trade Organisation—and I can see the very good reasons that you might—what would you do with the culture? What sorts of things would you like to see done with the issue of culture if it were moved out of the World Trade Organisation?

Miss Gailey—Our position would be that we would like an exclusion in all multilateral and bilateral trade agreements. I am sorry, I do not quite understand what you are now trying to say about what we should do with it.

Senator COONEY—I should explain myself. Would you say that no other cultures are allowed to come into Australia, or would you say that Australian culture can be subsidised, or would you say that there should be quotas as to what can come in from overseas? What would your policy be?

Miss Gailey—We would like to see the government's ability to continue to support and protect the so-called cultural industries in whatever manner it sees as appropriate after reasonable consultation with the community. At the moment it is not an exclusion of access to the Australian population of other cultures, it is a construction that enables Australians reasonable access to overseas cultural product whilst quarantining the space for Australian cultural product.

CHAIR—Can I ask each of you, perhaps, to feed into Senator Cooney's line of thinking: what are we really talking about in terms of cultural distinctiveness—and that, perhaps, might be the encapsulated expression? Are we really just talking about something that is locally done by an Australian, something locally produced, or something that is really distinctively Australian in its character? I am not quite sure what we are actually talking about and what we are excluding. For instance, if we were restricting the way Australians work or the way foreigners work, is that a different issue? Does that really go to cultural distinctiveness or does

it just go to opportunities for Australians? I think it is an interesting issue that really relates to what Senator Cooney was teasing out there.

Ms Morris—I would like to comment on that first, if I could, as I come from the department responsible for cultural policy. Within my branch we administer, for instance, certificates for qualifying Australian films and whether they are cultural product or not. The basis on which we assess whether something is an Australian cultural product is, principally, who has the creative control. If it is an idea generated by Australians resulting in an Australian product, and with audiovisual you can add into that, 'told by Australians', if there are Australian voices in it and they are telling Australian stories, then it is assessed as being Australian. But we have never tried to define what looks, sounds, or feels Australian.

CHAIR—Thank you for that. It is a good distinction.

Miss Gailey—That is increasingly difficult as Australia becomes a much more multicultural society.

CHAIR—Yes.

Miss Gailey—The point is that it is an expression of experience of Australians. That experience might be as an Anglo-Celtic sixth generation Australian, or it might be—

CHAIR—A new arrival.

Miss Gailey—an Asian new arrival. Those experiences are going to be very different and the stories that they wish to tell will be very different but they are, nonetheless, emanating from what is today Australia.

CHAIR—One of the very interesting things, of course, with globalisation is that culture cannot really be quarantined in a broad sense. You might be able to do something with product and you can do all the things that we do but culture, as such, surely in Australia is just as important to develop on a global basis as anything else. We need to have all these experiences and be able to really trade globally, even in culture.

Miss Gailey—That is right, to an extent, but Australia is a very small market. Particularly in the audiovisual sector, the dominant market is the English language market; then sitting behind that is the Indian language market and behind that is the Chinese language market. There is not a lot of cross-over between those three, but in the English language market, which is by a long way economically the biggest market, the dominance of America means that whilst there is an argument for cultural exchange, and that possibility exists now, the crucial thing is that, because we are a small market, the protections are in place to enable us to have an industry that can tell our stories at all. Without the protections we currently have, that would not exist. We only have to go back to the 1930s to see what happened to the industry once Hollywood took off and the combined onslaught of the British and the Americans in the late 1920s and solidly from the beginning of the 1930s onwards wiped out our industry entirely. We have not been able to maintain an industry in the absence of some form of protections and subsidies.

CHAIR—Yes.

Senator COONEY—You are happy if things are left as they are now? Is that right? In terms of the World Trade Organisation and what we might do or might not do, if things just kept on as they are now in Australia, that would be sufficient?

Miss Gailey—We would like an exclusion and we would like it strengthened. We have some nervousness about it. I am neither a lawyer nor an absolute authority on the WTO, but we do have some concerns that there is some potential for the manner in which the agreement deals with subsidy to end up impacting in a way that we might not feel comfortable with. Our concerns would extend then beyond the audiovisual sector and into the other sectors that we refer to in our submission, namely those areas where the government provides subsidy for cultural industries, whether they are opera, dance, ballet or theatre.

CHAIR—Does anyone at the table know what happens with the main English language producers of domestic culture like the United States, Canada, France and Germany?

Ms Morris—The United States does not need any protection. Every country outside the United States and India, which has a huge film industry, has some form of content regulation and subsidy. I apologise, I immediately start talking audiovisual, so take it as audiovisual. Film and television product is incredibly expensive to produce and basically no country can afford a local film industry without some subsidy and content regulation. How the mix of the subsidy and regulation and indirect subsidy through tax concessions works and who qualifies varies by country but there is that underlying framework everywhere.

Mr ADAMS—A third of the world speaks English, and that figure is growing, especially because of IT. The American market is the biggest market, and nobody seems to get into it other than Americans. So is the point to break into the American market, and what has Australian policy been to assist getting into that market?

Miss Gailey—Economically, absolutely, but our concerns here are the quarantining of a space that enables our own stories to be told. A lot of our stories travel really well. Film and television is earning more export dollars every year and we are succeeding: if you look at the Academy Award nominations at the moment, for a little country we are doing pretty well. When we are given the opportunity we can generally demonstrate that our stuff does travel and it does work. If you look across other art forms, in dance Australia is considered one of the best countries—

Mr ADAMS—So do our actors we train through NIDA—they are in Hollywood making trillions; so do our guys on the cameras who are doing very well. Looking at other industries, the chefs we train in Australia go out into the world with Australian culture.

Ms McCreadie—I do not think the issue is about the quality of the individuals, their talent and their capacity to travel, because that is the case. It is more an issue of developing distinctly Australian product here. That is what travels. One of the major points that should be given recognition within WTO in terms of the role of culture is an acceptance of the need for cultural diversity at a global level. The observation has been made by a number of people that, despite globalisation proceeding at a rapid pace, there is more and more a sense of the need for cultural diversity and for communities to emphasise their own culture. Distinctively Australian stories are the things that travel. The things that do not travel are pale imitations of American product.

Without the subsidy and Australian content regulation structures that we have, we will not have that distinctively Australian product. We will have offshore productions made here; and if that is all that happens then clearly you do not have a domestic industry. That does not bring much benefit to Australia, either culturally, diplomatically or economically.

Mr ADAMS—That is certainly right.

CHAIR—Does that put us at any kind of competitive disadvantage, though? We might end up with a beautiful preserved cultural enclave, if you like, that travels wonderfully well if you can get distribution agreements or whatever else you need. Are we closing our mind to the competitive advantages of being a bit more open, or is that not the case?

Ms Morris—To take up what Sue McCreadie said, we fund audiovisual product for cultural policy reasons. Exports we get from that are a bonus. The Film Finance Corporation, which is a government owned company and the major investor in film and television product, tries to get as great an amount of private investment and overseas sales as possible on every single project in which they invest. I think it is right, Sue, isn't it, that they require overseas pre-sales on all features films before they invest?

Ms McCreadie—Yes.

Ms Morris—The other thing is that the government only intervenes in product that is considered subject to market failure. Of the Australian product you see on Australian commercial TV, probably only about 10 per cent receives government subsidy. We only invest in certain genres. A large part of what you see—series, serials, game shows, news, sports coverage—receives no government subsidy. The content regulation that is there has grown the local audience for it, it rates well, networks are happy to invest in it, it is cheaper to make.

As a general point, there was a question earlier about what is cultural product. I think one of the dividing lines is whether or not it is subject to market failure. That does not by itself define 'cultural', but our interest in cultural products is—

CHAIR—Is that one of the criteria?

Ms Morris—It certainly is within audiovisual and I am fairly sure it would be across the gamut of cultural assistance. Within audiovisual there are certain grey areas. Some things are produced that sell well around the world. They are not distinctly Australian and are not funded by the government and they function quite well within the international marketplace. Mr Adams, I may be guessing, but I think the direction of your question about accessing the US market better was whether we would be better to negotiate on audiovisual with the US. I suspect that the Americans would say that theirs is entirely a free market—which it is. They have no audience demand for other product and their distribution and exhibition sector works without any government regulation or interference. We would have to negotiate for favoured treatment there for Australian product. We would characterise our intervention in audiovisual at the Australian end as creating a level playing field, not excluding foreign product or foreigners coming to shoot movies here. We have a growing sector of the industry here that is foreign funded films, with spin-offs for the local sector. What we do through the Australian content

standard and through direct and indirect subsidy is ensure that local product continues to get made and is viewed by Australians. Is that where you were heading on that question?

Mr ADAMS—Yes, down that track. The Americans have an open market. Their argument is: if you want to show something, go and sell it to the network.

Ms Morris—Yes.

Mr ADAMS—But their network is not interested.

Ms Morris—Generally not.

Mr ADAMS—They are not going to say to their audience, 'Do you want to see some Aussie stuff? Do you want to see *Water Rats*? We have got enough New York cops.' It gets down to the problem in this whole trade issue that big is always dominant and takes over.

Miss Gailey—If you look at audiences, the American market is in many ways fundamentally different from the Australian market. Only seven per cent of Americans have a passport. They look inwardly. Australia, as a society, has looked much more globally for the last 200 years. We have been voracious consumers of cultural product from all around the world and will continue to be so. The mechanisms that we have in place now to protect the Australian industry have demonstrated that Australians do want to see Australian cultural product on television, whether it is *Water Rats* or *Shine* being released on television, but they still want to have access to product from around the world. You have only got to look at the fact that SBS has an audience to see how diverse that is. It is also a reflection on the make-up of the Australian population. But there is no equivalent in America and there is not a similar demand that would soak up the product from around the world.

Mr ADAMS—I take your word on that, but it seems to be a very defeatist attitude that we cannot break in anywhere. They will take our football and run that and they will run all codes of football and the cricket. What other parts of the world take our cultural projects?

Ms Morris—Germany is our biggest export market for audiovisual product, followed by the UK, I think—I could be wrong on that. We sell very well into European countries.

Miss Gailey—That being said, it should be pointed out that *Water Rats* has sold to more countries around the world than any other television series produced anywhere in history.

Ms McCreadie—But without the Australian market it would not be made at all. That is the point. The first market for any product like this is always its home market. The first market for American product is its home market. It recoups its costs entirely.

Mr ADAMS—I take your point.

Ms McCreadie—I think it is important because all of these shows have been sold overseas and the producers have expressed quite a lot of concern recently about the fact they have left themselves a little vulnerable. They have allowed the networks to lower their licence fees as

they began to build up their sales in Britain and Germany. Now there have been changes in the markets in those countries and they have found that it is becoming more difficult to sell so they have got a gap between the cost of production and the network's licence fees. It has to be sustainable as a domestic industry or it just does not happen. *Water Rats* costs somewhere between $250,000 to $350,000 an hour. It has fluctuated between various series, but you can bring in an American cop show for $25,000 to $35,000 an hour. *Water Rats* rates fabulously but the network is looking at the costs that it is paying. If it can get something in that will rate as well, why would it choose *Water Rats* at a phenomenal cost?

Mr ADAMS—I support your argument, but a manufacturing industry organisation would sit there and tell us that they could not go to the world with exports unless they had a domestic market protection. That debate is well over, but that is exactly the same argument that they used 20 years ago, and, of course, there are now manufacturers in Australia that do not actually sell anything or very little on the domestic market. They sell their stuff to the world. That is IT, and there are a lot of other issues there, so that is what we are up against in argument.

Ms McCreadie—It is not culturally specific though, is it? *Water Rats* is culturally specific to Australia—that is why Australian audiences look at it—but a widget isn't. It is the same wherever it is made and wherever it is bought. There are a lot of mass produced things. *Water rats* is very specifically tailored to the Australian market; it is what Australian audiences want.

Mr ADAMS—It is Sydneycentric.

Ms McCreadie—You could say that—I will not get into that one.

Mr ADAMS—What is your relationship with DFAT? Have you had talks about your opportunity of having input into the negotiations when they go forward? Have they approached you for your views?

Ms Morris—We have regular liaison with DFAT, and we would be formally approached when the time comes. We stay in touch. Our building is located across the road from them; it is not an issue for us.

Mr ADAMS—But the views of these two organisations would be put into DFAT by yourselves?

Ms Morris—We would make the views of the sector known.

Mr ADAMS—Say the next trade round has been organised in Sydney and these two groups want to have some input. Would they get to talk to DFAT about having their views put into the Australian trade negotiator's position? They might reject it, but—

Ms Morris—I do not think I can answer that on DFAT's behalf. From memory they have government consultations—formal consultations through departmental committees or whatever—and they have community consultations.

Mr ADAMS—Can the organisations answer whether they have had any input, of the views that you are expressing to us, to the department?

Ms McCreadie—No, we have not—not to DFAT.

Miss Gailey—We have been to the community consultation meetings.

Mr ADAMS—They have set up some community consultation meetings and you have gone and made some input, but you have not as an organisation—

Miss Gailey—We have not been directly approached.

Mr ADAMS—Industry?

Miss Gailey—Not recently that I am aware of. As a union we are certainly not backward in coming forward, and if we believe there is a issue, which we have done, we will write direct to the minister.

Mr ADAMS—But organisations have raised concerns about having input. Whether their input makes it to the negotiation table or not is another point, but people have not had input into the negotiations. That is the point I was trying to make. Maybe you have inputs through a peak organisation like the ACTU or whatever, I do not know, and maybe all the writers and the authors come together in a group, but that was what I was interested to know.

Ms McCreadie—I think more consultation than just community consultations would be helpful because, in order to have a dialogue, from our perspective we need to know a little bit more about their considerations in terms of whether they have thought about taking it all off the table and whether there is an objection to it from DFAT's point of view. I hear DOCITA's view, but it would be good to have a dialogue with DFAT about that and about issues of definition of culture. No doubt they have had some dialogue with the Canadians, who have a very strong view about it from what we understand. That would be really helpful but, no, it has not happened.

Mr ADAMS—The French talking Canadians probably would, and I know the French do. In the agriculture sector there is a group called the Cairns Group, which Australia set up to handle their access to markets. Maybe the countries that have concerns about culture should be coming together and people should be throwing ideas about and getting central groups.

Miss Gailey—I understand that there is a coming together of some countries specifically in respect of cultural issues but that Australia has not had representation on that, as I understand it, loose organisation of countries.

Senator COONEY—Has DFAT approached anybody at the table?

Ms Farquhar—I should exclude IP Australia from that because we are not really involved in the sort of area that has been the subject of the discussion.

Senator COONEY—I understand that, but have none of your organisations been approached by DFAT?

Ms Morris—None of the government organisations have been.

Senator COONEY—I take it there have been interdepartmental conversations. Do you know who initiated those?

Ms Morris—I do not think I could tell you. We are in regular contact already.

Senator COONEY—I just want to see what initiative, if any, DFAT is taking in all this.

Ms McCreadie—Our Canadian counterparts, whom we have a lot to do with, certainly are a lot more involved in the trade negotiation and discussions with their government about the development of policy. They can often help us with answers about what is going on internationally.

Senator COONEY—The reason I am asking is that you get the feeling—not only with the issue we are now discussing but generally—that the Australian community itself is fairly passive in its relationships with DFAT. We will have lawyers here this afternoon—you have probably heard mention of lawyers—not so much to give them work but as a means of initiating something from the various bodies in the Australian community, so that at least what has been put overseas comes from the people who know.

Ms Farquhar—Could I say a little bit on that from the IP side of the picture. Our organisation certainly has very close relations with DFAT, and through that I am aware of DFAT's close relationship with relevant industry agencies as well. But this is on the intellectual properties aspects of it, not specifically on culture.

Senator COONEY—I was hoping you would be commenting on behalf of the intellectual property grouping because I think culture is interwoven with that as well. The issues that arise with culture arise with intellectual property generally.

Mr ADAMS—Culture is a bit like labour and environment.

Ms Farquhar—Yes.

Mr WILKIE—The argument that I appear to be hearing is that we really need to define Australian culture. We are having a lot of difficulty breaking into other markets, not because of world trade restrictions but because they do not really want the product. Therefore, there seems to be an argument that we really need to ensure that there are minimum broadcast times available for Australian product. Is that argument being put forward?

Miss Gailey—I do not think it is true to say that we are having difficulty breaking into other markets. For an industry the size of Australia's we are doing incredibly well, but the fact will never change that we are a country of not quite 20 million and we will never, in audiovisual, be competing on a level playing field with America. They are, and always will be, the dominant player. The same is true for many other countries around the world. We do have one advantage, which is the English language. But it is not a level playing field and will continue not to be, and America will remain the dominant market in the English language world.

We do incredibly well in breaking into non-English language markets, so I do not think it is right to characterise it as us having difficulty, because given where we sit internationally and given the size of this industry we are doing quite well. But we will only do well for all those reasons so long as the government is able to provide support mechanisms, whether it is through direct or indirect subsidy, whether it is through the content standard or whether it is through the migration regulations or whatever other mechanism. They are there to afford us a safety net and that safety net allows the industry to grow and to be a considerable force in the Australian economy. But we need the safety net, and the concern is the potential for trade negotiations to remove that safety net.

I cannot say what is going to happen in 50 years time; the delivery platforms in audiovisual are changing so dramatically. Ten years ago I might have said, 'Tariffs? Forget it.' I think it would be naive to say we have gone beyond any single form of assistance, because I certainly cannot foresee the future sufficiently well. The whole financing and distribution landscape internationally is a volatile and dynamic—

Mr ADAMS—Yes, I see the same thing. It is very difficult sitting as a legislator, because communications policy becomes a bloody nightmare when trying to find where the future is. What about people manufacturing programs? What about the distribution system—is that going to become wider and wider? Communications and how that opens up—

Miss Gailey—They are all additional layers. Once upon a time people wrote out books one by one. Then we had printing.

Mr ADAMS—Sheepskins, yes.

Miss Gailey—Following on from printing we had film. Film did not stop people reading books. Television did not stop people going to the movies.

Mr ADAMS—Nor did radio.

Miss Gailey—No. VCR did not stop people going to the movies. When VCRs were introduced there was a little bit of a blip—cinema attendances dropped—and now the multiplexes are burgeoning all over the country. None of those things wiped out the means of distribution of cultural product that were in place before they were introduced; they have simply added to them.

Mr ADAMS—Won't Americans be able to draw Australian content down on their communication system and pull it over there? Aren't we heading that way? Isn't the future about that?

Ms Morris—I think one of the issues in future distribution mechanisms for audiovisual—and it is one that is yet to be resolved—is, basically, how to get your money back. It is the most expensive cultural product to produce that there is. There are accepted patterns of exploitation for both TV and theatrical release of films that are still operating around the world even though the technology is there to change audience access. The reason that those 'protocols'—I am not sure whether 'protocols' is the right word; would that be right, Sue?—are still in place is

because at present you cannot get your money back any other way. But in five or 10 years time it could all be different—I really do not know.

Mr ADAMS—But this is what we are up against, isn't it? There is enormous change. Last October I was at the film school in Poland—that wonderful film school that has been there for an enormously long time. But it will be interesting to see where they end up in the next 20 or 30 years.

Ms Morris—Yes, very much so.

Miss Gailey—But that actually goes to the heart of why we want an exception for these industries: it is because we want the safety net to stay there. We want the government to have the ability to react to change and, as appropriate, introduce, amend or vary the mechanisms that are in place. It is for that very reason—because we cannot predict the future and because the rate of change is accelerating.

Mr ADAMS—That is right. But I believe we will need to build a group—with the Canadians, the French and others with a similar view—that will put that view at the World Trade Organisation negotiations. You said that the Americans make audiovisual pay for itself with their local system and then they can send it out. Is that dumping?

Miss Gailey—It is known as secondary markets.

Mr ADAMS—You probably do not understand the term dumping. In a manufacturing sense it is selling something below cost in another country.

Ms McCreadie—The marginal cost is very low. Once you have made it, all you are doing is making a copy and sending it somewhere, so the marginal cost is very small compared to the cost of the initial production.

Mr ADAMS—But is it dumping?

Ms McCreadie—It is not the same as dumping. It is selling it for less than the price of production. With audiovisual—

Mr WILKIE—What would it cost them to produce? We are saying that it is costing us $250,000 an hour to produce *Water Rats*.

Ms McCreadie—They have very high budget stuff.

Mr WILKIE—If they are selling at $20,000 for half an hour, and it is costing them $250,000 to produce, then they are dumping it.

Ms Morris—But they have recouped that cost in America. Basically, the entire global market for audiovisual reflects the economies of scale in the US. They are the largest producers and consumers. Their economies of scale are what set the standard for the rest of the world. They have a huge domestic market, they have high production values and they are able to recoup the

cost of production in their domestic market. So, for them, sales to other territories are money on top of that.

Miss Gailey—Whilst they might sell into Australia for $20,000 an hour they might be selling into Venezuela for $300 an hour.

Ms Morris—And they could be selling to the UK for $50,000 an hour.

Ms McCreadie—Because all they are doing is making a copy, and that does not really cost very much. That is the whole issue, and that is another reason why audiovisual is different. You raise the issue of copyright. That is a major concern in the changing digital environment. There is a lot of concern even from the US studios about cowboys putting movies on the Internet. There was a case not long ago—

Mr ADAMS—We just had the music case.

Ms McCreadie—Yes. It is similar because you can reproduce at very little cost and with the digital environment you can reproduce the quality, which once upon a time you could not do. To make a copy of a film does not cost you very much. To make a copy of *NYPD* and send it to an Australian network is a minuscule cost compared to the cost of producing that program. It is not really dumping; it is just the way the industry is set up.

Mr ADAMS—This is the future. We have not resolved these issues. These are issues that are still being discussed all around the world in terms of the legal side of globalisation, with the eagle beavers trying to come to grips with it on an international basis. It is a very difficult one.

Senator COONEY—As I understand what you are saying—and correct me if I am wrong—you want to maintain Australia's ability to reflect itself in a cultural way, whether it be by writing, film or what have you.

Ms McCreadie—The performing arts.

Senator COONEY—And, if we are going into another round, you want to maintain that ability by whatever means. Is that what you are saying?

Ms McCreadie—That is right.

Senator COONEY—And as long as it is an ability to reflect what we are as a people, then it ought to be protected?

Miss Gailey—The other side of that, obviously, is that we do not want people from other countries to access the mechanisms of support that have been put in place to protect our industry. Interestingly, the fallout of the CER case is panic in New Zealand, because they have finally realised that the only way they are going to turn around levels of New Zealand content on New Zealand television is to introduce a New Zealand content standard, but to do that now they are going to have to introduce an Australian New Zealand standard. Australian programming is very successful in New Zealand and would consume the majority of any

standard that they might be able to implement, and that would be a nonsense for them. If they were able to have a New Zealand standard, Australian programs could still sell into New Zealand in the space that is left over for programming from around the world. I am sorry, I have lost the point I was making.

Senator COONEY—Are you saying that it is not as if we do not want to have the material from overseas but that we want, as a principle, Australia to have the ability to reflect its own life in film form or in television form or what have you? I thought you then went on and said that is what we want but that we want the ability to go overseas as well.

Miss Gailey—I think at the moment Australia has got its support for these industries pretty well right: we would always like a bit more money, there are things around the edges like the content standard for commercials but, by and large, we have got it right. We provide support to an industry that has allowed it to grow. We have quarantined the transmission hours for Australian content, forcing the television networks to pay attention to Australian programming. Australian programming demonstrably works in the market, but that is there to ensure that that level continues to be available. But we have the balance right, because we still have the space for product from around the world for Australian audiences to access. Whether it is film, television, performing arts, dance or whatever, Australia has quite a complex thing that protects the space for Australians and allows access for audiences. I do not know what you are asking, Senator Cooney.

Senator COONEY—Sorry, I will clarify. My concern is that you could come back a year from now and say, 'We're not happy because things have changed.' I understand all that. But, as things are now working, if Australia could protect that situation, would you be happy?

Ms McCreadie—I think it needs to be flexible, because we do not know what forms of support we might need in the future.

Senator COONEY—I understand that; I am talking about now. I am saying that in three months, six months or a year from now, you might come back and say, 'Things have changed dramatically since we last were here.' But it would help me to know whether, in respect of how things are now, we should be striving to change things. Are things are reasonably well at the moment? I got the impression from Miss Gailey that things are reasonable at the moment.

Ms McCreadie—The concern is that during the MAI discussions there was discussion of different lists. Some lists were open to liberalisation. With some, once you locked them in, that was it, and you could not add to the list. So what would you do if you needed some new form of support for the local industry? What do you do in the digital environment? That is the only point I am raising. Yes, it is fine as things are now, but in a few years time—

Senator COONEY—If they were not right, what would you want us to do? The picture I get is that you are saying that at the moment things are all right but you might want to come back in a fortnight, three weeks, a month or five years from now to say there are some problems.

Ms Morris—I think what the industry sectors would say is, 'Yes, it is the right mix,' but what I hear from the MEAA and the Writers' Guild is that they would feel safer if there was an

exclusion rather than what we currently have which is a reservation regarding audio visual. That is the difference.

Senator COONEY—But an exclusion to exclude what? What are we going to exclude?

Ms McCreadie—Pressure to liberalise in that sector so that it is possible to have mechanisms in the future that we do not have at the moment. What we want to exclude is the pressure for that sector to be constantly liberalised as other things are.

Senator COONEY—So if you make an agreement what you would want is an exclusion in this agreement in respect of an ability to reflect Australian culture? That should be excluded from trade agreements?

Ms McCreadie—Yes, that is what we would like—bilateral and multilateral.

Senator COONEY—We have not heard much about intellectual property.

CHAIR—We can come back to this, because I think we will have time. But I want to give Susan Farquhar an opportunity to outline, perhaps in practical terms, what the TRIPS agreement means for Australian business and individuals. What sort of feedback are you getting and what difficulties can you tell us about?

Ms Farquhar—I speak principally from the point of view of patents, trademarks and designs—copyright is the responsibility of other agencies, but it all fits together as a total system—and what TRIPS has done is to help to ensure that, throughout the member states of the WTO, the recognition and protection of intellectual property will be harmonised and that it will meet certain minimum standards. That, in our view, is clearly in the interests of Australian creators and owners of intellectual property. It means that, when they go out into overseas markets, they can expect the recognition, protection and enforcement of their rights that they largely would be able to obtain in Australia.

These sorts of international systems were in place for many years before the TRIPS agreement was negotiated. There are a number of international agreements that have been in place for anything up to 100 years or more. What the TRIPS agreement has added to that international system are the minimum standards and the means to encourage and enforce member states to put those standards in place. There are the sanction provisions within the TRIPS agreement that provide for this obligation on member states to have systems in place nationally that meet the standards. It has also provided a dispute resolution process that operates on an international scale. It has not been invoked to a huge extent in the intellectual property area but, when it has, it seems to have operated reasonably effectively.

Generally speaking, the feedback that we get from the users of the system here, if it impacts on them at all, is that it is a good thing. From the perspective of IP Australia, anyway, I do not think there are any major areas of difficulty. An area that we are keen to see continuing to be recognised as an essential one is the coordination of the work within the TRIPS Council and the work within organisations such as the World Intellectual Property Organization. WIPO is the organisation that has administered these other international agreements that I mentioned.

CHAIR—What do you see is the relationship, and how well is it working?

Ms Farquhar—I think it is working reasonably well. It could always work better; you can have closer connections between organisations. WIPO has greater capacity because of the funding that it gets, from its members' contributions but, more importantly, from some of the international registration systems that it administers—the Patent Cooperation Treaty and the Madrid system of international registration of trademarks, which Australia has just agreed to accede to and which your committee reviewed a little while ago. Those registration systems raise quite significant amounts of money. All of that gives WIPO a great capacity to operate within the international IP system to assist developing countries, in particular, to bring their systems up to world standards. There is a specific agreement between the WIPO and the WTO that WIPO will provide this technical assistance to developing countries.

CHAIR—How is that going? It is all getting reviewed, isn't it?

Ms Farquhar—Yes. There have been a number of reviews. Last year was the year that developing countries were to have met their obligations, so there are reviews of how those obligations have been implemented. There is also a general review of the TRIPS agreement and how its implementation has gone on the broad scale. Then there are some specific reviews of particular provisions. One that is of particular currency is the patenting of life forms—genetic material, et cetera. At the moment there is an optional exclusion from patentability of those sorts of materials. Australia provides for patenting of that material, as do most of our major trading partners, but that provision is under review within the TRIPS council.

The issue is to maintain the appropriate communication and coordination between WIPO, which, as I have said, has the scope and the technical expertise through its member states and through the intellectual property organisations such as ours, and Attorney-General's and Communications, Information Technology and the Arts here, to provide advice and information on the working of the IP system and to work with the WTO through the TRIPS council to help get the appropriate standards in place around the world.

Senator COONEY—How is the system you are now telling us about helping somebody who wants to, say, patent an idea? Is it getting more secure for someone in Australia to patent a development that he or she may have made? Has it lessened the cost? I am just wondering how this has affected things. How many countries around the world are in the system?

Ms Farquhar—I think there are 140-odd members of the WTO and about 170 members of the WIPO. Ease of access to the patent system, costs and enforceability are all very critical issues that the IP community have been addressing for quite some time. Through the agreements that the WIPO administer and the work that they carry out, there has been greater harmonisation of the patent systems around the world. The TRIPS agreement has helped to progress that harmonisation by these minimum standards that have to be met.

The issue of cost is related to the harmonisation of the system. A patentee, in getting protection around the world, has to do that on a national basis; but if they know that the criteria for patentability are going to be equivalent in the countries they want protection in and that the procedures they have to go through in those countries are going to be very similar, then that reduces costs. The national system itself, though, adds cost to the process of protection. One

way of addressing that is through the Patent Cooperation Treaty, which is administered by WIPO and which allows a patentee to file an application in a country, such as Australia, and through that application nominate countries around the world.

There are still the costs of their professional advisers—the patent attorneys who help them in drawing up their patent applications. It is a fairly complex and technically difficult area; but, again through the work within the WIPO, members are trying to simplify the way in which patent specifications have to be drawn up so that that aspect of cost could be reduced. But if there was greater ability for the work within one office of examining and assessing the patentability of an invention to be recognised in other countries around the world so that there would not be duplication of it—which is what happens currently—then that would certainly have a significant impact on the cost to the patentees. That is work which is also being progressed through WIPO as well as through bilateral and plurilateral agreements.

Mr ADAMS—I did not quite understand that. Could you explain that again. What was that point you were making about getting costs down?

Ms Farquhar—There is currently a degree of duplication of effort. Because patent rights are granted on a national basis, if an Australian patentee wants to obtain protection in the US and Europe—although they can use the central route through the PCT—they still have to have work done on that patent application in the nominated countries. That involves work within the patent offices of those countries as well as the engaging of a legal representative. For example, if an application were filed in the Australian Patent Office and examined and assessed as to whether or not it would be patentable, and then the work done there was adopted by, say, the US patent office or the UK patent office without any further work—other than the purely administrative work—being done within those offices, that would reduce costs.

Mr ADAMS—It is the same as accepting a scientific analysis. For example, if a drug has been checked in the United States and seen to be acceptable, our regulating body picks it up here and says, 'This has been assessed by this body, which is a credible body in world terms, and we will accept that and not redo the work.'

Ms Farquhar—Yes, it is a similar principle.

Senator COONEY—This is what I was getting at with cost. If a person develops, say, a new car in Australia, the market here is going to be small and he or she has to patent it around the world. I wonder whether this new system is of any help to an Australian in that position as distinct from somebody who is in Europe, Japan or the United States, where the market is immediate and you can patent in that country and that is that. The Australians are in the difficulty of having to go around the world and patent everywhere.

Ms Farquhar—Certainly, from an economic point of view, the American inventor has an immediate market which is much more significant than the Australian patentee would have. I guess it would be a similar situation in any area of business.

Senator COONEY—What I was going to follow on with from there is: has Australia tried to do anything about this? So that if a patent were registered here, would that be sufficient in any dispute that might come up in some world body like the World Trade Organisation?

Ms Farquhar—If I am correct in understanding you, what you are talking about is a world effective patent.

Senator COONEY—Yes, or if not a world patent, a world system for deciding disputes—preferably both.

Ms Farquhar—There are a few issues there. Australia, through the patent office—which participates in the work of the WIPO and, to a certain extent, within the TRIPS council—is participating in the debate associated with greater harmonisation of the systems. Ultimately the objective would be for a world patent that, once granted, would have effect around the world. A critical aspect of such a patent would be its enforceability in the various jurisdictions around the world. That is a different element of the picture. It would require a great deal of development of international legal jurisdiction matters. Whilst there is a Hague agreement being negotiated at the moment which deals with some of these issues associated with international jurisdiction, it is probably fair to say that it is a considerable way off from resolving those issues.

At the moment, there are considerable differences in the way in which the law is applied. Even though patent law might be harmonised to a large extent in different jurisdictions around the world, there are still differences within those jurisdictions as to how that law is interpreted and applied. Until you achieve a greater degree of uniformity there, there will always be issues associated with how the patent rights would be enforced.

Senator COONEY—Given the present situation, it is much more difficult for somebody in Australia than in, say, America or Europe to press forward with the patent. I do not want to go into examples.

Ms Farquhar—We are working within a similar sort of system. I do not know that there is anything particularly more difficult for an Australian patent holder than for a Japanese one.

Senator COONEY—Except that, for Japan, you are on the spot there and then. You go to the patent office, you register, you pay your fees and you have a market whereas in Australia the market is not big enough to register just here. You have to go to Japan and register in Japan and then perhaps to Taiwan, to the United States and to Europe to protect yourself there.

Ms Farquhar—Australian patentees certainly suffer that disadvantage against the large economies of the world, but there would be no more significant disadvantage to an Australian patentee in comparison to a patentee in another comparable economy.

Senator COONEY—That is true; that is what I am saying. Within the context of the World Trade Organisation, the countries with powerful markets have the run of things. What I am trying to get at is whether we, as a country, are trying effectively—and I am sure we are—to get some rules set up that could be at least universally accepted.

CHAIR—We have about 15 minutes. Before I ask whether anyone wants to open up another line of questioning, is there anything that any of the participants would like to ask each other or would like to engage in with us? Is there anything that has arisen out of this morning that you think we might not have grasped? It can be a two-way process.

Ms McCreadie—I would like to ask if anyone can throw any light on what is going to happen in the bilateral negotiations with the United States in terms of a cultural reservation.

CHAIR—Nice try! Having this exchange has been very valuable because we at least have a much better grasp of where you are coming from. When we talk about Australian culture, it is not always immediately clear what we are really talking about—what are we trying to protect, what the risks are and where we are going. I do not want to close down the discussion if there is something that you want to take further.

Mr ADAMS—I take it from what Sue just said that it is about information flow for groups. This committee has picked up that the World Trade Organisation has been debated and discussed at one end, but there are a lot of groups that are affected that do not have input or an opportunity to get into it. Here we have people from groups that will be affected when the next round of negotiations take place if some sort of culture square is not excluded from negotiations. That effect could be because of media policy changes, such as ownership of media policy in Australia. If, say, the World Trade Organisation negotiated a position whereby the media had to have free access—that you have 10 years to open up your media to the world, and there is no more local content—it would have some sort of an affect on Australian content on television and radio. Do you feel that you would like more information and more opportunity to have an input?

Miss Gailey—We certainly would. I think the MAI was probably the starkest example of negotiations being under way without consultation with organisations such as ours, let alone the Australian community in general—

Ms Morris—That was undertaken by Treasury not DFAT.

Miss Gailey—I know; it was undertaken by Treasury. Nonetheless they were trade negotiations that would have had a profound effect on the entire country. Recognising that it was not DFAT but notwithstanding the ramifications of that would have been enormous. I think it is imperative that the opportunities for relevant organisations such as ourselves, but also across the community, are actually advised when negotiations that will impact on their area of interest are imminent, because it is not always possible to stay across all the media and sources of information to keep abreast of the issues that might be arising that may impact on your own area.

Mr ADAMS—This committee brought out quite a report on the MAI issue. It was pretty critical of the structures.

Senator COONEY—You would not be able to speak about this, Ms Morris, but others might. Are you in favour of the World Trade Organisation? I ask that question on the basis that Mr Howard, who was here from the National Farmers Federation, started off his presentation—and I do not know whether you were here—running down a list of all the problems with the World Trade Organisation, because it had all sorts of defects. In the end he said, 'We've got to hang in there warts and all.'

Ms McCreadie—I think we would be more comfortable in a multilateral context than in the bilateral context. It is perhaps a cheeky question, but I think we are nervous about bilateral trade

negotiations because, in that setting, it may be possible for pressure to be applied in order to make big gains in one area for culture to drop off. I am more confident that in a multilateral forum other countries will be resisting such pressures and that therefore the Australian government will feel emboldened to do the same. Overall, I think multilateralism—and I know that is not fashionable, according to this morning's press. I see it is no longer fashionable, that bilateralism has broken out everywhere and that it is seen that the WTO—

CHAIR—It might be the art of the possible.

Ms McCreadie—Yes, I understand that. So I do not think it would be good to just give up on the WTO and go for bilateralism or even regionalism.

Senator COONEY—So if the bully is in the yard you are more likely to overcome the bully if there is a group of you rather than one?

Ms McCreadie—Yes, I think so. But that is not to say that, from our point of view, it is perfect—with the idea that it might spread its wings into the subsidy area. At the moment I guess it is seen more as a continuation of GATT and being about trade barriers, as opposed to attacking direct subsidies. That would be of enormous concern. But the fact that it is broader than GATT is a bit of worry.

Miss Gailey—Equally unfashionably. At the time that we were going through the High Court with the Blue Sky issue we were looking at the possible impact of 900 trade treaties to which Australia was a party. The fewer treaties you are trying to come to terms with the better, with less chance of inadvertent consequences. You might have agreed to something in one trade treaty without having thought that, with four hops, skips and jumps through several others, you get to another one that will implode everything you had originally set out to do. So, yes, I think multilateral agreements—numbers on your side are generally a good thing.

CHAIR—Thank you very much. I thank each one of you for coming and having this discussion with us. We do find this very helpful—I hope you do too—because having a bit of a discussion and having a bit more time is much more productive for us than squeezing people into very small time frames where, really, no-one can say anything much. We found it valuable. Thank you very much—each of you—for your participation.

Proceedings suspended from 12.50 p.m. to 2.09 p.m.

BOUWHUIS, Mr Stephen, Acting Principal Legal Officer, Attorney-General's Department

JENNINGS, Mr Mark Brandon, Senior Adviser, Office of International Law, Attorney-General's Department

ZANKER, Mr Mark Andrew, Acting First Assistant Secretary, Office of International Law, Attorney-General's Department

LEVY, Mr Peter Gordon, Secretary-General, Law Council of Australia

BOREHAM, Mr Kevin, Solicitor, Phillips Fox Lawyers

BRAZIL, Mr Patrick, Special Counsel, Phillips Fox Lawyers

WAINCYMER, Professor Jeffrey Maurice (Private capacity)

Session 3—The legal profession

CHAIR—The committee will come to order. Today we are doing something a bit different: we are holding some panel discussions. This morning we had panel discussions on agriculture and then on cultural and intellectual property. This session of today's hearing into the World Trade Organisation is devoted to a discussion on the role of lawyers in the system. We are planning to have further panel discussions on the environment, human rights and labour issues in early April, so we are hoping to be as comprehensive as possible. I am going to ask each participant to make a short opening statement outlining what each believes are the relevant legal issues surrounding Australia's relationship with the World Trade Organisation. I do not want anyone to feel limited. If there is some issue that you want to bring up that you think might not respond to the terms of reference, let me know. But I think they are fairly comprehensive. Then I want to move to what I hope will be a free flowing discussion involving the committee and all panel participants. The committee is also happy if you want to speak amongst yourselves as well. Basically, we want to engage the issues rather than just have a strict question and answer type session, which is what we usually do. We found that this is very helpful to refine some of the broader issues that have come before the committee during the course of the inquiry.

I formally advise all participants that, although the committee does not require you to give evidence under oath, the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter that may be regarded as a contempt of parliament.

I welcome you all. Thank you for being here. I will ask each participant that wishes to do so to make a statement. I hope I will not belie my background too much if I ask Phillips Fox to lead off with a statement.

Mr Brazil—Thank you. You have, of course, our written submission, which is a little bit long but we still think it very well worth reading. It is against that background that I will touch upon a number of points. The first point I want to make relates to the question of legal servicing. I want to make it clear, as I hope our submission did, that it is no part of our claim that private

lawyers or even Phillips Fox in particular should take over this area. Rather the message we are seeking to convey is that we believe private legal firms—including our firm of course—can make a significant contribution to the legal servicing of the work that needs to be done in this area on behalf of the interests of Australia in agriculture, industry and so on. So I will be putting that.

The next point I want to deal with is a point that I gather may have been raised before you and has, I think, been raised in the corridors; that is, a sentiment to the effect, 'Oh, we don't want more lawyers around the place legalising proceedings. They're only interested in endless litigation,' and that sort of thing. I want to say, certainly on behalf of ourselves, but I am sure I can speak on behalf of the profession generally, that is not the situation at all. Let me test that by referring to two particular situations. One is where the hope is for—or at least a very satisfactory resolution to the issue would be—negotiations leading to a satisfactory settlement all round.

We believe and can verify by our own experience—and I will mention one case in particular—that it does not excuse you from employing lawyers on that particular matter. In fact, it rather confirms that you ought to, because you need the legal input in terms of putting forward, for the purpose of those negotiations, the very strongest case you can. Using lawyers for that purpose will mean you enhance your position in the negotiations and the other party may suddenly realise they have a weaker case than they thought, and perhaps ought to negotiate. Also—and this is equally important—if there is an agreement it will be a more satisfactory agreement than it would otherwise have been.

I will just illustrate that. Litigation can become serial litigation. It has not in the WTO area, but it has in a very important fisheries area involving sub-Antarctic fisheries. We have had litigation year after year, which, I might say in passing, to date we have always won. On the last occasion, once again we put in our pleadings and put in the legal hard yards in terms of presenting our case. It worked that time because the other side finally realised how weak a case it had. I am pleased to report that it looks as though we will not be having a two-week hearing this year on that particular matter. We are very close to an accommodation. I just give that as a practical illustration of the role lawyers can play not in producing further litigation but in fact in providing a basis for negotiations which, most important of all, have an acceptable ending.

Another point I would like to mention—I am just picking up points along the way—is this difficult and very important question of what I might call collateral agreements that are relevant to the trade area and their relationship to the WTO system. I would like to illustrate that because once again it is better to talk about particular cases than refer generically to the Cartagena Protocol on Biosafety.

CHAIR—It is before this committee.

Mr Brazil—I was hoping it was. I just want to make a couple of points. This is where I think a legal input is indispensable. We think that treaty does raise some enormous problems. As you well know, it deals with living modified organisms resulting from modern biotechnology—a very sensitive area indeed. Lots of problems with that are raised immediately. One is: why should Australia sign that agreement when the genuine trade issues have been dealt with in terms that are wide enough to encompass the concerns that are sought to be dealt with in that

treaty? I am thinking in particular of the technical barriers to trade agreement, known as the TBT, and the SPS, the phytosanitary agreement.

Certainly, our view is that the values, the issues and the interests that are raised in the Cartagena instrument are properly dealt with there and, most importantly—although there are other reasons for it—they are dealt with in a way that fits into the WTO context, so you do not have this enormous problem of how you reconcile the two instruments. I will go on a little bit more—perhaps going a little outside the charter of this discussion—and point out that the United States is not, and will not be, a party to the Cartagena convention, although the EU seems to be very interested in it. I think that raises very serious questions as to whether or not Australia ought to be joining it at all.

Mr ADAMS—I do not think we are here to debate that point. That point is resolved. We are going over a point that we do not need to continue to discuss.

CHAIR—I think Mr Brazil was saying that, within the context of the WTO, there is a role for lawyers in reconciling some of these conflicting agreements. I think that was the point. But we are coming back to it.

Mr ADAMS—I thought that was actually contrary to what was said in Mr Brazil's submission—that is, that lawyers do not want to upstage the trade people or DFAT. I thought that was what the submission said. What he is saying now is that they should not be a party to an agreement and that, if lawyers were involved, it would be a better document. I thought that was contrary to what you had said in your submission, Mr Brazil.

Mr Brazil—I did not put it as well as I should have. What I am saying is it is important—we would say indispensable—for those making those decisions to get legal advice of the kind I have just mentioned. As to the ultimate decisions on that, that would be a matter for the government of the day. I do not think there is any contradiction in that.

Moving on, I want to refer to another dispute. Once again, I do not want to be understood as a lawyer pre-empting the decisions that people will have to ultimately make. Another exercise that is going on at the moment is in relation to the wine industry, and that is in connection with the French case that is being argued for French wine to be designated as agricultural wine, whereas wine from other countries like Australia and the United States is deemed to be industrial wine. Obviously, there are implications there that have to be seriously looked at. By way of an opening statement, I think that was mainly what I wanted to say.

CHAIR—Mr Boreham, you did not want to add to that?

Mr Boreham—No.

CHAIR—Who wants to speak for the Attorney-General's Department?

Mr Jennings—The Attorney-General's Department welcomes the opportunity to participate with our colleagues from the private and the university sectors in this panel discussion. The subject of lawyers and the WTO can be addressed from a number of perspectives. In relation to the WTO, as an institution established under a multilateral treaty regime, the subject provides

room for discussing the WTO from the broad perspective of international law—in particular, its dispute settlement system. The WTO, however, cannot be viewed through a purely economic prism. It is an international organisation concerned with a particular field of international law—international trade law. By establishing a legal framework for the conduct of trade between members, the WTO makes a significant contribution to advancing the rule of law in international relations. The WTO, by its very nature, will attract the interest and involvement of lawyers. However, this should not engender the sentiment expressed in Shakespeare's *Henry VI*, part II, about the benefit of killing all the lawyers. Lawyers, as ably pointed out by Mr Brazil, do have a contribution to make.

The international legal regime established by the WTO agreement grants rights to members and requires them to meet obligations in the same way that other treaties do. Members are bound to exercise their rights and discharge their obligations in good faith. A central pillar of this regime is the dispute settlement understanding, the DSU. It embodies the commitment of WTO members to the peaceful settlement of international trade disputes. Under the DSU, there has been a growing recognition of the wider role to be played by lawyers in the conduct of WTO proceedings. The appellate body acknowledged this development in the bananas case, which has been referred to in submissions, when it noted that its mandate to review only issues of law or legal interpretation in panel reports made it particularly important that governments be represented by qualified counsel in proceedings before it.

The words of the appellate body regarding lawyers lead into the domestic debate on this issue. That is how legal expertise is brought to bear on the development and advocacy of cases involving Australia. I know the committee has had the benefit of a number of submissions addressing this issue. In its submission the Department of Foreign Affairs and Trade stated that Australia normally adopts a task force approach to the prosecution and defence of WTO disputes. Relevant departments and agencies participate in the teams assembled by DFAT, contributing their particular skills and expertise. The Attorney-General's Department contributes its expertise in international law and litigation to these teams. This expertise is to be found in the Office of International Law, of which we are members. The office represents Australia in international litigation, as well as representing Australia in a range of multilateral forums.

CHAIR—How does it actually fit together? Do you get consulted?

Mr Jennings—I will come to that. Members of the office have assisted in the conduct of WTO cases at both panel and appellate body levels. I have been involved with the lamb dispute, and Mr Bouwhuis has attended the appellate body hearing in the Korean beef case. We are members of the team dealing with the matter and we give input on submissions and a whole range of other matters, so it is a team based approach and we are fully contributing members of the team. That is basically how it works in the broad. Obviously there are particular approaches that we follow in relation to particular matters, but it is very much within the context of what DFAT was talking about in terms of a team based approach. As we noted in our submission, we are committed to working with DFAT and other agencies on WTO cases and more generally on WTO matters. Our colleagues from outside government have argued in their submissions for the involvement of private lawyers in the conduct of WTO disputes. It will come as no surprise to the committee that the Attorney-General's Department believes that relevant departments and agencies do not lack the skills and expertise necessary to conduct WTO cases. The harnessing

of these skills and expertise in the team based approach which we have spoken about ensures the best use of the resources.

In our submission we refer to the legal services direction, which is a relevant point in this area. Under that direction, international litigation and arbitration is work which is tied to the Attorney-General's Department, the Department of Foreign Affairs and Trade and the Australian Government Solicitor, so it is not only A-G's, it is those other two bodies as well. This work covers proceedings before WTO panels and the appellate body. But I should point out that, as you are no doubt aware, the legal services direction does not prevent counsel or other legal experts from outside these agencies being engaged to assist in the conduct of international work. For example, the leading international lawyer Professor James Crawford of Cambridge University was retained as counsel for Australia in the southern bluefin tuna case with Japan. There clearly is a need for private lawyers to advise their clients on aspects of WTO law. Representing their clients will necessarily involve building working relationships with DFAT and other relevant agencies, and it seems to the department that those relationships are to the benefit of all parties.

In terms of the other matters addressed in our submission, you have already had the benefit of reading that but we are certainly prepared to go into any other issues that might be there if the committee wishes. We will conclude our opening statement at that point.

CHAIR—Thank you. Professor Waincymer, do you have an opening statement?

Prof. Waincymer—I thank the committee for the privilege of participating and attending. I should say at the outset that I have a number of hats that I wear in this discussion. I am primarily here as a private academic. I am also a private lawyer and part-time consultant. I am going overseas next week to sit on a panel at the WTO for the first time. I am also chair of the Law Council's International Trade and Business Committee and was responsible for the submission that you have before you on that matter. Today, Peter Levy is here to speak to you from the Law Council's perspective. I will certainly speak to that paper, but I will primarily try to stand back a bit and be an academic.

CHAIR—I am sure you have different perspectives, so that is fine.

Prof. Waincymer—All inconsistent. The first thing I want to say—and I am sure this is obvious to your committee with both public and these kinds of panel discussions—is that I see your terms of reference as broadly systemic. They are broadly concerned with two areas of systemic issues. Firstly, at the WTO level, how does it operate as an international institution both within itself and in its relationships with other organisations—multinational and regional? Secondly, at the domestic level, how does Australia systemically deal with international trade and WTO issues? How do we involve the public in development of negotiating mandates? How do we present cases? Do we have the appropriate capacity, et cetera?

At the margin of those terms of reference, people will speak to you about substantive issues, such as the debate a moment ago about Cartagena Protocol—do we sign it or don't we? One can aptly, as you pointed out, see that well within these terms of reference as a matter of whether lawyers should be more involved or not, but over the dividing line it becomes an issue outside

of the terms of reference: is it doing a good job in a particular substantive area or not? I only wish to address you on those systemic issues.

The submission from the Law Council—and, indeed, I am sure all of the submissions today and, certainly, the comments from the Attorney-General's Department—makes the point that it must be understood by all people, particularly those in the corridors who apparently say, 'Get rid of the lawyers.' For better or for worse, an international legal organisation is a legal organisation. Lawyers are not preprogrammed to niceness, but the value, if any, of international organisations includes the possibility that as effective legal institutions they encourage the more powerful to behave in ways that are appropriate for the communal best interest and, indeed, for the benefit of smaller countries.

Australia has always been a strong proponent of international institutions because we respect the rule of law and we believe in the rule of law and we believe in the value of these institutions to achieve those outcomes. Never naively believing that they will be magical and never naively believing that power will not work within them, but always with an understanding that one must continue to work at the optimal level and also evaluate how well it is behaving. So I, for one, believe strongly in the WTO but I believe it is always open for S-11 activists through to economic rationalists to challenge whether it is really doing a good job and how we systemically can make it better. In that regard, any simplistic statement—whether it is from lawyers saying, 'We can do a fabulous job,' or an economist saying, 'Keep the lawyers out or you will destroy the system'—is nothing more nor less than a simplistic statement.

This is a complicated area of international law, and it has all the problems of international law, whether it is human rights or environmental protection or nuclear disarmament. Your jobs are difficult enough in this parliament, but if you worked in a parliament where there were 140 separate political parties, each of which negotiated every bill where no bill was ever passed without full consensus—that is the legal institution that the WTO is. It can only operate by a lowest common denominator. It can only draft badly at the last minute. Therefore, it can only do important interesting things in a less than optimal legal manner. It is within that system that Australia tries to work and it is within that system that we ought to be talking about whether institutionally we are devoting enough resources.

There is no question of the quality of the bureaucrats involved from the Australian point of view. I have been interested in this area for 25 years. I have never met a government official that I have not had the greatest respect for, and I am astounded at the quality of the individuals and the work, but I do believe that the total resources we devote, and the way we organise those resources, is likely to be suboptimal. But it is only suboptimal from a government's point of view in the way one chooses to devote scarce resources. So if I am only interested in trade, obviously I will ask for more resources in that area. It is for the government to decide whether more resources should be put into the WTO and less into the environment, et cetera. I do think that is a real issue for the committee to explore by comparing our institutional structure with the institutional structure of other countries that we would like to benchmark against within the system.

Secondly, and working off some of the comments previously made, it is completely wrong to treat the economic aspect, the political aspect and the legal aspect as distinct. The system works well if they all work together. Neoclassical economists who throughout my career have said,

'Keep the lawyers out because they are destroying it,' really want to be back in a lecture theatre of year ones saying, 'If everyone just agreed that comparative advantage is fabulous then we would all be a happier place.' The political scientists say they are stupid because they have not learned what you learn about game theory and prisoner's dilemma and why people do not behave that way. They both say, 'Keep the lawyers out because we make a lot of trouble'—and we often do. But Cartagena is an excellent example of why it all should go together: parliament has been placed in an invidious position because the team did not work as a team. What do you do when you are presented with something that is a very admirable policy aspiration but drafted poorly? If you throw it out on that basis you will be wrongly accused of not caring about the policy. If you accept it because you are concerned not to be accused of that, you are creating problems because the drafting will lead to demarcation disputes and uncertainty about what can or cannot be done under that agreement.

Too many of those who argue against lawyers are really saying, 'We can do it ourselves. We have done it well in the past. We can do it well in the future. Leave us alone. The lawyers cause other problems.' As I said, we have to be kept just as honest as anybody else is. We do—as most people in society know—create a lot of problems for a lot of people. But where we are advising government the problem should not be the same. There is a big difference between that and the way the legal system can capture private individuals who do not understand, cannot question and are in awe of legal institutions. All we are talking about at this table are government departments, the largest corporations and industry bodies that get involved inexorably in these WTO issues: would they benefit by appropriate legal expertise that is involved at all stages, not only after disputes have arisen but in a preventative capacity prior to those disputes arising?

CHAIR—We are very interested to see how you can suggest it all fits together. It seems it is a bit quarantined with DFAT and Attorney's. Where can the private profession make a serious contribution, and would they be helpful or not? How can all that fit together?

Prof. Waincymer—In terms of the fitting together it is easier to be a critic than a playwright. Notwithstanding that all the individuals are excellent, there are too many Chinese walls in the Australian structure. There is a bit of expertise in DFAT and in bit in A-G'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.

CHAIR—It permeates everywhere.

Prof. Waincymer—It permeates everywhere. The department of foreign affairs has excellent people, but a small number, given Australia's level of interest in this area. They not only run these cases—Australia is not involved in that many cases, but it is very involved as a third party, 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. If Industry is trying to set up a new pharmaceutical scheme or a textile scheme it is saying to Foreign Affairs, 'Can we do this or that?' So there is a lot of very complicated advice work. There also should be an educational role where, instead of a department of industry person saying, 'This is my scheme, does it work?' and being told no and having four months complicated work wasted, they are trained to understand what issues and rules they need to think about, so that when they are developing policy ideas and talking to industry they are talking in the language of the WTO.

CHAIR—Doesn't it even go further, though? I would have thought that major firms—the Phillips Foxes of the profession—need to be on top of the WTO and advise clients who might be exposed as part of the risk they take if they do not understand the implications. It seems to me that it has those sorts of ramifications as well.

Prof. Waincymer—Exactly. I have been involved advising corporations that are getting government handouts, because they know about Howe Leather and the problems that arose there.

CHAIR—Any investor would want to know.

Prof. Waincymer—An investor wants to know these sorts of things. At the extreme, you have to advise the most innocent company in the world. If you are a poor perfume importer into the United States, lo and behold, because the European Union does something wrong about bananas and does not want to honour the commitment, you cop an innocent tariff on perfume. The wider knowledge is important. That is where my sector is very important; the academy has to do more. The academy can do more if the government shows more interest in building the bridges between what it does and the academic institution.

CHAIR—These are some of the things we want to explore.

Prof. Waincymer—I go overseas a lot to America and Europe. America is a model that we ought to look at very carefully. Some of the most prestigious names in the international trade law world have tremendous programs within their universities.

CHAIR—Professor Jackson.

Prof. Waincymer—My first visit was spending eight weeks with John Jackson in Ann Arbor, Michigan—it was a fabulous place to take a young family. People came from all around the world to learn with him, and his students are in every job everywhere. The WTO is the John Jackson memorial institute almost. He takes his students on this fabulous one-week trip around Washington each year when everybody who is anybody will come and talk to his class. He gets invited as a consultant to the Canadian government—and the WTO is an organisation because his idea in a book got invited by Canada to be put forward, et cetera. Because of their revolving door policy and because of their USTR type structure, there are systemic reasons why it is easier there than here. People are still people everywhere: people care about their careers and their turf, and people do not like being told, 'I might have an idea that you haven't thought about'. I think we could do better, without a lot of money, by thinking about how we do this.

The WTO history shows that you cannot do anything without the will, and that is the same with a team effort between government and bureaucracy. You can set up all sorts of committees and interdepartmental whatevers but, if people really do not want to collaborate and if they do not see the value in putting different heads together and having different types of expertise, then it is going to be more trouble than it is worth. The private legal sector—and I count myself in this to some degree—does have to be watched carefully, because money is a driver and we are interested in new areas of work and clients and whatever. But, again, this is an area where government can easily work out who knows what they are talking about and who does not.

There is a much greater trend in Australia to have excellent government officials going into the private sector, so there are the linkages and there are the people with the proven records. There are non-lawyers who are really excellent bush lawyers—ex-government officials—who are consultants around the place and are also available for this kind of work. If we did get everybody in Australia to work reasonably together, we would not only do better in the parochial bilateral issues that we have, we could also develop a world-class educational forum where we build on our excellent relationships with Asia. We would say to people, as we are doing now with many AusAID grants and the like, 'Work with Australian experts to develop your capacity, to develop your ability to understand these institutions'. As you all know, that kind of bridge building is fabulous for trade and has all sorts of cultural and political advantages, so I certainly see a value in doing much more. I do not have a magic prescription for what should be done, but step one is acknowledging that 'it would be nice to do more of it.

The other thing I would say—and this particularly relates to DFAT; I am sure they would not want to say it themselves but some of them will be happy that I have said it—is that institionally the Australian career structure, through bureaucracy, generally invites you to move around. So you do a few years here, a few years there, you move up the chain and you learn about Canberra and the way things work. What does that mean for our WTO capacity? Do we want people who are moving up the tree or do we want people who stick there forever? If you get people who are moving up the tree, you do not have the institutional expertise. If you get people who are stuck there for ever and they are not being properly rewarded for what they do, they are doing a fabulous job developing expertise but they are just not getting up the bureaucratic chain. I think there are those issues as well—there are systemic problems.

CHAIR—There is a big problem. For instance, I was having this discussion with some people in Washington: that if they did a course with Professor Jackson they would be snaffled by somebody anyway. It really is very difficult.

Prof. Waincymer—But they do not mind, because 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. 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. I'm on the seminar circuit with John Jackson, et cetera.' 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. It is not plain sailing there, and certainly the European conniption has its internecine issues. But not only do I think we are smaller resource wise; I also think that somehow we do not set it up as well as we might.

CHAIR—There is probably not that fluidity of people being able to move and go in and out of private practice and in the department and whatever.

Prof. Waincymer—Exactly.

CHAIR—Thank you very much for that.

Mr Levy—The Law Council is the legal profession's peak representative body. I would like to speak briefly today on the relevance of the WTO's work to the Law Council's current work program as set out in the council's business plan for 2000-01. I seek leave to table a copy.

CHAIR—Thank you.

Mr Levy—I draw the committee's attention to two of the key strategies in the Law Council's business plan: key strategy 2, which is to establish a national legal services market in Australia; and key strategy 7, which is to facilitate transnational legal practice, including the creation of opportunities for new offshore work for Australian lawyers. I will deal first with key strategy 7, relating to international legal practice.

I have been with the Law Council for over 10 years now. Over that time I have seen legal practice, particularly the provision of business law services, dramatically and irrevocably change by reason of the rapid globalisation of business, the international capital market, the ease of international travel and the increasing sophistication of technology and telecommunications. It is simply not practical or realistic for governments or legal professional bodies to ignore the effects of globalisation and seek to build protective walls around their national jurisdictions and their national professions. Thus, one of the core Law Council objectives in relation to its international work agenda is the facilitation and promotion of international legal practice. This has a domestic and an international perspective to it.

The domestic perspective is the enactment of the model practice of foreign law bill in each state and territory so that there is a uniform scheme of foreign lawyer regulations throughout Australia. The international dimension is that the Law Council strongly advocates the removal of market access restrictions which prevent Australian lawyers practising in foreign countries. The removal of market access restrictions is pursued by the Law Council at the bilateral, regional and multilateral level. We adopt an integrated policy approach. The WTO's general agreement on trade and services, GATS, and in particular the individual country's specific commitment to provide access to their markets, is of vital importance to the removal of market access barriers which currently prevent Australian lawyers practising in overseas countries.

From an institutional point of view, the Law Council works very closely with the federal Attorney-General's Department, and particularly with the International Legal Services Advisory Council, ILSAC, and the Department of Foreign Affairs and Trade, in relation to negotiations within the WTO for further liberalisation and market access issues in relation to legal services.

I just pause there and say that I think the ILSAC model is a very effective mechanism because it brings together expertise within the bureaucracy, the private law firms, the law schools and the professional bodies. Again I have seen in the legal services area specifically some very effective work undertaken in relation to international legal practice and WTO issues. I give just one example where cooperation really can lead to good outcomes. In November 1998 there was a forum on transnational legal practice, which the Law Council was invited to. We expanded our delegation to include members of ILSAC and members of some of the national law firms. Australia was able to punch above its weight at that forum, but we followed that up with meetings in Geneva with WTO officials.

Another area of the WTO work which is of significant interest to the Law Council relates to the work program undertaken by the WTO Council for Trade in Services on domestic regulation. Article 6(4) requires the Council for Trade in Services to develop multilateral disciplines on domestic regulations and services, including qualification requirements, licensing requirements and technical standards. At this stage, the only profession that the WTO has

examined is accountancy, but Australia is pushing for the legal services sector to be examined in the near future. The sorts of issues that are thrown up in this area of the WTO's work relate to the issues that are in our key strategy concerning the establishment of a national legal services market—issues such as multidisciplinary practices, licensing of lawyers, et cetera. So many of the professional policy issues are being discussed at the international level at the present time that it is very important for the Law Council to tap into the WTO's work. At the international level we have increased our involvement with a body called the International Bar Association, which is one of the leading international bodies for the legal profession, because the International Bar Association has NGO status with the WTO and has frequent discussions with them. That is a very short overview.

Mr Zanker—I want to return to a few points that Jeff made. I agree with virtually everything he said, but there are a couple of points I would like to emphasise. The real importance of the WTO is that it was introduced to make sure that the trade system was more rules based than negotiation based as it was under the General Agreement on Tariffs and Trade. There are two types of rule, it seems to me: rule by power—certainly, in an economic sense, the United States is the most powerful country, and it can get its own way because of that sheer economic power—or rule by law, where everybody has a say in formulating the laws and mostly people enter into the system in good faith and do try to obey the law. The good thing about the WTO is that it is a rule of law institution, so it makes life a lot simpler for smaller economies like us and for developing countries. I think it is a pity that people lose sight of that or do not understand that. It may be now that in the age of the Internet, where information is so much more readily available and you can find out virtually everything about what the WTO is doing by just having a look at its site, that people might come to understand that. Reading through the submissions, there still seems to me to be a fair bit of misconception out in the general community about what the organisation is. It does not have any independent existence of its own; its constituents are those who make it up and who make the decisions. As Jeff said, it is like a parliament with 148 different parties that does not pass any bills.

CHAIR—Where no-one is elected!

Mr Zanker—That is right. It is a parliament that does not pass any bills without consensus.

CHAIR—The point you make is right. I think the lamb dispute really brought home to a lot of people the fact that we would not have been in a position to do that if we did not have a rules based system.

Mr Zanker—Yes, and you also have to expect wins and losses in such a system. The fact that you might lose a particular case is not the end of the world. Sometimes that is just the way it falls, as is the case in ordinary litigation.

CHAIR—Although the interesting thing about the WTO is that it seems that the cases that go forward are usually the ones where the outcome is pretty clear. The political game is when it is all going to get enforced, if ever.

Mr Zanker—That is right, yes.

CHAIR—Some of the more traditional ones are settled. The really interesting thing about the WTO is how the whole system is tending to be hijacked by all sorts of other interests with axes to grind. I think that is a real danger, that it has so much hanging off it that it is not really doing what it is designed to do.

Mr Zanker—I agree. There is obviously a clear role for government in explaining the benefits.

CHAIR—Absolutely; I agree. That is what we are trying to do in getting information. I am sorry that I interrupted you.

Mr Zanker—That is all right. The other thing is that cooperation is extremely important, because the WTO treaties are a pretty complex little area. In the old days of the general agreement on tariffs and trade when our interests were more focused on agriculture and things like that, it perhaps was not so important to us. But, with all these other areas that are technical barriers to trade and with the sanitary and phytosanitary matters—

CHAIR—I wish they had called it something different, but I cannot think what.

Mr Zanker—We could get the thesaurus out. All those things affect all types of activities, there is no doubt about that, and it is pretty hard to get your head around these things. In the Public Service, in the trade negotiations area in DFAT, they are fortunate to have a number of people on staff who have been specialists in the area for a long time; whereas, in my office, where we are not exclusively focused on trade but do spend 70 per cent or 80 per cent of our time on environmental matters, we do not necessarily have WTO experts and, as a result of staff turnover, people who come through are having to acquire the knowledge pretty rapidly. That can be a bit of a challenge. As was indicated, too, there are a lot of people who have gone out from within government—like Peter, Pat and Kevin—who have been senior officials in government and who have the benefit of considerable familiarity with the way these things have developed over the years.

CHAIR—Thank you very much. I am sure that Senator Cooney has been mulling over something here.

Senator COONEY—We have had some people coming along and saying that this is really a big play by the lawyers for more work. As Mr Brazil said, all he wants to do is to serve the nation and the people. It is not that he wants to be a lawyer but that he wants to bring in skills so that Australia's case can be best put to the WTO; that it really would not matter whether or not you were a lawyer as long as you had the skills. By dint of having the skills and having the ability, you are called a lawyer as a means of identification, but the big thing is that you are there to serve. May I say that Mr Brazil has served the fishing industry and Australia very well over the years.

If you look at it from the point of view that you are there to serve, people might be more willing to take up the proposition that there ought to be lawyers there. With that sort of background, I was going to ask you about your business plan, which says:

Key Strategy 2: To establish a national legal services market in Australia.

To develop proposals for national practising rights to enhance National Legal Services Market.

Point 2.1 states

To lobby for the implementation of existing Law Council policies regarding the national legal services market.

I was just wondering whether you have ever thought that that sort of phraseology might concern people—that, really, when you are talking about the 'market', all the lawyers are interested in is developing a market for their skills rather than offering services. It may well be that the people who have come to us and said, 'Look, we've got some worries about the lawyers,' might be thinking, 'They're not really trying to get there to service us, to try to tell us how to put the case and to bring the skills that people at the table have so abundantly, but they're there to make a quid out of it'—if I can use that expression. Did the Law Council think about that when they were developing their business plan?

Mr Levy—Not very much, Senator. First of all, the expression 'market' has really been brought in through the national competition policies, which have been foisted on everyone by all governments in Australia, and we are really just using the terminology of the economists and of governments. You should also go and look at key strategy 3:

To foster and promote reform initiatives to enhance access to justice and to attain a principled commitment from Commonwealth, State and Territory governments to maintain a properly funded legal aid system.

You can go through some of the other key strategies as well. In the context of our international work—and I did not raise it today—one of our core objectives is the furtherance of, and the promotion of, the rule of law and human rights in the international context. That is a heart land issue for the legal profession. I did not raise it today in the context of the WTO. The terms 'the marketplace' and 'legal services industries', et cetera were initially very much resisted by lawyers about seven or eight years ago. We have just fallen into the jargon of governments and competition authorities.

CHAIR—We brought forward a competition policy.

Senator COONEY—It is all that competition at the ballot box. I will follow on with the Attorney-General's Department. If you approach the problem as one of trying to get enough skills that are described as 'legal skills' into the system, then there should not be any worry about having the private sector. And if the private sector has those necessary skills, you might as well have them as part of the team that instructs the presenter at the disputes body.

Mr Zanker—Certainly that was the case in the southern bluefin tuna case, as Mark indicated.

Mr Jennings—Senator Cooney, perhaps I could draw on the lamb dispute as something of a case study, because that is the case that I have been most directly involved in recently. Is that okay?

CHAIR—I will ask you, if my colleague does not mind, whether you can tell us about the anatomy of how this got together—who was who in the zoo in presenting the case and how you got the evidence together.

Mr Jennings—I think that is the instructive part of it. I think it was referred to also in the submission by Meat and Livestock Australia in the way that that body has been involved, very closely, in the preparation of the case, including channelling in material through the lawyers they retained in Washington.

It is a good example of how Foreign Affairs—in this case; it is the lead agency—has not only drawn together the bureaucratic resources but is also working together with the industry

organisation with very effective cooperation, as is borne out in the MLA submission. What is involved is some fairly detailed analysis of the US market, and so on. The MLA has been contributing to that on the ground. You are aware of the background of the case: it is a safeguards action. The USITC recommended that measures be taken, and they were strengthened by the president. Safeguards is not an action taken against unfair trade; it is an action taken in relation to fair trade which threatens to cause serious injury to domestic industries.

In the preparation of submissions and so on you would have to draw together all that. WTO cases are very fact intensive cases, and you do, obviously, have to liaise closely with industry organisations who have quite expert knowledge in the areas. As Senator Cooney would know, the skill of drawing together these cases and marrying the facts and the legal principles is really what we are engaged in—and being able to present a very clear and persuasive case to the panel and, I might say, to the appellate body in the next couple of weeks.

I thought I would refer to that case if I had the opportunity, not only because it is one that I am personally familiar with but also because you have had submissions from outside government referring to the mechanisms that have been used very successfully. They also offer a good case study on how complex state-to-state litigation—which is what we are talking about: Australia is the party and the United States is the party, but these mechanisms have a very direct bearing on the interests of Australian companies and exporters—can be conducted. It is very complex work, and nobody is going to deny that it is challenging work. But drawing together expertise is obviously the best way forward. Lamb is a pretty good example of how that can work.

Senator COONEY—I was not saying for one minute that there wasn't great expertise in the Attorney-General's Department. But the point you have made is a point that has not been made so far and one that should have been made: it is a very fact-intensive area. A private solicitor who has acted, say, for lamb producers for decades has the knowledge. Firstly, they are going to know where the facts are and probably have them in the files and, secondly, they are going to be able to interpret them. That is one illustration of why you might have a combination of people.

Mr Jennings—In the case of lamb, again, there has been input from the US lawyers. In this case we are the complainants; we are on the front foot. It is important not only to have a good understanding of how the market is operating in the US to be able to rebut claims of threat of serious injury, which is the basis on which the USITC was proceeding, but also to be able to draw on legal expertise from the American lawyers as to the operation of the system there and so on. It is a good example of drawing on relevant expertise in pulling together the case.

Mr WILKIE—I am concerned that, if we move to a system of getting lawyers involved in disputes, it will become very expensive for people to follow up relevant cases. We had people representing pork producers in here this morning. They would like to follow up a case, but I do not think they would know how to go about it in the first place or have the money to pay for the lawyers' fees. How do we ensure that smaller producers like those guys can afford to get advice, and who should pay in the long term? Do we need to provide more resources to Legal Aid so that some of these smaller producers can get advice? Does a department need to pick it up? How do we go about it?

Mr Zanker—The Department of Foreign Affairs and Trade have set up their investigation unit and are certainly willing to undertake investigations of the kind that small producers perhaps cannot get much of a leg on. They have referred to that in their submission to you, and a number of other submissions have made reference to that as well. That is a comparatively new initiative. I think we have established a deal with the type of situation that you are talking about.

Mr Brazil—Certainly I think one would initially look in the area or in the direction that Mr Zanker has referred to. I think there would be private legal firms interested in doing work of that kind. There would be a decision to be made. I certainly am not in a position to say that it would be done on an honorary or gratis basis, but it is an area where something could be worked out one way or another with a little bit of assistance from the government.

Senator COONEY—You could do it on a contingency fee basis. If you won the market in the United States, the fee would be 40 per cent of the market.

Mr Brazil—We would be very happy to look at something in that area if it could be done.

Prof. Waincymer—I think it becomes a polarising discussion if the question that we ask is: should there be more involvement of private legal firms? If you go back more fundamentally, what you want to say is—

CHAIR—What is the need?

Prof. Waincymer—whose interests are involved here? What legal advice do they need? What legal expertise do they already have? Are they underresourced and, if there are a number of interests affected, how do they coordinate? Back to your comment, Senator Cooney, I am very concerned about the people who rabbit in the corridors and say, 'Keep the lawyers out.' They say, 'Lawyers want to help us.' The key word is 'us'. They presume that they are all that is important.

Howe Leather was a wonderful example. With Howe Leather, there was an intergovernmental agreement not to appeal the finding from the WTO. Prior to everyone finding out—surprisingly—that the panel said that the subsidy had to be repaid is the only time ever there is a retrospective remedy based on a technical meaning of the words 'withdraw the subsidy'. The bureaucrats decided, for what they thought were very good reasons at the time, to do a deal with the United States that whoever wins the first case does not appeal. The private company, who actually has the money and gets asked to give it back, is not involved there and does not get a vote at the table.

The 'us' is presuming the wrong thing in a democracy. Who is involved? The bureaucracy deserves to be represented. The industry deserves to be represented in the system, et cetera. If you can get that advice by employing more staff in Foreign Affairs because of their investigation mechanism and you do not need the private lawyers, that is fine. That is a separate issue. Private corporations, as you have pointed out, need appropriate expertise. It is certainly true that some law firms in the world charge exorbitant amounts of money to give this advice. I have talked to government officials in Third World countries that, in my view, are being grossly exploited with bills of half a million dollars to $2 million a year on cases where—you are right, Senator—in an hour you can tell someone who is going to win. Most claimants win WTO cases.

That is because most of the time you will bring a case when you know someone has done the wrong thing.

For example, the Pork Council does have to worry if someone is saying, 'This is a major case that is going to cost hundred and hundreds of thousands of dollars.' If you are an expert, you ought to be able to say to someone, 'You are getting this amount of money. The law says it is a prohibited export subsidy if there is this, this and this. This is how your opponents would argue. It is unclear. These are the cases that are relevant. You also have to factor in the political likelihood of your opponents in America or wherever bringing the case.' After an hour, if you have not finished the case and you have not prepared it, you can set the scene. Then after that, like most litigation, the more money you want to spend on evidence and things like that, so be it. Most of these cases, complex as they are, if you have honourable experts who really are experts, ought not be that expensive. It depends whether there are private individuals needing separate advice because governments are not providing it or whether it is adding to government expertise, et cetera.

Mention was made before, quite rightly, by the Attorney-General's Department that one of the early cases said that WTO is part of international law. Overnight, all of the experts in the GATT who only ever worried about GATT cases and GATT precedents had to go running away—myself included—to read more International Court of Justice cases and learn these sorts of things. DFAT did not have that expertise; A-G's had that expertise. So what if you are not prepared to just walk straight in and say, 'I do not really know this, can you help me out?' What does the International Court of Justice do about documents? What kind of evidence can you present? How are you likely to be able to run a hormones case or a salmon case, et cetera? From the governmental perspective, there is a lot of expertise needed and it changes as the system evolves. But the private sector, at the very least—whether they are paying for it or getting it free—needs to have a defined status.

There is also a fundamentally different status in Australia to in the United States. The United States, with section 301, rightly or wrongly says to individuals, 'If your case is good enough you can force us to bring it to the WTO.' Australia has chosen in the DIEM to say, 'You can come and talk to us, but we will still make the strategic decision, based on the criteria elaborated in the Foreign Affairs presentation, as to whether we—the 'us'—think it is in Australia's interests.' Neither is right or wrong, but it is a fundamental political, legal and ethical issue, and we are different. Whatever way you choose to go there are significant implications.

Mr Brazil—Before we leave this question, this is something I should have remembered when it was raised. Yes, we have actually given some thought to some sort of legal assistance program of the kind that is being discussed here. It would ideally have to be properly set up, but I think it has some potential. Certainly the concept that is in our mind is that while people will not always agree—far from it; there will be many occasions when they will not—nevertheless, I thought the principle or ideal or object was for a real continuum between industry and interested groups, on the one hand, and government, on the other, and that that continuum ought to be able to do something in the area of legal assistance.

CHAIR—Are there any lessons we can learn from the way the USTR is set up and the way the US run trade disputes? I realise there are enormous differences and that the United States are

involved in NAFTA and everywhere else, so it is a wholly different situation, but is there anything we can learn from the way the States run things, with their alert systems, assistance to industry and those kinds of programs?

Prof. Waincymer—The first mistake we made over the years—and I think we have now changed it—was that we have not had a lawyer in Geneva as part of the team and, again, there has been that divide, whereas the big players have had the lawyer on the ground. We do reasonably well with dispute settlement. I think our greatest need is preventative work, at the negotiation stage, and using lawyers to explain how to write it. I will give one little example. The biggest disagreement at the moment between developing countries and America and Europe is in the textiles area, where the developing countries agreed to the Uruguay Round and all of the opening in services in return for textiles improvement. One of the rules written into the textiles agreement was that the big players promised to progressively liberalise over what I think was about a 10-year period. When the developing countries said: 'Where is your progressive liberalisation?' there was an announcement that at 11.59 on the last day of the period all of a sudden America and Europe were going to open up. To no normal adjudicator in Australia would you describe that as progressive liberalisation. But they did not think about writing in, or they were not allowed to write in—

CHAIR—Some benchmarks or milestones.

Prof. Waincymer—the benchmark things that we have in the agricultural agreement. That is the kind of thing. There is a divide in legal expertise in understanding that it is a rules based system, that you are negotiating with people who do not want to agree to the rules: they want them to be weaker and they want to look for loopholes at the end of the day. So that is part of the team that ought to be going there.

In terms of the actual way disputes are presented, I frankly do not think any country does it in a particularly brilliant way. I think in the early years of the WTO too many people were too casuistic. There are a tremendous number of petty procedural points that in my view do not create the right ambience before a panel. Because most cases are won by the complainant, my personal view—every lawyer has got a different view—is that when you are defending a case you look for one or two really big systemic and substantive issues that you really care about and you go with them; you do not sit there and try to delay, obfuscate and things like that. I think everyone has been guilty of a bit too much of that in the short term. Their lawyers are not better than ours but the preliminary work is much better and the coordination at the negotiation stage is much better.

Mr ADAMS—I am concerned about the cost in the developing countries and what their views will be. If law is brought into the dispute settling tribunals the cost to them would be pretty horrific. Do you think there will be some sort of structure of legal aid or some aid programs to deal with that?

Prof. Waincymer—There is already; Norway was the first country to propose it. Although I cannot remember the name of it, there is an institutional, independent body where governments, including ours, are being invited to offer some money. That is just setting up the process of hiring experts to appear for developing countries at mandated rates that are reasonable. I would like to see us do one thing more. I have been involved in a number of applications to AusAID

and other places to do training programs for developing countries, and the demand there is greatest in things like dispute settlement. They want the capacity. They desperately do not want to hand over their policy problems to a large legal firm and not learn much at the end of the day, other than that we can be very expensive. They want to develop the capacity to do what Australia has done over the years, which is to represent through the quality of your intellectual development, et cetera.

Mr ADAMS—Skills based.

Prof. Waincymer—Skills based, yes. That is why I think a team thing—and that is the John Jackson model. When you are doing it academically and through the private sector and through government, you are really doing a service. The worry that some people would have here is, 'Why should Australia help developing countries learn how to run disputes better, because they are just going to turn around and run them against us?' That is not an irrelevant factor but there are so many positive benefits. When people develop expertise in this area they are actually supporters of the institution. Not only do they win the odd case but they actually believe in the institution and go around to their other government departments and say, 'You can't do that. It's illegal.' The Department of Foreign Affairs and Trade is in fact a great proselytiser in Australia of WTO clean behaviour. It institutionally develops this idea, 'Don't do this. This is the wrong thing to do'. Other departments say, 'This is terrible. We're trying to promote industry and you keep saying no to everything we are currently doing.' You can actually build that belief in the system through doing that and, as I say, develop great social, economic and political ties. There may be a reluctance to fund some of these types of things, but I would love to give the large law firms the opportunity to help these people as well.

Mr ADAMS—Can lawyers move between one state and another now in Australia? Can a barrister go somewhere and practice without—

Mr Levy—I will explain the position. Governments are implementing something called the national travelling practising certificate scheme, and it is operational in New South Wales, Victoria, the ACT, South Australia and the Northern Territory. A lawyer can go to another jurisdiction and practice on the basis of his or her practising certificate issued in the home jurisdiction. If they wish to establish an actual office in another jurisdiction they have to comply with the local PI insurance and fidelity fund—

Mr ADAMS—It is hardly free trade, is it?

Mr Levy—That is right.

Mr ADAMS—Have the professions got a bit to do there?

Mr Levy—The profession has been promoting that with government. There is another scheme, called the mutual recognition scheme, which enables not only lawyers but other occupational groups to be licensed or admitted in other jurisdictions. It is an entitlement to admission. The mutual recognition scheme was operating in all states and territories, but it fell over in Western Australia about a week ago—for some reason it was not renewed.

Mr ADAMS—Thank you. I think you addressed the point I was trying to make. There is another issue I want to raise in relation to cases being put to the WTO. A prime example would be the salmon case, where the salmon industry asked who was going to pay if it was wiped out through the introduction of overseas salmon. Also, the apple and pear industry would argue that there would be an increase of 20 per cent in its production costs, if it survived fire blight, if overseas product was introduced. In the future, can cases be made at law by industries that this may happen to? I see that there will be a lot of movement in this area and that a lot of cases will be based on phytosanitary issues. Do you have a point on this, Mr Brazil?

Mr Brazil—I will make three points. There is nothing in the WTO instruments at this stage that addresses that problem. In a sense, that is not unusual. Many major international treaties deal with a whole bundle of things, but they cannot necessarily deal with all the issues—like this—that may arise out of what is done under the treaty. So, first, the WTO instruments do not address this. Second, that interesting thought provokes another: could that and should that be made a condition of a decision—in this case, to allow the salmon to come in—namely, a footnote to the effect that if, indeed, damage turns out to be caused, then there is liability? I think that is more theoretical than practical, and people would be very reluctant to accept that. Nevertheless, that is a possibility.

The third possibility—and it gets back to the first point I made—is that no treaty covers the whole ground of matters, events and liabilities that may spring up as a result of what is done under it, but there is a very important and difficult chapter of international law called state responsibility. There might be an argument on the ground of state responsibility that, in regard to the circumstances you supposed, the general international law may, as a matter of state responsibility, impute some liability on the part of the government that has caused this damage. It is something that would have to be looked at.

Mr ADAMS—Foot-and-mouth could be an example—if we imported something and foot-and-mouth wiped out the beef industry of Australia.

Mr Brazil—The damages caused by that could be enormous. There has been a great deal of learning on state responsibility. It has been suggested that there ought to be treaty on it. It has never happened, but work on what is the law in that area goes back many years. I would be happy to provide a note to the committee on that.

CHAIR—Could you also look at the possibility—even though it is theoretical—of any kind of indemnity or insurance?

Mr Brazil—Yes. As Australia's leading insurance firm, we would be delighted to have a look at that.

CHAIR—I thought you would like that one.

Mr Jennings—State responsibility applies as between states; it is a claim by one state against another state for action which is illegal at international law. In terms of a government taking these decisions, the liability on state responsibility exists at the international level and is pursued through whatever mechanism may be available. I mentioned James Crawford during my opening statement, who is doing sterling service for Australia on the International Law

Commission. He has been working assiduously in this area of state responsibility to draw together the work that, as Mr Brazil said, has been going on for many years. It is a very contentious and difficult area because it comes down to the nub of international law—responsibility, liability, and so on—which is an area that will always cause difficulties because of the subject matter. There is very good work being done in the International Law Commission.

Mr Brazil—I think that is a good suggestion. I will certainly make contact with James.

CHAIR—I think that would be very useful. There is some American writings of some guy—I just cannot think of his name—who wrote very well about the Australian salmon case and whether or not there was any possibility of looking down the line at some—

Mr Brazil—Liability under general law—it is a fascinating legal problem, a very difficult one.

CHAIR—Does anyone have any thoughts on enforceability? This is basically a government to government organisation and, in the end, perhaps you can only go on with a bit of finger pointing if someone does not want to comply. The giants do not. They practically punched each other out on bananas and hormones, whereas most comply. What are your thoughts about the suitability of sanctions? It seems a very odd thing to be in a free trade organisation if the only thing you can really do is to impose sanctions to ensure compliance.

Mr Jennings—In relation to compliance and enforcement decisions, there are rules laid down in the DSU. They prevent unilateral action and retaliation. They channel it through the DSB, and so on. They impose some disciplines to ensure that precipitate actions are not taken; in fact, the dispute settlement body itself has an ongoing role to monitor implementation. Countries or members are able to come back through the DSB in another round of dispute settlement—I think it is article 21.5 of the DSU—if they are not happy with what is happening. I think currently there is one being run on shrimp-turtle. You will recall that there was a very significant case involving actions being taken by the United States in relation to shrimp imports. I think the US was making an argument that it was not compliant with its obligations, but it was relying on Article 20 of the GATT, which provides for exceptions to your obligations.

The case was very significant from a wider general international law point of view because of what it had to say about good faith in meeting your obligations. The bottom line is that some countries have taken the US on again and said, 'You are not implementing this properly, and we are going to run this through again.' This mechanism is very useful. You can come back and say, 'No we are not happy,' and run through a panel process again. In terms of broader international law, the system with the WTO is very well developed indeed but, as I think has been said, no system is perfect and it could be improved. But the mechanisms that are there do give you reasonable hope that, if you come out on the right side at the end of the day, your concerns will be properly addressed through implementation, but you also have the option to go back again and say, 'No we are not happy with what is going on.' If you look at the list of cases in the WTO, you do see these article 21.5 cases, where countries come back and say, 'No, we are essentially not happy with what you are doing.'

CHAIR—Do they reconvene a different panel?

Mr Jennings—I would have to have a look at the provision.

Prof. Waincymer—I would have to say it is the same panel.

Mr Jennings—If they can, they might have to change it.

Mr Brazil—I would like to make a comment. Of course, at the end of the day, you do not get enforcement, which is what you are talking about. There is a theoretical enforcement procedure available of a kind, and it depends on a number of things. If the defaulting party has subjected itself to the compulsory jurisdiction of the international court, then it may well be that you may be able to get an order out of the international court. There is a kind of enforcement mechanism there, but I must say it is a rather heavy-handed one. It is for the Security Council of the United Nations. Just to complete the discussion, theoretically that is, of course, available.

Prof. Waincymer—The biggest issue at the moment is not enforcement. The thing that worries me most is a view amongst the larger countries that perhaps, after losing a case, you have an option of either complying or allowing retaliation. That is the whole hormones, bananas, shrimp and turtle type issue. For Australia, that is a disaster. Certainly all of the respected academics, and most of the countries, are saying no. The WTO, like GATT, believes that the first option is to comply, but the way the rules were written were suboptimal. There are about 11 phrases one would draw attention to and about eight of them point to that view, and three of them are waffly and point the other way. I see significantly diminished value in the whole system for Australia if the norm becomes 'lose a case and just say to someone else to retaliate at the end of the day.'

CHAIR—Get knotted.

Prof. Waincymer—Timing is also more important than enforcement because, if it takes you 18 months to win a lamb case about a temporary measure dealing with a surge of imports, that season is over, your farmers are out of work and you have not really had much of a win. There are a lot of mechanisms in international law to promote compliance, and enforcement is always the one that they talk about last because it is never going to be meaningful, but transparency and mechanisms and processes really can make it happen. In the 50-odd year history of the GATT and WTO system, most people comply most times with most panel results.

CHAIR—Is Australia participating at all in the discussions on reform of the rules of the DSU?

Prof. Waincymer—That has sort of died. It had been promised to have been finished within four years.

CHAIR—It was very promising before Seattle, I thought. Was that right? It looked like—

Prof. Waincymer—It was likely to be the first thing that people would do. There were a couple of big messy issues that everyone knows need to be fixed. I was speaking to someone in the secretariat about a week ago and it has died. There was a position paper put around, and half the people do not even know it is there and no-one is bothering. There is a bit of a malaise in that area at the moment.

Senator COONEY—I would like to develop what Professor Waincymer was saying and ask him for a comment. This morning we heard from Mr Howard, who is from the National Farmers Federation. He said that the World Trade Organisation had some real problems but we had to keep it going because that is the only way through. He said that one of the problems was to try to get some leverage in what we say. He said that what we ought to do was go into the countries themselves, the big countries that matter, and see if we can change things around there. He said that is what the major countries do. He handed us up this document called *WTO agricultural negotiations: negotiating proposal by Japan.* One page is headed 'Towards the new era in which various types of agriculture coexist' and states:

We have also been actively engaged in many dialogues with a wide range of people in Japan, including producers and consumers.

Through these dialogues, a considerable number of Japanese people have stressed their concern about the low level of food self-sufficiency in Japan and strongly demanded measures securing the safety of imported food. We believe what they wish could be common to all over the world.

At this juncture, we proudly present the proposal as an antithesis to excessive trade supremacy, for the important coming round of negotiations to decide the direction of the agricultural trade in the 21st century.

It says that we ought to be protected. The document setting out Japan's negotiating proposals states:

Japan's Negotiating Proposal is based upon the fundamental philosophy of coexistence, as mentioned above, and pursues the following five major points.

The second of those five major points is:

(ii) Ensuring food security, which is the basis of the society in each country;

The document then goes on to say that we should be able to do what we want. Can you think of any way, through the rules, that the farmers could be reassured that the Japanese would take notice if anything was decided that was against their interests, taking into account the sort of approach they are taking now in coming down here and, in effect, putting their point of view?

Prof. Waincymer—I think you have to examine the system—

Senator COONEY—Should we abort any trial before the world's trade dispute body on the basis that all this propaganda has been brought in?

Prof. Waincymer—You have to judge the system, as compared with the alternative, which is no system. It is clear there are strong vested interests in Japan to protect agriculture. There are strong political and philosophical reasons for some of them to do so. There are some bizarre things with protection of the rice industry, et cetera. You can bring cases, they may comply, they may pay you back on the next coal export or whatever, but is the system worth having and, at the end of the day, is it better for Australia to pursue the system than to pursue a world with purely bilateral negotiations? We would not have been at any negotiating table without this system. With the Cairns Group, we were a major player in the agricultural negotiations, because there was a system, we got together with like-minded people and we got to the table. That was a fabulous example of how individual people can use their brains and their strategic powers to get things happening.

When you look at the rules that were written, they were not optimal and, again, that is where I say that lawyers can help at the outset. If you think for a moment about an agricultural commitment, countries said that they promised to decrease their aggregate measures of support

by a certain percentage a year. What is an aggregate measure of support? It is an extremely complicated accounting mechanism. You have to find out what money is being paid by what Japanese government authority to what industry to work out what is being paid. They are not going to tell you. How do you find that information? Once you do the calculations, you cannot know whether they have gone over the target until the end of the 12 months. By the end of the 12 months, it is too late. How do you bring the case in time if you have to wait until the end of the 12 months to know they have broken the law? All I am saying is that a lawyer should be there at the outset saying this to the negotiator. It takes me 35 seconds to say it to you. I will say it to the negotiator: 'Go and negotiate the best agricultural agreement you can.' But be aware of how rules can be a waste of words and paper if you do not think about some of these strategic issues.

Mr WILKIE—Outside legal advice was taken with the lamb dispute, but it took a long time to get resolved. In fact, I think, by the time it was resolved, it was hardly worth the farmers' while, because the agreement, which was a short-term agreement, was just about finished. If there had been much greater outside legal opinion and assistance given, could that dispute have been resolved any earlier?

Mr Jennings—My involvement started at the panel stage on lamb, and I am not really in a position to comment on what went on before then. I have been involved in the actual case proper. That may well be an issue you should direct to Foreign Affairs and Trade in any event because as they are the lead agency I do not want to sell them the dump on that. I think, as has been adverted to, even though, compared with some other international mechanisms, the WTO is a reasonably speedy process—you actually do have deadlines that are set and so on, unlike some cases that can drag on for years through tortuous jurisdictional arguments in the ICJ and so on—you do need to trigger the process.

Strategic decisions are taken about triggering consultations and so on and starting the process off. I am sorry I do not really have any knowledge about what went on before the panel's proceedings got started, but the measure was in place in terms of the three years of the tariff quotas and so on. The USITC had a mid-term review of that last year. In that sense, it is a live issue in the context of the proceedings in Geneva. But, if you have questions about the lead-up to the panel process, they are probably better directed to Foreign Affairs. I am sorry I cannot be of more direct assistance but my involvement really is at the case stage. I want also to make the point that the WTO processes can, comparatively speaking—with their deadlines and so on—take a significant period of time, but complex litigation in the domestic context can also take a considerable period of time. It is just one of the issues that have to be contended with.

Prof. Waincymer—I would answer in the negative. Most participants comply with deadlines all the time; panels sometimes go over their deadlines. But, getting back to the previous point, the agricultural industry in Australia ought to be saying, 'As part of our negotiating agenda on dispute settlement, we need a really fast system for those urgent short-term, seasonal agricultural disputes that happen, particularly in the safeguards type area.' In a domestic legal system you have an injunction process. I am not saying that we should have one in the WTO—that is a major issue in a world market—but if you are not going to have that protection you need some other protection so that you are not systemically winning battles and losing wars. Again, that is my point about the negotiating mandate: you should think about how you will ultimately want to protect your rights and, if you have not thought about that in advance, you

want to protect your rights and, if you have not thought about that in advance, you have not really negotiated in a comprehensive and sensible way.

CHAIR—I just want to make sure that everyone here has had an opportunity to put to us their ideas, if they have any, on the linkages between the capacity of DFAT, the capacity of the Attorney-General's department and the capacity of private practice, academics—wherever you may sit in the spectrum—to actually engage with each other and have some interface. Is there any role for government to educate, to resource, any better understanding between the legal practitioners—wherever you sit—involved in this process?

Prof. Waincymer—When someone says, 'Can governments resource better?' at the word 'resource' you say, 'Sure.'

CHAIR—You were talking about it being suboptimal. Could we perhaps reorient it if we are not going to pay any more money?

Prof. Waincymer—The answer I give is yes, but frankly I do not have a model that I would advocate at the moment.

CHAIR—I am just interested.

Prof. Waincymer—Whether it is some kind of funded institution, committee structure, dialogue, secondment or exchange programs, there are a raft of mechanisms. I am not sure whether your committee is going to actually investigate comparatives with USTR and there has been acceptance, but to the extent that you have any of that kind of research, it would be invaluable to explore what other people do and to see what would be the best cost benefit for us.

Mr Brazil—As long as there is recognition that the whole band of legal resources is there and is available—I am not sure it has been completely recognised here today—from the Attorney-General's Department. If that is recognised, I think that would help to provide some solutions in this particular area.

Senator COONEY—I wonder whether, as time goes by and people like the National Farmers Federation get more confidence in using the whole gamut of the private sector, Attorney-General's and the academics we have, and people who have got the sort of economic interest because it is their beef, their lamb chops or leather that is at stake—if they have the consciousness of it all—would insist on everybody joining together in a particular way.

Mr Brazil—I think you are saying what I was trying to say. There is a recognition that private legal firms are there and have the capacity and that sort of thing. If that is properly recognised, that would help in solving some of these problems. For example, in the lamb case, it is important that the people affected get good advice quickly as to what the options are and what have you. 'Do you want to go through this process, however expedited it is, because the season is going to be all over by the time it happens?'

Senator COONEY—So say somebody from Fisheries came in to see you, you would say, 'This is really a World Trade Organisation issue. We will ring up Attorney-General's or

Professor Waincymer and let us see if we can get a case together quickly. I will tell them it is a matter of some urgency.'

Mr Brazil—We would react on an ad hoc basis. Just what the outcome would be in a particular case, I do not know.

CHAIR—There does not seem to be the same sort of procedure here. There is such a well developed system in the States, and even in the EU to a lesser extent, of the private practice having really serious input into the resourcing of cases and how they are run, even though ultimately it must be controlled by governments. I do not think anyone is seriously arguing that there is not an overriding national interest, and there are potential conflicts between industry sectors. It obviously has to remain with government. It puzzles me that Australian lawyers do not seem to have the same kind of generic role in how these things evolve.

Mr Brazil—It is interesting, isn't it? American lawyers are being consulted but Australian firms are not. I find that difficult to understand.

CHAIR—I did too. I studied it but did not get many answers.

Mr Brazil—It comes in all sorts of ways. I had to give some quick advice to the ACT health minister on mandatory labelling of genetically modified food. I must say that it was provided on very short notice. Within 24 hours, it had been provided to a meeting of the Australia-New Zealand health ministers. In effect, they made a decision—you may remember—late in 1999. It proceeded along the lines that were in that advice. That is an example where something needed to be done quickly.

CHAIR—DFAT and the Attorney-General's Department have been very effective with probably not much in the way of resources. We are all learning here. It seems, from my own personal point of view, that there are avenues here we have not explored. That was one of the reasons why I was interested in this panel session.

The exhibit tabled by Mr Levy from the Law Council of Australia entitled *The Law Council of Australia: business plan 2000-2001* is accepted by the committee. Also, on the inquiry into the extradition law policy and practice, a submission has been received from the Victorian Department of Premier and Cabinet, submission No. 19, dated 7 March 2001, and accepted by the committee.

Resolved (on motion by **Mr Wilkie**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 3.54 p.m.