SAFTA – Responses to Supplementary Questions

Consultation process

Several submissions expressed concern about the consultation process with community groups, non-government organisations and local government associations prior to the tabling of the proposed SAFTA.

- *Can the Department of Foreign Affairs and Trade provide comment on the rationale behind the consultation process?*

Response:

The process of consultations undertaken by the Government in relation to SAFTA was guided primarily by the need to keep potentially interested stakeholders as fully informed as possible throughout the course of negotiations. In particular, consultations focused on peak bodies, sectoral industry associations or individual companies whose members might have an interest in the Singapore market or whose interests might be affected by any changes under consideration in the negotiations. A similarly high priority was accorded to consultations with the States and Territories, given the potential implications of commitments under the services, investment and government procurement chapters of the Agreement for their regulatory regimes, as well as their interest in supporting local industry and exporters in identifying opportunities that could be pursued in the negotiations. State and Territory governments also provide an additional avenue to convey any community concerns. They also carry responsibility for local government.

In addition to industry and government stakeholders, the Department held meetings with non-governmental and union groups interested in the negotiations, including at consultations with the Australian Fair Trade and Investment network in February 2002, which included representatives of a range of union and community groups. SAFTA was also discussed at meetings of trade consultative groups convened by the Minister for Trade, such as the WTO Advisory Group and the Trade Policy Advisory Group, which include representatives of prominent non-government organisations and academic experts. A comprehensive summary of the consultations on SAFTA can be found at Annex 1 to the National Interest Analysis submitted by the Government when SAFTA was tabled in Parliament on 4 March 2003.

- *Can the Department advise whether it is envisaged that future FTAs will use the same consultation rationale?*

The Government is pursuing a similar approach to consultations on other trade negotiations. In the case of both the FTAs with the United States and Thailand, the Government invited public submissions prior to the commencement of negotiations. The public submissions process on the Australia-US FTA (AUSFTA) attracted submissions from a wide range of organisations, including from over 30 non-government organisations and eight union bodies, as well as over 50 industry, business or professional associations, and upwards of 80 submissions from individuals. The input from non-governmental and community

organisations and individuals played a valuable role in informing the development of the Government's objectives and approach to the negotiations, particularly in relation to a range of community concerns. Prior to the negotiations, Government Ministers and DFAT officials also participated actively in a number of conferences organised on the subject of the proposed AUSFTA, as well in seminars and other meetings in State capitals, in which non-government and union organisations participated.

The ambit of consultations with non-government and community groups in relation to trade negotiations is influenced by the interest expressed by particular groups in relevant issues, as well as the extent to which issues of interest to them emerge in public debate. In principle, the Department is available at any time to discuss individual negotiations and related issues with interested groups. The much higher degree of public interest in issues surrounding the AUSFTA negotiations, and the more far-reaching implications of the issues emerging in public debate, has meant that the Department has held a much wider range of organised consultations on the AUSFTA than was the case with SAFTA.

- *Does the Department envisage that a public community consultation process will be undertaken leading up to the review of the agreement? Why/why not?*

[There will be ongoing consultations with stakeholders and interested organisations in the leadup to the review. For existing trade agreements, such as the Australia-New Zealand CER, it is not usual practice to establish a specific community consultative mechanism in relation to regular reviews of agreements - *TBC*].

- *Can the Department provide some comments on the apparent lack of consultation with local government associations?*

The provisions of SAFTA apply to all levels of government in Australia, including local government, although most provisions would have little direct impact on the activities of local government. This is similar to the situation with other comparable treaties such as the World Trade Organization (WTO) Agreements. Furthermore, the provisions of SAFTA that have most relevance to local government, i.e. the services and investment chapters, provide for a carve-out of all existing measures applied by this level of government that may be inconsistent with the national treatment and market access obligations of these chapters. This means that SAFTA will not require any changes to measures applied at the local government level.

In addition, local government, along with other levels of government, will enjoy the benefit of the general exceptions provisions of the services and investment chapters, which allow the adoption of measures otherwise inconsistent with these chapters to achieve important public policy objectives, subject to compliance with certain safeguards against the abuse of these provisions. Local government measures will also be covered by the Annex 4-(II)(A) reservations, which will provide Australian governments with the flexibility to both maintain existing non-conforming measures, and introduce new ones, for the sectors, sub-sectors and activities specified.

In line with these considerations, the Commonwealth Government did not specifically consult with local government during the negotiation of SAFTA. However, it will be consulting with local government to explain the provisions of the Agreement in the lead-up to the first review of SAFTA when Australia's list of reservations to the services and investment chapters will be finalized to extend its coverage to State and Territory measures.

Timing of treaty action and enabling legislation

The Committee notes that where enabling legislation is required for compliance with a proposed treaty action, this is normally stated in the National Interest Analysis. While legislation to implement the provisions of the SAFTA is noted in the NIA, there was no indication of when it would be introduced.

- *Can the Department advise the Committee as to why the introduction of the amendments to the Customs Amendment Bill 2003 and the Customs Tariff Amendment Bill 2003 were introduced prior to the conclusion of the Committee's review of the proposed treaty action?*

Response:

The Government introduced the relevant Customs Bills into the Parliament in the Autumn session in order to be in a position to bring SAFTA into force at an early date once the Government has had an opportunity to consider the report of the Joint Standing Committee on Treaties' report on the proposed treaty action.

The provisions of the two Bills implementing the tariff reductions under SAFTA will only commence on the day on which SAFTA enters into force. SAFTA will only enter into force when the Governments of Australia and Singapore take action to enter the treaty into force (by exchange of diplomatic notes) once they have completed their respective procedures to enable that to happen. For Australia, that includes completion of JSCOT's report on the treaty, and consideration of the report by the Government. The relevant legislative provisions will not have any effect before then.

In the meantime, the Government wishes to be in a position to allow Australian business and industry to avail itself of the provisions of SAFTA at the earliest practical opportunity. There is substantial interest in the business community, and our Singapore partners are also keen to move ahead.

It is not unusual for relevant legislation to be introduced to the Parliament before JSCOT has completed its review of a proposed treaty action. This occurred, for example, in 2002 with legislation to implement Australia's obligations under both the Protocol amending the Australia-US Double Taxation agreement and the International Convention for the Suppression of the Financing of Terrorism.

Impact on State/Territory governments

- Regulation of services

Several submissions have expressed concern at the impact of the proposed SAFTA on State and Territory governments to regulate services. The Government of Victoria (submission 26) states that '...safeguards need to be put in place to ensure that Australian States and Territories' abilities to regulate are suitably protected from inappropriate challenges from foreign investors under the Agreement. Further, it should also be ensured that States and Territories are specifically given standing to participate in the resolution of any dispute involving their constitutional responsibilities.'

- *Can the Department provide further comment on these issues?*

Response

The investor-state dispute settlement provisions included in SAFTA contain a number of important safeguards against their abuse, such as through inappropriate challenges from foreign investors. They can only be invoked against Australia in cases where a Singapore investor alleges that Australia has breached an obligation under the investment chapter of the Agreement which caused loss or damage to the investor or its investment. Initially, the parties to the dispute would have to seek to resolve it by consultation and negotiation. If this does not resolve the dispute within six months, either party to the dispute may refer it to one of three fora: the courts or administrative tribunals of the disputing Party; the International Centre for Settlement of Investment Disputes (ICSID) for conciliation or arbitration; or arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

If the dispute has already been submitted to Australia's courts or administrative tribunals, then this provision could not be invoked. Furthermore, if an investor chose to submit the dispute to either ICSID or UNCITRAL, it would have to provide written notice waiving its right to initiate or continue any proceedings before either of the other two dispute settlement fora (including Australia's domestic courts or administrative tribunals). In addition, the submission of the dispute to ICSID or UNCITRAL must take place within three years of the time at which the investor became aware, or should reasonably have become aware, of a breach of an obligation under the investment chapter causing loss or damage to the investor or its investment.

In the event that these dispute settlement provisions were to be invoked in relation to the actions of a State or Territory Government, then that Government would be fully involved in Australia's handling of the dispute.

The investor-state dispute settlement provisions of SAFTA can only be invoked in relation to the obligations of the investment chapter of the Agreement. They cannot be invoked in relation to the obligations of other chapters, such as the services chapter.

- *Consultation*

The Queensland Government states in its submission that a mechanism for ongoing consultation with State Governments during the life of the Agreement needs to be formalised. The submission also requests greater ministerial level involvement (as opposed to 'officer to officer' level communications).

- *Can the Department provide comment on the ongoing consultation mechanisms for states if the proposed SAFTA is ratified, and the level at which they might occur?*

A number of consultative processes with State and Territory Governments have been used during the negotiation of SAFTA and will continue to provide the basis for ongoing consultations. The National Trade Consultations (NTC) is a two-tiered high level consultative process between the Commonwealth, State and Territory Governments on trade and investment issues generally. In addition to meetings at officials' level, as part of this process the Minister for Trade chairs a Ministerial meeting twice a year in different cities with State and Territory Ministers who have responsibility for trade issues. Additional issue-specific meetings and ad hoc teleconferences may be held as necessary.

The Standing Committee on Treaties (SCOT), which consists of senior Commonwealth and State and Territory officers and meets twice a year, or more often if required, identifies and discusses treaties and other international instruments of sensitivity and importance to the States and Territories. SCOT, inter alia, monitors and reports on the implementation of treaties where the treaty has implications for States and Territories. SCOT discussed SAFTA at its meetings on 28 May and 13 November 2002, and 28 May 2003. Any amendments to SAFTA arising, for example, from the biennial review process could also be considered by SCOT.

Furthermore, at the SCOT meeting of 28 May 2003, the Commonwealth undertook to examine options that would make the consultative process more effective. Central among these could be a change to the process of agenda-setting for SCOT - for example, by providing the States and Territories a 'key issues brief' on possible agenda items three months ahead of SCOT meetings. This would allow the State and Territory central agencies to liaise with their respective line areas to identify priorities and provide feed back to the Commonwealth on the key issues brief.

In addition to these formal consultation mechanisms, the Department of Foreign Affairs and Trade (DFAT) has conducted SAFTA-specific consultations with the States and Territories involving both the Departments of Premier and Cabinet and those agencies responsible for trade issues. DFAT will continue this consultation process in the lead-up to the first review of SAFTA as well as to deal with continuing implementation issues related to the Agreement.

- *Can the Department clarify whether additional Reservations can be scheduled in a way that, in areas that encompass State responsibilities for which the Commonwealth has already scheduled a partial Reservation, would broaden the effect of that Reservation (see submission 21)?*

- *Can the Department advise if States and Territories can list a Reservation under Annex 4-II if the relevant sector or sub-sector is covered by a Reservation listed by the Commonwealth, but only under Annex 4-I (see submission 21)?*

The services and investment chapters of SAFTA include a transitional provision under which certain key obligations of these chapters will not apply to measures maintained by State and Territory Governments until modifications or additions are made to the lists of reservations contained in Annex 4 at the time of the first review of the Agreement. In some cases the first review of the Agreement will involve the incorporation of new reservations in Australia's list of reservations in Annex 4, while in other cases existing reservations may need to be redrafted to ensure they adequately cover all levels of government.

The reservations contained in Annexes 4-I(A) and 4-II(A) of the Agreement apply to Australia as a Party to SAFTA and cover all levels of government unless this is otherwise qualified. There will not be separate reservations for the Commonwealth Government, on the one hand, and the States and Territories, on the other. For example, the Annex 4-II(A) reservations state that "Australia reserves the right to adopt or maintain any measure with respect to" the sectors, sub-sectors or activities specified in those reservations. These Annex 4-II(A) reservations, which provide flexibility both to maintain existing non-conforming measures and to introduce new ones, would cover measures relating to the specified sectors, sub-sectors or activities, whether taken by the Commonwealth Government, State and Territory Governments, or local governments. In the case of the Annex 4-I(A) reservations, which involve a binding on the level of discrimination or restrictiveness of existing measures, the existing measures need to be described. This would normally involve identifying the jurisdiction applying the measure, whether at the Commonwealth level or particular States and Territories.

In some cases, there may be some overlap between Annex 4-I(A) and Annex 4-II(A) reservations. In these cases, Australia would need to ensure compliance with both reservations, i.e. the broader carve-out of the Annex 4-II(A) reservation, allowing the introduction of more restrictive measures, could not be applied in a manner which undermined the Annex 4-I(A) reservation binding the level of restrictiveness of the existing measures covered by the latter.

Dispute resolution process:

Page 9 of the AFTI-net submission refers to the dispute resolution process; other submissions also raise concerns about the investor-state complaints mechanism in the proposed SAFTA. One submission stated concern based on issues of transparency of the process and the objectivity of tribunal members.

- *Can the Department provide comment on whether concerns were expressed during its consultation process on the SAFTA about the investor-state complaints mechanism?*
- *Is there any information which could be provided to the Committee concerning the possible negative impact on a state's national interest by such investor-state complaints mechanisms in bilateral trade treaties?*

- *Do similar dispute resolution procedures exist in other treaties to which Australia is a party? Could the Department provide some comment on this issue?*

The Department does not recall any specific, detailed concerns being raised about the provisions on investor-state dispute settlement during the consultation processes on the negotiation of SAFTA. Information about these provisions, and clarification on their implications, has been sought during the consultations following the conclusion of the negotiations.

As outlined above, the investor-state dispute settlement provisions of SAFTA contain a number of important safeguards against their abuse. The investment chapter of the Agreement maintains the right to regulate of the Governments of the Parties while providing a range of protections to their investors. The key obligations of the investment chapter are those requiring national treatment of each other's investors, and providing protection for investors in relation to expropriation and nationalization, and compensation for losses in war or other civil strife. These obligations require a standard of treatment of Singapore investors and their investments which is no higher than that which one would generally expect these investors, and Australian investors, to enjoy under Australia's domestic legal requirements and current policy framework. However, the right of recourse to international arbitration under SAFTA's investor-state dispute settlement provisions provides an additional degree of assurance to the investors of the two Parties about the protection of their investments, and should provide an improved framework for investment flows between Australia and Singapore.

Similar types of investor-state dispute resolution processes to that contained in the investment chapter of SAFTA are to be found in the nineteen Investment Promotion and Protection Agreements (IPPAs) that have entered into force for Australia. The Department is not aware of any formal dispute settlement procedures initiated pursuant to these Agreements. These Agreements are:

1. Agreement between the Government of Australia and the Government of the **Argentine Republic** on the Promotion and Protection of Investments, and Protocol (Canberra, 23 August 1995) Entry into force: 11 January 1997 ATS 97/4

2. Agreement between the Government of Australia and the Government of the **Republic of Chile** on the Reciprocal Promotion and Protection of Investments, and Protocol (Canberra, 9 July 1996) Entry into force: 16 September 1999 ATS 99/37

3. Agreement between the Government of Australia and the Government of the **People's Republic of China** on the Reciprocal Encouragement and Protection of Investments (Beijing, 11 July 1988) Entry into force: 11 July 1988 ATS 88/14

4. Agreement between Australia and the **Czech Republic** on the Reciprocal Promotion and Protection of Investments (Canberra, 30 September 1993) Entry into force: 29 June 1994 ATS 94/18

5. Agreement between the Government of Australia and the Government of the **Arab Republic of Egypt** on the Promotion and Protection of Investments (Cairo, 3 May 2001) Entry into force: 5 September 2002 ATS 02/19

6. Agreement between the Government of Australia and the Government of **Hong Kong** for the Promotion and Protection of Investments (Hong Kong, 15 September 1993) Entry into force: 15 October 1993 ATS 93/30

7. Agreement between Australia and the **Republic of Hungary** on the Reciprocal Promotion and Protection of Investments (Budapest, 15 August 1991) Entry into force: 10 May 1992 ATS 92/19

8. Agreement between the Government of Australia and the Government of the **Republic of India** on the Promotion and Protection of Investments (New Delhi, 26 February 1999) Entry into force: 4 May 2000 ATS 00/14

9. Agreement between the Government of Australia and the Government of the **Republic of Indonesia** concerning the Promotion and Protection of Investments, and Exchange of Letters (Jakarta, 17 November 1992) Entry into force: 29 July 1993 ATS 93/19

10. Agreement between Australia and the **Lao People's Democratic Republic** on the Reciprocal Promotion and Protection of Investments (Vientiane, 6 April 1994) Entry into force: 8 April 1995 ATS 95/9

11. Agreement between the Government of Australia and the Government of the **Republic of Lithuania** on the Promotion and Protection of Investments (Vilnius, 24 November 1998) Entry into force: 10 May 2002 ATS 02/7

12. Agreement between Australia and the **Islamic Republic of Pakistan** on the Promotion and Protection of Investments (Islamabad, 7 February 1998) Entry into force: 14 October 1998 ATS 98/23

13. Agreement between the Government of Australia and the Government of the **Independent State of Papua New Guinea** for the Promotion and Protection of Investments (Port Moresby, 3 September 1990) Entry into force: 20 October 1991 ATS 91/38

14. Agreement between Australia and the **Republic of Peru** on the Promotion and Protection of Investments, and Protocol (Lima, 7 December 1995) Entry into force: 2 February 1997 ATS 97/8

15. Agreement between the Government of Australia and the Government of the **Republic of the Philippines** on the Promotion and Protection of Investments, and Protocol (Manila, 25 January 1995) Entry into force: 8 December 1995 ATS 95/28

16. Agreement between Australia and the **Republic of Poland** on the Reciprocal Promotion and Protection of Investments (Canberra, 7 May 1991) Entry into force: 27 March 1992 ATS 92/10

17. Agreement between the Government of Australia and the Government of **Romania** on the Reciprocal Promotion and Protection of Investments (Bucharest, 21 June 1993) Entry into force: 22 April 1994 ATS 94/10

18. Agreement between Australia and **Uruguay** on the Promotion and Protection of Investments (Punta del Este, 3 September 2001) Entry into force: 12 December 2002 ATS 03/10

19. Agreement between Australia and the **Socialist Republic of Vietnam** on the Reciprocal Promotion and Protection of Investments (Canberra, 5 March 1991) Entry into force: 11 September 1991 ATS 91/36

Recognition of qualifications

Submission 13 from the Institution of Engineers, Australia raises concerns about the negotiation of mutual recognition agreements (MRAs) with counterpart bodies in Singapore, which the Institution has been trying to negotiate without success. The submission suggests that government support is needed to change the current situation and expresses regret that this was not achieved by the proposed Agreement. The submission suggests that the APEC Engineer Register should be used as a best practice MRA and that the issue should be revisited during the first review of the Treaty. The submission states:

> *'The restrictions placed by the PEB on the recognition of Australian engineering qualifications have eroded the perceived benefits that SAFTA would bring via the export of educational services. The Institution would suggest that the Australian government has underestimated the potential of non-tariff barriers, like the non-recognition of qualifications by the PEB, to undermine the perceived benefits of SAFTA in the educational services area.'*

- *Can the Department provide a comment on the omission of engineering qualifications from the proposed Treaty and whether this issue might be included for consideration during the first review?*

Response

Recognition of professional qualifications is covered in the SAFTA through Article 23 of Chapter 7. This Article obliges Parties to "encourage their relevant competent bodies to enter into negotiations on recognition of professional qualifications and/or registration procedures with a view to the achievement of early outcomes."

This provision reflects the fact that recognition of qualifications and registration procedures can act as barriers to professionals practicing in the other Party. It will allow the Government to formally support, at a government-to-government level, the efforts of our

professional bodies, including the Institution of Engineers, in pursuit of mutual recognition agreements (MRAs) with their counterpart bodies in Singapore.

In response to the interest of the architecture and engineering professions in negotiating MRAs with their Singapore counterparts, the Government used the negotiations for SAFTA to gain the cooperation of Singapore in initiating meetings between the relevant professional bodies. To date, more progress has been achieved in these talks on developing an MRA on architecture than in relation to engineering. The Government is continuing to provide support to the efforts to negotiate an MRA on engineering and SAFTA, including its first review, will provide an important vehicle to move these efforts forward.

Rules of Origin (ROOs) clause

Submission 15 raises concerns about the rules of origin clause in the proposed SAFTA, stating that accumulation rules (with regard to outward processing allowed in ROOs for Singapore) will mean goods imported without tariffs under SAFTA are also manufactured in states with low-cost labour resulting from lack of core labour standards. The ACTU (submission 21) suggests that a review of the 30% rule be conducted in the context of significant use of offshore processing in cheap labour countries.

- Has any analysis been conducted as to the impact that the Rules of Origin clause might have on manufacturing industries in Australia?

- Will cost-benefit analyses on the impact of the 30% rule on industry at a national, state and regional level be undertaken for future agreements of this kind?

The Committee understands that the Rules of Origin clause for the proposed Agreement is vastly different from that being negotiated for the proposed Australia-United States Free Trade Agreement, in terms of length and complexity.

- Could the Department provide some information on why different approaches have been taken with the Rules of Origin clause in the proposed Singapore-Australia Free Trade Agreement and the clause currently being negotiated with the proposed Australia-US Free Trade Agreement?

Response: TBA

Provision of services

Several submissions refer to definitions of 'commercial' and what 'public services' are excluded (for example, the AFTI-net submission which refers at page 6 to 'an unclear definition of 'public service'': 'The health, education and postal sectors provide examples of public services being provided partially by private providers in Australia.')

- *Can the Department advise what the public service areas named above are/are not covered by this Reservation, and why?*

Response

SAFTA follows the same approach as used in the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) of excluding, from the coverage of the commitments in the services chapter, services "supplied in the exercise of government authority within the territory of each respective Party". It also follows the GATS in defining these services to mean "any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers".

Most services supplied by public entities in areas such as the health, education and postal sectors would fall within these definitions. However, whether a particular service provided in one of these areas fell within the scope of the definition of a service supplied in the exercise of government authority would need to be determined on a case-by-case basis. The intention of using these definitions in SAFTA, as in the GATS, is to ensure that the delivery of public services aimed at achieving important public policy objectives are not affected by the obligations of the services chapter, while providing some protection that these obligations will not be undermined through the use of public entities to provide services that are really commercial services or which are in competition with other service suppliers. The latter consideration can be an important issue when Australian service suppliers are competing in countries where there is significantly greater public intervention or ownership than is the case in Australia.

The services chapter of SAFTA applies to those services supplied on a commercial or a competitive basis within the economies of the two Parties. Key obligations of the services chapter, such as national treatment, are aimed at ensuring equivalency of competitive conditions between domestic and foreign service suppliers in relation to these services. However, the chapter makes no judgement about the extent to which the economies of the Parties should be based on such commercial or competitive supply of services, rather than on the non-commercial or non-competitive provision of public services. The obligations of the services chapter will only apply to that part of the economy that involves the provision of services on a commercial or a competitive basis. In Australia, as in most other countries, sectors such as health, education and postal/courier services, involve a mix of both services provided on a commercial/competitive basis and services provided on a non-commercial/non-competitive basis and this mix can change over time. For this reason the services chapter of SAFTA does not exclude particular sectors - such as health or education - from its scope, but a particular type of service in any sector, i.e. services provided in the exercise of government authority.

In cases where a public entity provides a service which falls within the scope of the services chapter of SAFTA, because it is provided on a commercial basis or in competition with other service suppliers, it has been possible to take out reservations listed in Annex 4 of the Agreement to give cover to any measures which do not comply with the market access and national obligations of the chapter.

Competitive Neutrality

Chapter 12, article 4, refers to reasonable measures taken to ensure that governments provide no competitive advantage to government-owned business in their business activities. The ACTU's submission refers to the 'lower borrowing costs available to government-owned businesses'.

- *Can the Department provide more information or clarification on this point?*

Response:

The Department assumes that the 'lower borrowing costs available to government-owned businesses' mentioned in the ACTU's submission referred to the lower costs of finance available to government-owned enterprises due to their access to government guarantees . The Intergovernmental Competition Principles Agreement (CPA), concluded by the Commonwealth, States andTerritories in 1995 explicitly addresses this issue. Under clause 3(4) of the CPA, the parties are required to impose debt guarantee fees on government business enterprises directed towards offsetting the competitive advantages provided by government guarantees. Clause 7 of the CPA extends this obligation to local government.

These measures are consistent with SAFTA, Chapter 12, Article 4, which provides that the Parties shall take "reasonable measures to ensure that governments at all levels do not provide any competitive advantage [compared with the private sector] to any government-owned businesses in their business activities simply because they are government owned."

Labour rights and environmental standards

Several submissions raise concerns about the lack of provisions on labour rights or environmental standards.

- *Does the Department have any comment to make on the lack of labour and environmental clauses in the proposed Agreement?*

Response

Australia and Singapore did not include chapters on labour and the environment as neither country considered that provisions of that kind would be appropriate or necessary for this Agreement.