Australian Government

Department of Foreign Affairs and Trade

Government response to the report of the Senate Foreign Affairs, Defence and Trade References Committee –

Voting on trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement.

The Senate Foreign Affairs, Defence and Trade References Committee Report: Voting on trade The General Agreement on Trade in Services and an Australia-US Free Trade Agreement

Recommendation 1

The Committee recommends that the Government have more regard to the negotiating needs of, and the capacity and resource constraints on developing countries that participate in the WTO processes. Given that the WTO is a body that operates by consensus, Members from developing countries in particular need sufficient time and resources to develop appropriate responses to complex trade issues.

The Government supports reform of the WTO where it would improve the current processes and welcomes the current review of WTO processes being undertaken by a Consultative Board of eminent persons, chaired by Peter Sutherland, former WTO Director-General. The Consultative Board has been charged with preparing a report on how to institutionally strengthen and equip the WTO to respond effectively to future systemic challenges brought about by an increasingly integrated global economy. This process was initiated by WTO Director-General Supachai on 19 June 2003. The Government is concerned to ensure that any efforts to reform the WTO contribute to its core objective, namely the effective operation of the rules-based multilateral trading system.

The Government recognises the difficulties some developing countries face in responding to issues raised by the WTO. The Government attaches a high degree of importance to providing technical assistance and capacity building to assist developing countries maximise the opportunities of the Doha round. Since 2001/02, the Government has provided multi-year commitments in trade-related assistance worth $275 million, including an estimated $32 million in 2004/05, an increase of over 50% since 1996/7.

Since 2002, Australia has contributed $A1.96 million, including $A500,000 in 2005, to the WTO Global Trust Fund, as well as $A1 million to the Agency for International Trade Information and Cooperation (AITIC) to assist developing countries not resident in Geneva to participate in the Doha Round. The Government also has a $A1 million program to assist African countries increase their agricultural competitiveness and food security and a $A3 million (2003-06) WTO Regional Capacity Building Project to enhance trade policy capacity in South East Asia.

Recommendation 2

The Committee recommends that the Government introduce legislation to implement the following process for parliamentary scrutiny and endorsement of proposed trade treaties:

a) Prior to making offers for further market liberalisation under any WTO Agreements, or commencing negotiations for bilateral or regional free trade agreements, the government shall table in both Houses of Parliament a document setting out its priorities

and objectives, including comprehensive information about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.

b) These documents shall be referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for examination by public hearing and report to the Parliament within 90 days.

c) Both Houses of Parliament will then consider the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, and then vote on whether to endorse the government's proposal or not.

d) Once Parliament has endorsed the proposal, negotiations may begin.

e) Once the negotiation process is complete, the Government shall then table in parliament a package including the proposed treaty together with any legislation required to implement the treaty domestically.

f) The treaty and the implementing legislation are then voted on as a package, in an "up or down" vote, i.e. on the basis that the package is either accepted or rejected in its entirety. The legislation should specify the form in which the government should present its proposal to parliament and require the proposal to set out clearly the objectives of the treaty and the proposed timeline for negotiations.

Under Section 61 of the Australian Constitution, treaty making is the formal responsibility of the Executive rather than the Parliament. However, the Government considers that it is only proper that Parliament has a role in scrutiny of trade agreements. The constitutional system ensures that checks and balances operate, through Parliament's role in examining all proposed treaty actions and in passing legislation to give effect to treaties and the judiciary's oversight of the system. The Joint Standing Committee on Treaties (JSCOT) - a committee initiated by this Government - provides for Parliament's involvement. In those cases where an agreement might go beyond existing regulation, the Parliament has the right to vote on legislative change required as part of that agreement.

The Government considers the efficiency and certainty of the current process enables it to negotiate with its overseas counterparts with authority and credibility, and contributes to Australia becoming a source of influence in the treaty's negotiation. This is particularly important in trade negotiations which are often characterised by offers and counter-offers, for which negotiators require some level of flexibility to respond.

The Government considers the report's recommendation on trade treaties and the Parliamentary process would be unworkable. It would circumscribe the capacity of the Government to secure the best possible trade outcomes from trade negotiations. It would undermine the Executive's constitutional authority to sign treaties. Furthermore, it is not clear why trade treaties should receive additional scrutiny to any other treaties.

The Government is committed to ensuring that information on trade negotiations is made readily available to the community and to consulting those likely to be affected by the Government's negotiating position. While all treaties are tabled in both Houses of Parliament for at least 15 sitting days prior to binding treaty action being taken, since negotiations for major multilateral treaties are generally lengthy and quite public, parliamentary debate often takes place for a much longer period than this, as the issues become publicly known. In cases when implementing legislation is necessary prior to ratification, Parliament has a further opportunity to debate the treaty. The Government makes its decision on whether a treaty is in the national interest based on information obtained during consultations with relevant stakeholders. Inevitably, the final decision necessarily involves a balancing of competing interests. The Government considers that the objective of ensuring both that the Government is able to energetically pursue opportunities for trade growth, and that appropriate consultation on negotiating objectives is undertaken with the broader community, are best met by current Parliamentary and consultation processes and practices.

Recommendation 3

The Committee recommends that the Government commission multi-disciplinary research to evaluate the socio-economic impact of trade liberalisation in Australia since the conclusion of the Uruguay Round.

The Government does not consider a new research project along these lines is warranted at this stage, a decade after the conclusion of the Uruguay round. The case for trade liberalisation and a new trade round – the Doha round - has been established and is well accepted. In the past, a large number of reports have been produced which analyse the impacts of trade liberalisation on Australia. In 1997, the Department of Foreign Affairs and Trade (DFAT), in conjunction with the Centre for International Economics, produced a study on the impact of trade liberalisation on the Australian economy entitled, "Trade Liberalisation: How Australia Gains". This study found that trade liberalisation had boosted Australia's international competitiveness and provided significant gains to consumers and families. A range of other reports have also been concluded including a 1999 CIE report "Global Trade Reform" as well as a significant body of research on the agricultural sector undertaken by the Australian Bureau of Agricultural and Resource Economics (ABARE).

Recommendation 4

The Committee recommends that the Government clearly define and make public its broad interpretation of Article I.3 of the GATS so that the public is aware of the basis on which future negotiations are undertaken.

The scope of the GATS does not extend to services supplied in the exercise of governmental authority. The GATS is based therefore on the right of governments to provide, fund and regulate public services.

The Government believes that the GATS provides adequately for the co-existence of publicly and privately provided services, even within the same sector. The Government does not believe that article 1.3(c) derogates from this. Public services are generally provided to pursue social policies. The purposes of provision of public and private services are different, even if they exist side by side. The GATS does not set standards for public service; that is up to individual governments.

The GATS features no mandatory obligation for governments to privatise or open up public services to competition and it does not dictate any specific role for the public and private sectors. Australia is free to decide what service sectors are reserved for the State or state-owned enterprises. Under the GATS it is up to Member governments to decide whether and to what extent they open sectors to foreign competition and whether and to what extent they afford foreign suppliers the same treatment as domestic suppliers in their GATS schedules.

When the GATS was negotiated, this provision was included to ensure the capacity of governments to deliver services under their authority. We believe other WTO members view the agreement in a similar way. That is well demonstrated by the fact that it has not been raised as an issue—certainly not through dispute settlement or otherwise.

The Government would like to make very clear that it is firmly committed to doing everything in its power to preserve Australia's rights to provide public services, as was provided for in this Agreement.

The Government will continue to make the above points in consultations with stakeholders and in public presentations.

Recommendation 5

The Committee recommends that in its future public consultation processes on trade issues, the Department of Foreign Affairs and Trade publishes submissions it receives, or a list of submitters with information on how to obtain copies of submissions, on its website.

This recommendation raises the issue of the privacy of those making the submission and the contents of that submission. Subject to the agreement of submitters, DFAT will in future publish submissions or list submitters on its website. Submitters will be asked to indicate their willingness to have their names or submissions made publicly available. It will be made clear that submitters will not be disadvantaged on the basis of whether they choose to have their submission made public.

Recommendation 6

The Committee recommends that the Department of Foreign Affairs and Trade consult widely with industry groups, unions, non-government organisations and other relevant bodies prior to preparation of Australia's offers and requests under the GATS, and

provide constructive feedback to all organisations about how their views have been taken into account in the preparation of Australia's negotiating position.

DFAT will continue to consult widely with industry groups, unions, non-government organisations and other relevant bodies in the request-offer phase of the GATS negotiations. The Government provides constructive feedback to all stakeholders in a number of ways, including discussion papers, newsletters, meetings and verbal reports. DFAT considers that such feedback adds to the sense of stakeholder participation in the process and ownership of the outcomes and will continue to provide it to the extent possible. DFAT notes however that it is not always possible to provide feedback on all issues raised by interested parties, given the need to identify a negotiating position that reflects Australia's national interest and maximises its negotiating leverage, particularly at certain key points of the negotiations.

The Government would note that DFAT has held consultations with a variety of stakeholders. The Department is in regular contact and consultation with 14 Commonwealth departments and agencies. It has met with all state and territory governments, including representatives of 25 state/territory departments. It has met a number of times with the Australian Local Government Association and responds regularly to queries from local governments. It has met with 220 industry associations and businesses. It has met with 92 non-government organisations. It has accepted 81 submissions from civil society on the negotiations on the GATS and a further 23 in the lead-up to the Cancun ministerial. It has updated its web site 15 times since July 2002 to reflect ongoing negotiations, with substantive detail on progress in those negotiations. The Department also has 269 subscribers to its services negotiation email service.

Recommendation 7

The Committee recommends that the Department of Foreign Affairs and Trade consult again with stakeholders with expertise in the relevant areas once Australia's draft offer(s) have been prepared in future GATS negotiations, and prior to such offer(s) being communicated to the WTO as Australia's official offer.

As indicated in the response to Recommendation 6, DFAT will continue to engage in extensive consultations with key stakeholders in the preparation of GATS requests and offers.

Recommendation 8

The Committee recommends that the Government does not make any offers in the GATS, either in this round or in future negotiations, in the area of postal services which would adversely affect Australia Post's reserved (standard letter) service.

Australia, like many other countries, has a regulatory framework for postal services which is based on the social objective of ensuring the provision of a universal standard

letter. Australia will maintain its capacity to meet this objective in its negotiating approach.

Recommendation 9

The Committee recommends that the Government make no further commitments under the GATS in areas of provision of public health services, public education and the ownership of water.

The Government, in Mr Vaile's media release of 1 April 2003 on Australia's initial offer, and again on 26 May 2005 in relation to the revised offer, stated that Australia would not be making any offers in the areas of public health, public education or the ownership of water.

Recommendation 10

The Committee recommends that the Government continue to recognise the essential role of creative artists and cultural organisations in reflecting the intrinsic values and characteristics of Australian society and that it make no commitments in current or future GATS negotiations that might adversely impact on cultural industries. The Committee further recommends that the Government continue the Most Favoured Nation exemption for co-production arrangements beyond 2004.

The Government will continue to recognise the essential role of creative artists and cultural organisations in reflecting the intrinsic values and characteristics of Australian society. The Government, in Mr Vaile's media release of 1 April 2003 on Australia's initial offer, said it will ensure that the outcomes of negotiations will not impair Australia's ability to deliver fundamental policy objectives in relation to social and cultural goals.

Australia's MFN exemption on audiovisual services forms an ongoing part of Australia's GATS schedule of commitments. This MFN exemption enables Australia to maintain co-production agreements with certain countries. Although the GATS Annex on Article II Exemptions provides that, in principle, such exemptions should not exceed a period of 10 years from the entry into force of the GATS, there has been no decision by WTO Members on any systematic approach to MFN exemptions under the GATS.

Recommendation 11

The Committee recommends that the Government – prior to embarking on the pursuit of any bilateral trading or investment agreement – request the Productivity Commission to examine and report upon the proposed agreement. Such a report should deliver a detailed econometric assessment of its impacts on Australia's economic well-being, identifying any structural or institutional adjustments that might be required by such an agreement, as well as an assessment of the social, regulatory, cultural and environmental

impacts of the agreement. A clear summary of potential costs and benefits should be included in the advice.

The Government agrees with the need for appropriate assessments of the likely economic and other impacts of bilateral FTAs prior to their conclusion. It has followed that approach in relation to AUSFTA, SAFTA and the Australia-Thailand FTA. As well as commissioning independent assessments of the likely effects of these agreements prior to negotiations, DFAT commissioned a detailed assessment of the economic and environmental impacts of AUSFTA as finally agreed. That study, by the Centre for International Economics was released on 30 April 2004.

It may be appropriate in some circumstances to request the Productivity Commission to undertake assessment of aspects of trade agreements or to assist with advice and input in relation to other inquiries. It is unlikely that any study could definitively answer all the issues addressed in the recommendations prior to commencing negotiations, in the absence of the detail of outcomes of the agreement. The Government's approach has been to use economic modelling and analysis prior to agreements as a guide to the potential benefits available from a particular negotiation. At the same time it is conscious that there will be additional benefits and other implications that cannot be captured by economic modelling. In relation to the AUSFTA and other agreements, the Government has consulted extensively to ensure that the fullest possible account is taken of potential impacts of a proposed agreement, in order that relevant concerns and implications are reflected in the government's objectives and the instructions given to negotiators.

Recommendation 12

The Committee recommends that future bilateral trade agreements be pursued without recourse to a negative list approach.

The Government does not agree with the Committee's concerns about the possible impact of the negative list approach, which only applies to the services and investment chapters of FTAs.

As the Report notes, a negative list approach is inherently more liberalising and transparent. Australia led the way in introducing the negative list approach when it negotiated the Protocol on Trade in Services to the Closer Economic Relations Agreement with New Zealand, concluded in 1988. Concerns about specific implications for existing measures can be addressed through the reservations mechanism. By this means, Australia is able to continue applying measures which may not comply with relevant liberalisation provisions, but which it wishes to retain. Furthermore, the negative list does not prevent governments from regulating either current or new services. It only constrains governments from imposing limitations to national treatment, market access and other principles set out in the services and investment chapters of an agreement. This approach does not prevent governments from continuing to adopt non-discriminatory regulations needed to address important public policy objectives like protection of the environment or human health.

Recommendation 13

The Committee recommends that the Government declare that it will not entertain any further proposals from the United States that go to the structure or operation of the Pharmaceutical Benefits Scheme, or that in any way undermine the effectiveness of the PBS as a price capping mechanism. Accordingly, the Government should exempt the PBS from the proposed Australia-US Free Trade Agreement.

This recommendation has been overtaken in that the final text of the AUSFTA includes provisions relating to the PBS. The integrity of the PBS has been entirely preserved.

Recommendation 14

The Committee recommends that in view of the risks associated with the negative list approach, the Government exempt Australia's quarantine laws from negotiations for the proposed Australia-US Free Trade Agreement.

The negative list approach referred to in the recommendation, which applies to trade in services and investment in the Agreement, has no bearing on sanitary and phytosanitary measures, which relate to trade in goods. The integrity of Australia's quarantine regime, and our right to protect animal, plant and human health will not be affected by the AUSFTA.

Recommendation 15

The Committee recommends that in view of the risks associated with the negative list approach, the Government exempt Australia's genetic engineering regulatory regime (including that dealing with labelling and GE free zones) from negotiations for the Australia-US Free Trade Agreement.

The AUSFTA does not contain any provisions relating to regulation of genetically modified (GM) foods, nor does it have any provisions that would require Australia to change its GM food labelling requirements or any aspect of its GE/GM regulatory regime, including those relating to GE/GM free zones.

As outlined in response to Recommendation 14, the "negative list approach" applies to trade in services and investment. It does not have any bearing on Australia's regulatory regime for GM foods.

Recommendation 16

The Committee recommends that:

a) the narrow definition for e-commerce used in the Singapore-Australia FTA be the definition for e-commerce in the Australia-US Free Trade Agreement; and

b) *the Government ensure that Australia's cultural objectives will not be compromised by avoiding any concessions or undertakings that would enable future technologies or content delivery platforms to undermine or circumvent existing or future cultural protection policies.*

Accordingly, the Committee recommends that the Government exempt Australia's cultural industries from the proposed Australia-US Free Trade Agreement.

The provisions of the draft Electronic Commerce chapter of AUSFTA do not constrain Australia's capacity to regulate in relation to audio-visual services.

While there is no definition of electronic commerce as such in the chapter, it does cover non-discriminatory treatment of digital products, in Article 16.4. However, that Article also states that the obligations on non-discriminatory treatment do not apply to non-conforming measures adopted or maintained in accordance with the chapters on Cross-Border Trade in Services, Investment and Financial Services and the annexes of reservations. Article 16.4.3 further underscores "for greater certainty" that these obligations do not prevent a Party from adopting or maintaining measures in the audiovisual and broadcasting sectors, in accordance with its reservations.

AUSFTA is consistent with Australia's cultural objectives, particularly the need to ensure the availability of Australian voices and stories on audiovisual broadcasting services now and in the future.

The outcome of the negotiations on audiovisual and broadcasting services preserves Australia's existing local content requirements and other measures and ensures Australia's right to intervene in response to new media developments, subject to a number of commitments on the degree or level of any new or additional local content requirements.

Australia's reservations under the Chapters on Cross Border Trade in Services and Investment permit Australia to maintain the existing 55 per cent local content transmission quota on programming and the 80 per cent local content transmission quota on advertising on free-to-air commercial TV on both analogue and digital (other than multichannelling) platforms. Subquotas for particular program formats (eg drama, documentary) will continue to be able to be applied within the 55% quota.

In relation to digital multichannelling, Australia will be able to impose a 55% local content requirement on programming on either two channels or 20% of the total number of channels (whichever is greater) made available by an individual broadcaster. No local content transmission quota could be imposed on more than three channels of any individual commercial television service broadcaster.

With regard to subscription television broadcasting services, the FTA allows Australia to ensure its cultural objectives are protected through maintaining the current requirement

for 10 per cent of expenditure on predominantly drama channels to be allocated to new Australian production. This may be increased up to a maximum level of 20 per cent. In addition the FTA allows scope for any future Australian government to introduce new expenditure requirements of up to 10 per cent on four additional program formats, ie the arts, children's, documentary and educational.

The Agreement also protects local content on free-to-air radio broadcasting services, through transmission quotas which allow for up to 25 percent local content in programming (eg of musical items) transmitted annually between 6.00 am and midnight on individual stations of a service providers.

The Agreement preserves the right for Australia to introduce local content requirements on interactive audio and/or video services if it determines that Australian content is not readily available to Australian consumers.

Finally, nothing in the Agreement will affect in any way the Government's right to support the cultural sector through the allocation of public funding of activities such as the public broadcasters (ABC and SBS), public libraries or archives, or in relation to Government funding for Australian artists, writers and performers.

Recommendation 17

The Committee recommends that:

a) the Australian Government retain its capacity to regulate foreign investment, including the retention of the Foreign Investment Review Board; and

b) no investor-state provisions be included in the Australia-US Free Trade Agreement.

The Government has retained the right to examine, through the Foreign Investment Review Board, United States investment proposals that may raise significant issues to ensure they are in the national interest.

The arrangements under the Chapter on Investment of the AUSFTA raise the screening threshold for United States proposals for investment in Australian businesses (other than financial sector companies) and proposals for acquisition of developed non-commercial residential land from $A50 to $A800 million. These changes to the thresholds for screening will improve Australia's attraction as an investment environment by removing from the screening process many smaller and medium sized investments which do not raise national interest concerns.

However, investment will still be screened in all sensitive sectors, as will all large investments which are more likely to raise national interest concerns. In particular, United States investment in urban land (including residential properties) and in existing media businesses will continue to be screened regardless of value.

United States investment above $A50 million in existing businesses in the telecommunication, transport and defence-related sectors will be screened.

In addition, existing foreign investment limits relating to the media, Telstra, CSL, Qantas and other Australia international airlines, federal leased airports and shipping have all been preserved.

The Investment Chapter of the AUSFTA does not establish an Investor State Dispute Settlement mechanism. This is in recognition of the Parties' open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems.

Recommendation 18

The Committee recommends that the government retain the 'single desk' arrangements for wheat exports and that these arrangements be exempt from the proposed Australia-US Free Trade Agreement.

Australia's single-desk arrangements for marketing Australian commodities will not be affected by the AUSFTA.

Recommendation 19

The Committee recommends that any rules of origin applied in the Textile, Clothing and Footwear sector provide for goods made-up in Australia to access the US market without tariffs, irrespective of the source of the original yarn or fabric.

The Government argued in the negotiations for the adoption rules of origin (ROOs) for textiles, clothing and footwear (TCF) products on the same basis used generally for ROOs in the agreement. However, the US could not be persuaded to move from its insistence on inclusion of a "yarn-forward" rule of origin for textiles and clothing (this does not apply to footwear). Generally speaking, this rule means that fabrics produced for export must be made up of yarns wholly formed in one or other of the Parties to the Agreement; and apparel for export be produced from fabrics entirely formed in one or other of the Parties using yarns wholly formed in one or other of the Parties. Given the inclusion of yarn-forward textile and clothing rules, Australia insisted on maintaining long phase-outs for textile and tariffs under AUSFTA.

Recommendation 20

The Committee recommends that the Senate refer the final text of the Australia-US Free Trade Agreement to the Senate Foreign Affairs, Defence and Trade References Committee for examination and report.

This appears to be a question directed to the Senate.