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

November 2003

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List of acronyms

ACTU	Australian Council of Trade Unions
AFTA-CER	ASEAN Free Trade Area - The Australia and New Zealand Closer Economic Relations Trade Agreement
AFTINET	Australian Fair Trade and Investment Network
ALGA	Australian Local Government Association
AMWU	Australian Manufacturing Workers' Union
ANZUS	Security Treaty between Australia, New Zealand and the United States of America
APEC	Asia Pacific Economic Cooperation
ASDA	Australian Screen Directors Association
ASEAN	Association of Southeast Asian Nations
ASU	Australian Services Union
ATTAC	Action for a Tobin Tax to Assist the Citizen
AUSTA	Australian Business Coalition for a free trade agreement with the US
AWB	Australian Wheat Board Ltd
CEPU	Communications, Electrical and Plumbing Union
CIE	Centre for International Economics
DFAT	Department of Foreign Affairs and Trade
ETM	Elaborately Transformed Manufactures
EU	European Union
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	The World Bank's International Centre for Settlement of Investment Disputes

IMF	International Monetary Fund
JSCFADT	Joint Standing Committee on Foreign Affairs, Defence and Trade
JSCOT	Joint Standing Committee on Treaties
MFN	Most Favoured Nation principle of the WTO
MLA	Meat and Livestock Corporation
NIA	National Interest Analysis
NFF	National Farmers' Federation
NAFTA	North American Free Trade Agreement
NCEPH	National Centre for Epidemiology and Population Health
NGO	Non-government organisation
OECD	Organisation for Economic Cooperation and Development
PHAA	Public Health Association of Australia
SCOT	Commonwealth-State Standing Committee on Treaties
SME	Small and medium-sized Enterprises
TRIPS	WTO Agreement on Trade-Related Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	UN Committee on Trade and Development
US FTA	Australia-United States Free Trade Agreement
VTHC	Victorian Trades Hall Council
WTO	World Trade Organisation

Preface

The WTO's General Agreement on Trade in Services (GATS) and the proposed Australia-US Free Trade Agreement (US FTA) are two of the more significant trade agreements to have engaged Australia's interest. This Report provides an analysis and assessment of the current state of play with both treaties. It is to be seen as part of the transparency and accountability requirements of the parliament.

In this inquiry, the Committee has had to deal with the dynamic nature of negotiations for both GATS and the US FTA. The collapse of the WTO ministerial talks at Cancun (September 2003) has severely impeded the progress of the Doha round of multilateral trade negotiations in general and the GATS in particular. On the home front, Australia has been involved in four rounds of talks with American negotiators, with a critical round of negotiations scheduled for December 2003.

This report, therefore, is far from being the last word on the outcomes for Australia. It does, however, seek to provide a comprehensive overview of the issues thrown up by the GATS and the US FTA, and to highlight both the pitfalls and opportunities that confront Australia as it presses forward on these two fronts.

The GATS – perceived by many as a powerful instrument of economic globalisation – has been the source of community concern about the extent to which the opening up of the Australian market to foreign service providers will impact upon Australia's sovereignty. Fears have been expressed that commitments to GATS will restrict the capacity of governments to regulate the services sector for the purposes of environmental protection, preservation of cultural interests, quarantine, financial practices, health and safety standards, and the pursuit of domestically significant polices. In particular, there is a concern that the GATS will undermine governments' capacity to deliver and control core public services.

The Committee has sought to examine these issues in detail and to provide a balanced account of the costs and benefits associated with the GATS. The Committee is generally satisfied that Australia has approached the GATS negotiations in a prudent manner. In identifying those services that will be invited into the domestic market, Australian negotiators have taken particular care to address the prominent concerns of the community. This is not to say that we have perfect knowledge about future developments under GATS, nor that proposals will not emerge that will re-kindle anxieties.

The Committee will continue to monitor Australia's progress in the WTO's Doha round, and urges the government to attend carefully to the matters raised in this Report when framing its negotiating strategies.

The US FTA has attracted some controversy, with economic modellers arriving at differing assessments of its benefits, and with the politics of agriculture, national identity and welfare animating much of both the public debate and the negotiating process itself. The FTA has received strong backing from Prime Minister Howard and US President Bush, who have asked their negotiators to have the draft agreement settled by the end of 2003.

The Committee notes that Australia has been very much the initiator of the present US FTA proposal, in contrast to its past reluctance to embrace bilateral trade agreements with America when the 'hub and spokes' proposal was floated. Now however such an agreement is promoted as a means of 'harmonising' Australia's trade and security arrangements with the US.

An Australia-US Free Trade Agreement would encourage a much greater integration of the American and Australian economies, with important ramifications for inter-country investment flows. As usual, negotiating access to agricultural markets has proven a difficult task. For the Americans, Australia's strict quarantine regime is regarded as a disguised trade barrier militating against a range of products, from chicken meat to stone fruits. For Australian farmers, some of America's tariffs and quotas are hugely protectionist. As well, domestic US farm subsidies make it even more difficult for Australian producers to compete.

Again, regulatory issues were prominent among the concerns expressed to the Committee by witnesses, including fears that Australian environmental and investment controls might be challenged, diluted or dismantled in favour of corporate interests. This inquiry has highlighted fears that Australia's Pharmaceuticals Benefits Scheme may be caught up in the FTA negotiations. US negotiators have also stated that, while existing Australian media local content rules could be accommodated in an FTA, the future delivery of cultural product in digital form was a different matter.

Because the report of the Committee's inquiry into GATS and the US FTA was due to be tabled in November 2003, it has not been possible for the Committee to examine the US FTA in its final form. The Committee has therefore recommended that the Senate refer the details of the FTA to the Committee for examination and report once the detailed contents of the proposed FTA are known.

As well as examining specific features of the two Agreements, the Committee has also explored more general aspects of international trade. For example, it has considered the role of trade in poverty reduction and economic development; the impact of bilateral trading agreements on multilateral trade arrangements; and questions of trade creation and diversion.

Perhaps of greater importance is the Committee's consideration of how best to ensure that major trade agreements are negotiated in a way that ensures transparency and the ability of citizens to have an effective input into the shaping of them. America's constitutional arrangements provide for Congress to have a significant role both in initiating trade agreements, and in agreeing to the final treaty. Australia's approach is quite different, with the executive government able to initiate and sign off on a trade

deal with very little input from the parliament. Apart from a review of the finalised agreement by a parliamentary committee (which can comment on the treaty but not amend it), parliament's main role is *after the event*, when it must vote on any changes to domestic law that the new trade treaty requires.

In the Committee's view, much of the public's uncertainty and suspicion regarding trade deals could be dispelled by proper levels of parliamentary scrutiny. To that end, the Committee has recommended a formalising of the treaty-making process whereby parliament is directly engaged in scrutiny of the proposed agreement, and in monitoring closely the associated negotiations. As well, the Committee has made recommendations to government concerning the level of independent advice and research that should precede and accompany treaty-making.

Trade treaties are not small undertakings. They have the potential to affect citizens directly and immediately; they can result in important structural and institutional changes; they seek to bring about long term efficiencies in the way our country develops and how competitive we are as a nation; and they can bind future governments in unpredictable ways that can affect our national interest. For these reasons governments must optimise the transparency of the treaty-making process, consult widely in the formulation of negotiating strategies, and remain fully accountable to the parliament for the outcomes that flow from any agreement.

Hopefully, this report will make an enduring contribution to the way in which our nation embraces trade reform. At a time of increasing criticism of trade agreements by interest groups, an effective parliamentary role not only strengthens our democracy but should also reassure sceptics and believers alike that the national interest will be properly served.

Senator the Hon Peter Cook

Chair

Recommendations

Chapter 2

The Trade Debate

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.

Chapter 3

Treaties and the parliamentary process

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.

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.

Chapter 5

GATS: implications and impacts

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.

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.

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.

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**.**

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.

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.

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.

Chapter 6

The Australia-US Free Trade Agreement

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.

Recommendation 12

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

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.

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.

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**.**

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.

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.

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.

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**.**

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.

Chapter 1

Introduction and conduct of the inquiry

Referral of the inquiry

1.1 On 12 December 2002, the Senate established an inquiry into the General Agreement on Trade in Services (GATS) and the proposed Australia-United States Free Trade Agreement (US FTA). The inquiry was referred to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report by 27 November 2003.

Terms of reference

1.2 The Senate referred the following matters to the Committee:

(1) The relevant issues involved in the negotiation of the General Agreement on Trade in Services (GATS) in the Doha Development Round of the World Trade Organisation, including but not limited to:

(a) the economic, regional, social, cultural, environmental and policy impact of services trade liberalisation

(b) Australia's goals and strategy for the negotiations, including the formulation of and response to requests, the transparency of the process and government accountability

(c) the GATS negotiations in the context of the 'development' objectives of the Doha Round

(d) the impact of the GATS on the provision of, and access to, public services provided by government, such as health, education and water

(e) the impact of the GATS on the ability of all levels of government to regulate services and own public assets.

(2) The issues for Australia in the negotiation of a Free Trade Agreement with the United States of America including but not limited to:

(a) the economic, regional, social, cultural, environmental and policy impact of such an agreement

(b) Australia's goals and strategy for negotiations including the formulation of our mandate, the transparency of the process and government accountability

(c) the impact on the Doha Development Round.

Conduct of the Inquiry

Advertisement

1.3 The Committee advertised the terms of reference in *The Australian* on 18 December 2003. The closing date for submissions was 11 April 2003.

Submissions

1.4 The Committee received 177 submissions, including supplementary submissions. These are listed at Appendix 1. The Committee also received 146 form letters.

Public Hearings

1.5 The Committee held six public hearings, in Melbourne, Canberra, Sydney and Brisbane. A list of these hearings, together with the names of witnesses who appeared, is at Appendix 2.

References

1.6 References made in this report are to individual submissions, not to a bound volume. References to the Committee *Hansard* transcript are to the Official *Hansard* record of the public hearings.

Acknowledgements

1.7 The Committee would like to acknowledge the assistance of the Parliamentary Library in the preparation of this report. The Committee also thanks all witnesses and departmental officers for their valuable contributions, in particular those who provided additional submissions at the request of the Committee.

Structure of report

1.8 The Committee considered that it would be useful to provide a brief introduction outlining the development of the multilateral trading system, the question of trade for development and poverty reduction and the debate about the comparative advantages and disadvantages of the multilateral system as against bilateral trade agreements. Chapter 2 and part of Chapter 6 considers these issues.

1.9 Chapter 3 examines the issue of parliamentary involvement in the treaty-making process. The lack of parliamentary participation in the process of negotiating trade treaties was raised in a number of submissions to the inquiry. There are important differences between trade treaties and treaties dealing with other issues such as human rights and labour standards. Because of the binding nature of the commitments made in trade agreements, and their enforceable dispute resolution mechanisms, the Committee considered that a strong case could be made for greater Parliamentary scrutiny and involvement in the process of making trade treaties.

1.10 The relevant issues in regard to the General Agreement on Trade in Services (GATS) and the proposed Australia – United States Free Trade Agreement (US FTA) are then considered. Chapter 4 contains an introduction to the GATS and an outline of Australia's involvement in the negotiations for liberalisation of services trade from the Uruguay Round to the present. Chapter 5 considers in more detail a number of issues raised in evidence before the committee, including the GATS and public services, the impact of the GATS on governments' right to regulate, and the public consultation processes undertaken by the Department of Foreign Affairs and Trade.

1.11 Chapter 6 considers the proposed US FTA in some detail, setting out the history of and rationale behind the current negotiations and examining the major concerns raised in evidence before the Committee. The general issues include the adequacy of the economic analysis which has been used to justify entering into the US FTA, including the nature of the information published by the Department of Foreign Affairs and Trade; whether bilateral agreements undermine the multilateral trading system; the relationship of the US FTA to Australia's broader foreign policy and security; the question of trade diversion; and the impact on governments' flexibility and the right to regulate.

1.12 Chapter 6 goes on to consider a number of specific issues about which there was a level of public anxiety and which many consider to be under threat as a result of the negotiation of the US FTA. These issues include Australia's Pharmaceutical Benefits Scheme, the quarantine regime, local content rules in the media, investment and dispute resolution, agriculture and rules of origin.

Ongoing issues

1.13 As indicated in the Preface, as the Committee's report was due to be tabled in November 2003 (prior to completion of the negotiations for the US FTA) it has not been possible for the Committee to examine the US FTA in its final form. For this reason, the Committee has recommended that its review be extended and that the Senate refer the details of the US FTA to the Committee for examination and report once the final contents of the proposed agreement are known, and the text has become available for scrutiny. If the proposed December 2003 deadline for conclusion of negotiations is met, it is expected that the draft will become available in early 2004. The Committee's intention is that it will examine and report on the text of the proposed FTA within the same time frame as the US Congress is conducting its own examination of the treaty.

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Chapter 2

The Trade Debate

2.1 In order to fully understand the current trade debate, a brief summary of the history of trade liberalisation and the creation of the World Trade Organisation (WTO) is in order.[1]

2.2 Following this discussion - and in the context of both the General Agreement on Trade in Services (GATS) and the Australia-US Free Trade Agreement (US FTA) - the Committee also addresses the trade debate in relation to economic development and poverty reduction agendas and the arguments surrounding the relative merits of multilateral trade agreements versus bilateral trade agreements.

From Bretton Woods to the World Trade Organisation

2.3 In July 1944, delegates from 45 nations gathered at the United Nations Monetary and Financial Conference in Bretton Woods, New Hampshire. The delegates met to discuss the postwar recovery of Europe as well as a number of monetary issues, such as unstable exchange rates and protectionist trade policies.

2.4 During the 1930s, many of the world's major economies had unstable currency exchange rates. As well, many nations pursued protectionist trade policies. In the early 1940s, the United States and Great Britain developed proposals for the creation of new international financial institutions that would stabilise exchange rates and boost international trade. There was also a recognised need to organise a recovery of Europe in the hopes of avoiding the problems that arose after the First World War.

2.5 The delegates at the 1944 Conference reached what is known as the Bretton Woods Agreement to establish a postwar international monetary system of convertible currencies, fixed exchange rates and free trade. To facilitate these objectives, the agreement created two international institutions: the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank). The intention was to provide economic aid for reconstruction of postwar Europe. An initial loan of $250 million to France in 1947 was the World Bank's first act.

2.6 Bretton Woods also envisaged the creation of an International Trade Organisation but this was unable to be realised in its initial form as the United States Congress would not endorse it. Instead, it was created later, in 1947, in the form of the General Agreement on Tariffs and Trade (GATT), which was signed by the US and

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1 For this purpose, the Committee has largely drawn from the information contained on the WTO website (www.wto.org). The WTO's official title is World Trade Organization, however, we have used the Australian spelling of 'organisation' throughout this report.

23 other countries including Australia. To a large extent the GATT managed to fill the gap created by the still–born International Trade Organisation and it emerged as the world's *de facto* trade organisation. The GATT was later replaced by the World Trade Organisation.[2]

2.7 The WTO was established in 1995 and built upon the organisational structure that existed under GATT auspices as of the early 1990s. After its creation in 1947, the GATT progressively developed into a system of great complexity. Its reach expanded steadily in response to developments in the world economy and the interests of its signatories.

2.8 Initially limited largely to a tariff agreement, the GATT increasingly came to incorporate negotiated disciplines on non–tariff trade policies, which increased in relative importance as average tariff levels fell. Its success was reflected in a steady expansion in the number of Members, known as contracting parties, because as Members, countries agree to abide by the principles governing the Organisation. During the Uruguay round of trade negotiations (1986-94), some 25 countries joined, bringing the total to 128 in early 1995.

2.9 The WTO is now responsible for administering multilateral trade agreements negotiated by its Members, such as:

- The General Agreement on Tariffs and Trade (GATT);
- The General Agreement on Trade in Services (GATS); and
- The Agreement on Trade-Related Intellectual Property Rights (TRIPs).

2.10 With the 1994 agreement to establish the WTO, the institution was formally transformed into an international organisation of equal standing with the International Monetary Fund (IMF) and the World Bank (as originally intended by the 1944 Bretton Woods conference).

2.11 The WTO itself does not prescribe substantive rules regarding government policies. It is simply a formal institutional structure under whose auspices Members negotiate and implement trade agreements. The rules are contained in the treaties it oversees.

2.12 The basic underlying philosophy of the WTO is that open markets, non-discrimination, and global competition in international trade are conducive to the national welfare of all countries. Indeed, the WTO website states that the WTO's overriding objective is to help trade flow smoothly, freely, fairly and predictably. It does this by:

- administering trade agreements;

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2 http://canadianeconomy.gc.ca/english/economy/1944Bretton_woods.html Canadian Government website.

- acting as a forum for trade negotiations;
- settling trade disputes;
- reviewing national trade policies;
- assisting developing countries in trade policy issues, through technical assistance and training programmes; and
- cooperating with other international organizations.

2.13 The multilateral trading system overseen by the WTO operates on a number of principles.

1. Most–favoured nation (MFN): treating other countries equally. Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members (some exceptions are allowed). In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners—whether rich or poor, weak or strong.

2. National treatment: Treating foreigners and locals equally. Imported and locally-produced goods should be treated equally—at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents.

3. Freer trade: gradually, through negotiation. Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively. From time to time other issues such as red tape and exchange rate policies have also been discussed.

4. Predictability: through binding agreements and transparency. With stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition - choice and lower prices. The multilateral trading system is an attempt by governments to make the business environment stable and predictable.

5. Promoting fair competition: The rules on non-discrimination—MFN and national treatment—are designed to secure fair conditions of trade. So too are those on dumping (exporting at below cost to gain market share) and subsidies. The issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by any unfair practices of a trading partner.

6. Encouraging development and economic reform: The WTO system contributes to development. Over three quarters of WTO members are

developing countries and countries in transition to market economies. They need flexibility in the time they take to implement the system's agreements.

Trade for development and poverty reduction

2.14 Trade has long been advocated as a catalyst for economic growth and development, including a more recent focus on its ability to assist in poverty reduction. In fact, the opening line of the Doha Ministerial Declaration adopted on 14 November 2001 states that '[t]he multilateral trading system embodied in the World Trade Organisation has contributed significantly to economic growth, development and employment throughout the past fifty years.' This Declaration forms the basis of what is now known as the Doha Development Agenda.

2.15 The Declaration also states that '[i]nternational trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognise the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates.' In this context, members of the WTO in the Doha negotiations consider enhanced market access, balanced rules and well targeted, sustainably financed technical assistance and capacity–building programs have important roles to play.

2.16 The other institutions born of the Bretton Woods Agreement—the World Bank and the International Monetary Fund—also aim to promote an international trading system that is conducive to economic development.

2.17 It is no coincidence that the Doha Agenda is so closely linked to development. During the 1990s, a number of development goals were set out by international conferences and summits which were later brought together as the International Development Goals. In September 2000, the member states of the United Nations unanimously adopted the Millennium Declaration. Following consultations among international agencies, including the World Bank, the IMF, the OECD, and the specialised agencies of the United Nations, the General Assembly recognised the International Development Goals (to become known as the Millennium Development Goals) as part of the road map for implementing the Millennium Declaration.[3] The eight Millennium Development Goals are:

1. Eradicate extreme poverty and hunger
2. Achieve universal primary education
3. Promote gender equality and empower women
4. Reduce child mortality
5. Improve maternal health

3 For more detailed information, see the World Bank Group website: http://www.developmentgoals.org/About_the_goals.htm

6. Combat HIV/AIDS, malaria and other diseases

7. Ensure environmental sustainability

8. Develop a global partnership for development.

2.18 Australia's foreign affairs and trade policy White Paper, *Advancing the National Interest* was released by the Minister for Foreign Affairs on 12 February 2003. Chapter Four of the White Paper outlines Australia's desire to build prosperity through market liberalisation. The White Paper states that Australia shares many of the interests of developing countries, particularly the desire for improved market access in agriculture and the concern that new rules not be disguised protection.[4]

2.19 As well as the White Paper, DFAT has published additional material highlighting the beneficial effect of trade on development and poverty reduction. DFAT states that a study of 73 developing countries, including China, India, Brazil, Mexico, Malaysia and the Philippines, found that those countries increasing their openness to trade have grown on average faster than those that did not, and faster than most rich countries. In addition, between 1993 and 1998, the number of people living in absolute poverty in developing countries that opened themselves to trade declined by 14 per cent. By contrast, in developing countries that did not open themselves to trade, poverty rose by 4 per cent between 1993 and 1998.[5]

2.20 The Committee notes that these sorts of claims have themselves come under challenge from well-respected economists. For example, Nobel laureate Joseph Stiglitz—an advocate of trade liberalisation, but critic of its unbalanced implementation—has said of a liberalising/privatising Latin America that: 'Little if any progress has been made in reducing inequality… and the percentages, let alone numbers, in poverty actually increased'.[6]

2.21 The DFAT publication also states that the Australian Government understands that the pace of change is a challenge for many developing countries. For this reason, the Australian Government's overseas aid program is concerned with helping developing countries to develop their economies and build stronger institutions in order to manage the economic and social impact of globalisation. This involves preferential access to the Australian market for developing and less developed countries, and funding for education and infrastructure projects so countries can identify economic opportunities and participate more effectively in international trade and investment organisations.

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4 Department of Foreign Affairs and Trade, *Advancing the National Interest*, p. 55.

5 Department of Foreign Affairs and Trade, *Trade, Development and Poverty Reduction* (http://www.dfat.gov.au/trade/fs_tap_reduction.html). See also, Department of Foreign Affairs and Trade, *Advancing the National Interest*, p. 27.

6 Stiglitz, J, *Development Policies in a World of Globalisation* Paper presented at the fiftieth anniversary of the Brazilian Economic and Social Development Bank, Rio de Janeiro, (12 September, 2003), p. 1.

2.22 In addition, Australia has multi–year trade–related aid commitments totalling over $200 million. In 2002–03 approximately $28 million is to be spent helping poor countries to improve their trade policy skills, enhance tariff, taxation, customs and quarantine regimes, and strengthen trade and tourism promotion. Some examples of these programs include:[7]

- Training trade negotiators from Africa and the Asia Pacific;
- Assisting the Indonesian Government to improve its ability to manage its trade policy;
- Assisting Papua New Guinea to manage its ports and customs;
- Funding a program to help smaller developing countries—particularly small island states—to participate in the Doha negotiations, by funding an office in Geneva to give countries without representation in Geneva, access to up to date information on the negotiations;
- Contributing to the WTO Global Trust Fund—set up to ensure that developing country members of the WTO can take full advantage of the opportunities offered by the Doha negotiations; and
- Improving South East Asian countries' capacity to cope with the institutional and regulatory requirements of the global trading system through a $3 million Regional WTO Capacity Building Project.

2.23 Joseph Stiglitz, cited earlier, was formerly Senior Vice–President and Chief Economist of the World Bank. He considers the gap between the developed and the less developed countries to be growing and that the international community is doing too little to narrow that gap. Stiglitz suggests that as developing countries take steps to open their economies and expand their exports, they are increasingly confronted with significant trade barriers or face protected or restricted markets in their areas of natural comparative advantage.[8]

2.24 Whilst Stiglitz has no doubt that trade liberalisation will be of benefit to developing countries and the world more generally, he does suggest that trade liberalisation must conform to a balanced agenda, and observe processes and outcomes that take into account the concerns of the developing world. Indeed, in more recent articles Stiglitz has delivered stinging critiques of what he calls 'the Washington consensus policies' of liberalisation, privatisation and stabilisation as these policies are thrust upon developing countries by advanced nations.[9]

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7 Department of Foreign Affairs and Trade, *Trade, Development and Poverty Reduction* (http://www.dfat.gov.au/trade/fs_tap_reduction.html)

8 Stiglitz, J *Two Principles for the Next Round, Or, How to Bring Developing Countries in from the Cold*, 21 September 1999. (www.worldbank.org/knowledge/chiefecon/articles/geneva.htm)

9 Stiglitz, J *Development Policies in a World of Globalisation.* Paper presented on the occasion of the 50th anniversary of the Brazilian Economic and Social Development Bank, Rio de Janeiro, September 2002.

2.25 Some economists have concluded that there are no examples of countries that have achieved strong growth rates of outputs and exports following wholesale liberalisation policies'.[10] Further:

> This holds not only in recent times, but even in the distant past when the currently rich countries were themselves climbing the ladder of success. For they themselves relied heavily on trade protection and subsidies, ignored patent laws and intellectual property rights, and generally championed free trade only when it was to their economic advantage. Indeed, the rich countries do not follow many of these policies even today.[11]

2.26 The IMF itself conceded in a report of 2002 that 'contrary to the rosy predictions of its theoretical models, a systematic examination [of] the empirical evidence leads to the 'sobering' conclusion that 'there is no proof in the data that financial globalisation has benefited growth' in developing countries'.[12] More recently, an IMF study dated March 17, 2003 and titled *Effects of Financial Globalisation on Developing Countries: Some Empirical Evidence*, has gone even further. It recognises that 'an objective reading of the vast research effort to date suggests that there is no strong, robust and uniform support for the (neo–liberal) theoretical argument that financial globalisation per se delivers a higher rate of economic growth'.[13]

2.27 The Committee notes that these remarks focus on financial issues, rather than trade in goods and services, but they prompt a pause for reflection. It is certainly the case that investment issues are a matter of considerable contention in the Doha Round.

2.28 What is true is that the world's more developed countries—the US, EU and Japan, heavily protect their agricultural sectors and, in the case of the US, their textile

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10 Manuel R. Agosin and Diana Tussie, 'Trade and Growth: New Dilemmas in Trade Policy—An Overview', ch. 1 in *Trade and Growth: New Dilemmas in Trade Policy*, St. Martin's Press, 1993, and Dani Rodrik, *The Global Governance of Trade: As if Trade Really Mattered*, United Nations Development Program, 2001, cited in *Globalisation and the Myth of Free Trade*, paper for the Conference on Globalisation and the Myth of Free Trade, New School University, New York, April 2003.

11 Manuel R. Agosin and Diana Tussie, 'Trade and Growth: New Dilemmas in Trade Policy—An Overview', ch. 1 in *Trade and Growth: New Dilemmas in Trade Policy*, St. Martin's Press, 1993, and Dani Rodrik, *The Global Governance of Trade: As if Trade Really Mattered*, United Nations Development Program, 2001, Anwar Shaikh, *Globalisation and the Myth of Free Trade*, paper for the Conference on Globalisation and the Myth of Free Trade, New School University, New York, April 2003.

12 International Monetary Fund, *Effects of Financial Globalisation on Developing Countries: Some Empirical Evidence,* Eswar Prasad, Kenneth Rogoff, Shan–Jin Wei, and M. Ayhan Kose, March 2002, cited in Anwar Shaikh, *Globalisation and the Myth of Free Trade*, paper for the Conference on Globalisation and the Myth of Free Trade, New School University, New York, April 2003.

13 Report available at http://www.imf.org/external/np/res/docs/2003/031703.pdf

sector. These are sectors where developing countries typically have a competitive advantage. High levels of protection and subsidies mean that developing countries cannot sell their goods to developed countries but, if the former are made to open their economies, they end up importing more goods from developed countries.

2.29 Developing countries have for some time been proclaiming their disadvantage in the face of what they regard as trade policies and arrangements devised to favour the globalised aspirations of the advanced economies. The following accounts illustrate the kinds of disadvantages and difficulties encountered by developing countries seeking to function within the global trading environment.

> The linking of [non–tariff issues, competition policy etc.] to trade clearly work against developing countries that are trying to integrate into the world economy. They will continually find market access into several developed countries more restrictive as non tariff barriers are put up. Thus there is every reason for Malaysia and other developing countries to be suspicious of the motives for linking extraneous issues to trade.[14]

> The waste of money is grotesque. Last year the West paid out $US318 billion—five times more than it spent on foreign aid—to subsidise and protect its farmers, mostly against farmers in developing countries. In Japan, Korea, Switzerland and Norway, 60 to 70 per cent of farmers' income came from subsidies and protection. The European Union pays $US2 a day in subsidies to every cow, yet most people in the world live on less than that. The United States pays its 25,000 cotton farmers $US3.9 billion a year, three times as much as US aid to the 500 million people of Africa.[15]

> In the United States, the case for infant industry protection was made in 1791, in the famous report by Hamilton to the Congress. Hamilton argued that 'since international trade is not free, Europe is more advanced in manufacturing and its industries enjoy government aids'.. then if the United States followed free trade, it would suffer from 'unequal exchange' because competition with established manufacturers of other nations on equal terms is impracticable; and that 'it is for the United States to consider by what means they can render themselves least dependent on the combinations, right or wrong, of foreign policy'. Interestingly, many developing countries make the same point today. But then they are labelled as going against the powerful and benign forces of globalisation and market reforms which, in the unforeseen long term, are assumed to benefit the people—however hard and tough, or even painful, the immediate adjustments may be.[16]

2.30 Some evidence received by the Committee suggested that the pursuit of trade liberalisation is at the expense of developing countries and disadvantaged peoples and

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14 Paper presented by Mr M. Suppermaniam, Deputy Secretary General (Trade), Malaysian Ministry of International Trade and Industry Langkawi, 12–14 November, 1999.

15 Colebatch, T, 'Let's trade a biased system for a more balanced set of rules' *The Age,* 9 September 2003.

16 Available at http://www.sunsonline.org/trade/process/followup/1999/01270299.htm

little room is made to accommodate the needs of developing countries. For example, ATTAC Australia informed the Committee that a large group of developing countries requested some very basic rules of procedure before and during WTO negotiations. These included consistent procedure for decision making; that drafts should be based on consensus; that there be enough time to consider any changes; and that the secretariat and meeting chairpersons should remain impartial to the various positions. ATTAC stated that these requests were rejected by a group of developed countries, led by Australia, citing a preference for flexibility.[17]

2.31 The Committee regards this evidence as illustrative of the obvious disadvantage that developing countries face in multilateral trade negotiations.[18] On the face of it, the Committee does not consider these requests to be unreasonable. In fact, Australia's apparent stance in relation to these requests appears to be inconsistent with a number of Australia's trade related aid commitments listed above. The Committee strongly suggests that in future negotiations Australia should be both supportive and accommodating of similar requests.

Recommendation 1

2.32 **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.**

GATS and the development agenda

2.33 DFAT advised the Committee that the GATS can be described as a 'development friendly' agreement that takes into consideration the needs and concerns of developing countries.[19] DFAT considers this interpretation to stem in large part from the Uruguay Round negotiations, during which it was made clear that services industries in developing countries remained underdeveloped and that special consideration would have to be given to promote the development of services industries in these countries. For example, Article XIX.2 of the GATS provides that there should be greater flexibility for individual developing country Members to open fewer sectors, liberalise fewer types of transactions, and to extend market access progressively in line with their development situation, which may include the

17 *Committee Hansard*, 23 July 2003, p. 334 (ATTAC). See also, p. 336 (AID/WATCH); and *Tabled document* 4, 23 July 2003 (ATTAC)

18 For example, 19 of the 42 African WTO members have no trade representative at WTO headquarters in Geneva. In contrast, the average number of trade officials from OECD countries is just under seven. See, Joseph E. Stiglitz, *Two Principles for the Next Round, Or, How to Bring Developing Countries in from the Cold*, 21 September 1999 www.worldbank.org/knowledge/chiefecon/articles/geneva.htm

19 *Submission* 54, p. 26 (DFAT)

attachment of certain conditions to access commitments in accordance with the objectives referred to in Article IV (Increasing Participation of Developing Countries).

2.34 The Australian Fair Trade and Investment Network (AFTINET) acknowledges that DFAT formulates and disseminates its development policies as a function of AusAID's work. But AFTINET considered it unfortunate, particularly in contrast to countries such as Canada and New Zealand, that DFAT's discussion paper on the GATS revealed that AusAID's development goals do not play any role in Australia's position on the GATS negotiations:

> The discussion paper does not address the issue of how Australia's approach to the GATS negotiations fits within Australia's foreign policy objectives regarding developing countries, which is particularly striking given the effect that Australia's requests might have on these countries. Other countries have incorporated development policies into their approach to the GATS negotiations. Canada and New Zealand, for example, both cite particular measures they have adopted within their GATS strategy to take account of the impact of GATS on least developed countries.[20]

2.35 The Committee notes that the need to take into account the concerns of developing countries is reflected in the Guidelines and Procedures for the Negotiations on Trade in Services, which was adopted by the Council of Trade in Services on 28 March 2001. The Council asserted that the process of liberalisation would take place with due regard for national policy objectives, the level of development and the size of economies of individual members, both overall and in individual sectors. Proper consideration would be given to the needs of small and medium-sized enterprises (SME) service suppliers, especially those of developing countries.[21]

2.36 DFAT explained that the 'Doha Development Agenda' reflects the widely-accepted need to move developing countries' concerns toward the centre of the WTO's work and in an important development, service negotiators agreed to modalities for autonomous liberalisation. This enables WTO members, particularly developing countries, to claim negotiating credit for any reform (autonomous liberalisation) which countries have undertaken. Such credit would be claimed on a bilateral basis.

2.37 DFAT identified a number of common elements as being relevant to enhancing the participation of service suppliers from developing countries in global trade in services. While DFAT considers some of these elements act as market access barriers, others are conditions affecting the performance capacity of suppliers from developing countries. These include:

- Access to technology

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20 *Submission* 42, pp. 14–15 (AFTINET)

21 *Submission* 54, p. 26 (DFAT)

- Sound and reliable banking and financial structure, with adequate prudential measures
- Capacity of SMEs to compete internationally
- Access to information networks
- Regional integration
- Transparent legal and institutional frameworks.

2.38 The United Nations Committee on Trade and Development (UNCTAD) has estimated that the importance of services in the economies of developing countries has steadily increased to over 50 per cent of GNP with services providing more than half of the employment opportunities in developing countries. The Committee notes however, that in general, the majority of these jobs are in the more labour-intensive but lower-skilled tourism sector rather than the more highly-skilled services sectors such as financial, legal, accounting and similar services.

2.39 A submission from International Trade Strategies Pty Ltd stated that developing countries are likely to benefit significantly from further liberalisation of trade in services. International Trade Strategies suggested that liberalisation provides opportunity for officials to advance commitments to permit competition from foreign providers of services which advance reform of the domestic economy and that in effect, GATS offers developing countries the *only* enforceable global framework for growing their services trade opportunities in the future.[22]

2.40 DFAT also highlighted a number of areas of importance to developing countries in the context of GATS negotiations that would be of benefit to developing countries, or where developing countries could best utilise their comparative advantage. These included the temporary movement of people who provide services (or 'movement of natural persons' known as Mode 4); lowering price and improving quality and creating the optimal conditions to attract foreign direct investment.[23]

2.41 Unfortunately, when questioned on ways in which developing countries could utilise the full potential of their comparative advantage by lowering prices and improving quality of services, DFAT was only able to point to the apparent benefits of liberalisation of services trade and implementation of effective regulatory measures rather than practical ways in which developing countries could achieve this. In relation to how Australia was assisting developing countries in this regard, DFAT made the following comments:

> Australia has a relatively open and liberal services sector offering trade opportunities for developed and developing countries alike. Australia has also made commitments in a number of service sectors which are of interest to niche suppliers of services based in developing countries. Australia also has a relatively liberal Mode 4 entry regime which assists the temporary entry of experts and

22 *Submission* 30, p. 3 (International Trade Strategies Pty Ltd)

23 *Submission* 54, pp. 27–29 (DFAT)

> specialists based in developing countries. In addition Australia is engaged in outreach activities that aim to enhance technical analysis and capacity building capabilities in developing countries.[24]

2.42 Specifically in relation to the Mode 4 entry regime, DFAT stated that 'a large proportion of services export income in developing countries is derived from Mode 4'. That is, six of the top ten countries receiving workers' remittances were developing countries. DFAT also highlighted the issue that developing countries' comparative advantage is in the movement of low and semi-skilled labour services but that the chief industry sectors of many developed countries are capital-intensive industries which results in the entry of low–skilled workers being restricted.

2.43 Australia's initial offer in services is aimed at supporting the overall trade objective of liberalising trade in areas of importance to Australia and the Committee acknowledges that, under the GATS, offers lodged by Members are applicable to services and service suppliers of all Members, both developed and developing. However, DFAT highlighted some very real benefits to developing countries through the movement of low-skilled workers and whilst Australia's existing commitments under Mode 4 are very facilitative of genuine business movements, they do not address this issue.

2.44 The Committee has visited this issue in some detail in a recent inquiry into Australia's relations with Papua New Guinea and the Island States of the South-west Pacific. That inquiry resulted in the Committee recommending a pilot program to allow low–skilled workers from throughout Papua New Guinea and the Pacific to access the Australian job market, predominately in the areas of fruit–picking and the like. The Committee notes that the Government has not yet responded to the recommendations of that inquiry and awaits that response.

2.45 AFTINET also drew attention to the objective of promoting prosperity in developing countries outlined in *Advancing the National Interest*. However, AFTINET suggested that, if this is a genuine goal, it should be reflected in the approach taken towards trade relations with developing countries and should include recognition of the importance of developing countries maintaining a capacity to regulate and discriminate against foreign investors and corporations, so as to have some control over the development process.[25]

2.46 In addition, ATTAC Australia believes that the GATS will have a considerable impact on the fragile economies of the developing world and that therefore Australia should take a more responsible position by considering the effects of any negotiating position on developing countries as opposed to simply being concerned about what Australia can get out of the GATS.[26]

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24 *Answers to Questions on notice*, Question 25, p. 2 (DFAT)

25 *Submission* 42, p. 15 (AFTINET)

26 *Submission* 56, p. 4 (ATTAC Australia)

2.47 A similar position was put to the Committee by AID/WATCH, suggesting that there is widespread community concern over the impact of this economic agenda on the Third World. AID/WATCH considered the benefits to developing countries to be unclear.[27] During GATS negotiations in Geneva and elsewhere, developing countries have been expressing their frustration at what they see as the imbalance and lack of fairness in the offers being made by developed countries and also at the apparent reluctance to provide market opportunities to developing countries in those sectors where they may have an advantage.

> Developing countries … have voiced their unhappiness with the lack so far of agricultural liberalisation commitments by developed countries, particularly the Europeans. They do not see why they should make significant commitments in services if they are not to benefit from market access in agriculture.… Indonesia, Malaysia, Thailand and the Philippines, have been frustrated at the negative response, particularly from developed countries, to their request for establishing an emergency safeguard mechanism for services. … Several developing countries have also been pushing for meaningful improvement for increased market access in movement of natural persons (Mode 4). They point to the imbalance of developed countries piling on the pressure on developing countries to commit to give commercial presence to their firms in a wide range of sectors (under Mode 3 of GATS) whilst they (the developed countries) themselves are not making any commitments on liberalising Mode 4.[28]

2.48 Detailed consideration of domestic concerns raised by the GATS is given in Chapters 4 and 5.

Multilateral v bilateral trade agreements

2.49 A prominent concern raised by witnesses and submitters was that Australia's negotiation of a free trade agreement with the United States of America would be detrimental to current multilateral trade and service negotiations by undermining the principles of the multilateral trading system through the WTO. For example, AFTINET suggested that the negotiation of a bilateral trade agreement with the US 'carries the danger of undermining Australia's policy support for, and credibility in, multilateral negotiations'.[29] Professor Ross Garnaut also stated that the negotiation of an FTA with the US at this time 'would accelerate the weakening of the multilateral trading system that is currently in process by adding to momentum for development of discriminatory free trade areas and by diverting focus from multilateral trade negotiations'.[30]

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27 *Committee Hansard*, 23 July 2003, p. 339 (AID/WATCH)

28 See TWN Report by Martin Khor, Geneva 12 July 2003. Available at http://www.tebtebba.org/tebtebba_files/finance/slowly.rtf

29 *Submission* 42, p. 48 (AFTINET)

30 *Committee Hansard*, 22 July 2003, p. 197 (Garnaut)

2.50 The debate is explored in more detail in Chapter 6 dealing with the Australia-US Free Trade Agreement. What follows is a brief overview of the argument.

2.51 The suggestion that negotiation of an FTA with the US will undermine the multilateral trading system or signal a lessening of Australia's commitment to the WTO and multilateral liberalisation was strongly contested by DFAT. DFAT believed such arguments appeared to ignore, among other things, the following:

> FTAs are sanctioned by the WTO … if they are comprehensive and trade creating…;
>
> FTAs can help the WTO system to generate momentum by liberalising difficult sectors among a few countries…[31]

2.52 These arguments were also supported by the Cattle Council of Australia who stated that 'a successful AUS-US FTA could benefit both Australian and US beef producers as it would increase the pressure on countries such as the EU, Korea and Japan in the next Round of WTO multilateral negotiations'.[32]

2.53 The Committee notes the arguments made by DFAT above, but notes also that some of these points have been contested, and some clarification may be required. For example, FTAs are sanctioned by the WTO only if they are compliant with the WTO constitution. A better example of FTAs generating momentum for the multilateral round may be the North American Free Trade Agreement and the Uruguay Round.

2.54 The Government is pursuing a combined multilateral, regional and bilateral approach to trade policy suggesting that Australia may be 'left behind' if it does not negotiate free trade agreements in tandem with multilateral negotiations:

> Many other countries are in the process of negotiating or seeking free trade agreements with our trading partners. This could pose risks to our interests if our competitors were to gain preferential access to our export markets. It is possible, too, that investment might be diverted from Australia to other countries that have negotiated preferential access with each other. Inaction as others negotiate free trade agreements could risk an erosion of our competitive position in those markets.[33]

2.55 DFAT considers free trade agreements that are comprehensive in scope and coverage can complement and provide momentum to Australia's wider multilateral

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31 *Submission* 54, pp. 39-40 (DFAT)

32 *Submission* 63, p. 3 (Cattle Council of Australia). See also, *Submission* 47, pp. 26–27 (AUSTA Business Group)

33 Department of Foreign Affairs and Trade, *Advancing the National Interest*, p. 59

trade objectives. DFAT stated that one of the best ways of ensuring this occurs is for agreements to meet the criteria in the WTO agreements.[34]

2.56 However, Professor Garnaut expressed concern that pursuit of free trade agreements is discriminatory (in economic terms) and contrary to WTO criteria and the fundamental 'most favoured nation' principle. Professor Garnaut believed such moves add to the weakening of the multilateral system, and was concerned that exceptions to the 'most favoured nation' principle were becoming 'the game that is getting all the energy'.

> The most favoured nation principle became the first article of the GATT. A shared understanding that trade relations should be on a most favoured nation basis is really the first vehicle for carrying forward this idea. Institutionally, the idea is embodied in Article I of the World Trade Organisation, the most favoured nation clause, which is based on the old GATT. Of course the GATT included Article XXIV, which was to provide an exception to the most favoured nation clause. That exception was introduced to keep open the possibility of developments in Europe that were desirable for political reasons—the developments that became the European Union. But the founding fathers—I think they were all fathers, not mothers—of the GATT and the WTO never envisaged that Article XXIV would become the main game.[35]

2.57 The Committee also notes arguments that suggest that, with the more recent focus on regional and bilateral trade agreements, there is a risk that Australia and the world may see the emergence of the same global tensions that applied prior to the Bretton Woods Agreement. Such a situation may see deepening political divisions and Australia being excluded from certain trade blocs with enormous economic consequences.

> [If] trade discrimination becomes the norm and if one decides who to favour and who to exclude, partly on political grounds—countries that seem to be political friends at a point in time—there is a danger that political divisions will be entrenched and deepened. There is a danger that at this time, when more than ever we need trust and cooperation across the civilisations of the world to defeat the scourges of terrorism, we will entrench some important divisions in the international community.
>
> In our region there is a danger that we will end up over time—not tomorrow but over time—with a division down the Pacific, with us being part of a block with the United States and most of East Asia having discriminatory arrangements amongst themselves that leave us out. That would obviously have horrific economic consequences for us. The economic consequences would be much smaller for the United States and Europe, but they would be huge for us, because they are our main export markets. In addition, there is a

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34 See DFAT website: www.dfat.gov.au/trade/negotiations/australias_approach.html. See also, Department of Foreign Affairs and Trade, *Advancing the National Interest*, pp. 58–63

35 *Committee Hansard*, 22 July 2003, p. 198 (Garnaut). See also, *Submission* 70 (Capling)

> danger that that would make cooperation more difficult on the many things that we have to cooperate on at this difficult time in the world.[36]

2.58 The Committee acknowledges that it is inherent in bilateral and regional free trade agreements that the MFN principle is not followed. However, the Committee notes that APEC, a regional economic forum that Australia helped establish, is based on the principle of 'open regionalism'. In other words, what progress APEC makes in opening up markets in member economies is then automatically shared with the world on an MFN basis. This approach strengthens the multilateral system and prevents the Asia Pacific region from becoming an exclusive economic club. APEC's goals, to which Australia is committed, are for free trade within the region by 2010 for developed countries and 202 for developing countries. The Committee further considers the impact of bilateral agreements on the multilateral trading system and other elements of the US FTA in Chapter 6.

36 *Committee Hansard,* 22 July 2003, p. 202 (Garnaut)

Chapter 3

Treaties and the parliamentary process

3.1 An issue which was a recurring theme in a number of submissions made to the Committee was concern about the lack of parliamentary involvement in Australia in the process of negotiating trade agreements, whether on a multilateral or bilateral basis.

3.2 The structure of the political system in Australia means that it is the role of the executive government to negotiate international treaties. The parliament's role is confined to the passing of legislation which is necessary domestically to give effect to the provisions of the treaty. A parliamentary committee examines and reports to the parliament on the treaty, but cannot amend it.

The Constitution and the treaty–making process

3.3 Under the Australian Constitution, there are two different powers relevant to the treaty-making process. The power to enter into treaties is an executive power, conferred by section 61 of the Constitution. The power to implement treaties however is a legislative power, contained in section 51(xxix) of the Constitution.[1]

3.4 Section 61 of the Constitution states as follows:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor–General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

3.5 Whilst this section does not specifically refer to the power to enter into treaties, it is regarded as well settled by the High Court that this power resides with the Executive.[2]

3.6 Section 51(xxix) of the Constitution confers on the Commonwealth parliament the power to legislate with regard to 'external affairs'. This has been interpreted by the High Court to mean that the Commonwealth parliament may

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1 See Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995, p. 45. Chapter 4 of this report discusses in some detail the constitutional power to enter into and implement treaties, as well as the history of the executive power to make treaties.

2 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995, p. 46.

legislate under this section to implement in domestic law a treaty which has been entered into by the Executive pursuant to its power in section 61 of the Constitution.[3]

3.7 The Department of Foreign Affairs and Trade's (DFAT) Australia and International Treaty Making Information Kit[4] notes that it is generally accepted that such legislation will be constitutionally valid if it is reasonably appropriate and adapted to giving effect to a treaty. In some specific cases, the government may rely on the trade and commerce power (s.51(i)) as well as the external affairs power. In other cases, there may be no need to rely on the external affairs power, because the subject of the treaty lies within other Commonwealth powers or because State and Territory governments will enact appropriate legislation.

3.8 As indicated above, the decision to enter into a treaty is one which is made by the Executive, rather than the parliament. Decisions about the negotiation of multilateral conventions, including determination of objectives, negotiating positions, parameters within which the Australian negotiators can operate and the final decision about whether to sign and ratify are taken at ministerial level, and in many cases, Cabinet.[5]

3.9 DFAT states that Australia's constitutional system ensures that checks and balances operate, through the parliamentary process of examining all proposed treaty actions and in passing the legislation required to give effect a treaty. DFAT points out that this 'efficiency and certainty of process enables the government to negotiate with its overseas counterparts with authority and credibility, and contributes to Australia becoming a source of influence in the treaty's negotiation.'[6]

3.10 Although there is no formal role set out in the Constitution for parliament in the treaty–making process, DFAT points out that the processes of the Joint Standing Committee on Treaties (outlined below) involve tabling treaties in parliament for at least 15 sitting days, prior to binding treaty action being taken. However, a treaty is generally tabled *after* it has been signed for Australia but before any action is taken which would bind Australia under international law.

3.11 Negotiations for major multilateral treaties are often lengthy and quite public, which means there are opportunities for parliamentary debate, questions on notice and questions without notice as the issues become publicly known. In addition, it is

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3 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties,* November 1995, p. 46. Chapter 5 of this report discusses the evolution of the High Court's interpretation of the 'external affairs' power.

4 Department of Foreign Affairs and Trade (DFAT) *Australia and International Treating Making Information Kit* (2002) p. 7. Available at http://www.austlii.edu.au/au/other/dfat/infokit.html accessed 28 October 2003. The following paragraphs are drawn from this publication.

5 DFAT, *Australia and International Treaty Making Information Kit* (2002), p. 4.

6 DFAT, *Australia and International Treaty Making Information Kit* (2002), p. 4.

argued, there is the opportunity for further debate on any implementing legislation which is required as a result of the treaty.[7]

3.12 The government's determination with regard to whether to become a party to a treaty or not is based on an assessment of what is in Australia's national interest. What is in the national interest is decided on the basis of information obtained in consultations with relevant sections of the community. The practice is to provide public information about the treaty being considered, and if possible, develop a consensus within the community before taking definitive treaty action. This inevitably involves balancing a range of competing interests.[8]

3.13 Generally speaking, included in the consultations are State and Territory governments, which are a primary focus, and industry and other interest groups, including non-government organisations (NGOs). There is a range of formal and informal consultation processes involved, which are outlined in a general way below.

The 1996 reforms

3.14 In recognition of the need for greater openness and transparency in the treaty-making process, the government implemented a number of reforms to the existing processes in mid–1996. These reforms included the establishment of the Treaties Council, the formation of the parliamentary Joint Standing Committee on Treaties (JSCOT) and the establishment of the Australian Treaties Library. The Commonwealth–State–Territory Standing Committee on Treaties (SCOT) is another important consultation mechanism.[9]

3.15 The peak consultative body is the Treaties Council, the members of which are the Prime Minister, the Premiers of the States and the Chief Ministers of the Territories. The aim of the Council is to facilitate high-level consultation between the States and Territories and the Commonwealth, and allow States and Territories to draw to the Commonwealth's attention treaties of particular sensitivity and importance to them. The Council meets as agreed by the Commonwealth and the States and Territories.

3.16 The SCOT meets twice a year and plays a coordinating role for the Treaties Council. The SCOT is comprised of officers representing the Premiers' and Chief Ministers' Departments of the States and Territories, and officers from the Commonwealth Departments of Prime Minister and Cabinet, Foreign Affairs and Trade, and Attorney General's. This committee receives a Treaties Schedule on a quarterly basis, listing all international treaties that Australia is currently negotiating or which or under review. The SCOT process allows State and Territory

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7 DFAT, *Australia and International Treaty Making Information Kit* (2002), p. 5.

8 DFAT, *Australia and International Treaty Making Information Kit* (2002), p. 5.

9 See DFAT, *Australia and International Treaty Making Information Kit* (2002), pp.21–34 for a detailed discussion and evaluation of the reforms undertaken in 1996.

representatives to seek further details, offer views and comments and flag any matters on which they wish to be consulted or improve consultation mechanisms.[10]

3.17 The Australian Treaties Library is an internet database established by DFAT in conjunction with the Australasian Legal Information Institute.[11] The Treaties Library is one of the world's most complete, freely available national databases of treaty information, and is regarded as very successful innovation. It contains a wide range of documents and information about treaties including:

- all treaties in force for Australia;
- National Interest Assessments for all tabled treaties;
- lists of multilateral treaties under negotiation; and
- treaties signed, but not yet in force, for Australia.[12]

Joint Standing Committee on Treaties

3.18 The parliamentary Joint Standing Committee on Treaties (JSCOT) was established in 1996, its role being to review and report on all treaty actions proposed by the government before action is taken which binds Australia to the terms of the treaty.[13]

3.19 The Committee's resolution of appointment empowers it to inquire into and report on:

a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the parliament;

b) any question relating to a treaty or other international instrument whether or not negotiated to completion, referred to the committee by:

   i) either House of parliament; or

   ii) a Minister; and

c) such other matters as may be referred to the committee by the Minster for Foreign Affairs on such conditions as the Minister may prescribe.

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10 DFAT, *Australia and International Treaty Making Information Kit* (2002), p. 6.

11 See http://www.austlii.edu.au/au/other/dfat/, accessed 29 October 2003.

12 DFAT, *Australia and International Treaty Making Information Kit* (2002), p. 26.

13 This section on the role of JSCOT is drawn from the Joint Standing Committee on Treaties web page detailing the establishment, role and history of the Committee, at http://www.aph.gov.au/house/committee/jsct/ppgrole.htm, accessed 29 October 2003.

3.20 The current treaty-making process requires that all treaty actions proposed by the government are tabled in parliament for a period of at least 15 sitting days before action is taken that will bind Australia at international law to the terms of the treaty.

3.21 The term 'treaty actions' has a broad meaning. It covers bilateral and multilateral agreements and encompasses a range of actions including entering into new treaties, amendments to existing treaties and withdrawal from treaties. The exception to the rule that treaties be tabled before binding action is taken is where the Minister for Foreign Affairs certifies that a treaty is particularly urgent or sensitive, involving significant commercial, strategic or foreign policy interests.

3.22 When tabled in parliament, the text of a proposed treaty action is accompanied by a National Interest Analysis (NIA) which explains why the government considers it appropriate to enter into the treaty. An NIA includes information about:

- the economic, social and cultural effects of the proposed treaty;
- the obligations imposed by the treaty;
- how the treaty will be implemented domestically;
- the financial costs associated with implementing and complying with the terms of the treaty; and
- the consultation that has occurred with State and Territory governments, industry and community groups and other interested parties.

3.23 The text and the NIA for each proposed treaty are automatically referred to the JSCOT for review. The Committee advertises its review in the national press and on its website, inviting comments from anyone with an interest in the subject matter of the proposed treaty. The JSCOT routinely takes evidence at public hearings from government agencies and people who have made written submissions.

3.24 When its inquiries have been completed, the JSCOT presents a report to parliament containing advice on whether Australia should take binding treaty action and on other related issues that have emerged during its review.

3.25 The JSCOT has also conducted seminars designed to improve public awareness of the opportunities that exist for community involvement in the process of making and reviewing Australia's international treaty obligations.[14]

Consultation and parliamentary scrutiny of treaties

3.26 The Committee acknowledges the work that has been done, in particular since the reforms introduced by the government in 1996, to ensure that the treaty–making process is more open, transparent and systematic, and that there is a greater level of

14 Further information on these seminars, held in 1999 and 2000, can be found at the JSCOT website: http://www.aph.gov.au/house/committee/jsct/index.htm

parliamentary involvement than there has been in the past as a result of the creation of the JSCOT. In the main, the reforms undertaken are regarded as having been successful in enhancing the level of public awareness of Australia's participation in the treaty–making process and improving the accessibility of information to the general public about treaties through the development of the Treaties Library.

3.27 The Committee accepts, too, that DFAT has made efforts to increase the level of public consultation as part of the treaty-making process. The particular consultations undertaken in the context of the GATS and the US FTA are discussed in detail in Chapters 5 and 6.

3.28 Notwithstanding these successful reforms, it was apparent from evidence received by the Committee that there remains a level of concern that, particularly with regard to trade agreements, there is insufficient consultation and community involvement in the treaty–making process and inadequate opportunities for parliamentary scrutiny of proposed treaties *prior* to signature by Australia – as opposed to *following* signature but *prior* to any action which binds Australia in international law (i.e., ratification).

3.29 The Victorian Trades Hall Council indicated that it was concerned 'about the continuing trade liberalisation and the pressure that goes on during these trade negotiation rounds, without any appropriate assessment of the impacts of that, including at the state and regional level'. In relation to the GATS, the Council expressed unease that, because the round is continuing, there is 'no real time for civil society involvement in the deliberations' and parliament has very little involvement in setting the parameters and initiating the negotiations.[15]

3.30 The power to sign up to international treaties resides exclusively with the executive arm of government under the foreign affairs power in the Constitution, yet in trade treaties, it is state and local governments that are almost always the bodies responsible for the delivery of services which may be affected, for example health, education, water and waste management. The Council drew attention to a lack of debate in the community about these issues, and also a lack of debate in government at the state level, arguing that state governments should be much more involved in the negotiations:

> Many people, at both local and state government level, have no idea of how fundamentally some of the decisions by national governments—by the executive arm—affect other tiers of government. I would welcome any recommendations by this committee that would further incorporate state and local governments—not just state government, but local government—into that process.[16]

15 *Committee Hansard,* 8 May 2003, p. 33 (Mr Leigh Hubbard, Victorian Trades Hall Council)

16 *Committee Hansard,* 8 May 2003, p. 41 (Hubbard, Victorian Trades Hall Council)

3.31 The Public Health Association of Australia (PHAA) advocates greater public involvement in the process of negotiating trade agreements. The PHAA is concerned that the 'process for the actual negotiations has left structured democratic debate out of the process altogether':

> We have four recommendations for the negotiations. The first is that research be undertaken before any trade negotiation is commenced or continued to evaluate the effects of potential trade agreements on the health of Australians, our trading partners and developing countries likely to be affected by the agreements. The second is that such research be made publicly available for consideration in public debate… The third is that the negotiation of any trade agreement be contingent upon the adoption of a set of principles, as outlined above, and broad community debate. The fourth is that the inclusion of specific areas in the negotiations be contingent upon [P]arliament's approval rather than the [G]overnment's approval.[17]

3.32 The Castan Centre for Human Rights Law highlighted the human rights aspect of the debate, arguing that given the potentially massive impact a treaty like the GATS can have on human rights (through liberalisation in sectors such as health, water, education, prisons and a number of others) there should be a great deal more openness in the process than is currently the case.[18]

3.33 In the context of the negotiation of the Free Trade Agreement with the United States (US FTA), the AUSTA Business Group made the point that, given the constrained time frame for the completion of the agreement, it was very important to ensure that those who have an interest in and are affected by the US FTA are involved in the negotiating processes, the parliament being an obvious vehicle for this.[19]

3.34 The Communications, Electrical and Plumbing Union (CEPU) expressed concern at the lack of transparency of the negotiating processes, arguing for the development of mechanisms to allow much wider public debate over, and input into, agreements such as the GATS, which have such far-reaching consequences in many areas of the Australian community. The CEPU further argued that the decision-making powers of our democratic institutions must not be undermined by commitments which bind future governments indefinitely and which foreclose policy options in response to new technological developments.[20]

3.35 In the context of the GATS and governments' right to regulate, which is discussed in Chapter 5, the Australian Manufacturing Workers Union expressed

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17 *Committee Hansard,* 22 July 2003, p. 220 (Ms Pieta Laut, Public Health Association of Australia (PHAA))

18 *Committee Hansard,* 8 May 2003, p. 54 (Mr Adam McBeth, Castan Centre for Human Rights Law)

19 *Committee Hansard,* 9 May 2003, p. 120 (Mr Alan Oxley, AUSTA)

20 *Committee Hansard,* 9 May 2003, p. 96 (Mr Brian Baulk, Communications, Electrical and Plumbing Union (CEPU))

concern that future policy decisions may be compromised by the commitments entered into by the government of the day:

> The AMWU is deeply concerned that modern trade treaties, and in particular GATS, fetter future parliaments in a way that most international treaties do not. While human rights based treaties, such as ILO conventions, have no enforceable dispute mechanism—for a nation to legislate or act in a manner inconsistent with GATS carries the risk of substantial economic penalties. This novel feature of trade treaties dramatically increases the importance of the government acting with complete openness. This feature also dictates that GATS commitments should be made sparingly, if at all, and only after extensive community consultation… [US FTA and] GATS negotiations should only take place with the oversight and consent of both houses of parliament.[21]

3.36 The Australian Council of Trade Unions (ACTU) points out that the key issue with regard to process is transparency, arguing that it is vitally important to know what is 'on the table' when trade agreements are being negotiated:

> As a democratic country, we really do need to know what is on the table, we need to have the kind of research base that provides for broad based debate in the community and we need to be able to model the ambit claims, if you like, in terms of winners and losers. To do anything less is … to allow a bureaucratic approach that sees negotiations conducted in secret without an understanding of who wins, who loses and how we make those decisions.[22]

3.37 The ACTU argues further that greater parliamentary scrutiny and involvement is required as part of the process of negotiating trade agreements, which, because of their potentially broad ranging impacts, are in a different category to other types of international treaties:

> We are very interested in … progressing the parliamentary role within all of this. … It seems to us that without at the very least something like the US environment, where you have an oversight committee and a genuine debate on the parliamentary floor, then we are not operating with an appropriate democratic process.
>
> We are not now talking about treaties that might be ratification of international standards that have gone through numerous processes of discussion; we are not talking about treaties around the sorts of the debates that might go on between countries pursuant to international standards or rules or indeed in a defence environment; we are actually talking about the shape of Australia's economic and social future. I think we would argue other treaties need something similar but treaties concerning Australia's

21 *Submission* 160, p. 51 (Australian Manufacturing Workers Union (AMWU))

22 *Committee Hansard,* 22 July 2003, p. 234 (Ms Sharan Burrow, Australian Council of Trade Unions (ACTU))

> economic and social future seem to us to require a much more broadly based environment.[23]

3.38 Similarly, AFTINET advocates greater parliamentary involvement and scrutiny of multilateral trade agreements such as the GATS, and bilateral agreements such as the proposed US FTA. AFTINET points out that trade agreements now cover a wide range of issues, and are not just about trade in goods and lowering of tariffs. Agreements such as the GATS can have wide ranging impacts in areas such as social policy, health and environmental policy and legislation. The WTO has a range of agreements covering areas such as trade in goods, services, agriculture, intellectual property rights, sanitary and phytosanitary measures (health, safety and environment), trade related investment and government procurement.[24]

3.39 Bilateral and regional trade agreements cover a potentially wider range of issues, and usually adopt a 'negative list' approach rather than the 'positive list' approach of the GATS. These types of agreement have the potential to impact on any area of government regulation which is not specifically excluded from the agreement.

3.40 Further, AFTINET points out that, once signed, trade agreements effectively bind future governments and are difficult to change. Amending Australia's commitments under the GATS for example could involve long lead times, loss of trade access or payment of compensation. Because of this limiting effect on the ability of future parliaments to legislate, it is essential that parliament is fully aware of the content of trade agreements and has the opportunity to debate such agreements, prior to Australia being bound to comply with the agreement in question.[25]

3.41 AFTINET acknowledges the review of treaties undertaken by the JSCOT but argues that there are a number of flaws in this process. The JSCOT reviews all treaties and its workload means that there is often not sufficient time for proper consideration of complex treaties, or time to seek submissions from community groups or hold public hearings.

3.42 For example, the Singapore-Australia Free Trade Agreement was finalised on 17 February 2003, and tabled on 4 March 2003, with three other treaties. AFTINET argues that during the negotiation of this treaty there was little consultation with civil society groups, and no disclosure of what the government was negotiating, including the adoption of the 'negative list' approach. The JSCOT allowed a short time period for public submissions on the treaty, and did not hold advertised public hearings for community groups to give evidence, receiving verbal evidence from DFAT only.[26]

3.43 The JSCOT may make recommendations about a treaty but as treaties are referred to the committee after signature but prior to action being taken to bind

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23 *Committee Hansard,* 22 July 2003, pp. 239–240 (Burrow, ACTU)

24 *Submission* 42B, p. 2 (AFTINET)

25 *Submission* 42B, p. 2 (AFTINET)

26 *Submission* 42B, pp. 2–3 (AFTINET)

Australia to the terms of the treaty, there is limited, if any, scope for influence over the process. AFTINET points out that in some cases, the government does not wait for the JSCOT's recommendations before introducing implementing legislation into parliament.[27]

3.44 Liberty Victoria also makes the point that trade agreements can and should be distinguished from treaties such as United Nations human rights treaties, international labour conventions and international environmental agreements. Unlike labour, human rights and environmental agreements, trade treaties incorporate dispute settlement processes and binding enforcement mechanisms, including sanctions and compensation, making them more analogous to private law or contract law than traditional human rights treaties. In addition, trade treaties have a greater impact on government regulatory powers and have the capacity to bind future governments far more than human rights treaties, yet the trend is for these treaties to be displaced by trade rules.[28]

3.45 Liberty Victoria acknowledges that in the past, the treaty-making process has worked reasonably well, but argues that new developments in respect of the binding nature of trade agreements and of international institutions such as the WTO require reform of the process. The key distinction, it is argued, between conventional treaties and trade treaties is that states can choose to 'selectively exit' conventional treaties with relative impunity. Trade treaties impose penalties for serious breaches.

3.46 Although governments are obliged to adhere to their responsibilities under conventional treaties, in reality, these treaties have ineffectual enforcement mechanisms. As a consequence, states that choose to ignore their obligations may face diplomatic pressures or possibly sanctions. In contrast, trade agreements impose binding justiciable constraints on governments regarding the conduct of fiscal, monetary, trade and investment policies. In effect, the rules of international trade are able to limit the processes of democratic decision-making.[29]

3.47 The current treaty–making process, involving scrutiny by JSCOT (as outlined above) may appear democratic but Liberty Victoria argues that it is fundamentally flawed, expressing similar concerns to AFTINET on this point. The JSCOT or parliament may have issues with the provisions of a treaty or its impact on certain sectors of the community, but the JSCOT makes recommendations only and the Executive can choose to ignore these recommendations.

3.48 Liberty Victoria argues that given the processes of JSCOT and the exceptional nature of international trade agreements, there needs to be more parliamentary involvement in and scrutiny of trade agreements. State and local governments are

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27 *Submission* 42B, pp. 3 (AFTINET)

28 *Submission* 14A, pp. 2–3 (Liberty Victoria–Victorian Council for Civil Liberties)

29 *Submission* 14A, pp. 5, 7 (Liberty Victoria)

bound by these agreements, particularly the GATS, and therefore need to be more involved in the process.

3.49 Liberty Victoria points out that in the United States, international trade agreements cannot be ratified until they are approved by both houses of the Congress. This process can be time consuming and cumbersome, the difficulties of which have been overcome by the introduction of legislation providing for a Trade Promotion Authority. The legislation in the US ensures that other factors, such as the effects on workers, the broader community and the environment cannot be ignored in the ratification process. The process in the US is discussed further later in this Chapter.

3.50 In the absence of a similar process in Australia, Liberty Victoria recommends that parliamentary approval of trade agreements should be a necessary precondition of ratification. After negotiation and signature, a treaty should not become legally binding until there has been sufficient parliamentary scrutiny, and after sufficient debate, parliament and not the Executive should have responsibility for ratification.[30]

Senate Legal and Constitutional Committee Report—Trick or Treaty?

3.51 The Committee notes that the Senate Legal and Constitutional References Committee considered the issue of parliamentary involvement in the treaty-making process in its comprehensive report *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*.[31] This report gave detailed consideration to a range of issues including accountability and sovereignty and whether there is a need for greater parliamentary involvement in the treaty–making process.[32]

3.52 The Legal and Constitutional Committee was of the view that a range of arguments could be made for increased parliamentary involvement in the treaty-making process, and that there was strong support for this proposition in the evidence before it. The key point in favour of greater involvement was the increasing number and wide range of subjects covered by treaties. The Committee reasoned that the more important the subject matter, the greater the need for parliamentary involvement.[33]

3.53 With regard to the democracy or otherwise of the treaty-making process, the Legal and Constitutional Committee concluded that the act of entering into a treaty is a free decision of Australia as a sovereign nation, entered into by a democratically

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30 *Submission* 14A, pp. 9–10 (Liberty Victoria)

31 The report was tabled in November 1995 and is available at http://www.aph.gov.au/Senate/committee/legcon_ctte/treaty/report/index.htm

32 See Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties,* November 1995, chapter 14. This Chapter also considers whether there could be said to be a 'democratic deficit' in the current processes, coming to a conclusion that there probably wasn't sufficient evidence to indicate that this was the case.

33 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, p. 239.

elected government. Further, parliament must pass any legislation necessary to implement the treaty in domestic law. The process itself was regarded as democratic, but in need of some enhancement, for example, by improving consultation mechanisms.[34]

3.54 In *Trick or Treaty*, the Committee acknowledged that, by incurring international obligations under treaties, the government exerts influence on the Commonwealth parliament and/or the States and Territories to fulfil those obligations. For this reason, the Committee advocated greater involvement by the parliament prior to ratification of a treaty, so that it can 'make a free choice without the pressure of a potential breach of treaty obligations'.[35]

Joint Standing Committee on Treaties Report—Who's afraid of the WTO?

3.55 The JSCOT considered a range of issues relating to Australia's relationship with the WTO in its report *Who's Afraid of the WTO? Australia and the World Trade Organisation*[36], including community education and consultation and parliamentary scrutiny of WTO agreements. The JSCOT noted calls for greater parliamentary scrutiny of Australia's relationship with the WTO, particularly in debating any future WTO Agreements before they are ratified by the government.[37]

3.56 The JSCOT's view was that, while the government had made considerable improvements in the level of consultation undertaken with interested parties during the development of WTO negotiating positions, there are few opportunities for parliamentary involvement in these debates. The JSCOT acknowledged that beyond the work of the Trade sub–committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, parliament's role in reviewing trade policy is limited to *ad hoc* scrutiny through Senate Estimates and occasional debate and questions.[38]

3.57 The JSCOT pointed out that, given the impact that global trade has on the lives of Australians, parliament should take a more prominent role in debating the many trade related issues which are of concern to the general community. The JSCOT recommended the establishment of a Joint Standing Committee on Trade Liberalisation, to allow parliament to play a more active role in reviewing Australia's engagement in the multilateral trading system. Further, it was recommended that this

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34 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, p. 246.

35 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, p. 247.

36 Joint Standing Committee on Treaties (JSCOT), Report 42: *Who's Afraid of the WTO? Australia and the World Trade Organisation*, September 2001. Available at http://www.aph.gov.au/house/committee/jsct/wto/index.htm, accessed 31 October 2003.

37 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, p. 67.

38 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, p. 68.

committee undertake an annual review of Australia's WTO policy, including negotiating positions, dispute cases, compliance and structural adjustment.[39]

3.58 It was envisaged that this proposed committee could comment on Australia's negotiating proposals, before WTO negotiations commence, and could undertake extensive community consultations on trade policy and WTO matters. The JSCOT noted that a Canadian parliamentary committee did just this prior to the 1999 Seattle WTO meeting.[40]

3.59 Further, the JSCOT noted that much of the focus of Australia's engagement with the WTO seemed to be on the opportunities for Australian exporters, rather than the domestic impacts of trade liberalisation. The JSCOT saw that the proposed joint committee dedicated solely to international trade matters could help redress this balance, allowing parliament to examine and report on the domestic impact of the government's trade policies and proposed outcomes.

3.60 The JSCOT clearly recognised that there was a need for greater transparency in Australia's international trade relations, and saw the proposed joint committee as a way of encouraging this transparency.[41]

3.61 In response to the recommendations regarding greater parliamentary scrutiny of Australia's trade policies and relationship with the WTO, the government acknowledged that it is a matter for parliament to determine what committees it wishes to establish, but indicated that it thought the establishment of a separate committee dealing with trade liberalisation was not necessary. The government noted that the Joint Standing Committee on Foreign Affairs, Defence and Trade and its Trade Sub–committee already has a mandate to review and examine developments in the international trade environment and Australia's trade priorities, including the WTO.[42]

Conclusions

3.62 The Committee concurs with the analysis and assessment of the Senate Legal and Constitutional Committee discussed above with regard to parliamentary involvement in the treaty-making process, and the democracy of the process. The Committee agrees that the more important the subject matter of the treaty, the greater the level of scrutiny is required. The Legal and Constitutional Committee's assessment was made in 1995 and there are now even stronger reasons for greater parliamentary scrutiny given the proliferation of trade agreements, and, in particular,

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39 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, pp. 68, 69.

40 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, p. 68.

41 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, p. 68.

42 government Response to Report 42 of the Joint Standing Committee on Treaties, 29 August 2002, available at http://www.aph.gov.au/house/committee/jsct/governmentresponses/42nd.pdf at 31 October 2003.

the trend towards bilateral agreements. These developments have occurred largely since the Legal and Constitutional Committee's report was tabled.

3.63 The crux of the issue regarding treaty-making processes is that there is a valid distinction to be made between human rights type treaties (which have no enforceable dispute resolution mechanisms and no financial penalties for withdrawal) and trade treaties (in particular WTO agreements including GATS). The GATS, along with a number of other WTO Agreements, has a binding dispute resolution process and WTO Members are exposed to potentially significant financial penalties or 'compensatory adjustment' if they withdraw from commitments made under the GATS, as has been discussed earlier in this Chapter.

3.64 This means that future governments and future parliaments are bound to comply with Australia's current and future GATS commitments, and similarly, with the provisions of bilateral trade agreements. Once commitments have been made to liberalise particular sectors, it is extremely difficult, if not impossible, to reverse those commitments. Indeed, this is one of the main 'selling points' of the GATS—it provides certainty in the multilateral context and Members are able to rely on the commitments of other Members, in the knowledge that those commitments are very difficult to revoke once given. Another advantage of the GATS, in terms of providing certainty for Members, is the existence of an enforceable dispute resolution mechanism.

3.65 In the Committee's view, the argument that the treaty-making process is sufficiently democratic because governments are elected and because legislation is required to be passed to implement treaties into domestic law does not have a great deal of force with regard to trade treaties which bind future governments and parliaments. Moreover, governments seldom, if ever, could be said to have a mandate to enter into trade agreements given that such agreements are rarely referred to or given coverage prior to elections.[43]

3.66 In accordance with the evidence discussed earlier in this Chapter, the Committee believes that a strong case can be made for greater parliamentary involvement in setting the negotiating priorities and monitoring the impacts of trade treaties, in addition to the kind of scrutiny undertaken by the JSCOT.

3.67 The Committee accepts in part the view of the JSCOT in its report on Australia's relationship with the WTO, discussed earlier, that the focus of Australia's trade policy and trade consultations has been, and perhaps continues to be, too much on the opportunities for Australian businesses seeking to export globally and too little

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43 The Senate Legal and Constitutional Committee Report *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* at pages 232-233 refers to evidence from Professor de Q Walker of the University of Queensland, who argues that even the most important treaties lack anything resembling a mandate from the electorate, giving the example of the Closer Economic Relations (CER) treaty with New Zealand. The CER had a major impact on the economy but was not mentioned in any party's campaign during the federal election prior to its ratification.

on the domestic impacts of trade liberalisation in general, and of the GATS and the proposed US FTA in particular. Any trade liberalisation is likely to disrupt some existing industries and promote the development of others. This has implications for patterns of employment and raises complex domestic policy questions centered on managing the impact of change which in the aggregate benefits the economy but has negative impacts on certain sub–groups. The challenge for governments is to ensure that there are appropriate structural adjustment mechanisms in place to minimise the negative impacts.

3.68 This focus has perhaps contributed to the concerns that union groups, NGOs and others expressed to the Committee regarding the impacts of liberalisation of trade in services on the provision of public services and the government's right to regulate, and the level of consultation undertaken by the government prior to committing Australia to legally binding trade agreements. These concerns are discussed earlier in this Chapter, and in Chapter 5.

3.69 The Committee notes that the Joint Standing Committee on Foreign Affairs, Defence and Trade's (JSCFADT) Resolution of Appointment empowers it to consider and report on such matters relating to foreign affairs, defence and trade as may be referred to it by either House of parliament, the Minister for Foreign Affairs, the Minister for Defence, or the Minister for Trade.[44]

3.70 The JSCFADT resolved in August 2001 to 'undertake continuous and cumulative parliamentary scrutiny of the World Trade Organisation.' This scrutiny takes the form of an annual one-day public hearing on the WTO with specific reference to its progress towards trade liberalisation and the implications of its activities for Australia. The Trade Sub-Committee of the JSCFADT undertakes the scrutiny in the context of the Annual Report of the Department of Foreign Affairs and Trade. The first public hearing, with a focus on the prospects for the Doha Round, was held on 23 August 2002.[45] A second was held on 24 November 2003.

3.71 However, there appears to be no similar initiative for the scrutiny and discussion of proposed free trade agreements, in particular the US FTA. The JSCOT's role in this process (at least in the vast majority of cases) is limited to scrutinising the proposed agreement once it has been signed for Australia, but before it is ratified. In addition, as discussed to earlier in this Chapter, the JSCOT may not always be able to give individual treaties the level of scrutiny which may be warranted (an example is

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44 Joint Standing Committee on Foreign Affairs, Defence and Trade Resolution of Appointment. See http://www.aph.gov.au/house/committee/jfadt/resoltn.htm, accessed 31 October 2003.

45 See the Joint Standing Committee on Foreign Affairs, Defence and Trade web page at http://www.aph.gov.au/house/committee/jfadt/WorldTrade/WTOIndex.htm, accessed 31 October 2003.

the case of the Singapore–Australia Free Trade Agreement) because of time pressures and the number of other treaties to be examined.[46]

3.72 The crucial point for trade agreements is 'prior to signature', because once a treaty has been signed, although Australia is strictly not bound to the terms of that treaty in international law, it would be extremely unlikely for the government to refuse to ratify a treaty on the basis of any JSCOT recommendations, or indeed for any other reasons.

3.73 The Committee's view is that parliament needs to be more involved in the process prior to signature of treaties. The focus of parliament's involvement should be more balanced, not just on the opportunities and benefits of increased export opportunities for Australian businesses, but also on the domestic impacts of trade liberalisation in general, including social, cultural and environmental impacts, including measures to offset or manage adverse adjustment impacts.

3.74 There seems to be scope under the terms of reference for the JSCFADT and of the JSCOT to allow for greater involvement in scrutiny of proposed trade treaties than is currently the case. The Trade Sub–committee of the JSCFADT for example, could fulfil the role of the proposed new committee on trade liberalisation recommended by the JSCOT in its report on Australia and the WTO, discussed earlier. This could involve monitoring the impacts of trade agreements on Australia, opportunities for trade expansion and trade negotiating positions developed by the government.[47]

3.75 The JSCOT's Resolution of Appointment empowers it to inquire into and report on any question relating to a treaty or other international instrument whether or not negotiated to completion referred to it by either House of parliament or a minister. It seems that this power is rarely used, however, with the bulk of the JSCOT's work involving examination of treaties after signature by Australia.

3.76 The government is currently required to table a National Interest Analysis along with each treaty tabled. The NIA includes information about the economic, social and cultural effects of the proposed treaty, and the obligations imposed by it. However, the NIA is a cursory statement of impacts that the Committee regards as 'too little too late'. Information in a more comprehensive form is required at a much earlier stage in the process, and prior to the government committing Australia to be bound by multilateral obligations or by a proposed free trade agreement.

3.77 The Committee has referred above to the process by which trade negotiations are initiated by US administrations. In brief, the Congress must approve a Trade

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46 See *Submission* 42B (AFTINET) and *Committee Hansard* 23 July 2003, p. 278 (Dr Patricia Ranald, AFTINET). Dr Ranald argues that JSCOT is not structured to deal adequately with the number of treaties it receives, and that there is scope to have a committee which deals only with trade agreements, and has the necessary expertise to thoroughly scrutinise such agreements.

47 See JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, Recommendation 6, p. 69.

Promotion Authority which sets out the objectives of the negotiations, and any conditions which must be met. The US government can then negotiate with its trading partner(s) to settle a proposed agreement. This proposed agreement is then tabled in the US Congress, where it must remain for a fixed period of time to enable sufficient scrutiny by members before being put to a vote by which the agreement will be either rejected or accepted—but not modified.

3.78 As discussed earlier, the potentially dramatic impact that trade treaties in particular can have on the lives of citizens and on the shape of a country's economy means that there is significant justification for parliament exercising careful scrutiny of the whole process. The process that operates in the United States facilitates a level of congressional/parliamentary scrutiny that is worth emulating. It provides for executive authority to negotiate trade agreements while also allowing proper congressional monitoring and approval.

> Trade Promotion Authority is nothing more than a kind of agreement between Congress and the President about how trade negotiations will be handled. It is an attempt to achieve cooperation and coordination between the two branches of government.
>
> Under Trade Promotion Authority, Congress usually spells out specific negotiations and objectives that it would like to see achieved. Congress also outlines how the chief executive will keep them apprised and briefed on developments in trade negotiations. Finally, Trade Promotion Authority always includes an agreement from Congress that once a trade negotiation is finished, the legislation implementing it will be handled on the floor of the House and the Senate without amendments. Members of Congress are given only the chance to vote the agreement up or down, but not to "nit pick" it until it unravels as a balance of trade concessions.[48]

3.79 There appears to be no formal impediment, constitutional or otherwise, to the Australian parliament adopting a similar arrangement to that operating in the US Congress. Not only will such an arrangement provide for transparency and accountability in the negotiation and execution of trade agreements, but it will also give considerable comfort to the government in terms of securing the implementation of the agreement.

3.80 In any event, current procedures require the parliament to pass relevant implementing legislation before any agreement can properly come into effect. Lead negotiator Stephen Deady explained the situation to the Committee in the following terms:

> There would be a clause [in the agreement] that would say that for both governments the necessary legislative procedures have to take place. Then a date of entry into force would be set, agreed by both parties, once those procedures had concluded…

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48 Description provided at http://www.cwt.org/learn/whitepapers/tradepro.html, accessed 29 October 2003.

> Until … all [legislation is] passed, we would not be able to go to the United States and say, 'We have fulfilled the obligations under article X, Y or Z and we are now in a position to have the agreement enter into force on such and such a date.' … These are the commitments we have entered into with the United States and these are the legislative requirements necessary to bring those commitments into effect, so unless that happens we cannot identify the date to allow the agreement to come into effect.[49]

3.81 Under the existing state of affairs, the government can sign off on an agreement, but find itself confronted with, say, amendments by the Senate of some elements of the domestic legislation necessary to implement the agreement. If the prospect of such amendments was known in advance, the trade negotiators could take them into account.

3.82 For example, in the case of the current US FTA, where cultural protection and the Pharmaceutical Benefits Scheme are proving contentious issues, should the government settle an FTA by making some concessions on these, the Senate may well vote down the relevant domestic legislative amendments. 'If that looked like happening, however, the US Congress would be even less likely to ratify the FTA.' [50]

3.83 It is extremely unlikely that such a situation would arise under conditions where both Houses of the Australian parliament have been closely involved throughout the treaty-making process. With a formal parliamentary arrangement in place the trade agreement would progress on the basis of 'no surprises'. This can only benefit all parties to the agreement, and will ensure that Australia is able to negotiate with authority internationally.

3.84 Because of the domestic significance of international trade treaties it is imperative that they be predicated on what is in Australia's national interest. The parliament and the government share that interest. However, the government has the authority to make treaties, so it is essential that the roles of parliament (as watchdog) and the government (as executive) be reconciled where such a major undertaking is at stake.

3.85 The Committee therefore sees considerable merit in the establishment of a formal arrangement, with a proper legislative basis, whereby the government can embark on trade negotiations with the parliament's endorsement of the trade objectives and any conditions that must apply.

3.86 The Committee proposes 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

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49 *Committee Hansard,* 2 October 2003, p. 470-471 (Deady, DFAT)

50 Toohey, B 'Not much in trade pact for us' *West Australian* 10 November 2003, p. 17.

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 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, ie, on the basis that the package is either accepted or rejected in its entirety.

3.87 This process should be set out in legislation and complemented by appropriate procedures in each House of parliament. 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.

3.88 A vote in favour of a proposed set of objectives at the initial stage would be an 'in principle' endorsement of the treaty and would give the government a greater democratic mandate in negotiations. A concluded trade agreement that conformed to already agreed objectives would be more likely to receive final parliamentary approval.

3.89 The Committee recognises that, as with the current JSCOT processes, there will occasionally be a need to 'fast track' a proposed treaty for security or other reasons. Implementing this type of process recommended by the Committee for proposed trade agreements may mean that the negotiating process takes longer. However, given the potential impact of trade agreements such as the GATS and the US FTA on all areas of Australian society, and the binding effects of these agreements on future parliaments, any possible delays are more than justified by the benefits of having comprehensive parliamentary debate on the pros and cons of proposed trade agreements.

3.90 The Committee hopes that a focus on the provision of more comprehensive information at an earlier stage in the process will ensure that through the mechanism of early parliamentary involvement, the Australian public will be better informed

about the impacts of trade agreements, the consequences of services trade liberalisation and of bilateral free (preferential/discriminatory) trade agreements.

Recommendation 2

3.91 **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, ie, 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.

3.92 A number of submissions to the inquiry raised the issue of the lack of adequate research being undertaken prior to Australia committing itself to trade agreements. Balanced and comprehensive research on the economic, social, cultural and policy impacts of any trade treaty Australia proposes to enter into is a vital part of ensuring that there is proper scrutiny of the agreement and would contribute greatly to the quality of the public debate on these issues.

3.93 The Committee notes that the JSCOT in its report on Australia's relationship with the WTO recommended 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 in 1994.[51] The JSCOT further recommended that in evaluating whether Australia should enter into any future WTO Agreements, the government should assess the likely socio–economic impacts on industry sectors and surrounding communities.[52] The Committee further notes that the government to date has not commissioned multidisciplinary research as recommended by the JSCOT. Nor would it appear that such research has been undertaken prior to making binding commitments under the GATS or commencing negotiations for the US FTA.

Recommendation 3

3.94 **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.**

51 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, Recommendation 1, p. 26.

52 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, Recommendation 2, p. 33.

Chapter 4

Introduction to the General Agreement on Trade in Services

What is the GATS? [1]

4.1 As outlined in Chapter 2, the World Trade Organisation (WTO) has its origin in the General Agreement on Tariffs and Trade (GATT). It was formed on 1 January 1995, when the trade agreements negotiated in the Uruguay Round came into operation. One of the most important functions of the WTO is to provide a rules based forum for multilateral trade negotiations. The Uruguay Round was the last of the GATT rounds, and ran from 1986 to 1994. It resulted in the creation of a number of agreements, including the General Agreement on Trade in Services (GATS).[2]

4.2 As a result, the GATS came into force on 1 January 1995 and was the first binding multilateral agreement covering international trade in *services*. Although not defined in the GATS, *services* are generally understood in economic terms as activities that add value to another economic unit or good.

4.3 The coverage of the GATS is extremely wide, covering twelve services sectors:

- business
- communication
- construction and engineering
- distribution
- education
- environment
- financial
- health
- recreational
- cultural and sporting
- tourism and travel
- transport and an 'other' category

4.4 The exceptions are:

a) The GATS excludes 'services supplied in the exercise of governmental authority'.[3] These are services provided by the

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1 The introductory part of this chapter has been largely drawn from the Committee's background paper *General Agreement on Trade in Services: What is it? What's the fuss?* (available at the Committee's web page: http://www.aph.gov.au/Senate/committee/fadt_ctte/GATS/index.htm)

2 Other agreements negotiated in the Uruguay round include the Agreement on Agriculture, the Agreement on Trade-Related Investment Measures (TRIMs), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). See Bruce Donald 'The World Trade Organisation (WTO) Seattle Ministerial Conference, December 1999: Issues and Prospects', *Current Issues Brief* 12 1999-2000, Parliamentary Library, Canberra, 1999.

3 GATS Article I.3.

government not on a commercial basis, nor in competition with other suppliers. For example, social security schemes and central banking provided under non-market conditions are not subject to the GATS.

b) The GATS does not apply to air traffic rights and services directly related to the exercise of those rights.

4.5 The GATS consists of two broad elements:

a) An overall framework which sets out the general rules and obligations that apply to all Member countries and to all services.

b) The national 'schedules of commitments' in which each Member country specifies the degree of access it is prepared to guarantee to foreign service suppliers. The schedules of commitments represent the extent to which a Member country has elected to 'opt in' to international trade in specific service sectors. It is a declaration by the Member country of its commitment to allow the specified foreign services to be delivered to its citizens under the rules set down by the GATS.

Structure of the GATS

4.6 The preamble to the GATS sets out the three basic considerations that shaped its development:

a) The establishment of a multilateral framework of principles and rules would progressively open up trade in services and contribute to economic development worldwide.

b) Member countries—and especially developing countries—will still need to regulate the supply of services to meet national policy objectives.

c) Developing countries should be helped to improve their participation in the world trade in services through strengthening the capacity, efficiency and competitiveness of their own domestic services.

4.7 The GATS as a whole has 29 Articles set out across six Parts. Part I sets out its scope and definition. Part II, the longest, deals with general obligations and disciplines that apply, for the most part, to all services and all Members. Part III sets out the rules that Members must observe in relation to the specific commitments in the schedules. Parts V and VI cover institutional and other final provisions.

4.8 **Part I** describes the services which are subject to the GATS, and extends a Member country's GATS obligations to its regional and local governments. *Article I* identifies four ways in which a service can be traded. These four ways are known as 'modes of supply'. These 'modes of supply' are critical to the way in which a Member

country specifies its commitments in the schedule of services to which it proposes to give access by foreign suppliers.

Mode 1—cross border supply of services

Here a supplier in one country delivers a service direct to a consumer in another country, comparable to goods being traded across a border. Examples are distance education services, or a lawyer providing legal advice to a client in another country via the internet.

Mode 2—consumption abroad

Here a consumer moves to a foreign country to obtain the service. For example, a citizen travels abroad to study, or to undergo specialist medical treatment, or to simply be a tourist. A ship being repaired in a foreign port is also Mode 2.

Mode 3—commercial presence

This refers to a service provider establishing facilities in a foreign country. For example, a university, a bank or a courier service sets up a branch overseas.

Mode 4—presence of natural persons

This refers to individuals travelling from their home country to perform services in another country for a limited period. For example, a consultant, a fashion model, a sports coach, a project manager goes abroad to do a job then returns home.

4.9 The particular 'mode of supply' of a service is very significant in terms of the practical implementation of that service in a country and the management by that country of its GATS obligations regarding the provision of that service. This is because the ability to provide a service to a foreign country depends crucially on the government regulations that apply in that country. The regulations that might apply for one mode of service delivery (for example, training delivered by a visiting instructor) may be quite different from the regulations that might apply to another mode of service delivery (similar training delivered, say, via the internet).

4.10 **Part II** of the GATS sets out the general obligations and disciplines that must be observed by the Member countries in the way they allow access by foreign service providers, whatever the 'mode of supply'. Part II also specifies the exemptions that are allowable. There are two basic principles that lie at the core of Part II. These are:

a) The principle of so-called 'most favoured nation' (MFN) treatment. That is, Member countries must accord any other Member country treatment that is no less favourable than it accords to like services and suppliers from any other country. However, the GATS provides for exemptions in particular cases under certain conditions which are set out in an Annex to the GATS.

b) The principle of transparency. Because governments' domestic regulations have such an impact on the delivery of services within their jurisdictions, the GATS requires Members to publish all relevant measures of general application that affect the services under the Agreement. Members must also disclose any laws, regulations or administrative guidelines that affect services listed in their schedule of commitments under GATS. Moreover, to assist developing countries seeking to trade internationally in services, Members must establish contact points to whom service suppliers from developing countries can turn for information about all aspects of the supply of the service concerned.

4.11 Part II also sets out rules to try and ensure that domestic regulations are applied reasonably, objectively and impartially, with independent tribunals or similar procedures available to ensure their fair and proper application. As well, government regulations concerning the qualifications of service suppliers, technical standards and licensing requirements should not constitute unnecessary barriers to trade. That is, they should not operate as disguised restrictions on the delivery of a service. The remainder of Part II deals with safeguards and subsidies.

4.12 **Part III** sets out the rules that, along with the categorisation of services into four 'modes of supply', shape the way in which each Member formulates its individual schedule of commitments to admit foreign suppliers of services into its market. The two main Articles in Part III deal with market access and national treatment. These are two key undertakings when a Member decides to list a commitment to accept a foreign service.

Market access

4.13 For reasons of domestic political concern or national interest, a country may wish to limit access to its market by applying certain measures to would–be foreign suppliers. The GATS lists six measures to limit market access that a Member country may specify in its national schedule of commitments. These are:

- limitations on the number of service suppliers
- limitations on the total value of services
- limitations on the total quantity of services operations or output
- limitations on the number of persons engaged in the supply of the service
- restrictions via a requirement that the service be supplied only through certain forms of legal entity or joint venture
- percentage limitations on the participation of foreign capital or on the total value of foreign investment

4.14 Unless a Member country clearly provides in its schedule for the use of one or more of these limitations, it cannot apply such limitations on market access to a foreign service or its provider. In other words, a foreign service provider has a right to

assume full and free market access to a sector nominated by a Member country unless that country clearly specifies certain limitations in its schedule of commitments.

National treatment

4.15 The rule concerning national treatment (Article XVII) essentially requires that, once a sector has been scheduled for foreign access, a Member country shall not discriminate between foreign and domestic services and suppliers. Article XVII does not list measures that would be considered discriminatory. It simply states that in the sectors covered by the Member's schedule of commitments, with regard to measures affecting trade in services, a Member is obliged to give foreign services and suppliers treatment no less favourable that it gives its own services and suppliers. This is subject to any qualifications set out in the schedule of commitments.

4.16 **Part IV** comprises essentially technical, procedural rules for the implementation of the GATS. These rules set out the elements to be covered in a Member country's schedule of commitments and confirm the schedule as forming an integral part of the GATS agreement itself. There are also rules about how a member country might modify or withdraw commitments from its schedule. Probably the most important element of Part IV is *Article XIX*, which commits Members to enter into 'successive rounds of negotiations with a view to achieving a progressively higher level of liberalisation'. The current round of GATS negotiations is the first of these 'successive rounds'.

4.17 **Parts V and VI** contain an array of standard institutional and final provisions, including dispute settlement procedures and the forma establishment of the Council for Trade in Services.

4.18 Attached to the GATS are eight Annexes which amplify issues on *Article II* (MFN) exemptions and the presence of natural persons, while others address special concerns in key service sectors – air transport, financial services, telecommunications and maritime transport.

Structure and function of a GATS schedule

4.19 A Member country's obligations under GATS depend profoundly on the specific commitments that the country chooses to include in its national schedule. In its schedule of commitments, a Member country will:

- specify the services sectors or sub-sectors to which the Member will allow access
- specify any limitations to market access that will apply in the sector(s) concerned and according to the particular mode of supply
- specify any limitations that are placed on national treatment for foreign suppliers of the service
- specify any other binding commitments that the Member country is willing to undertake

4.20 The schedule as a whole is set out in two parts. The first part lists 'horizontal commitments' that apply across all sectors. The second part sets out the commitments undertaken in relation to each listed sector or sub-sector. If a sector is not listed in the Member country's schedule, this means that the country has made no specific commitments with respect to that sector. Australia's commitments are discussed later in this Chapter.

How is this GATS round negotiated?

4.21 Negotiations proceed under the auspices of the WTO's Council for Trade in Services. The current round of services negotiations – the 'GATS 2000 negotiations' – flow from the built-in agenda established at the conclusion of the Uruguay Round which committed Members to embark, within 5 years, upon negotiations to further liberalise international trade in services. These negotiations were formally launched in February 2000, and at the WTO Ministerial Conference in Doha, Qatar in November 2001, WTO Ministers agreed on a timeframe for the market access phase of the GATS negotiations.

4.22 The first phase of the negotiations was a 'rule-making' phase, during which Members negotiated new rules about trade in services dealing with subsidies, emergency safeguards and government procurement. This is being handled largely through the Working Party on GATS Rules. Negotiations on GATS rules are continuing, with slow progress having been made to date, and the mandate has been extended to March 2004.

4.23 The second phase is the 'request and offer' phase, where Members negotiate further market access on a sector by sector basis. These market access negotiations are taking place in special sessions of the Council. In this request and offer phase, Member countries make direct requests of their trading partners to open up as far as possible the national schedule of commitments each trading partner is prepared to make. Countries meet on a bilateral basis to 'clarify' their requests of each other. The parties may then make offers in response to those requests.

4.24 Australia has lodged requests with 35 Member countries for market openings across 21 service sectors, including financial and education sectors, mining, environmental and private hospital and aged care services.[4]

4.25 While many countries disclose broadly the areas in which they are seeking to achieve greater access, and while some trade organisations produce digests of GATS activity, the detailed requests and negotiations between trading partners during the request and offer phase are confidential. Early in 2003, a document alleged to be the requests made of Australia by the European Union was leaked and found its way on to various websites. The alleged EU request sought 'horizontal' commitments on Modes 3 and 4 (commercial presence and presence of natural persons) and 'sectoral'

4 Department of Foreign Affairs and Trade (DFAT) Office of Trade Negotiations, Discussion Paper on the General Agreement on Trade in Services, January 2003.

commitments in such things as postal services, business and financial services, tourism, transport and energy.

4.26 The confidential nature of the negotiations, and the broad range of services under discussion, has led to speculation about the potential negative consequences of GATS, notwithstanding reassurances about governments' right to regulate the nature and extent of services traded. This issue is discussed in more detail in Chapter 5.

4.27 Under the timetable agreed by Ministers at Doha, Members were expected to lodge initial *requests* for specific commitments by 30 June 2002. Initial *offers* were due by 31 March 2003. More than 30 Members have submitted requests for new market openings and the removal of discriminatory practices in the markets of their trading partners. Most developed countries and a small number of developing countries have put forward requests.

Public speculation and concerns about the GATS

> The GATS is a new agreement, not yet complete, not terribly user-friendly, with a complex geometry of general and *a la carte* obligations set against the backdrop of [near] universal coverage and sovereign immunity in liberalisation matters. Novelty, complexity and variable geometry all too easily lead to misrepresentation and/or over-interpretation.[5]

4.28 As the GATS 2000 negotiations have gathered momentum, so too has the level of concern being voiced by non-government organisations (NGOs) and others about the potential impact of the GATS on, for example, national sovereignty and public services. The question has been raised as to whether some services are simply too important to submit to an agreement primarily designed to enhance international commerce.

4.29 These issues include to what extent public services fall under the obligations of the GATS, and the extent to which the GATS impinges on governments' right to regulate. These and a number of other issues of concern involving particular sectors were raised with the Committee during the course of its inquiry, and are discussed in greater detail in Chapter 5.

Australia's involvement – an outline of the story so far

4.30 The Uruguay Round of trade negotiations commenced in September 1986, concluding in April 1994. An ambitious agenda was agreed upon at the beginning of the Round, including tariff and non tariff measures, agriculture, tropical products, natural resource-based products, textiles and clothing, safeguards, GATT articles,

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5 Pierre Suavé, Trade Directorate OECD, *Trade, Education and the GATS: What's in, what's out, what's all the fuss about?* Paper prepared for the OECD/ US Forum on Trade in Educational Services, Washington DC, May 2002.

dispute settlement and three new issues – trade related aspects of intellectual property rights, trade related investment measures and trade in services. [6]

4.31 However, negotiations took twice as long as the expected 4 years to complete, and broke down a number of times.[7] Notwithstanding this, Australia has benefited substantially from the gains achieved in the Uruguay Round, which increased significantly market access for Australian firms. Overall, tariffs facing Australia's exports were cut on average by about 50 per cent on a trade weighted basis and more than 86 per cent of Australia's exports gained increased market access through bound tariff commitments by most of Australia's major trading partners.[8]

4.32 During the Uruguay Round, through participation in the Cairns Group, Australia was able to maximise its influence in the WTO and to ensure the group negotiated as a block to achieve substantial reductions in barriers to agricultural trade.[9]

4.33 As outlined earlier in this chapter, the Uruguay Round also contained a 'built in' agenda for negotiations on the Agriculture Agreement and the GATS. This agreement is reflected in Article XIX.1 of the GATS which provides that Members are to enter into successive rounds of negotiations beginning not later than 5 years from the date of entry into force of the WTO Agreement. The aim of these negotiations is to achieve a progressively higher level of liberalisation. As a result, negotiations on both these agreements commenced in early 2000, despite the failure of the Ministerial Conference in Seattle in December 1999 to launch a new round.

4.34 The WTO Ministerial Conference in Doha, Qatar was more successful than the conference in Seattle, succeeding in launching Doha Development Agenda, or the Doha Round, in November 2001. The negotiations in this Round are scheduled to conclude by 1 January 2005.

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6 Ann Capling, *Australia and the Global Trading System - From Havana to Seattle*, Cambridge University Press 2001, p. 104.

7 Bruce Donald 'The World Trade Organization (WTO) Seattle Ministerial Conference, December 1999: Issues and Prospects', *Current Issues Brief* 12 1999-2000, Parliamentary Library, Canberra, 1999, p. 12.

8 Submission by the Department of Foreign Affairs and Trade to the Joint Standing Committee on Treaties' inquiry into the nature and scope of Australia's relationship with the WTO (Report 42 - *Who's Afraid of the WTO? Australia and the World Trade Organisation*), submission 222, September 2000, p. 12.

9 The Joint Standing Committee on Treaties Report 42 – *Who's Afraid of the WTO? Australia and the World Trade Organisation*, p.43. The Cairns Group is Argentina; Australia; Bolivia; Brazil; Canada; Chile; Colombia; Costa Rica; Fiji; Guatemala; Indonesia; Malaysia; New Zealand; Paraguay; the Philippines; South Africa, Thailand and Uruguay.

4.35 The Doha Ministerial Declaration[10], adopted on 14 November 2001, states that the multilateral trading system embodied in the WTO has contributed significantly to economic growth, development and employment throughout the past fifty years, and reaffirms the principles set out in the Marrakesh Agreement establishing the WTO.

4.36 The Declaration stresses the importance of international trade in promoting economic development and poverty alleviation, and recognises that the majority of WTO Members are developing countries. To this end, the Declaration indicates that enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programs have important roles to play in ensuring developing countries secure a share in the growth of world trade.

4.37 The Declaration seeks to recognise the particular vulnerability of the least developed countries and the unique structural difficulties they face in the global economy, commits to addressing the marginalisation of these countries in international trade and seeks to improve their effective participation in the multilateral trade system.

4.38 The Declaration also confirms the Members' collective responsibility to ensure internal transparency and the effective participation of all Members, and commits to making the WTO's operations more transparent, including through more effective and prompt dissemination of information and to improve dialogue with the public.

4.39 The Declaration then goes on to set out the work program agreed upon by Members. Paragraph 15 deals with Services, and states that negotiations on trade in services "shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. The Declaration reaffirms the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing negotiations, with a view to achieving the objectives of the GATS. The Declaration provides that participants were to submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.

4.40 The work program set out in the Declaration covers a broad range of other issues in addition to services, including:

- implementation issues and concerns
- agriculture and market access for non-agricultural products
- trade related aspects of intellectual property rights
- the relationship between trade and investment

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10 The text of the Doha Ministerial Declaration can be accessed at the WTO website: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#services, accessed 9 October 2003.

- interaction between trade and competition policy
- transparency in government procurement
- trade facilitation
- WTO rules
- dispute settlement understanding
- trade and environment
- electronic commerce

Australia's approach to the Doha negotiations – goals and strategy

4.41 The Department of Foreign Affairs and Trade (DFAT) indicated in its submission to the inquiry that Australia is well placed to participate in the GATS negotiations because of its open and competitive services sector, the result of decades of autonomous reform of the regulatory environment and an increased openness to world trade in services. Further, it is said that autonomous market reform in Australia has "outpaced trade liberalisation in the WTO" so that Australia's services sector is in fact more liberal than is currently reflected in our GATS schedule.[11]

4.42 The GATS is often broadly described as a 'standstill' agreement in that it commits Members to existing levels of reform, rather than requiring new commitments needing major policy or regulatory adjustments. It is said that the value of such agreements is in preventing certain trade barriers from being reintroduced.[12]

4.43 DFAT argues that there is potential for the current round of GATS negotiations to have a greater impact on services trade liberalisation that the Uruguay Round. The existing GATS schedules reflect commitments made by Members during the Uruguay Round, when the text of the agreement itself was also being negotiated. It is suggested that a lack of familiarity with the operation of the GATS may have limited Members' commitments, but that prospects for greater liberalisation are increasing, particularly as Members recognise the benefits to their own economies of reforming services trade and so undertake autonomous liberalisation.[13]

4.44 DFAT indicates that one of the main negotiating objectives for Australia is to gain new commitments in markets and sectors where there is significant export potential and interest. To this end, Australia is engaged in a 'multi-faceted negotiating approach'. This approach is described as follows:

> Firstly, Australia is actively engaged in bilateral request/offer negotiations. This requires Australia to identify its negotiating priorities on a sector and country specific basis and to raise these priorities with key countries.

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11 *Submission* 54, p. 17 (Department of Foreign Affairs and Trade – DFAT)

12 *Submission* 54, pp. 17-18 (DFAT)

13 *Submission* 54, p. 18 (DFAT)

> …
>
> At the same time, Australia participates in a number of sector specific 'friends' groups. This enables Australia to work with other members that have similar priorities for specific sectors to form common positions and thereby increase negotiating leverage. 'Coalition building' in this sense often involves working through classification and other issues to find possible solutions to problems that make commitment difficult for some members. For instance, wording of limitations on commitments might be crafted to allow WTO Members to achieve their policy objectives while minimising barriers to trade.[14]

4.45 As part of the negotiating process, Australia also participates in a range of subsidiary committees examining framework issues such as rules, domestic regulation and scheduling of commitments. Australia's position in these committees is driven by the need to preserve the right to regulate at all levels of government, and to provide subsidies to public service sectors.[15]

4.46 As outlined above, the deadline for receipt of initial requests of other Members as part of the request and offer process was 1 July 2002. Australia's initial requests, covering 17 services sectors, were delivered to 33 WTO Members in the week commencing 1 July 2002, with supplementary requests delivered in the week commencing 28 October 2002. Australia's requests have targeted the services trade barriers of Members whose markets are regarded as important to Australian services exporters, including the European Union, the United States, Canada, countries in North, South and South-East Asia, and some countries in Latin America, the South Pacific and Africa.[16]

4.47 Australia's requests were directed to the following services sectors:

- Accountancy
- Architecture
- Engineering
- Legal
- Services related to mining
- Computer and related services (e.g. software implementation, data processing, installation of computer software)
- Construction
- Distribution
- Private education

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14 *Submission* 54, p. 18 (DFAT)

15 *Submission* 54, p. 19 (DFAT)

16 *Submission* 54, p. 19 (DFAT)

- Environmental services
- Financial
- Private health and aged care
- Maritime transport
- Pipeline transport
- Freight logistics (services related to the movement of goods though and within national borders, such as cargo-handling, storage and warehousing, container station and depot services, and so on)
- Air transport
- Telecommunications
- Tourism
- Sporting services (e.g. sporting event organisation and promotion, operation of sporting facilities)
- Other business services such as management consulting, landscape architecture and urban planning[17]

4.48 Australia has received requests from 23 other WTO Members, including developed and developing countries.[18] The requests cover the following areas:

- Business services and professional services (e.g. real estate, advertising, printing and publishing, legal, accountancy)
- Transport – road, rail, maritime, air
- Recreational, cultural and sporting services
- Tourism
- Health services
- Financial services
- Environmental services
- Education
- Distribution
- Construction
- Audiovisual
- Telecommunications

17 *Submission* 54, pp. 19-20 (DFAT)

18 Australia has received requests from Argentina, Brazil, Canada, China, Chinese Taipei, Egypt, European Communities and their Member States, Hong Kong SAR, India, Japan, Korea, Malaysia, Mauritius, Mexico, Norway, Pakistan, Panama, Peru, Singapore, Switzerland, United States of America and Uruguay. DFAT Discussion Paper on the GATS, January 2003.

- Postal and courier services
- Horizontal issues relating to the temporary movement of services suppliers, foreign investment screening requirements and transparency[19]

4.49 As DFAT as indicated, there is no requirement for Australia to respond to these requests, or to provide reciprocity in the requests Australia has made in similar sectors. DFAT has advised that meetings held to date to discuss these requests have focused on clarifying the scope of the requests and responding to any misunderstandings about Australia's regulatory regime.[20]

4.50 As outlined above, the second stage of the 'request and offer' process is the submission of initial offers by Member countries. The initial offers are non-binding and can be withdrawn or amended at any time. Theoretically, different offers can be made to different Members, however, in practice, one offer is made by a country to all other WTO Members. DFAT has indicated that offers are devised with both 'offensive' and 'defensive' interests in mind. For instance, if a country has strong defensive interests in a particular sector, it may choose not to make any commitments in a particular sector, or to limit its commitments in that sector. If a country has active offensive interests, it may choose to make commitments in order to 'raise the level of liberalising ambition.'[21]

4.51 DFAT has advised that Australia's initial offer was submitted in Geneva on the deadline of 31 March 2003. The offer was developed by DFAT in consultation with other Commonwealth government departments, and drew on information obtained through DFAT's consultations with industry, State and Territory governments, non-government organisations (NGOs) and the public. According to DFAT, the offer also took into account public submissions made to the Department in response to a discussion paper released on 15 January 2003.[22]

4.52 As indicated above, DFAT has pointed out that Australia's initial offer to WTO Members is not legally binding and can be amended or withdrawn, depending on progress in negotiations. DFAT has indicated that the offer

> … builds on the substantial commitments made in the Uruguay Round and subsequent sectoral negotiations in financial and telecommunications services. The offer includes possible commitments on elements of telecommunications, financial services, air and maritime transport, landscape services, legal services, environmental services, computer and related services and mining services. In certain sectors, the offer modernises our existing commitment to reflect regulatory changes since the last set of negotiations. In other sectors or sub-sectors, Australia is making new

19 *Submission* 54, pp. 20-21 (DFAT)

20 *Submission* 54, p. 21 (DFAT)

21 *Submission* 54, p. 21 (DFAT)

22 *Submission* 54, p. 21 (DFAT)

commitments. The offer is consistent with the current regulatory environment in all sectors.[23]

4.53 The sectors in which new commitments have been made are:

- landscape architectural services, in which Australia has a strong export interest;
- mining and related services, in which Australia has substantial expertise and export interest; and
- ground handling within transport services.

4.54 In the telecommunications, computer and related services, other transport services, legal services, environmental services and financial services, Australia's offer builds on commitments made in the Uruguay Round.[24]

4.55 Notwithstanding the fact that there is no requirement for reciprocity as such, it was pointed out in evidence to the Committee that the initial offer transmitted to the WTO is a clear indication to other WTO Members that Australia is prepared to liberalise in the sectors indicated, and this leads to an expectation that we will follow through and make commitments in those areas.[25]

4.56 DFAT's public discussion paper released in June 2003 indicated that progress in the Doha round up to that point had been disappointing in many areas, with key deadlines in negotiations in agriculture and industrial products having been missed.[26] With regard to services negotiations, Australia lodged its initial offer in response to the initial requests by the deadline of 31 March 2003. As at June 2003, 23 WTO Members had lodged their offers with the WTO.[27]

4.57 DFAT's assessment of the offers made to Australia is that 'they show modest but serious preparedness to open services markets in various developed countries. The response by developing countries has so far been variable, and Australia is keen

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23 *Submission* 54, p. 21 (DFAT)

24 *Submission* 54, p. 22-23 (DFAT). For a fuller description of the offers made in the various sectors, see pages 21 to 23 of *Submission* 54 (DFAT)

25 *Committee Hansard,* 8 May 2003, p. 29 (Mr Ted Murphy, National Tertiary Education Union)

26 DFAT Public Discussion Paper – June 2003, Developments in the World Trade Organisation. Available at http://www.dfat.gov.au/trade/negotiations/consultations/background_paper_doharound_030616.html (accessed 14 October 2003)

27 DFAT Public Discussion Paper – June 2003, Developments in the World Trade Organisation, p.2. Members who have lodged their offers include United States, the EC, Japan, Korea, Australia, New Zealand, Canada, Chinese Taipei, Hong Kong, Switzerland, Norway, Uruguay, Paraguay, Argentina, Poland, Iceland, Bahrain, Liechtenstein, Senegal, Israel, Czech Republic, and St Kitts and Nevis.

to see more developing countries make offers.'[28] The discussion paper also stressed that gaining a critical mass of offers in services prior to the Cancun Ministerial Report would be important to the balance in market access negotiations overall.

4.58 In evidence to the Committee in October 2003, DFAT indicated that services negotiations had made some modest progress, particularly in the area of market access, but that the lack of progress at the Cancun Ministerial Meeting would have some impact on progress. Notwithstanding this, service negotiators met in Geneva in the first week of October 2003, and as at that date, there were 38 offers on the table covering 52 WTO Members out of a total of 148. DFAT believes that the Members that have made offers are responsible for over 70 per cent of the world's trade in services.[29]

4.59 Services negotiating sessions were also held in May and July 2003. These sessions involved negotiations to advance market access through bilateral and plurilateral meetings and negotiating on the GATS framework, particularly in regard to domestic regulation and rules.

4.60 The bilateral sessions have focused on clarifying the detail of offers made by other Members and explaining Australia's offer. DFAT indicated that Australia has not made any commitment to offer more than its initial offer, despite being pressed by some Members on a range of issues. Australia's offer has apparently been well received, although some negotiating partners have been 'critical that our offer does not necessarily reflect fully the current openness of our regime.' DFAT indicated that it will keep under review the extent of Australia's 'negotiating flexibility'.[30]

4.61 Despite the lack of progress at the Cancun meeting, there remains optimism about the progress of services negotiations, with DFAT indicating that there remains a 'very positive degree of engagement amongst many members on the services sector' and that there is 'degree of support from industry groups globally in the negotiations'. Whilst it is possible to see the services negotiations continuing in the absence of progress in other areas of the Doha Round given this commitment from Members, DFAT acknowledges that it is very hard to see a conclusion on services in the absence of a conclusion of the broader negotiating effort.[31]

Importance of services trade to the Australian economy

4.62 The Committee received evidence referring to the importance of trade in services to the Australian economy, and at a broader level, to the global economy. As discussed above, the GATS covers an extremely broad range of services. While

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28 DFAT Public Discussion Paper – June 2003, Developments in the World Trade Organisation, p. 3.

29 *Committee Hansard,* 2 October 2003, p. 428 (Mr Bruce Gosper, DFAT)

30 *Committee Hansard,* 2 October 2003, p. 428 (Gosper, DFAT)

31 *Committee Hansard,* 2 October 2003, p. 441 (Gosper, DFAT)

acknowledging that there is 'no single measure which captures the various forms which services trade takes', DFAT argues that '…it is clear that services trade has expanded rapidly, contributing strongly to the globalisation of economic activity. Balance of payment statistics show global commercial services trade growing at about one and a half times the annual rate of the growth of merchandise trade in the 1980s and continuing to grow marginally more rapidly than merchandise trade since 1990.'[32]

4.63 DFAT points out that Australia has very substantial interests in the services sector. Services industries 'made up around 69 per cent of total industry value added in 2000-01 and paid 83 per cent of all wages and salaries.' Further, the contribution of services to the Australian economy is said to have increased substantially over time, with Australian Bureau of Statistics (ABS) data showing that the services contribution to GDP has increased by around 14 per cent between 1964-65 to 1992-93. Over the same period, the share of manufacturing dropped from approximately 26 to 15 per cent of GDP and agriculture from about 11 per cent to 3 per cent.[33]

4.64 The contribution of services to Australia's exports has also increased over time, from 12 per cent in 1959-60 to almost 21 per cent in 1990-91. In 2001-02 the share was 20 per cent. The long term growth in the services sector is said to be attributable to a number of factors, including rising incomes, demographic and lifestyle changes, increasing demand for new business and financial services, the growing importance of knowledge and information technology, and the liberalisation, privatisation and deregulation carried out by successive governments since the 1980s.[34]

4.65 International Trade Strategies states in its submission that the services sector constitutes "an increasingly important part of the global economy" and that services is the largest and fastest growing sector of the world economy. In Australia, ITS indicates that services account for 72% of GDP, and comprise an 80% share of employment. Total Australian services trade was worth approximately $57 billion in 2001-02, with exports worth around $31 billion.[35]

4.66 International Trade Strategies argues that liberalisation of services trade offers significant benefits for WTO Members, including Australia. Its view is that initial commitments to liberalise services trade under the GATS have been 'modest relative to trade in goods' and that significant barriers remain.[36]

4.67 The Committee accepts that, whilst it may be difficult to precisely measure the impacts of services trade to the Australian and the global economies, the contribution of the services sector to the Australian economy is significant and

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32 *Submission* 54, p. 5 (DFAT)

33 *Submission* 54, p. 6 (DFAT)

34 *Submission* 54, p. 6 (DFAT)

35 *Submission* 30, pp. 1-2 (International Trade Strategies Pty Ltd (ITS))

36 *Submission* 30, p. 2 (ITS)

growing. Participation in the GATS would appear to offer benefits in terms of market access for Australian service providers. However, the Committee is concerned that there are some critical issues to be resolved in terms of the broader impact of the GATS on the provision of public services at all levels of government, the impact of the GATS on governments' right to regulate and impacts on particular sectors. These issues are discussed in Chapter 5.

Chapter 5

GATS: implications and impacts

5.1 It became clear to the Committee at an early stage in the inquiry that there was a significant level of public concern about a number of aspects of the GATS and the processes by which Australia would commit itself to liberalising access to various service sectors. These issues include:

- the GATS and public services;
- the impact of the GATS and governments' right to regulate, including the application of the necessity test;
- the transparency of and level of public consultation prior to and during the request and offer phase of the negotiations; and
- particular sectors of concern, including health, public education, the provision of water, postal services and cultural issues.

GATS and public services

5.2 As outlined in Chapter 4, the GATS applies to a broad range of services, with limited exceptions. An important exception, listed in Article I.3(b) is services 'supplied in the exercise of governmental authority'. A service supplied in the exercise of governmental authority is defined in Article I.3(c) as 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.'

5.3 A number of submissions to the inquiry indicated a high level of concern about the nature and scope of this definition, and a degree of skepticism with regard to reassurances by the Department of Foreign Affairs and Trade (DFAT) that public services will not fall within the scope of the GATS.

5.4 The main argument made by those who are unconvinced about the scope of the exception in Article I.3 (believing it will be applied narrowly rather than broadly) is that in the economies of most developed countries, a range of public services supplied by governments, such as education and health, are often delivered alongside private sector entities providing similar services which could be found to be providing their service either on a commercial basis or in competition with the government supplier. The Australian Fair Trade and Investment Network (AFTINET) points out, for instance, that public services such as education, health, water, prisons, telecommunications, energy and many more are provided alongside private sector operators. [1]

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1 *Submission* 42, p. 19 (Australian Fair Trade and Investment Network (AFTINET))

5.5 The Australian Manufacturing Workers Union (AMWU) expressed disagreement with DFAT's interpretation of Article 1.3 of the GATS, arguing that, if public services are provided for a mix of social policy and other reasons, this does not of itself mean that those services cannot be supplied on a 'commercial basis' or 'in competition' with other service providers. Further, with regard to the interpretation of these phrases, it is not clear whether to fall within this exception services must be supplied only on a commercial basis, or whether this must be the dominant basis or part of a mix of reasons on which a service is delivered.[2]

5.6 AID/WATCH also indicated concern that the increased corporatisation of public services and the parallel provision of services such as health by public and private providers could mean that in the event of a dispute, the GATS could be interpreted as applying to publicly provided services.[3]

5.7 Trade Watch argues that a number of public services operate either on a commercial basis or in competition with one or more service providers and expresses concern that because of the built in agenda in the GATS to progressively liberalise the services sector, there will be increasing pressure brought to bear on governments to open access to services currently provided publicly.[4]

5.8 The Victorian Trades Hall Council notes the complexity of the provision of public services in Australia, pointing out that the simple division of public versus private services is unlikely to work in practice.[5] The Community and Public Sector Union indicated that it had 'significant concerns' about the operation of Article I.3, arguing that the capacity of this Article to exclude sectors such as job search, health or education is in considerable doubt.[6]

5.9 The Australian Council of Trade Unions (ACTU) indicates similar concerns with the definition of services supplied in the exercise of governmental authority, arguing that few Australian public services are supplied neither on a commercial basis nor in competition with other service suppliers. The issue is that there are different interpretations of the phrases 'on a commercial basis' and 'in competition with other suppliers.' The ACTU's submission refers to a paper by the Secretariat of the WTO Council for Trade in Services which acknowledges this problem, stating that it is not completely clear what the term 'commercial basis' means.[7]

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2 *Submission* 160, p. 50 (Australian Manufacturing Workers Union (AMWU))

3 *Submission* 165, p. 11 (AID/WATCH)

4 *Submission* 156, p. 10 (Trade Watch)

5 *Submission* 135, p. 7 (Victorian Trades Hall Council)

6 *Submission* 154, pp. 4–5 (Community and Public Sector Union (CPSU))

7 *Submission* 125, pp. 11–12 (Australian Council of Trade Unions (ACTU)). The quote in the submission is cited as being from the Background Note by the Secretariat on Environmental Services, 6 July 1998, paragraph 53.

5.10 There are two 'limbs' to the definition in paragraph (c) of Article I.3, which refers to 'commercial basis' and to 'competition with one or more service suppliers'. Leaving aside for a moment questions about the meaning of 'commercial basis', it could be argued that, even if a public provider of a service is considered not to be supplying it on a commercial basis, it could still be supplying that service in competition with other suppliers.[8]

5.11 The ACTU acknowledges the argument made in response to this, namely that, even if private sector bodies are providing similar services to government providers, the government services are supplied for a range of policy reasons, so the purpose of the supply is different—for example, a public supplier of a service may have certain universal access obligations. However, the ACTU suggests that this argument is almost like saying that unless public suppliers of a service are operating on a commercial basis, they are not in competition with private providers of the same service that do not operate on such a basis. It is important to note that the wording of Article I.3(c) does not conflate these two requirements but refers to services supplied on a commercial basis **or** in competition with other suppliers as separate cases.[9]

5.12 The ACTU points out that in scheduling commitments in 1994, the Australian government did not simply rely on the current interpretation of Article I.3 when it included education services in Australia's schedule of commitments. Commitments on education services were limited to private higher education and private secondary education.[10]

5.13 The Castan Centre for Human Rights Law argues that the exclusion in Article I.3 applies only to government–run monopolies, and even then may not apply if the monopoly runs at a profit and possibly even if any charge is applied to the service, depending on the interpretation of 'on a commercial basis'. On the narrowest reading of Article I.3, a government service provider that applies a charge to one kind of service in order to subsidise another would not fit within the exclusion for government services. All services that do not fit within this exclusion are subject to the obligations set out in Part II of the GATS, which means that any government regulation of these services must comply with the GATS rules.[11]

5.14 If this was the case, the Castan Centre points out that some of the services that have an impact on human rights and which could fall within the scope of Part II of the GATS include water and power utilities, sewerage and waste disposal, health services, education, telecommunications, prisons and detention centres and security services.[12]

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8 *Submission* 125, p. 12 (ACTU)

9 *Submission* 125, p. 12 (ACTU)

10 *Submission* 125, p. 12 (ACTU)

11 *Submission* 58, p. 4 (Castan Centre for Human Rights Law)

12 *Submission* 58, p. 4 (Castan Centre for Human Rights Law)

5.15 A further complicating factor in considering the definition of Article I.3 and the application of Part II of the GATS is that governments are frequently under pressure to privatise social services or to implement 'full cost recovery', where the charge for a service is required to at least meet the cost of supplying that service. Arguably, this makes such a service a supply 'on a commercial basis' and within the scope of the GATS.[13]

5.16 The Victorian Greens raise some interpretive difficulties with Article I.3, arguing that from a legal perspective, the critical terms are 'commercial' and 'competition', neither of which are defined in the GATS. In the event of a dispute, the meaning of these terms will be decided by a WTO dispute settlement panel. As to the ordinary meaning of these words, 'commercial' generally means engaged in commerce, pertaining to commerce or trade, buying and selling of goods for money or equivalent. Tertiary education and many health services, it is argued, are supplied on a fee for service basis which could bring those services within the definition of 'commercial'.[14]

5.17 The ordinary meaning of 'competition' is 'rivalry in the market', or 'the act of competing or contending with others'. Universities, for example, whether public or private, compete for students, and public and private health services compete for patients. Therefore, arguably, these services would not necessarily be excluded under Article I.3(b). It is also argued that the use of 'nor' in Article I.3(b) suggests that to protect a public service from the operation of the GATS it must be demonstrated that both qualifications apply, i.e., the service is provided *neither* on a commercial basis *nor* in competition with other service providers.[15]

5.18 The Victorian Greens refer to WTO Secretariat Background Notes which raise concerns about the scope of Article I.3 and the meaning of 'in competition with' in this context. The Background Note of the WTO Secretariat on Health and Social Services (which is quoted) comments on the hospital sector, which in many countries is made up of government and private providers operating on a commercial basis, charging the patient or the patient's insurance for treatment. The Background Note goes on to state that '[i]t seems unrealistic in such cases to argue for continued application of Article I.3 and/or maintain that no competitive relationship exists between the two groups of suppliers or services'. The conclusion drawn from these

13 *Submission* 58, p. 4 (Castan Centre for Human Rights Law). The Castan Centre goes on to point out that for developing countries seeking loans from the World Bank or the International Monetary Fund, where privatisation and commercialisation are common conditions for assistance, it is questionable whether the application of the general obligations in Part II of the GATS to privatised services is genuinely consensual, especially where these conditions are imposed after the country acceded to the GATS.

14 *Submission* 114, p. 4 (Victorian Greens)

15 *Submission* 114, p. 9 (Victorian Greens)

comments is that Article I.3(b) and (c) will have a narrow application and will not protect a number of public services.[16]

5.19 Suggestions to lessen the interpretive difficulties and the ambiguity in Article I.3(b) and (c) are proposed in the Victorian Greens' submission. The first suggestion is the adoption of a restrictive interpretation. If a term is ambiguous, then the meaning of the term which involves less general restrictions on the sovereignty of the Member should be used.

5.20 The second suggestion is to adopt an effective interpretation or purposive approach, looking at the goal of the treaty and treating all objectives equally. Hence, although the overarching objective of the GATS is to liberalise trade in services, the preambular statements of the GATS also refer to the right to regulate the supply of services. This would lead to an interpretation of Article I.3(c) which is narrower in scope than the meaning obtained from a textual approach. The interpretation then applied would mean that the overall objectives of the GATS would be to liberalise trade in services while securing the sovereign rights of Members to regulate the supply of those services.[17]

5.21 A third suggestion involves examining legislative approaches to narrow the scope of the reference in Article I.3 to public services. This would involve an amendment to the GATS either through an interpretive understanding or an authoritative decision of the Ministerial Conference or the General Council of the WTO, to narrow the scope of Article I.3 by specifying meanings for 'commercial basis' and 'in competition'.[18]

5.22 A number of other submissions to the inquiry expressed similar concerns to those discussed above in relation to the potentially narrow scope of the application of Article I.3, and therefore the potential for a number of public services in Australia to be caught by the provisions of the GATS.[19]

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16 *Submission* 114, pp. 4–5 (Victorian Greens) The Background Notes quoted in the submission are from the Secretariat on Health and Social Services, 18/9/98 S/C/W/50 and the Secretariat on Environmental Services 6/7/98, S/C/W/46.

17 *Submission* 114, p. 6 (Victorian Greens). The suggestions referred to are credited to Markus Krajewski, a Visiting Attorney at the Centre for International Environmental Law in Geneva.

18 *Submission* 114, p. 6 (Victorian Greens)

19 See for example *Submission* 8 (Australian Pensioners and Superannuants' League Qld Inc.), *Submission* 17 (Combined Pensioners and Superannuants Association of NSW Inc), *Submission* 22 (The United Trades and Labor Council of South Australia), *Submission* 26 (Waddington), *Submission* 35 (Little), *Submission* 33 (Clifford), *Submission* 34 (Maguire), *Submission* 41 (Bracken) *Submission* 43 (National Centre for Epidemiology and Population Health), *Submission* 107 (Mr Arnold Rowlands), *Submission* 118 (Earthworker), *Submission* 119 (StopMAI Coalition (WA)), *Submission* 127 (Dee Margetts MLC), *Submission* 142 (O'Connell), *Submission* 145 (Bradley and Nielsen), *Submission* 146 (Copeman), *Submission* 156 (Trade Watch)

5.23 In response to these concerns, DFAT maintains that the GATS does not force governments to privatise or open up public services to competition and that, in the context of GATS, Member countries remain free to determine which sectors will be reserved for the state or state–owned enterprises. The corollary of this is that Members are also free to decide which sectors they will open to outside competition and make binding commitments to in their GATS schedules.

5.24 DFAT further maintains that there is no doubt that, when the GATS was being negotiated during the Uruguay Round, Member governments believed that public services were to be excluded from the scope of the GATS, and that this position has been reinforced during current negotiations.[20]

5.25 In evidence to the Committee, Mr Bruce Gosper referred to the exception in Article I.3 and submitted that the GATS framework is based on the right of governments to provide, fund and regulate public services, and that the negotiating parties did not intend to infringe on this right. The Department's view is that the GATS provides adequately for the co–existence of publicly and privately provided services, even in the same sector. [21]

5.26 It is argued that the purposes underpinning the provision of public services differ from the purposes for which privately delivered services are supplied, even where those services exist in parallel. Public education or public health services are provided for a broad set of public policy reasons, whereas similar services in the private sector are provided for a narrower set of reasons. The Committee notes this argument but questions whether this fact in itself would be sufficient, in the event of any dispute about a public service, to prove that that service is not provided on a commercial basis nor in competition with other providers.

5.27 For these reasons, DFAT argues, Australia has made commitments on private secondary and private tertiary education, but not on public education. Australia is seeking commitments from other WTO Members in the Doha Round on private health and private aged care but not on public services in these sectors. In doing so, Australia has acknowledged that in the health, education and social services sectors, the main providers are publicly owned. This recognition is emphasised in Australia's October 2001 negotiating proposal on education services which assert that governments must retain their sovereign right to determine their own domestic funding and regulatory measures.[22]

5.28 In terms of Australia's negotiating position, DFAT argues that Australia's commitments in the Uruguay Round were structured so that we are able to discriminate between foreign and domestic suppliers should the question about the provision of public services become an issue.

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20 *Submission* 54, p. 30 (DFAT)

21 *Committee Hansard,* 2 October 2003, p. 427 (Mr Bruce Gosper, DFAT)

22 *Submission* 54, p. 30 (DFAT)

5.29 With regard to the understanding of Article I.3 by WTO Members, Mr Gosper pointed out that since the GATS was adopted in 1994, no Member has 'chosen to contend these matters in dispute settlement or … in any other WTO process'. In response to a question from the Committee regarding the concerns expressed to the Committee about the interpretation of Article I.3, Mr Gosper went on to emphasise this point:

> The first comment I would make is that, as I said originally, we have now got nine years of experience of this agreement. We know what was intended when it was negotiated and we know how WTO members view the agreement. That is well demonstrated by the fact that it has not been raised as an issue or tackled in any meaningful way—certainly not through dispute settlement or otherwise. The critics of this provision—those who are most concerned about it—do not refer to anything that has actually happened or is happening but to the potential for some implication to arise from this clause.[23]

5.30 Mr Gosper acknowledged the concerns about the way in which Article 1.3 could be interpreted in terms of the delivery of similar services by public and private entities:

> I will not deny that there is ambiguity that can be read into this clause. That is not least because, to be very frank, the character of public services in most modern developed economies—in fact, I would say all—involves both public and privately delivered services. Most of these things exist side by side to some extent now in all economies—certainly in all developed economies and certainly in our own. So that raises a complexity to it.

5.31 However, Mr Gosper explained that, accepting that there was ambiguity in these words, the first question to ask is whether this causes a real problem at the moment, bearing in mind that the interpretation of this Article will only become an issue if a WTO Member brings a case against another Member using the dispute settlement process. The response to this question was that at present, this is not a problem, and has not been so in nine years of operation of the GATS. The second question is whether this ambiguity in Article I.3 can be easily remedied; the answer to this being that it is not clear that it can be easily resolved—the ambiguity may be perpetuated or worsened.[24]

5.32 It was acknowledged that this provision has not been tested in a dispute settlement process before the WTO, and that there has only been one dispute (not yet resolved) with respect to the services regime since the GATS came into force. However, DFAT asserted that, notwithstanding the lack of a ruling by the WTO on

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23 *Committee Hansard,* 2 October 2003, p. 431 (Gosper, DFAT)

24 *Committee Hansard,* 2 October 2003, p. 431 (Gosper, DFAT)

this point, '[w]e know what it means. We are a member government of the WTO, and our view on what it means seems to be shared by other WTO member governments.'[25]

5.33 Further, when this issue was discussed by Member governments of the WTO, the question was not one of how the ambiguity in this Article could be resolved amongst Members but how to raise 'comfort level' of civil society groups and others with respect to this Article. There is said to be no indication amongst WTO Members that they do not understand exactly what this Article means, and no move by any Member to request clarification on this point.[26]

5.34 The issue of subsidies is intertwined with the concerns about provision of public services. The argument is that, if public services and private services in the same sector are regarded as being in competition, the private provider may be able to seek a share of any subsidies provided to the public sector by the government, in accordance with the national treatment requirements of the GATS.

5.35 The rule on national treatment, contained in Article XVII of the GATS essentially requires that once a sector has been scheduled for foreign access, a Member country must not discriminate between foreign and domestic services and suppliers; that is, in those sectors scheduled, and subject to any conditions and qualifications set out in the schedule, foreign suppliers must not be given treatment any less favourable that domestic suppliers.

5.36 In this context, DFAT considers the concerns about access to subsidies are overstated, apart from its view that public and private services are not provided in competition, because:

> [f]irstly the issue could only ever arise if a member had made a mode 3 [commercial presence] commitment in a sector with public and private elements, and secondly the argument assumes that the payments to the public sector are in fact subsidies. The work on subsidies in the GATS has barely started, but if the rules of the WTO Agreement on Subsidies and Countervailing Measures were to be applied, it seems unlikely, under the specificity provisions, that a payment by a government to the public sector would be characterised as a subsidy.[27]

5.37 DFAT indicated that the possible future impact of the GATS on the provision of public services will need to be kept under review, with a view to adopting the most effective approach to removing doubts about the 'exclusion from the GATS of public services and of public payments for service provision'.

> Article XV (Subsidies) requires members to enter into negotiations with a view to developing the necessary multilateral disciplines to avoid the trade distortive effects of subsidies. Article XV also notes (recognising the likely

25 *Committee Hansard,* 2 October 2003, p. 431 (Gosper, DFAT)

26 *Committee Hansard,* 2 October 2003, p. 432 (Ms Lisa Filipetto, DFAT)

27 *Submission* 54, p. 31 (DFAT)

> complexity of developing subsidies disciplines, including because of the public provision of many services) that the negotiations should take into account the needs of Members for flexibility in this area.[28]

5.38 DFAT noted that the work on subsidies continues to proceed very slowly, and emphasised the Australian government's commitment to doing nothing in the negotiations that would limit the right of WTO Members to regulate and fund public services for social policy reasons.[29]

5.39 The Committee takes some reassurance from these statements about the meaning of Article I.3 and the certainty with which they are expressed, and notes the government's position of principle on maintaining the right of WTO Members to regulate and fund public services. The Committee accepts that much of the concern expressed in evidence to this inquiry about the applicability of the GATS to public services is about the unknown, about outcomes which have not yet occurred and may not occur, and are based on possibilities rather than actualities.

5.40 The Committee acknowledges too that the government has confirmed that it will not be making offers in these negotiations with regard to public health, public education and ownership of water.[30] However, it is always possible that there will be pressure in the future to liberalise access to these services given the built in agenda of the GATS which requires a commitment to increasing liberalisation.

5.41 It is clear that there remains a significant level of concern about the potentially broad-ranging impact of the GATS on public services. Reassurances that all Members of the WTO are certain of the meaning of Article I.3, may mean that it is unlikely that there will be a dispute. However, the Committee remains unconvinced that, in the event of a dispute, Article I.3 would be interpreted in the broad or inclusive way suggested by DFAT. This would mean that public services now said to be exempt from the GATS could be found to be subject to the obligations under Part II.[31]

5.42 Further, as pointed out by DFAT, the negotiations for the development of rules on subsidies as required under Article XV of the GATS have not yet been finalised and are progressing very slowly, partly because of the large number of services provided publicly. The fact that the rules on such an important issue have not been finalised, yet Members are making binding commitments under the GATS, suggests that there is all the more reason to be cautious in making any commitments which could impact on the provision of public services.

5.43 In the Committee's view, perhaps more could be done to 'raise the comfort level' of civil society groups and the community in general with regard to whether

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28 *Submission* 54, p. 31 (DFAT)

29 *Submission* 54, p. 31 (DFAT)

30 See *Committee Hansard,* 2 October 2003, p. 429 (Gosper, DFAT)

31 Such services could, for example, include sewerage and waste disposal, telecommunications, water, prisons, and energy.

public services are excluded from the GATS or not. There may be some comfort provided in recognition or acknowledgement by the government of the ambiguity in Article I.3 and therefore adopting a conservative approach to making commitments in sectors where publicly funded services are involved.

5.44 In its assessment of the interpretive issues surrounding this Article, the Victorian Greens submission suggests three different approaches to resolving the ambiguity, discussed above. Two of these suggestions do not involve changes to the GATS itself but involve adopting different approaches to the interpretation of the treaty. The Committee considers that these proposals, in particular the first two suggestions, do have the potential to lessen the ambiguity surrounding this clause and are worthy of further consideration.

Recommendation 4

5.45 **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.**

GATS and the right to regulate

5.46 The potential restrictions that the GATS places on Members' right to regulate domestically is related to the question of the applicability of the GATS to public services. Evidence received by the Committee during the course of this inquiry indicates similar concerns about the impact of the GATS on the right to regulate domestically to achieve desired policy outcomes.

5.47 Whilst supportive of trade liberalisation which leads to improvements in market access for services exporters and improvements in the level and quantum of services provided to local communities, the Australian Local government Association indicated that it would oppose any 'proposal that may have the potential to undermine the or weaken public governance arrangements in Australia. Specifically, local government would oppose any proposal that would reduce the capacity of local authorities to make appropriate regulations on behalf of their communities.'[32]

5.48 AFTINET argues that Australia's regulation at all levels of government could be subject to challenge by another Member under the GATS. Article XXIII (Dispute Settlement and Enforcement) provides that any Member may seek a ruling from the WTO's Dispute Settlement Body (DSB) if that Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member is being is being nullified or impaired as a result of the application of any measure.

5.49 If the DSB determines that the measure has nullified or impaired a benefit, the Member affected is entitled to a mutually satisfactory adjustment, which may include

32 *Committee Hansard,* 22 July 2003, pp. 186–187 (Mr Ian Chalmers, ALGA) See also *Submission* 120, p. 2 (ALGA)

the modification or withdrawal of the measure. If the parties cannot agree on a mutually satisfactory adjustment, Article XXIII provides that Article 22 of the Dispute Settlement Understanding is to apply, which allows affected members to apply measures against the country in question.

5.50 The effect of this, AFTINET argues, is that 'great economic and political pressure can be brought to bear on Australia' as to how the government should regulate. The decision about whether a regulation is acceptable or not is made by a closed body of trade experts who consider trade issues only, not the broader public policy objectives which governments must have regard to.[33]

5.51 AFTINET also points out that Australia is unable to change its GATS commitments without cost. As the ACTU has also pointed out, and as is discussed below, Article XXI allows for 'compensatory adjustment' to be made to affected Members by a Member which changes its GATS commitments. If Australia wanted to change its commitments, it could not do so until after the compensatory adjustment was implemented.[34] Aside from the potential cost of such compensation, this provision means that commitments entered into by one government are effectively binding on subsequent governments, potentially restricting future regulation.

5.52 The AMWU acknowledges the government's commitment that it 'will not agree to any diminution of our overall right to regulate that would constrain our ability to pursue legitimate policy objectives in the regulation of services sectors, or compromise the capacity of governments to fund and maintain public services'. It argues that this statement 'must translate into a broad, substantial and ongoing commitment' and notes that the government has not been specific with regard to what it means by 'legitimate' policy objectives or maintaining public services.[35]

5.53 The AMWU also expresses concern that modern trade treaties, and in particular the GATS, fetter future parliaments in a way that most international treaties do not. As other submissions discussed here have pointed out, for a Member to take action which is inconsistent with its obligations under the GATS carries with it the risk of substantial economic penalties. Future governments are potentially constrained in their ability to regulate services as a result of binding GATS commitments.[36]

5.54 The Victorian Greens place their uneasiness about the restrictions the GATS imposes on the right to regulate in the context of the particular issues faced by developing countries. It is argued that the GATS currently imposes significant restrictions on the ability of Member governments to make domestic regulations controlling the delivery of services. The ability to regulate for developing nations is stressed as being vitally important to ensure, for example, effective provision of basic

33 *Submission* 42, pp. 15–16 (AFTINET)

34 *Submission* 42, p. 16 (AFTINET)

35 *Submission* 160, p. 51 (AMWU)

36 *Submission* 160, p. 51 (AMWU)

services, provisions to guard against unregulated development and the environmental damage which can accompany it and regulations to protect health, safety standards and workers' rights.[37]

5.55 WTO Watch Queensland expresses a similar concern to the ACTU, discussed below, acknowledging that the preamble to the GATS and the text of the Doha Declaration recognise the right of governments to regulate but pointing out that these statements are not legally binding. In the case of a dispute, the preamble to the GATS may be used to shed light on the interpretation of the agreement but regulatory measures must conform to the requirements in the body of the GATS and a Member's specific commitments.[38]

5.56 The ALGA cautions that, although some services provided by local government may not be provided on a commercially viable basis and therefore fall outside the scope of the GATS

> [n]evertheless, we are not blessed with infinite foresight and we do want to make sure that the structure of agreements that are made on a transnational basis do not open the possibility at some stage in the future that, for commercial reasons, the freedom of local authorities to make regulations, to set by-laws and to subsidise the delivery of services in the community interest cannot be constrained.[39]

5.57 The ACTU acknowledges that the preamble to the GATS affirms the right of Member governments to regulate the supply of services, but points out that this right is circumscribed in a number of ways in the text of the GATS. The ability of governments to regulate is limited by their schedule of commitments. To the extent that national treatment commitments are undertaken, regulation by way of measures that favour domestic suppliers over foreign suppliers is precluded. Similarly, to the extent that market access commitments are undertaken, there are a number of measures set out in Article XVI which a Member may not adopt, which constrains governments ability to regulate.[40]

5.58 The Committee accepts this point and notes also that it is possible for Member governments to schedule limitations on market access in specified areas and on the application of national treatment. The key is that these limitations *must be specified in the Member's schedule of commitments.*

5.59 The ACTU acknowledges that a Member can schedule a particular limitation or reservation for a sector or sub–sector for which it is providing a market access commitment. Limitations are generally used to maintain existing specific measures which are in some way contrary to the principle of market access. The ACTU argues

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37 *Submission* 114, p. 25 (Victorian Greens)

38 *Submission* 117, p. 15 (WTO Watch Queensland)

39 *Committee Hansard,* 22 July 2003, p. 193 (Chalmers, ALGA)

40 *Submission* 125, p. 4 (ACTU)

however that scheduling a limitation does not of itself confer a general right to regulate in the sector concerned. The principle of 'standstill' applies to scheduled limitations which means that changes cannot be made to existing arrangements, and new measures cannot be introduced, if the effect would be to expand the trade restrictive effect of the scheduled limitation.[41]

5.60 The ACTU points out two examples to illustrate the significance of the schedule of commitments for a government's right to regulate. Having given commitments to remove local content quotas for television and radio, the New Zealand government received advice to the effect that to reintroduce content quotas would potentially put the government in breach of its GATS commitments. With regard to universities, the New Zealand government is similarly precluded by the market access commitments made by the previous government from setting a numerical limit on the number of private universities in that country.[42]

5.61 Under Article XXI of the GATS, a Member may modify or withdraw any commitment in its schedule, any time after three years have elapsed from the date the commitment was entered into. However, if this occurs, any other Member that may be affected by the withdrawal may enter into negotiations with that Member, to agree on any necessary compensatory adjustment, which can be substantial. If agreement is not reached, the matter may be referred for arbitration. If the modifying Member does not comply with the outcome of the arbitration, other Members may deny substantially equivalent benefits—i.e. impose trade sanctions.

5.62 It is argued that this provision provides a deterrent effect and 'effectively locks in the commitments made by governments that were in office at the time of negotiations on specific sector commitments.'[43] The Committee acknowledges this argument, and has some concerns about the way in which a government can bind subsequent governments to what amounts to irreversible commitments under the GATS. This issue was discussed in more detail in Chapter 3.

5.63 Professor Jan McDonald drew the Committee's attention to the potential environmental implications of the restrictions on domestic regulation implicit in the GATS. Article VI.4 of the GATS requires the Council for Trade in Services to develop any necessary disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade. Professor McDonald points out that such disciplines may inadvertently curtail legitimate social and environmental regulation—the 'chilling' effect.[44]

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41 *Submission* 125, p. 5 (ACTU)

42 *Submission* 125, p. 5 (ACTU). On New Zealand's audio visual commitments, see also *Submission* 40, p. 22 (Australian Writers' Guild (AWG))

43 *Submission* 125, p. 5 (ACTU)

44 *Committee Hansard,* 24 July 2003, p. 397 (McDonald). See also *Submission* 143, pp.1–2 (Professor Jan McDonald)

5.64 Australia currently has in place a sophisticated regulatory framework within which services industries must operate. This system is 'far from perfect, but it represents a democratically–reached compromise between development priorities and the need to safeguard and enhance environmental quality for future generations.' Professor McDonald argues that great care must be exercised in the negotiation of additional disciplines under Article VI.4, the aim of which is to reduce the use of regulatory barriers to trade, to 'ensure that normal environmental regulatory requirements, such as local government pollution control licences and development approvals, are not exposed as 'unnecessary obstacles to trade''. Further, Professor McDonald argues:

> Article VI.4 should, if anything, be clarified to make clear that it does not take away members' rights to impose measures for good urban and resource planning and for environmental management.[45]

5.65 Professor McDonald notes also that there is no equivalent GATS provision to Article XX(b) of the General Agreement on Tariffs and Trade (GATT) which permits measures 'relating to the conservation of exhaustible natural resources'. This omission from the GATS is potentially very significant, given that undertakings to liberalise services sectors cannot be reversed once made. A Member may be exposed to WTO dispute settlement proceedings if it seeks to remedy unforeseen environmental consequences of opening a particular sector to competition.

5.66 Given these provisions, Professor McDonald stresses that the irreversibility of commitments under the GATS is 'reason enough to take an extremely cautious approach to the range of services and types of restrictions Australia wishes to liberalise.'[46]

5.67 A further concern is that, by committing to liberalise new services sectors under the GATS, Australia is not making it more difficult to 'alter and respond within our regulatory framework.'[47] Regardless of whether a service provider is Australian or foreign owned, Professor McDonald argues that

> [w]hat is essential is that liberalisation allows Members to retain the right to demand high standards of service industries, regardless of their nationality. Stipulations of environmental track record/past performance should be permissible for new entrants, regardless of nationality. The expectation that providers will comply fully with the regulatory framework for their industry should also be made clear. For example, market access arrangements must not be construed as limiting the right of regulators to restrict the volume or scope of activities in certain environmentally harmful activities, such as mineral exploration.[48]

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45 *Submission* 143, p. 2 (McDonald)

46 *Submission* 143, p. 3 (McDonald)

47 *Committee Hansard,* 24 July 2003, p. 398 (McDonald)

48 *Submission* 143, p. 3 (McDonald)

5.68 When new sectors are opened up under the GATS, it must be made explicit that this is occurring within an evolving and non–static regulatory framework, which should ensure that it is possible to maintain regulatory flexibility to 'recognise and respond to new environmental challenges as and when they arise.'[49]

5.69 Allowing foreign service providers into Australia under Mode 3 (commercial presence) also raises regulatory enforcement issues. Professor McDonald points out that the fact that a service provider is not Australian is not of itself bad for the environment, but it can be more difficult to impose liability for breaches of applicable environmental laws, especially the 'ultimate sanctions of personal fines and prison terms for company managers'. There could also be problems recovering fines or the cost of remediation if environmental damage is caused.[50]

5.70 One way of addressing these issues, and ensuring as far as possible that Australia is able to enforce its current regulatory regime to enable protection of the environment where this is necessary, is to undertake an appropriate sustainability impact assessment on a sector-specific basis. Before a new sector is opened up under the GATS, an assessment could be made of the regulations currently applying to that sector, and of what is necessary for that particular sector.[51]

5.71 The Committee accepts that the environmental, regional, social and cultural impacts of trade liberalisation are not immediately apparent. This is all the more reason to be cautious in making commitments to open up sectors under the GATS and to ensure that there is flexibility to enforce Australia's existing regulatory regime and where necessary, introduce new regulator controls for specific sectors.

5.72 The Committee has recommended elsewhere measures to ensure appropriate review of the impacts of trade liberalisation on Australia's regulatory regime, and that proper consideration is given to the economic, social, cultural and regional impacts of trade agreements (see Chapter 3).

Response to issues raised

5.73 DFAT points out that the GATS recognises the right of Members to regulate, and introduce new regulations on the supply of services within their territories, in order to meet national policy objectives. Further, the GATS itself indicates various ways in which a range of areas fall outside the scope of the GATS disciplines, including:

- Immigration matters
- Services supplied in the exercise of governmental authority
- Fiscal policy and taxation measures

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49 *Committee Hansard,* 24 July 2003, p. 400 (McDonald)

50 *Submission* 143, p. 3 (McDonald)

51 *Committee Hansard,* 24 July 2003, p. 402 (McDonald)

- Customs systems
- Certain aspects of investor protection concerning the movement of capital
- Monetary policy and exchange rate management
- Privatisation – although there are disciplines for state-owned trading entities and monopolies
- Services directly related to the exercise of air traffic rights.

5.74 In addition, Article XIV of the GATS contains a number of general exceptions which enable certain measures to be adopted or enforced, provided that those measures are not applied in an arbitrary or unjustifiably discriminatory manner, or a disguised restriction on trade in services. The measures listed are measures necessary to:

- protect public morals or to maintain public order (which may be invoked only where a 'genuine and sufficiently serious threat is posed to one of the fundamental interests of society');
- protect human, animal or plant life or health;
- prevent deceptive and fraudulent practices and protect the privacy of individuals;
- protect safety.[52]

5.75 Article XIV *bis* contains security exceptions, and notes that nothing in the GATS is to be construed as requiring any Member to disclose information contrary to its essential security interests, or preventing any Member from taking action necessary to protect those interests.

5.76 DFAT maintains that the structure of the GATS itself is sufficiently flexible to allow Members to frame their commitments in the way they wish to. For example, Article II allows for exemptions from the Most Favoured Nation (MFN) principle, provided that these comply with the Annex on Article II Exemptions. The Annex provides that in principle, exemptions should not exceed ten years and are subject to negotiations in subsequent trade liberalising rounds. The Council for Trade in Services is to review all exemptions granted for a period of more than five years.

5.77 Australia has two MFN exemptions, to enable maximum regulatory flexibility in the audiovisual and cultural sectors, and across the board there are more than 180 MFN exemptions.[53]

5.78 Article XVI (Market Access) allows Members to schedule limitations on market access in a range of specified areas listed in the Article, including limitations

52 *Submission* 54, p. 32 (DFAT)

53 *Submission* 54, p. 32 (DFAT)

on the number of services suppliers in a sector, limitations on the total number of services transactions, and measures which restrict or require specific types of legal entity or joint venture through which a services supplier may supply that service.

5.79 Article XVII (National Treatment) requires a Member to provide the service suppliers of other Members treatment no less favourable than it provides to its own like services and service suppliers. This requirement is subject to any conditions and qualifications set out in a Member's schedule.

5.80 DFAT indicated that Australia has scheduled limitations to market access and on the application of national treatment in a number of cases where the existence of Commonwealth, State or Territory laws impinge on the application of Australia's market access or national treatment conditions commitments. Australia has also included further limitations in its horizontal schedule.[54]

Working Party on Domestic Regulation

5.81 In accordance with Article VI.4 of the GATS, the WTO's Council for Trade in Services has established the Working Party on Domestic Regulation to develop any necessary disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. Article VI.4 states that the disciplines developed must aim to ensure, among other things, that these requirements are:

- based on objective and transparent criteria, such as competence and the ability to supply the service;
- not more burdensome that necessary to ensure the quality of the service;
- in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5.82 The ACTU has expressed concern that the scope of the proposed disciplines being developed by the Working Party could potentially be quite wide, based on what was submitted by Members to the Working Party in 2002 as examples of trade barriers that could or should be addressed by new disciplines. Examples given include:

- zoning and operating restrictions designed to protect small stores;
- different licensing and qualification requirements set by federal and state governments, and by different states;
- a requirement for fluency in the language of the country in which a service is being delivered, allegedly not necessary to ensure the quality of the service;
- 'unreasonable' environmental and safety standards for maritime transport;

54 *Submission* 54, p. 32 (DFAT)

- indemnity insurance requirements.[55]

5.83 The ACTU argues that the nature of the criteria listed in Article VI.4 constitute a 'potentially narrow frame of reference for judging domestic regulation of the kind covered by Article V1'. For example, licensing requirements may go well beyond the competence or ability of the service supplier, and may include factors such as public interest, affordability of access, price stability, consumer protection or universal service obligations. Such requirements can be seen as 'more burdensome that necessary to ensure the quality of the service', contrary to the criteria in Article VI.4, because they go beyond quality assurance and competence and ability to supply the service.[56]

5.84 According to DFAT, the progress of the Working Party to date has been slow, because many Members have other priorities. The Australian government has indicated its intention is to ensure that no decisions adopted under Article VI.4 limit the right of the government to regulate for legitimate policy (i.e. not trade restrictive) reasons, and that any outcomes under Article VI.4 reinforce the domestic legal and review processes already applicable to GATS domestic regulatory issues under Article VI.2.[57] Further, DFAT maintains that the GATS does not add significant or substantial new issues for Australia in the domestic regulatory area, pointing out that Australia's own regulatory regime is already ahead by a considerable degree of what the GATS is trying to achieve, and that this is an area in which Australia can make a positive contribution.[58]

Necessity test

5.85 Article XIV of the GATS sets out a number of general exceptions, which means that the GATS will not apply to measures which may be adopted by a Member for a range of reasons. These exceptions include measures necessary to protect public morals or maintain public order, necessary to protect human, animal or plant life and health, or necessary to secure compliance with laws or regulations relating to the prevention of fraud and the protection of the privacy of individuals.

5.86 The issue of the interpretation and application of what is called the 'necessity test' is interlinked to a degree with the issue of the restrictions the GATS places on governments' ability to regulate.

5.87 The ACTU points out that measures taken under Article XIV must not be a disguised restriction on trade in services. Further, the term 'necessary' in the context of similar articles in other WTO agreements has been interpreted by Dispute Panels as incorporating a requirement that the measures taken by a government be 'least trade

55 *Submission* 125, p. 7 (ACTU)

56 *Submission* 125, p. 8 (ACTU)

57 *Submission* 54, p. 33 (DFAT)

58 *Committee Hansard,* 2 October 2003, p. 427 (Gosper, DFAT)

restrictive' in impact, even if they are not a disguised restriction on trade in services. In other words, the ACTU argues, although certain measures may have been genuinely taken by a government to protect human life, etc, the measure may still be disallowed by the WTO on the grounds that other measures, less trade restrictive in effect, could have been taken to achieve those objectives.[59]

5.88 In response to this, DFAT stressed that the necessity test would not apply to the necessity of objectives, which are a matter for Member governments to decide, but to the measures chosen to meet those objectives. The necessity test is said not to be about the primacy of a government to establish its policies but about the implementation of those policies to ensure that there is more of a predictability and certainty about the process than the outcome.[60]

The hybrid nature of the GATS

5.89 A further point worth noting in the context of the impact of the GATS on a broad range of services and the right to regulate is that the GATS is essentially a 'hybrid' agreement, incorporating some features which are 'top–down' (applying to all services unless exemptions are listed, sometimes known as negative listing) and others which are 'bottom–up' (applying only to those sectors which are listed, or positive listing).

5.90 The top down features of the GATS include the fact that it applies to all measures affecting trade in services (Article I.1), the GATS covers all means of supplying services internationally (the four modes set out in Article I.2), the Most Favoured Nation rule and the fact that no services, except those supplied in the exercise of governmental authority, are excluded *a priori*.[61]

5.91 The 'bottom up' features of the GATS, which only apply to sectors included in Members' schedules include the provisions on Market Access (Article XVI) and National Treatment (Article XVII).

5.92 Perhaps the most significant issue here is the potential scope of the interpretation of what is meant by 'measures' in Article I.1. Such measures, or government actions, can take any form including laws, regulations, administrative decisions and possibly even unwritten practices. These restrictions cover measures implemented by all levels of government—state, local and federal. The Canadian Centre for Policy Alternatives points out that the WTO appellate body has stated that there is no reason to give Article I.1 a narrow meaning, stating that there is no notion of limiting the scope of the GATS to certain types of measures or a certain regulatory

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59 *Submission* 125, p. 6 (ACTU)

60 *Committee Hansard,* 2 October 2003, pp. 426, 440 (Gosper and Filipetto, DFAT)

61 Scott Sinclair and Jim Grieshaber-Otto, *Facing the Facts: A guide to the GATS debate,* Canadian Centre for Policy Alternatives, 2002, pp. 12–13. On the top-down and bottom-up features of the GATS, see also *Submission* 117, pp. 6–10 (WTO Watch Queensland)

domain. Rather, Article I.1 refers to measure in terms of their effects, which means that such measures could be of any type or relate to any area of regulation.[62]

5.93 The Committee notes that the existence of such jurisprudence indicates that it is more likely than not that, in the event of any dispute about the scope of this provision, it is likely to be interpreted very broadly:

> In other words, no government action, whatever its purpose—protecting the environment, safeguarding consumers, enforcing labour standards, promoting fair competition, ensuring universal service … is, in principle, beyond GATS scrutiny and potential challenge. Because of this stunning breadth along, it is not only legitimate, but vital, for citizens, NGOs, and elected representatives at all levels of government to critically examine potential GATS impacts on an almost unlimited range of public interest measures.[63]

The public consultation process

5.94 In its submission and during oral evidence, the Department of Foreign Affairs and Trade explained to the Committee in some detail the nature and extent of the public consultation it had undertaken on the GATS. This process is outlined in greater detail below. The consultation itself can be viewed as a two way process: the Department engages in consultation with industry and other bodies to inform itself and gain a better understanding of Australia's offensive and defensive interests and therefore, its negotiating priorities. In turn, the Department has a responsibility to keep the public informed as far as possible of the processes, and to be accountable and transparent in its decision making.[64]

5.95 A wide range of witnesses, including industry bodies, unions, NGOs and community groups made known to the Committee their views of the consultation processes undertaken by the DFAT and the adequacy or otherwise of those processes. A number of these bodies, particularly industry bodies, were quite satisfied with the level of consultation, recognising that it is not possible to make public all information regarding the negotiations while the process is underway.

5.96 However, some witnesses felt that the processes engaged in with non–government organisations (NGOs) and other civil society groups was on a somewhat different level to the process engaged in with industry groups and others with economic interests in services trade liberalisation.[65]

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62 Canadian Centre for Policy Alternatives, *Facing the Facts: A guide to the GATS debate* pp. 13–14. The case which is referred to is the EC Bananas case.

63 Canadian Centre for Policy Alternatives, *Facing the Facts: A guide to the GATS debate* p. 14.

64 *Submission* 54, p. 24 (DFAT)

65 See for example, *Committee Hansard,* 23 July 2003, pp. 283–284 (Dr Patricia Ranald, AFTINET)

5.97 In the Committee's view, the evidence presented to the inquiry indicated something of a disparity between the level of consultation offered to industry bodies and others such as unions, NGOs and other civil society groups.

Consultation with industry and professional bodies

5.98 As the peak industry body representing suppliers of information and communications technology goods and services, the Australian Information Industry Association considers that the level of consultation undertaken by DFAT has been adequate in the circumstances:

> We have had opportunities at several different levels to consult and be consulted. We have participated in the regular industry forums that DFAT has organised; I think the most recent one was in the last two or three weeks. We have also had private consultations going back to November last year with DFAT and with [the Department of Communications, Information Technology and the Arts.] …. Those consultations have covered general issues and specific issues such as intellectual property rights, government procurement and so on.[66]

5.99 Meat and Livestock Australia, another industry body, acknowledged the concerted efforts of DFAT over the past five or so years to provide industries with information on the state of trade negotiations and objectives, and indicated satisfaction with the levels of consultation:

> Certainly we have close contact with the WTO section of the Department of Foreign Affairs and Trade, the trade negotiations section, the US FTA people and also the individual desks within DFAT. I must say that as an industry—and I am sure that I speak for all of industry on this issue—we believe that our consultations with the Department of Foreign Affairs and Trade are at a very satisfactory level.[67]

5.100 The Australian Local government Association (ALGA) indicated that it was satisfied with the level of consultation undertaken by DFAT with regard to issues of concern to local government:

> I am pleased to say that, in the case of the recent negotiations relating to the General Agreement on Trade in Services, the Commonwealth has consulted quite effectively with local government. In this regard I would like to place on record our appreciation for the time and effort of officials from the Department of Foreign Affairs and Trade in both briefing local government leaders and listening to their concerns.
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> …

66 *Committee Hansard,* 22 July 2003, p.176 (Mr Rob Durie, Australian Information Industry Association)

67 *Committee Hansard,* 23 July 2003, p. 298 (Dr Peter Barnard, Meat and Livestock Australia)

> [W]e did have a sequence of senior official level meetings with the Department of Foreign Affairs and Trade officials who were careful to emphasise to us that the information they were sharing was to some extent confidential, and we respected that candour. In that regard, yes, we were reasonably confident that we had a good appreciation of the ambit of issues that were to be discussed in the last round. I do not think any great state secrets were revealed to local government leaders, but we did feel that we were operating in an environment of no surprises.[68]

5.101 The ALGA also indicated that it was satisfied that broadly speaking, what was discussed with DFAT was what was presented at the WTO as Australia's position, and that there were no unfair surprises.[69]

Consultation with unions

5.102 The Australian Nursing Federation indicated that it was sought out and consulted by DFAT about nursing and nursing regulation in Australia in the context, and that this consultation was welcome and had a very positive outcome. However, the Federation expressed considerable concern that the level of understanding within DFAT about the structure of the nursing profession, nursing education, and the regulatory regime in Australia was not high. Given this, the Federation stressed the need for continuing and structured consultation by the Department as the GATS negotiations progress.[70]

5.103 The Australian Services Union (ASU) indicated that it had written to the Minister for Trade outlining its concerns about the GATS negotiations and that it had received a substantial response from the Minister. The ASU also met with ministerial staff and DFAT officers, and was pleased with the response received but felt that had it not raised a number of concerns, it may not have been consulted.[71]

5.104 The AMWU welcomed the opportunity to provide submissions to DFAT on trade issues but indicated that unions appear to be rarely consulted on specific or substantive issues, while business is regularly consulted on trade and industry issues, and is involved in ongoing trade policy formulation and negotiations.[72]

5.105 The Communications, Electrical and Plumbing Union (CEPU) commented on the lack of transparency of WTO processes generally and indicated that it had found it very difficult to establish the nature of the discussions around the GATS negotiations. The CEPU indicated that it had not been sought out for consultation but had requested the right to be consulted by the Australian government on any further developments in

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68 *Committee Hansard,* 22 July 2003, pp. 186, 188 (Chalmers, ALGA)

69 *Committee Hansard,* 22 July 2003, p. 188 (Chalmers, ALGA)

70 *Committee Hansard,* 22 July 2003, pp.227–228 (Ms Jill Iliffe, Australian Nursing Federation) and *Submission* 150, p. 3 (Australian Nursing Federation)

71 *Committee Hansard,* 23 July 2003, p. 321 (Mr Greg McLean, Australian Services Union)

72 *Submission* 160, p. 13 (AMWU)

the GATS negotiations concerning postal services in particular and has sought further information on any final position taken by the government on postal services.[73]

5.106 The ACTU commended DFAT for its program of consultation with the union movement and non–government organisations, and welcomed the decision to establish a WTO Advisory Committee. However, the ACTU stressed that was important for Australia's formal negotiation communications to the WTO to be 'informed by the views of relevant organisations and the community generally.'[74]

5.107 Whilst acknowledging DFAT's release of a discussion paper and call for public comment prior to finalising Australia's initial offer, the ACTU pointed out that relevant affiliates of the ACTU such as the Finance Sector Union, the Communications, Electrical and Plumbing Union, and the Construction Forestry Mining and energy Union were not consulted prior to Australia submitting communications on financial services, telecommunications and construction and related services to the WTO Council for Trade in Services.[75]

5.108 In summary, the ACTU indicated that, while it had access to the DFAT negotiators, its view was that the level of consultation needed to be more detailed:

> Fundamentally, while we cannot in all honesty say that we do not have access to the respective DFAT negotiators, it is really at the level of superficiality. It is often after the event, not before the event. To be fair to the negotiators, they are operating in a context which has a nature of secrecy that I talked about. There is access, yes; substantive detail, no.[76]

5.109 The Australian Film Commission indicated that it thought the degree of consultation with the government was 'entirely adequate' but in the context of the US FTA, expressed a 'very high level of anxiety with regard to what the final outcome will be of this treaty.'[77] The Australian Screen Directors Association felt similarly that it had access to the negotiators and had been 'kept in the loop' with regard to the progress of the negotiations but nonetheless expressed concerns about the final outcome.[78]

Consultation with non-government organisations and others

5.110 AFTINET indicated that it had sought out consultation with the Department, had made a written submission and had been engaged in a meeting with a number of

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73 *Submission* 87, pp. 4–5 (Communications, Electrical and Plumbing Union (CEPU))

74 *Submission* 125, p. 3 (ACTU)

75 *Submission* 123, p. 3 (ACTU)

76 *Committee Hansard,* 22 July 2003, p. 239 (Ms Sharan Burrow, ACTU)

77 *Committee Hansard,* 23 July 2003, pp. 264–265 (Mr Kim Dalton, Australian Film Commission)

78 *Committee Hansard,* 23 July 2003, p. 266 (Mr Richard Harris, Australian Screen Directors Association)

church, union and community organisations, but that while the Department agreed to meet with AFTINET:

> … I think the hard truth is that, if you are not an industry group, it is more difficult to get into the loop of the process with DFAT. We seek consultation and they agree to meet with us, but it is a slightly different process from some of the industry groups.
>
> …
>
> I think they see general community interest in trade agreements as being, I suppose, at a slightly lower plane than some of the industry groups, whereas we would argue that there is a legitimate role for general community organisations to express their views about these agreements because they impact on such broad areas of social policy which affect everybody in the community.[79]

5.111 The Doctors Reform Society and the Queensland Nurses Union expressed a view that at the community level, the consultation undertaken by DFAT seemed "superficial" at times. These organisations indicated that they thought there had been an improvement in the nature of the consultation in recent times, and felt they were being listened to, but had no real sense that there would be a further opportunity for them to comment as negotiations progress towards a conclusion.[80]

5.112 Both AID/WATCH and ATTAC Australia suggested that with regard to trade agreements in general, there needs to be wider consultation with industry, civil society groups, unions and community groups prior to negotiations beginning, to ensure that the broader community is aware of what is being proposed.[81]

DFAT's consultation strategies

5.113 The Department advised the Committee that it has been consulting with representatives of a number of key stakeholders in the development of its negotiating position, including state, territory and local government, Commonwealth government agencies, unions and non-government organisations (NGOs). The consultations have taken the shape of formal and informal meetings, face to face meetings, and published information.[82]

5.114 DFAT published a discussion paper on the GATS on 15 January 2003, and called for public comment on the paper, with submissions to be received by 24

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79 *Committee Hansard,* 23 July 2003, p. 283–284 (Dr Patricia Ranald, AFTINET)

80 *Committee Hansard,* 24 July 2003, pp. 380–381 (Dr Tracy Schrader, Doctors Reform Society, and Ms Beth Mohle, Queensland Nurses Union). Ms Terrie Templeton, of WTO Watch Queensland and the Alliance to Expose GATS, expressed a similar view.

81 *Committee Hansard,* 23 July 2003, pp. 341, 342 (Mr Chris Dubrow, ATTAC Australia and Ms Marina Carman, AID/WATCH).

82 *Submission* 54, p. 24 (DFAT)

February 2003. In response to this, DFAT advised that it received a large number of submissions from individuals, unions, civil society groups and some industry stakeholders, expressing a wide range of views.

5.115 The issue of the nature and extent of the public consultation on the GATS was discussed at some length at the Committee's public hearing on 2 October 2003. The Department summarised the process as follows:

> We are in regular contact and consultation with 14 Commonwealth departments and agencies. We have met with state and territory governments, including representatives of 25 state departments. We have met a number of times with the Local government Association and we respond regularly to queries from local governments. We have met with 164 industry associations and businesses. We have met with 80 non–government organisations. We have accepted 73 submissions from civil society on the negotiations on the GATS and a further 23 in the lead-up to the Cancun ministerial. We have updated our web site 10 times since July 2002 to reflect ongoing negotiations, with substantive detail on progress in those negotiations. We have 269 subscribers to our services negotiation email service, which is available to anyone who so desires.[83]

5.116 The Department advised that it consults with these different groups at different times, as the need arises, and depending on the stage it is at in the negotiating cycle. It consults when input is required on particular issues or when it wishes to keep stakeholders informed of developments. Such consultations are a mix of formal and informal processes and direct and indirect contact. In particular, the Department indicated that it has been consulting over the last two months with industry to further prioritise the requests Australia will be making of other WTO Members in the context of the GATS. In the lead up to the submission of Australia's offer at the end of March, the consultation focused on State governments, NGOs and other Commonwealth departments.[84]

5.117 Further, the Department established a WTO Advisory Group in early 2002, in addition to the Trade Policy Advisory Council that advises the Minster for Trade. The objective of the WTO Advisory Group is explicitly to advise on WTO issues, and participation is at the Minister's invitation. The Group meets several times a year and is comprised of a range of industry representatives, academics, a representative from the Australian Conservation Foundation and a representative from the union movement.[85]

5.118 Members of the Advisory Group are invited to accompany the Minister to the WTO Ministerial Meetings and the Department indicated that a number travelled to the meetings in Doha and Cancun. During the course of the negotiations at these

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83 *Committee Hansard,* 2 October 2003, p. 426 (Gosper, DFAT)

84 *Committee Hansard,* 2 October 2003, p. 426 (Gosper, DFAT)

85 *Committee Hansard,* 2 October 2003, pp. 439–440 (Gosper, DFAT)

meetings, DFAT indicated that members of the Group are closely involved in the briefings with the Minister and Departmental officials on what is happening in the negotiating rooms, and how Australia is pursuing its objectives.[86]

5.119 At the hearing on 2 October 2003, the Committee raised the point that, notwithstanding the extent of the consultations and opportunities for input into the processes, there remains a persistent public anxiety about the GATS negotiations, which continues to be one of the big issues in the public debate about trade negotiations.

5.120 DFAT acknowledged this level of anxiety among the public and particularly in NGOs and community groups, indicating that much of the concern could be said to reflect broader concerns about the impact of globalisation:

> Many of those concerns, including the concerns that have been raised with the committee, are not exclusively focused on the GATS regime itself but nevertheless find some expression in relation to the GATS and even in specific provisions of the GATS, including issues such as the capacity of governments to continue to regulate, to set environmental standards and to set standards for work force education and so forth. These are broader issues than simply GATS.[87]

5.121 The Department indicated that it has been very conscious of these concerns, which is why it has enhanced its consultation processes, including publication of material, and taking the 'unprecedented' step of publicising many details of the requests that have been made of Australia and our initial offer. The Department stated that it believes that it was in response to public concern that the government clearly affirmed that it will *not* be making offers in the areas of public health, public education or the ownership of water as part of these negotiations at all.[88]

5.122 The Committee welcomes DFAT's 'unprecedented' decision to make public a range of information about the GATS negotiations, including requests made of Australia, and the statement that Australia will not be making any offers in these negotiations in the areas of public health, public education and the ownership of water.

5.123 In terms of rating the success of the consultative processes, the Department's view is that it has had a reasonable degree of success in addressing concerns and improving processes:

> I think we have had a fair degree of success in identifying the need for greater consultation and addressing many of the concerns that have been put forward. I think a key part of that has been the government's openness in respect of the requests, in respect of its initial offer and in respect of making

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86 *Committee Hansard,* 2 October 2003, p. 440 (Gosper, DFAT)

87 *Committee Hansard,* 2 October 2003, p. 429 (Gosper, DFAT)

88 *Committee Hansard,* 2 October 2003, p. 429 (Gosper, DFAT)

> clear what it is not prepared to do in these negotiations. I think that has been well received by many—but certainly not all—of the groups that we deal with. I would not for a moment deny that there is still much public anxiety about and interest in these negotiations or that we do not have to continue, and if possible improve and extend, our consultative processes, but I think we have had a degree of impact thus far in the process that we have built over the last couple of years.[89]

5.124 The Committee notes the considerable efforts made by DFAT to consult with a wide range of organisations as part of the GATS negotiating processes, and its attempts to raise the level of public awareness and understanding of the benefits of multilateral trade liberalisation in general and the GATS in particular. The Committee also notes that as part of this process, DFAT has published a range of information about the WTO and negotiations on its website.

5.125 The Committee notes however that the submissions received by DFAT in response to the public discussion paper it issued on the GATS in January 2003 were not made available on the DFAT website. Whilst the Committee does not doubt the Department's commitment to open consultation, it is unfortunate that a decision was made not to publish the submissions or a list of submitters. Publishing the submissions received would have facilitated information exchange and contributed greatly to the usefulness, transparency and effectiveness of the consultation process.

Recommendation 5

5.126 **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.**

5.127 The Committee accepts that, for a range of reasons, it is not possible to fully disclose all relevant information in regard to the negotiations. The Department points out that release of information to the public is constrained by the following factors:

- requests may be government to government communications which cannot be released without the agreement of all WTO Members;
- other WTO Member governments may be unwilling to release information on its requests which relates to strategies for negotiations as to do so may reduce the effectiveness of those strategies; and
- information may be provided by Member countries on a commercial-in-confidence basis.[90]

Within these constraints, the government's position is that only 'strategically important and commercially sensitive information be restricted in distribution'.[91]

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89 *Committee Hansard,* 2 October 2003, p. 430 (Gosper, DFAT)

90 *Submission* 54, p. 24 (DFAT)

5.128 Part of the issue with regard to the perceived adequacy or otherwise of the consultations undertaken by DFAT seems to be the level of information about Australia's GATS offers which is publicly available. A number of submissions called for the release of Australia's draft offer under the GATS before it is communicated to the WTO as Australia's official offer - a view supported by Mr Ted Murphy of the National Tertiary Education Union:

> It is fair to say that, when the department circulated the material calling for submissions on the preparation of Australia's initial offer, it provided in the discussion paper a list of requests—separate, so you could not work out who was making which request—and a list of countries. Subsequently documents were leaked which are claimed to be—and no-one has disputed it, including the European Commission—the final request to Australia from the European Commission. There were a number of requests in that document that were not contained in the department's list. It would, in my view, be helpful if the full requests are made available.[92]

5.129 Mr Murphy also pointed out the significance of Australia's initial offer in the context of WTO negotiations and therefore the need for greater input from the various stakeholders and the community in general:

> The government will say, quite rightly, that the initial offer can be withdrawn or modified. But I will say that once you put an initial offer like that out in the public domain, including within the WTO, it is a clear indication to other WTO countries that you are prepared to liberalise in these areas and with the likelihood that you will follow through that indication with committing those areas. Therefore, from the standpoint of the capacity of parliament or the public to say, 'We think that is an appropriate area for liberalising and that is not,' or, 'There are some issues here in the wording of your liberalisation commitment that you may not have taken into account,' the draft offer should be made available before it is released or communicated to the WTO as an official initial offer.[93]

5.130 The Committee recognises, as DFAT indicated, that many of the concerns raised in evidence to this inquiry are relevant in a broader context than simply the GATS, and reflect worries about globalisation in general. However, the issue is an important one in the context of the GATS negotiations, and simply because the concerns are broader, it does not mean that these issues cannot and should not be addressed in the context of the GATS. If it is possible to 'raise the comfort level' of civil society groups and the community in general by providing more information

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91 *Submission* 54, p. 25 (DFAT)

92 *Committee Hansard* 8 May 2003, p. 29 (Mr Ted Murphy, National Tertiary Education Union (NTEU))

93 *Committee Hansard,* 8 May 2003, p. 29 (Murphy, NTEU)

about the domestic impacts of trade liberalisation as well as information for industry groups about export opportunities[94], this should be done.

5.131 In the Committee's view, given the potentially wide ranging impacts of the negotiations for liberalisation of trade in services within the GATS framework, and the fact that that Australia's current commitments will bind future governments[95], information such as Australia's initial offer *should* be public knowledge. The negotiations for liberalisation of trade in services within the GATS framework have the potential to impact greatly on the provision of a range of services in Australia and there should be a greater openness and transparency in the process.

5.132 Despite the fact that the government has ruled out making offers in particular areas in this round of negotiations, there is still concern that, because of the 'built in' agenda within the GATS which promotes increasing liberalisation of trade in services, there will be mounting pressure in future negotiations to liberalise access to these services. If offers are not made in certain areas in the Doha Round, those areas are not ruled out of discussion in the next round of negotiations. This remains an important issue regardless of how slowly negotiations are progressing at present.

5.133 Bearing this in mind, the Committee considers that DFAT should continue to consult widely prior to the preparation of Australia's GATS requests and offers, in particular with NGOs and other civil society groups. DFAT should continue to make public any requests made of Australia, and prior to communicating Australia's initial offer(s) to the WTO in future negotiations, it should consult with relevant stakeholders to ensure that all possible implications of the offer have been considered.

Recommendation 6

5.134 **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.**

Recommendation 7

5.135 **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.**

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94 This issue is discussed in Chapter 3.

95 This issue is discussed earlier in this Chapter in the context of the GATS and governments' right to regulate.

5.136 A number of submissions drew attention to the fact that there seemed to be a lack of balance and credibility in the information DFAT has published about the GATS, arguing that material presented by the government on such important matters should acknowledge that the issues are not necessarily straightforward and that parts of the community have expressed concern about certain trade policy issues.[96] The AMWU argued that, while the Department may hold a view about the merits of particular arguments, the discussion papers should acknowledge any uncertainties or ambiguities and discuss alternative views in a methodical and objective manner.[97]

5.137 AFTINET pointed out that the Discussion Paper failed to stated what broader principles underpin Australia's GATS negotiating position; beyond the objective of increasing export opportunities there is no indication of the principles on which the negotiations will be conducted by Australia.[98]

5.138 Given the broad scope and potentially far reaching impact of trade agreements such as the GATS and the US FTA, and given also the example of the ill–fated Multilateral Agreement on Investment, it is vital that the government is, and is seen to be, providing well researched, balanced material which both fosters and contributes to genuine and open public debate on these issues.

5.139 The Committee urges DFAT to ensure that the material it publishes on trade negotiations, in particular papers which call for public comments, is balanced and objective, and a fair representation of the arguments and concerns raised on both sides of the debate.

Other issues

Postal services

5.140 The Committee heard evidence from several witnesses about the impact of fully opening up to competition the postal sector. The CEPU pointed out that Australia has received a request to undertake commitments in the postal and courier services categories, which has not been done to date. The postal sector is already significantly open and to undertake further liberalisation of the postal services sector, it was argued, would 'erode Australia Post's capacity to provide the first-rate service to all Australians' that the community currently enjoys.[99]

5.141 The CEPU advised the Committee that what is known as the 'reserved service', being the delivery of a standard letter to anywhere within Australia for a set price, accounts for about 50 per cent of Australia Post's business. The price of the stamp for sending a standard letter within Australia clearly does not reflect the true cost of that service, particularly in rural and remote areas of the country. The major

96 *Submission* 160, p. 12 (AMWU).

97 *Submission* 160, p. 49 (AMWU). See also *Submission* 53 (Edwards), *Submission* 162 (Sanders)

98 *Submission* 42, p. 10 (AFTINET)

99 *Committee Hansard,* 9 May 2003, p. 97 (Mr Brian Baulk, CEPU)

trunk routes on the eastern seaboard effectively cross-subsidise the services in less populated areas.

5.142 If this service were opened up to competition, it was argued, competitors would most probably only be interested in competing in those more profitable areas:

> Therefore the universal service that has been the hallmark of postal services in this country and the world would be severely under attack. That has major implications for jobs and for the revenue of Australia Post. We see that as being a fundamental threat to a very important communication system for Australia.[100]

5.143 The Post Office Agents Association pointed out that opening up the reserved service to competition would undermine the economics upon which Australia Post operates, with potentially adverse consequences for the level of service provided to the community and employment at Australia Post:

> Our concern … is that if the government takes the choice of allowing foreign competition in so that all but the last vestiges of the reserve services are open to competition—that is, so that Australia Post is open to competition—and that competition impacts upon the reserve services, it will do so only on the profitable elements of those reserve services. That will seriously undermine the basic economics that Australia Post operates on. It is largely a large-scale operation with very marginal pricing, and if you interfere with the scale of operations then you can move an organisation from being a profitable one to a non-profitable one with only minor changes. That in turn is going to have consequences for the service to the community, the investment that the contracting part of the business has made and, of course, the employees' opportunities for work.[101]

Recommendation 8

5.144 **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.**

Health issues

5.145 The National Centre for Epidemiology and Population Health (NCEPH) argues that free trade has the potential to 'challenge and ultimately dismantle the current cornerstones of Australian health provision'. The NCEPH urges that there be no commitments made under the GATS which would jeopardise the Pharmaceutical Benefits Scheme, Medicare, public hospitals and community health centres. Further, the government should reserve its authority to regulate private health insurance,

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100 *Committee Hansard,* 8 May 2003, p. 103 (Baulk, CEPU)

101 *Committee Hansard,* 8 May 2003, p. 106 (Mr Michael Talbot, Post Office Agents Association)

protect food labelling from weakened standards and exclude water treatment, water supply and sanitation services from the GATS.[102]

5.146 The Public Health Association of Australia opposes the inclusion of health services in the GATS negotiations, on the grounds of equity, efficiency and the impact on Australia's workforce. The PHAA notes that the government has agreed not to make commitments in the area of public health in these negotiations but argues that there will be pressure in the future for offers to be made in this sector.[103]

5.147 With regard to the supply of water, the NCEPH argues that water and sanitation services are 'natural monopolies' because these services rely on a single infrastructure. Competition in the provision of these services is not feasible, it is argued, and lower prices will not result from privatisation of these services. The provision of water treatment and sanitation services should be treated as essential public goods rather than tradeable commodities and therefore should not be subject to trade negotiations.[104]

5.148 AFTINET points out that a broader definition of 'environmental services' would cover the supply of water. The consequences of making water supply subject to the GATS are that the horizontal obligations of market access and national treatment would apply, subject to any horizontal commitment by Australia limiting its obligations to liberalise.[105]

5.149 As discussed earlier in this Chapter, the Committee welcomes the government's decision not to make offers in public health, public education and ownership of water in the current round of GATS negotiations. However, the nature of the GATS means that there may well be pressure in future negotiating rounds to make offers in these sectors. Given the potentially wide ranging impacts of changes to these sectors, the Committee's view is that the government should not make any commitments to further liberalisation in the public health, public education and water sectors.

Recommendation 9

5.150 **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.**

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102 *Submission* 43, p. 2 (National Centre for Epidemiology and Population Health (NCEPH))

103 *Submission* 152, p. 2 (Public Health Association of Australia)

104 *Submission* 43, p. 7 (NCEPH)

105 *Submission* 42, p. 23 (AFTINET). See also *Submission* 56 (ATTAC Australia), *Submission* 83 (The Global Justice Network of The Grail), *Submission* 107 (Mr Arnold Rowlands), *Submission* 130 (Rail Tram and Bus Union), *Submission* 127 (Ms Dee Margetts, MLC), *Submission* 8 (Australian Pensioners' and Superannuants League QLD Inc)

Cultural services

5.151 Cultural services in the context of the US FTA negotiations are discussed in Chapter 6, in particular, Australia's local content requirements. Australia currently has no GATS commitments in the audio-visual sector, and has a Most Favoured Nation exemption, which is due to expire in 2004, for co-production arrangements.

5.152 The Committee recognises that the level of government support currently provided to Australia's cultural industries, in the form of subsidies and content quotas, is vital in ensuring that these industries survive and grow in Australia.

5.153 The Australian Screen Directors Association (ASDA) indicated that it was 'pleased to see that the government has made neither offers nor any commitments in respect of any aspect of GATS that might impact on cultural industries' in the current GATS negotiations. ASDA recommends that Australia's position should continue to be as it was in the Uruguay round, making no commitments in this area in future rounds. This view is shared by a number of other bodies including the Australian Writers Guild, the Australian Film Commission, the Media Entertainment and Arts Alliance, the Australian Coalition for Cultural Diversity and the Music Council of Australia.[106]

5.154 These organisations also argued strongly that by their very nature, cultural goods and services are not commodities like other tradeable goods and services and cannot be reduced to economic terms alone. In the context of the existence of GATS rules, it is argued that any commitments made by Australia should not undermine Australia's ability to regulate and support its cultural industries, which rely on government support to enable them to thrive.

5.155 The Committee notes that the government has stated that it is committed to preserving the right to regulate audio visual media to achieve cultural policy objectives. A high priority is placed by the government on these objectives and Australia has taken a strong stand on their legitimacy in the WTO, explaining to Members the value the government places on the freedom to have in place measures to pursue these objectives through policy interventions, and to adapt these measures as circumstances change.[107] The Committee notes the government's strong position in respect of the audiovisual sub-sector as articulated in the Australian Intervention on GATS made in Geneva in 2001, referred to in Chapter 6.

Recommendation 10

5.156 **The Committee recommends that the government continue to recognise the essential role of creative artists and cultural organisations in reflecting the**

106 *Submission* 132, p. 6 (Australian Screen Directors Association). See also *Submission* 155 (Australian Film Commission), *Submission* 40 (Australian Writers' Guild), *Submission* 68 (Media, Entertainment and Arts Alliance), *Submission* 109 (Australian Coalition for Cultural Diversity) and *Submission* 48 (Music Council of Australia)

107 *Submission* 54, p. 14 (DFAT)

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.

Chapter 6

The Australia-US Free Trade Agreement

What is a free trade agreement?

6.1 A free trade agreement (FTA) is typically a bilateral, preferential[1] agreement between two countries aimed at securing maximum access to each other's domestic markets in order to facilitate trade in goods and services. It commits the parties to policies of non-intervention by the state in trade between their nations. Such an agreement usually entails:

- removing or lowering explicit trade barriers, including import taxes (tariffs) and import quotas.

- softening or eliminating non-tariff or 'hidden' trade barriers – for example, quarantine laws, production and export subsidies, local content requirements, foreign ownership limits, and domestic monopolies.

6.2 Free Trade Agreements necessarily involve an exception to the Most Favoured Nation (MFN) principle, the fundamental rule guiding trade in goods among members of the World Trade Organisation. Under the MFN rule, members of the WTO must give fellow WTO members no less favourable treatment in terms of tariff rates and other trade measures than they afford to any other country. However, WTO rules allow individual countries to afford preferential treatment to partners in an FTA, provided that the FTA conforms to certain strict conditions.

6.3 The rationale for allowing this exception is set out in Article XXIV of the General Agreement on Tariffs and Trade (GATT) of 1947, which recognises the desirability of increasing freedom of trade by the development of closer integration between member countries through agreements establishing free-trade areas. At the same time, strict conditions apply to FTAs to ensure that they serve a liberalising purpose in international trade and do not encourage the establishment of new barriers. Nor should FTAs provide an occasion to introduce new measures discriminating between trading partners.

6.4 The crucial test of an FTA is that it must eliminate all tariffs and other restrictions on substantially all trade in goods between its member countries. Although WTO members have differed over how precisely to define 'substantially all trade', few would disagree that this means, at the very least, that a high proportion of trade between the parties - whether measured by trade volumes or tariff lines - should be

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1 Some economists contend that a 'preferential' agreement is, by its very nature, also 'discriminatory' – that is, discriminatory against all those countries that are not included in the FTA.

covered by the elimination of tariffs and other restrictive trade regulations. Australia considers that this must be a very high percentage, and that no major sector should be excluded from tariff elimination.[2]

6.5 The WTO also provides for bilateral or regional agreements liberalising trade in services. While an FTA as defined under the WTO does not have to include trade in services, most contemporary agreements that are labelled 'Free Trade Agreements' cover both goods and services, reflecting the growing importance of the services in the global economy.

6.6 In addition to trade in goods and services, Free Trade Agreements frequently cover such issues as investment protection and promotion, government procurement and competition policy, which are either not yet encompassed by WTO rules or only partially covered.

6.7 FTAs often also contain practical provisions in areas such as harmonisation or mutual recognition of technical standards, customs cooperation, application of subsidies or anti-dumping policies, electronic commerce, and protection of intellectual property rights.

Australia's economic relationship with the United States[3]

6.8 The United States is Australia's most significant economic partner when measured in terms of combined trade and investment activity. However, of all its trading partners, Australia carries the largest trade deficit with the US, which distorts the economic relationship.

6.9 The US is Australia's second most important destination for merchandise exports after Japan, and our most important market for services and investment. Two way trade in goods and services in 2002 was valued at over A$45 billion, accounting for nearly 15% of Australia's total trade. The United States was the single most important destination for Australian services exports in 2002, accounting for nearly 15% of total services exports and has grown by A$363 million over the last five years to A$4.6 billion. Overall, however, Australia only ranks 28 on America's list of import sources. In 2002, for example, America drew only 0.6 per cent of its global imports from Australia. [4]

6.10 Australia is currently the United States' 24th largest trading partner (total trade) and 15th largest export market. The United States is among Australia's highest growth export markets, with 5-year trend growth at 16 per cent. Australia's merchandise exports to the United States represent nearly 10 per cent of total

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2 Department of Foreign Affairs and Trade at http://www.dfat.gov.au/trade/negotiations/us_bkg.html

3 Information supplied by the Department of Foreign Affairs and Trade, *Submission* 54

4 DFAT *Fact Sheet: United States of America* available at http://www.dfat.gov.au/geo/fs/usa.pdf

Australian exports. However given the firming of the Australian dollar against the US currency, this trend can be expected to plateau.

6.11 Principal exports to the United States in 2002 included beef - where Australia filled its US tariff rate quota for the first time in late 2001 and again in 2002 - crude petroleum, alcoholic beverages, aircraft and parts, and motor vehicles. Exports of elaborately transformed manufactures (ETMs) are one of the strongest performers increasing by 63 per cent over the last five years – albeit from a relatively small base. The United States is now Australia's largest market for exports of ETMs.

6.12 The United States remains the largest source of Australian merchandise and services imports. Merchandise imports accounted for 18 per cent of total imports - major items being aircraft and parts, computers and parts, telecommunications equipment and measuring instruments. In 2002, services imports from the United States accounted for 20 per cent of total Australian services imports.

6.13 As is clear from the above, Australia continues to carry a substantial merchandise trade deficit with the United States - the largest of any trading partner. Whilst the deficit doubled over 1990-95, the bilateral balance on merchandise trade then stabilised, remaining within an A$11-A$13 billion range in favour of the US. The trade deficit with the US was A$12.8 billion in 2002. The merchandise trade deficit is in large part the result of Australia's manufactured and high tech import requirements being sourced from competitive US suppliers. This should all be seen in the context of Australia's overall trade deficit, which in September 2003 was running at $2.3 billion – the fourth highest deficit on record, and the 22nd consecutive month in which imports outstripped exports.

6.14 As at 30 June 2001, the United States was the largest recipient of Australian investment (A$177 billion) and Australia's largest source of investment (A$235 billion, or around 30% share of total level of foreign investment in Australia). Flows of Australian investment in the United States over the last five years have been increasing from around $18 billion in 1995 to around $97 billion in 2001, although dropping off in 2002 to $75 billion. In 2001-2002, the US share of foreign investment in Australia was 28.7 per cent.

6.15 Australia’s economy is small in comparison to the US, being about 4 per cent the size of the US economy. Both economies are already relatively open, Australia being one of the most open economies in the world. The US maintains a protectionist regime in agriculture – an area in which Australia’s highly efficient rural producers have a comparative advantage.

History of the Australia-US Free Trade Agreement (US FTA)

6.16 The government’s wish to pursue a free trade agreement with the United States came to public attention around the middle of 2001, as Prime Minister Howard was preparing to visit Washington for celebrations surrounding the 50th Anniversary of the ANZUS Treaty. The Prime Minister expressed the government’s position in the following terms during radio interviews in August and September 2001:

> It won't be easy getting a start on negotiating a free trade agreement with the United States but it is worth looking at. I won't sign any agreement … that damages Australia's interests. But the United States market is a very big market and if we are able to get greater access to that market on reasonable terms then we'd be foolish to give up that opportunity, absolutely stupid… [I]f we were able to get a toehold into that huge American market that would be tremendously important to Australia.[5]

> I don't expect to get… an in principle commitment to start negotiations for that. The reason is that right at the moment, in fact, almost while I'm in Washington there's an exchange going on between the administration and congress for the administration to get a trade promotion authority and they, for domestic, political reasons, which I fully understand, they don't want issues relating to in-principle commitment to negotiate free trade agreements to other countries to be around at the time they're having that exchange with congress. [6]

6.17 Unlike the Australian situation, the US government requires an Authority from Congress before it can proceed with a trade agreement. This so-called 'Trade Promotion Authority' specifies the framework, goals and conditions which are to inform the development of the agreement.

6.18 Some informal discussions at officials' level took place during the ensuing 12 month period,[7] and in November 2002, the United States announced formally its intention to enter into negotiations with Australia.[8] Australia's designated lead negotiator, Mr Stephen Deady, outlined the sequence of events that flowed from the formal announcement

> There was a 90-day period required under the US Trade Promotion Authority whereby consultations with the Congress were required before formal negotiations could commence. The first negotiating round was held here in Canberra, back in March of this year. We have now had three full negotiating rounds—the one in March in Canberra and then two subsequent rounds in May and in July in Hawaii. We are now in the process of preparing for the fourth round of talks, which will be back here in Canberra running through the week beginning 27 October. At this stage we have also planned a further full negotiating round for the first week in December, in Washington.[9]

6.19 The main focus of the negotiations in the first three rounds was on:

a) developing the broad framework,

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5 John Howard MP, Transcript of Radio 4BC interview with John Miller, 9 August 2001

6 John Howard MP, Transcript of Radio 3LO interview with Jon Faine, 4 September 2001

7 *Committee Hansard*, 2 October 2003, p. 482 (Deady, DFAT)

8 *Committee Hansard*, 2 October 2003, p. 460 (Deady, DFAT)

9 *Committee Hansard*, 2 October 2003, p. 460 (Deady, DFAT)

b) the legal text that would cover the agreement, and

c) agreeing on the chapters that would be covered by a comprehensive agreement between Australia and the United States.[10]

6.20 In May 2003, Prime Minister Howard met with US President Bush at Crawford, Texas, and both leaders confirmed that they wished to pursue a target date of December 2003 for the conclusion of negotiations. DFAT officials advised the Committee that negotiations were being conducted assiduously in order to meet the tight deadlines.

> It was only in the third round that we were able to sit down with the United States and begin negotiations on the specific market access aspects of the negotiations. These market access commitments are really the core of free trade agreements. Again, a requirement of US law was that the United States was not able to commence formal negotiations on market access until the International Trade Commission in the United States had completed an economic assessment of the impact of the Australia-US free trade agreement on US industry…
>
> We are seeking a truly comprehensive and liberalising free trade agreement that is fully consistent with the rules of the WTO, both the rules of the GATT which deal with free trade agreements and the rules under the GATS which talk about the economic integration of economies. We are looking at a very big agreement. The agreement itself will run to probably 23 or 24 different chapters, covering the full range of economic activity.[11]

6.21 Once negotiations have been completed, and a proposed Free Trade Agreement settled, the US Trade Promotion Authority requires that Agreement to be considered by Congress. There are no provisions for Congress to amend the Agreement – it will either accept or reject it.

Why a Free Trade Agreement?

6.22 The Howard Government has consistently regarded bilateral agreements as an important supplement to its multilateral trading efforts. Following the Seattle WTO ministerial, the government announced that it was:

> intending to explore the prospect of bilateral free trade agreements where these would deliver benefits to Australian exporters in a deeper way and in a quicker fashion than perhaps may have been possible through the multilateral negotiations.[12]

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10 *Committee Hansard*, 2 October 2003, p. 460 (Deady, DFAT)

11 *Committee Hansard*, 2 October 2003, p. 460 (Deady, DFAT)

12 *Committee Hansard*, 2 October 2003, p. 481 (Deady, DFAT)

6.23 On 3 March 2003, the Minister for Trade, Mr Vaile, announced the Australian Government's objectives for the Australia-US FTA (Appendix 3). Key points from those objectives supporting the government's decision to negotiate an Australia-US Free Trade Agreement were summarised in DFAT's submission to the Committee:

- This is an unprecedented opportunity to negotiate an agreement with the largest economy in the world, and a major trade and investment partner for Australia.

- Improved market access to this major market and expanded two way trade would stimulate economic growth, which will means more jobs, income and improved well-being for Australians:

  - by addressing existing market access problems in the US market for Australian exporters of farm products, manufactures and services, including beef, dairy, sugar, canned fruit, fast ferries, magnesium, telecoms and electronic commerce, the movement of people, intellectual property rights, and government procurement.

- An FTA would rebalance our competitive position vis a vis the exports of other countries that already enjoy lower barriers to trade in the US – or may do so as a result of future FTAs

- An FTA would help build momentum towards multilateral liberalisation and help Australian exporters compete in an environment where the popularity and number of FTAs are growing.

- A high standard FTA with the US would add momentum to the objectives we are pursuing through the WTO aimed at strengthening the multilateral trading system and advancing the cause of global trade liberalisation.

- The Government has stated its intention to ensure that the FTA will not impair Australia's ability to deliver key public policy objectives in areas including health care, education, consumer protection, environment and Australian culture and identity.[13]

6.24 The government commissioned from the Centre for International Economics a study on the economic impacts on Australia of a USFTA. The study suggested that that liberalisation of bilateral trade and investment could boost Australia's GDP by 0.3-0.4 per cent per annum within 10 years. The modelling assumed the removal of all tariffs and other barriers for which it was possible to estimate the quantifiable impact of their removal. If the final agreement were not to eliminate all barriers immediately upon entry into force, the impact would be proportionately less and spread over a longer time frame.

13 *Submission* 54, pp. 37-38 (Department of Foreign Affairs and Trade)

6.25 The CIE report became the subject of some debate during the Committee's inquiry, especially following the release of a report from another consulting group (ACIL) that drew notably less favourable conclusions about the proposed FTA. This controversy will be examined in a little more detail below. Government officials have consistently endorsed the CIE report, and have argued that ACIL's analysis is flawed.

6.26 The financial benefits identified in the CIE report were outlined by DFAT on several occasions, and summarized by Australia's lead negotiator, Stephen Deady, in the following terms:

> The study does a number of things: it produces a run of what GDP would be over the course of the next 20 years with an FTA between Australia and the United States with full liberalisation. So it makes GDP projections for 20 years. It produces a run on what GDP would be without an FTA. There are several things it does but, of the numbers that have been quoted, the purpose of one was to say: 'Let's take a snapshot. In 2010, 10 years after it came into effect, GDP in Australia would be $US2 billion higher than it would otherwise be.' So, in that year, GDP is higher by that amount… GDP over five or 10 years would be $10 billion—
>
> The… modelling is driven by the removal of all barriers to trade—tariffs, quantitative restrictions—at the border, but there are a number of additional barriers, restrictions, that the modelling work cannot measure. To that extent it is an underestimate, if you like, of the gains. For example, we have had this debate with the modellers just in the last couple of weeks: it does not take into account the restrictions on Australia selling to the government procurement market in the United States. It looks at the tariffs, non-tariff barriers, quantitative restrictions but not at some of those other instruments of policy in the United States which clearly impact on Australian exports. To that extent, it would underestimate the gains. In services and investment, again it is argued that it would underestimate. The modellers tell us that is a very hard thing to model. To that extent, the dynamic gains that might emerge from the investment services aspects of the agreement again are not fully reflected. With that caveat on your description, as a modelling exercise it models the things it can measure—removal of all those barriers, elimination of all the quantitative restrictions, all the tariffs on goods—and those things are fully reflected.
>
> The study identified a number of additional barriers that Australia faces in the US market. It also talked about some of the barriers in Australia. It talked about the procurement barriers in relation to the United States—the Buy America Act and the fact that we were not a member of the GPA of the WTO. It talked about some of the difficulties in modelling things like procurement, but it did not actually model those restrictions on Australia's exports into the United States or the removal of those restrictions in relation to procurement.[14]

14 *Committee Hansard*, 2 October 2003, pp. 484, 485, 486. (Deady, DFAT)

6.27 The Committee does not question the professional competence of CIE – nor indeed that of ACIL. But the Committee is mindful of the limitations of economic models in predicting actual outcomes. Significant factors in the results produced by such models include the accuracy and comprehensiveness of the data entered, the consistency or otherwise of trendlines, and the range and accuracy of the assumptions that are built in to (or excluded from) the models used. For this reason, the Committee does not dwell too deeply on the dollar figures thrown into the FTA debate, preferring to concentrate on the *principles* of global free trade, the *process* by which free trade agreements are developed, and the *mechanisms* by which such agreements are legitimized.

Adequacy of the economic analysis

> For the US, an FTA is thus a much less significant national economic decision than for Australia.[15]

> [I]mpacts have been at best only partially considered; impact analysis is inadequate… [W]e do not seem to have estimated in any satisfactory way potential gains and losses under alternative regimes; so regime analysis is inadequate. … [O]ur goals, strategies and processes appear confused; negotiations are then likely to be less effective than they might be. Indeed, we could actually achieve outcomes which are disadvantageous to the interests of Australia and Australians. [16]

6.28 Several witnesses commented upon the fact that Australia was the initiator of the recent moves towards an FTA with America, and that there was no immediate or obvious significant benefit to be had by the US in entering such an arrangement. It also appears that the Australian move did not emerge from any prior detailed assessment of the economic benefits that might be realised. Professor Ross Garnaut told the Committee that:

> From what I hear, no real economic analysis was done even in the closed circles of the Public Service prior to the initial commitment to seek a free trade agreement with the United States in December 2000.[17]

6.29 Professor Garnaut presented his concerns in considerably more detail in a paper delivered in February 2003 to the Sydney meeting of the Australian Business Economists group.[18]

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15 Australian APEC Study Centre *An Australia-US Free Trade Agreement: Issues and Implications*, Monash University, August 2001, p.48

16 *Committee Hansard,* 24 July 2003, p. 408 (McGovern, Queensland University of Technology)

17 *Committee Hansard*, 22 July 2003, p. 200 (Garnaut)

18 Garnaut, R 'Australian security and Free Trade with America'. Paper presented at the Australian Business Economists meeting on *US and Australia Free Trade Agreement: National interest or Vested interest?* Sydney, 27 February 2003

6.30 During its inquiry, the Committee noted the emergence of a common thread of concern among public witnesses (both in relation to GATS and the US FTA) about the perceived shortcomings of DFAT in the coverage and balance of its published information and advice. The perceived lack of serious attention to any negative impacts of these agreements seems to have made many people suspicious. They sense that they are not being told the full story - that the government is being insufficiently frank, that it seems only to present information that is favourable to its case, and that the government is exaggerating the benefits.

6.31 The Committee was told by one witness that, when he sought from DFAT any material outlining what he called the 'disbenefits' of free trade and investment, the emailed responses from DFAT stated, among other things:

> Regarding the "disbenefits" of trade liberalisation, I suggest you search your university library for alternative viewpoints. It is the government's belief that trade liberalisation is, on the whole, beneficial to the Australian and world economies…
>
> … For your purposes, the Productivity Commission may be a more useful source of information on trade liberalisation and domestic market reform than DFAT. Unlike government departments, the Productivity Commission is an independent Commonwealth Agency, which does not report directly to a Minister.[19]

6.32 Another witness expressed serious reservations about DFAT's willingness and capacity to make a judicious assessment of the merits of various arguments within the trade debate. He spoke of his personal dealings with DFAT officials as part of the consultation process engaged in by the Department.

> One particular session I attended was about the importance of trade. It was by the Trade Advocacy and Outreach Section. They were very concerned that the general public had not cottoned on to their way of seeing things and those they needed to educate the public to the correct view…. In answering questions, the presenter of this particular talk was talking of this big marketing push and of bringing the public along. I took some verbatim quotes while I was there. He said, 'It is ideological, political, and I am comfortable to acknowledge this.' He also said, 'We look for information that bolsters our own view.' I think the Senate needs to be aware that this attitude is within that department and that these people are not capable of giving balanced, open, fair and fearless advice.[20]

6.33 The point was frequently made to the Committee that the material provided publicly by DFAT – especially the documentation available on its website – lacked balance in that there was little, if any, consideration of potential downsides to a US FTA.

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19 *Submission* 53, pp. 23-24 (Edwards)

20 *Committee Hansard,* 24 July 2003, p. 392 (Sanders)

> The materials that the Department of Foreign Affairs and Trade has published to advance the Government's agenda of globalisation of trade and investment argue only one side of the case, as if 'there is no alternative'… Simply repeating a false statement over and over does not make it true. If there is one message which I would like to leave for the Committee, it is the shallowness of so much of what is presented as argument in favour of free trade and the absence of critical, multi-disciplinary analysis.[21]

> The economic impacts of trade liberalisation are being consistently overstated and environmental and regional impacts in particular are being understated. There is an imbalance in the way we have reported on trade liberalisation and understood it… I suggest… that some of the official Commonwealth documentation provides evidence of confusion and misrepresentation. I think there are some issues here in terms of the way the whole trade story is being discussed.[22]

6.34 The Committee appreciates that DFAT's task is to communicate, promote and implement government policy. However, it is problematic if that communication is perceived by many to be at best insufficiently nuanced, or at worst, brute propaganda.

6.35 The Committee has noted earlier the controversy generated by the studies that had been commissioned to assess the potential of the Australia-US Free Trade Agreement. DFAT commissioned two main studies concerning the US FTA. They are available on its website.

a) *An Australia-US Free Trade Agreement: Issues and Implications*, produced by the Australian APEC Study Centre, Monash University published in August 2001, and

b) *Economic Impacts of an Australia-United States Free Trade Area,* produced by the Centre for International Economics, published in June 2001

6.36 The US government requested a report from its own International Trade Commission (ITC) on the impact of the FTA on the American economy. The Committee sought advice from the ITC about the status and availability of that report and was advised that 'the report was sent to the United States Trade Representative's office in early June 2003' and that it is 'a confidential report for internal U.S. Government use only'.[23]

6.37 A third report by ACIL Consulting was commissioned, not by DFAT, but by the government's Rural Industries Research and Development Corporation. Entitled *A Bridge Too Far ? An Australian Agricultural Perspective on the Australia/United*

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21 *Submission* 53, p. 1 (Edwards)

22 *Committee Hansard,* 24 July 2003, p. 407 (McGovern)

23 Correspondence between Mr David Lundy (ITC) and the Committee Secretariat, 25 November 2003

States Free Trade Area Idea, this report was at odds with the findings of the DFAT-commissioned studies. It proved to be the catalyst for some academic and political disputation. In March 2003, the Centre for International Economics published a critical rejoinder to the ACIL Report.

6.38 The Committee does not intend to pursue its own critique of these reports – it merely notes the differences between them. However, economists, trade officials and financial commentators have made a variety of claims about the validity of the reports, and the Committee has had several of these drawn to its attention in hearings and submissions.

6.39 DFAT and the CIE have both criticised the ACIL report (*A Bridge Too Far ?*) in some detail – CIE in the published paper mentioned above, and DFAT in the verbal evidence to the Committee given by its lead negotiator Stephen Deady:

> I had serious problems with a number of the assertions and claims made in that [ACIL] study when I was a referee on the study going right back through the process. I really tried to explain to the author why I thought what I did about some of those claims about what happened in the Uruguay Round and subsequently in trade policy in the United States and in this country. But, anyway, that is their report. They have put their name to it and they stand by it. I have no problem with that. But, as we have said, we believe that the report is flawed, and I certainly stand by that.[24]

6.40 In turn, perhaps the most detailed critique of the DFAT-commissioned CIE Report (*Economic Impacts of an AUSFTA*) has been made by Professor Ross Garnaut in articles produced during 2002 and 2003. In these, he argues that the CIE report should be regarded 'not as an attempt at realistic assessment of the effects of an Australia-United States Free Trade Agreement, but rather as an assessment based on assumptions that are generally favourable to a free trade agreement.'[25]

6.41 In his evidence to the Committee, Professor Garnaut observed:

> Some ex post facto economic work was done but by consultancies under quite specific and narrow terms of reference, which did not ask the question, 'Would this free trade agreement be good for Australian economic welfare?' Those terms of reference specified a lot of assumptions and then asked, 'What are the implications of these assumptions?' That negates transparent, independent analysis, which was the key to Australia becoming a more open, productive economy in the last decades of the 20th century.[26]

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24 *Committee Hansard*, 2 October 2003, p. 491 (Deady, DFAT)

25 Garnaut, R 'Australian security and Free Trade with America'. Paper presented at the Australian Business Economists meeting on *Us and Australia Free Trade Agreement: National interest or Vested interest?* Sydney, 27 February 2003, p. 6

26 *Committee Hansard*, 22 July 2003, p. 200 (Garnaut)

6.42 Professor Garnaut also presented to the Committee five important issues relating to the US FTA that, in his view, were not 'amenable to modelling.'[27] These issues are as follows:

- the negotiation of a bilateral FTA would accelerate the weakening of the multilateral system;
- there will be resulting trade diversion from Australia's most important export region, East Asia;
- the rules of origin associated with a US FTA would raise transaction costs in international trade and lower productivity in the process;
- the exclusion of US agricultural subsidies from the FTA would corrode the position of free trade agricultural exporters in the international system and could negate any benefits from increased market access to the US;
- the processes of policy making in developing this agreement, relying on commissioning consulting reports with limited terms of reference, have been very damaging to trade policy processes.[28]

6.43 According to Professor Garnaut:

> Every one of those [five] points was excluded by assumption when DFAT commissioned the Centre for International Economics to do their study… Those five points are the big ones. If you exclude those points and say, 'Let's forget about those but what would a free trade agreement that does not consider any of those things do?' there is still a debate.[29]

6.44 With respect to the APEC Study Centre report, it was of significance for some witnesses that the director of the Centre that produced *Issues and Implications* is Mr Alan Oxley. Mr Oxley is also the managing consultant of the firm International Trade Strategies, and the business director for AUSTA, the 'Australian Business coalition established to promote conclusion of a Free Trade Agreement between Australia and the United States.'[30] It was also claimed that Mr Oxley's colleagues in the APEC Centre research team were prominent advocates of business interests and one of them also an employee of his firm International Trade Strategies.[31]

6.45 The Committee does not question the professional competence of any of the agencies that produced the various reports. However, it understands how perceptions have arisen among some members of the public that DFAT attends almost exclusively to those reports and assessments that are favourable to its policy objectives; that those

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27 *Committee Hansard*, 22 July 2003, p. 205 (Garnaut)

28 *Committee Hansard,* 22 July 2003, pp. 196, 197, 198, 199, 100 (Garnaut)

29 *Committee Hansard*, 22 July 2003, p. 205 (Garnaut)

30 *Submission* 47, p. 1 (Oxley for AUSTA)

31 *Submission* 160, p. 22 (Australian Manufacturing Workers Union)

reports are too closely aligned with vested interests; and that DFAT either disregards or denigrates alternative assessments.

6.46 In the Committee's view, it is vital that policy analysis and development not only be transparent but be seen to be so. This is especially the case where such high-profile agreements are concerned. To do otherwise is to invite criticism of the FTA on process grounds alone.

> It is disturbing that transparent and disinterested analysis has played such a small role, and business vested interests such a large one, in policy making so far on the free trade agreement. The debate suffers from the absence of a report from the Productivity Commission, attempting to measure objectively and independently the extent and distribution of benefits. The papers commissioned by DFAT came after the policy decision to seek a free trade agreement…[32]

6.47 The Committee notes that the government's decision to pursue a free trade agreement with America represented a significant turnaround from its previous position, and something of a 'historic departure in Australian trade policy'.[33] Like its Labor predecessors, 'through the 1990s the Howard government… remained deeply wary of proposals for bilateral trade deals'.[34]

6.48 When President Bill Clinton approached Australia about the possibility of a free trade agreement he was rebuffed. Rob O'Donovan was Australian Senior Trade Commissioner in Los Angeles until 1998, and was a contributor to the DFAT *Review of Australian US Trade relations - A Partnership in Transition.* In a February 2002 article for the Brisbane Institute he wrote:

> The Howard government … in 1997… still firmly rejected the overtures from the Clinton Administration for a bilateral free trade agreement as the Hawke government had done so in the late 80's. It did so for much the same reasons - any success we had was achieved multilaterally and we were unlikely to get any joy in those US agricultural markets where we were competitive but our competitors had friends in Congress… The last consideration hasn't changed so it is worth asking what has?[35]

6.49 The Committee has been unable to elucidate a satisfactory account of the process by which the Australian government's views on this matter were modified to the extent of shifting from a consistent rejection of a US free trade agreement to a

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32 Garnaut, R 'Australian security and Free Trade with America'. Paper presented at the Australian Business Economists meeting on *Us and Australia Free Trade Agreement: National interest or Vested interest?* Sydney, 27 February 2003, p. 20

33 Capling, A 'Trade, the USA and Down Under's Tyranny of Size' *The Sydney Papers* Autumn 2001, p. 180

34 Capling, A 'Trade, the USA and Down Under's Tyranny of Size' *The Sydney Papers* Autumn 2001, p. 177

35 Available at http://www.brisinst.org.au/resources/brisbane_institute_fta.html

forthright and energetic pursuit of one. Some commentators have discerned the shift to be purely a political choice.

> Although the public debate will be about economics, the real agenda of the FTA is political. Prime Minister Howard has strategic reasons to support the agreement. An FTA would consolidate the emerging US-Australia axis.[36]

6.50 Occasional reference was made during the Committee's inquiry to the potential role of the Productivity Commission in assisting the Commonwealth government to assess the economic impacts of a free trade agreement. The Howard government has not sought such advice from the Productivity Commission in relation to the US FTA. However, a Productivity Commission Staff Working Paper was published in May 2003 entitled *The Trade and Investment Effects of Preferential Trading Arrangements – Old and New Evidence.*[37]

6.51 The Working Paper examined 18 existing preferential trade agreements (PTAs), and not those in prospect. Findings relevant to the Committee's present inquiry include the following:

- The 'bulk of the existing literature seems to point to PTAs being stumbling blocks rather than building blocks to multilateral liberalisation'. (p22)
- Nearly all PTAs are found 'to have caused net trade diversion' and overall have created 'negative net trade effects.' (p77)
- The findings on investment are 'more positive than with trade, but not without qualifications'. (p98) It is 'possible for PTAs to have more adverse effects on investment flows than trade flows.' (p97)
- Some of the 'apparently quite liberal PTAs… have failed to create significant additional trade among members' (p100)
- The findings 'on the effects of the non-trade provisions of PTAs are more positive than those on the trade provisions'. (p101)

6.52 The Committee believes that it would be highly desirable if the services of the Productivity Commission were drawn upon by the government to provide analysis and advice concerning proposed trading agreements. Not only would this add significantly to the pool of information available to government for decision-making and policy development, but it would also militate strongly against the perception that the government was relying on advice that was highly coloured by a particular view.

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36 Hamilton, C 'Free trade deal won't produce the goods' *Australian Chief Executive* (CEDA) April 2003, p. 29

37 Adams, R (et al) *The Trade and Investment Effects of Preferential Trading Arrangements – Old and New Evidence*, Productivity Commission Staff Working Paper, Canberra, May 2003

Recommendation 11

6.53 **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.**

Key issues of concern with the US FTA

6.54 In both submissions to the Committee, and in oral evidence given at public hearings, certain key issues were repeatedly highlighted. The following provides a brief summary of the matters raised.

Do bilateral agreements undermine multilateral arrangements?

6.55 There has been a long-standing debate about the extent to which WTO based multilateral trade negotiations might be undermined by countries entering bilateral agreements that are by their nature preferential. The Committee explored the issue on several occasions by posing the question as to whether burgeoning bilateral agreements had 'sucked the oxygen out of' multilateral efforts.

> One of the reasons for it lacking oxygen is that the energy of major players—including Australia, the United States and Japan—has been focused on small-group and bilateral free trade agreements rather than multilateral negotiations. To get a pretty good feel for the nature of the problem, one only has to compare the effort that the Australian government put into organising support amongst Western Pacific countries during the Uruguay Round with the focus of attention on trade policy discussion at the moment.[38]

6.56 Both in oral evidence before the Committee, and in its submission, the government argued strongly that there was no conflict arising from the pursuit of both bilateral and multilateral arrangements.

> Some commentators have suggested that negotiation of an FTA with the US will undermine the multilateral trading system founded on the WTO, or signal a lessening of Australia's commitment to the WTO and multilateral liberalisation.
>
> This observation appears to ignore the following:

38 *Committee Hansard*, 22 July 2003, p. 197 (Garnaut)

- FTAs are sanctioned by the WTO – good FTAs are accepted as consistent with the WTO if they are comprehensive and trade creating…
- FTAs can help the WTO system to generate momentum by liberalising difficult sectors among a few countries – and help with the adjustments necessary under global liberalisation negotiations
- in circumstances where the pace of the Doha Round is slowing … and in particular the difficulty of securing commitments from WTO members to significant agriculture reform, governments will wish to take the opportunity to secure WTO-consistent market opening elsewhere;
- suggestions that bilateral FTA negotiations somehow conflict with Australia's efforts in the WTO reflect a flawed understanding of trade negotiations
- there is no conflict between the objectives Australia is pursuing in the WTO and our FTA negotiations.
- we *continue to press the United States* in Geneva on access for sugar, dairy and other products
- the bilateral FTA negotiations give us a further opportunity to secure our Doha Round objectives on agricultural market access more deeply and rapidly than would be possible through the WTO Doha Round.[39]

6.57 The Committee notes the rather more cautious statement by the Centre for International Economics – author of the government-commissioned report favourable to a US FTA – in its rejoinder to the (less FTA-favourable) ACIL Report.

> It would have to be admitted, however, that a competitive scramble to form as many bilateral FTAs between pairs of countries around the world distracts attention from the main game – the multilateral reduction of barriers. FTAs do suffer from the problem that they are discriminatory and weaken the principle of non-discrimination that underpins the GATT.[40]

6.58 Agricultural interests have consistently regarded multilateral negotiations as the most effective path to liberalisation of their sector. The Committee notes, however, that the US FTA has received broad support from agricultural industries.

> We certainly do not resile from the fact that the main game is the WTO. … [S]ome of the oxygen is going out as a result of people looking at bilateral arrangements or preferential deals. That could partly be because of frustration with the process, but I believe also that the process has pretty much slowed up because one of the major parties, the EU, cannot get

39 *Submission* 54, p. 40 (DFAT)

40 Centre for International Economics *Australia-United States Free Trade Agreement: Comments on the ACIL Report* (Sydney) March 2003, p. 12

> themselves sorted out on agriculture. That has meant that everything else has drifted. We are waiting for the Europeans to pull themselves together and work out what they want internally before we can get on with the multilateral round.[41]

The broader foreign policy and security framework

6.59 In the Committee's view, Australia's pursuit of a free trade agreement with America has as much, if not more, to do with Australia's broader foreign policy objectives as it does with pure trade and investment goals. Certainly for the United States administration, free trade agreements can only be situated within a particular foreign policy setting. This was made clear in a widely-reported speech (May 2003) to the Institute for International Economics by USTR Zoellick:

> U.S. Trade Representative Robert Zoellick late last week said countries that seek free-trade agreements with the United States must pass muster on more than trade and economic criteria in order to be eligible. At a minimum, these countries must cooperate with the United States on its foreign policy and national security goals… The U.S. seeks "cooperation -or better- on foreign policy and security issues," Zoellick said… Given that the U.S. has international interests beyond trade, "why not try to urge people to support our overall policies?" he asked.
>
> Zoellick said that he uses a set of 13 criteria to evaluate potential negotiating partners, but he insisted that there are no formal rules for the selection or any guarantees. "It's not automatic," Zoellick said. Negotiating an FTA with the U.S. "is not something one has a right to. It's a privilege." [42]

6.60 Some witnesses regarded these sorts of remarks as signalling America's desire to 'cement a network of countries into a pact which will bind them to comply with US foreign policy ambitions.'[43] Others expressed concern that Australia's national interests may be compromised by being seen as inextricably bound to the US.

> Australia has built up positive trade and cultural relationships with many countries in our region. This is in part because we are not seen as an economic or cultural appendage of the US, but as an independent country with its own trade and foreign policy, which has in the past differed with the US on some key issues. Australia's role within the Cairns Group could be compromised if a US-Australia FTA goes ahead.[44]

6.61 Other witnesses regarded a US FTA as an appropriate and important complement to Australia's existing alliance with the United States. The government has been unequivocal in this respect. In particular, its views are declared strongly in Australia's latest foreign policy White Paper *Advancing the National Interest.*

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41 *Committee Hansard*, 9 May 2003, pp.139, 140 (Lavery, Australian Dairy Industry Council)

42 Quoted in *Inside US Trade*, 16 May 2003.

43 *Submission* 53, p. 20 (Edwards)

44 *Submission* 42, p. 34 (Australian Fair Trade and Investment Network - AFTINET)

> Australia's links with the United States are fundamental for our security and prosperity… Australia has a vital interest in supporting long-term US strategic engagement in East Asia, because of its fundamental contribution to regional stability and prosperity. The government's pursuit of a free trade agreement with the United States is a powerful opportunity to put our economic relationship on a parallel footing with our political relationship, which is manifested so clearly in the US alliance.[45]

6.62 The Committee agrees that Australia's relationship with the United States is its most vital strategic and political alliance. However, several witnesses argued that the linking of trade and investment agreements so closely to issues of security and strategic political interest is not without its tensions.

> As a trade economist, I get very nervous about links between trade and security or trade and defence or other things which are not closely related to trade, because they can distort the kind of agreement that comes out of it.[46]

> Never before has Australia compromised our foreign policy independence for trade favours. Our Government might deny such but US trade negotiator Mr Zoellick himself linked the issue of trade and foreign policy. This is a dangerous precedent for our independence as a nation.[47]

6.63 The linking of trade and security relationships is clearly regarded as desirable and appropriate by both the American and Australian governments, but the Committee notes that the role of the US Congress in trade matters introduces a distinctive dynamic into that linkage.

> The United States trade policy is not made by the administration; it is made in the Congress. There is a long tradition—and not a very elegant tradition—of United States trade policy being bought and sold in the US Congress, and administration views on security priorities do not always hold sway in the US Congress. So people who give high priority to a good political relationship and to the ANZUS alliance have always taken pains to separate the alliance relationship from the trade relationship[48].

6.64 In the Committee's view, the harmonizing of trade and security relationships is something that must be approached with considerable caution. There have been instances in the past where discriminatory trade action by the US – especially in connection with agriculture – has led to strong domestic calls for retaliatory action on the security front, such as withdrawal of permission for American access to satellite tracking stations and communications facilities. Such controversies are best avoided.

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45 Australian Foreign and Trade Policy White Paper *Advancing the National Interest* Canberra (2003) p.(xvi)

46 *Committee Hansard*, 9 May 2003, p. 161 (Lloyd)

47 *Submission* 125, p. 2 (ACTU)

48 *Committee Hansard*, 22 July 2003, p. 203 (Garnaut)

6.65 As Australia becomes more deeply engaged in trade with its regional neighbours, and especially with emerging economic powers like China, any tensions between, say, the US and China, could place Australia in an invidious position if the Australia-US relationship is predicated on closely entwined security and trade interests that verge on the symbiotic.

Prospects of trade diversion from existing markets

6.66 Australia's trade arrangements have historically been strongly multilateral, and since the 1950s have been oriented strongly towards the Asia-Pacific region. In recent decades, the focus has intensified with respect to South-East and East Asia. China, Japan and Korea are among Australia's most important export markets.

6.67 Professor Ross Garnaut has been one of the more prominent economists arguing that a US FTA would divert trade from Australia's regional trading partners.

> [T]he negotiation of such an agreement would weaken Australian trading performance in its most important export region, East Asia, including by encouraging the emergence of free trade areas in East Asia that discriminate against Australia.
>
> Trade discrimination within East Asia with Australia being excluded—for example, giving Thai and Philippine preferences in the Chinese, Korean and Japanese markets—would be devastating for Australia, and discussions are now under way to do precisely those things. Any potential gains in the United States market from the bilateral agreement would, on analysis, be trivial compared with the potential losses of our main markets and main growth markets in East Asia. I am not saying that we would lose all of those markets, but we now are at risk of discriminatory arrangements being developed in East Asia that will exclude us, which will be very damaging..[49]

6.68 The Committee pursued this argument at some length during its inquiry, especially with Australia's lead FTA negotiator, Mr Stephen Deady. Mr Deady argued strongly that the trade diversion argument did not square with the reality of what was happening between Australia and its Asian neighbours.

> What we are looking at are the barriers that Australian exports face in the United States market. Some of those barriers are particularly significant, coincidentally, in areas where we are perhaps the world's most efficient producer—or, if we are not the most efficient, we are in the top two—namely, the areas of sugar, dairy and beef. Any access that Australia gains to the United States market in those commodities is, in my view, unequivocally trade creating. There is no diversion of product. … We are not displacing a third country which is an inefficient producer in the US market; we are replacing inefficient US production.[50]

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49 *Committee Hansard*, 22 July 2003, pp. 197, 198 (Garnaut)

50 *Committee Hansard*, 2 October 2003, p. 494 (Deady, DFAT)

> All of this discussion of trade creation and trade diversion has to take into account the level of the external tariff. If you looked at these studies 10 or 15 years ago, the external tariffs were significantly higher and so the threat of trade diversion was potentially again significantly much higher. The fact is that the average Australian tariff is now very low and a very large percentage of imports into this country are duty-free, so there is no negative impact whatsoever from preferential arrangements within the United States where existing multilateral tariffs are zero.[51]

6.69 The DFAT submission to the Committee addressed the argument in some detail, but at the broader level of Australia's relations with East Asia.

> Some observers appear to be concerned that the opening of negotiations between Australia and the US will damage Australia's relations with or interests in the East Asian region because of the signal it would send about Australia's attachment to the region. This observation appears to ignore evidence that Australia's ongoing commitment to and engagement with East Asia remains strong:
>
> - the recent signing of our FTA with Singapore;
> - negotiations on a Closer Economic Relations Free Trade Agreement with Thailand, launched in May 2002;[52]
> - the ongoing high priority we attach to a strong and progressive APEC agenda which brings together all the key economies of our region;
> - our pursuit of a new trade and economic agreement with our largest export market, Japan, and Australia's willingness to undertake an FTA with Japan;
> - our pursuit of a new framework agreement with China to enhance trade, investment and economic cooperation, announced in May 2002;[53]
> - the AFTA-CER Closer Economic Partnership framework agreement between the Association of South-East Asian Nations (ASEAN) governments and Australia and New Zealand, signed in 2001, which stemmed from Australia's initiative in 2000 to explore a possible FTA between AFTA and CER.
>
> Moreover, other countries in the region are not only interested in pursuing FTAs with each other, and with others outside the region, but with the US as

51 *Committee Hansard*, 2 October 2003, p. 495 (Deady, DFAT)

52 And brought to a successful conclusion in October 2003.

53 The visit of China's President Hu Jintao in October 2003 provided an occasion to confirm that Australia and China would undertake studies to examine the possibility of a free trade agreement.

well – which hardly suggests that the countries of the region have a philosophical objection to FTAs in general, or with the US in particular:

- most East Asian countries are already involved in FTA discussions or negotiations or have concluded FTAs both within and outside the region (Japan-Mexico, Korea-Chile, ASEAN - China, ASEAN-Japan, Singapore with the US, Canada and Japan, New Zealand with Singapore and Hong Kong);

- the US announced in October 2002 the Enterprise for ASEAN Initiative under which the US and individual ASEAN countries will jointly determine if and when they are ready to launch FTA negotiations;

- in these circumstances it would appear odd if those countries were to single out Australia for negative reaction to the announcement of the opening of negotiations for an Australia-US Free Trade Agreement;

DFAT has encountered no such negative reaction from our regional trading partners.

Pursuing trade links with Asia and the US is not a zero-sum game: the US is an important economic partner for most Asian countries, and a stronger and more prosperous Australia will be a better partner for them.[54]

6.70 The Committee acknowledges the merits of these arguments. There remains, however, the findings of the research mentioned earlier that was carried out by the Productivity Commission. This research examined 'both theoretically and empirically, the effects of the trade and non-trade provisions of PTAs on the trade and foreign direct investment flows of member and non-member countries'.[55] This research concluded, among other things, that 'of the 18 recent PTAs examined in detail, 12 have diverted more trade from non-members than they have created among members.'[56]

6.71 The Committee considers that the question of trade diversion is not the same as the broader question of damaged relations through a perception that Australia's focus is beyond the region. The former is more amenable to objective measurement than the latter. The Committee reiterates its view that, when it comes to making assessments of the merits of a proposed new trading arrangement, it is important that governments seek comprehensive, independent advice that draws on detailed analysis of potential costs as well as potential benefits.

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54 *Submission* 54, p. 39 (DFAT)

55 Adams, R (et al) *The Trade and Investment Effects of Preferential Trading Arrangements – Old and New Evidence*, Productivity Commission Staff Working Paper, Canberra, May 2003, p(xi)

56 Adams, R (et al) *The Trade and Investment Effects of Preferential Trading Arrangements – Old and New Evidence*, Productivity Commission Staff Working Paper, Canberra, May 2003, p(xii)

Retention of governments' policy flexibility and right to regulate

> There is a significant lack of detail at the moment in terms of the sorts of regulatory changes that the Americans might be seeking under the free trade agreement process. We are very concerned about the time frame that is being advanced, which is moving very rapidly—at least on some of the recent comments last week—to a conclusion of a free trade agreement between Australia and the United States, for there to be full public discussion about the consequences of regulatory changes that the government may commit to in making those treaties. Without having the details, it is difficult for us to comment, but we do raise our very significant concern that there has to be a capacity for consideration and discussion before there are any binding consequences on Australian control of public policy.[57]

6.72 A prominent public concern with respect to both GATS and the US FTA was whether such agreements militated too strongly against the capacity of governments to regulate effectively and to prescribe domestic policies without them being challenged as breaches of agreements or impediments to trade. Such concerns relate particularly to environmental, investment and quarantine controls, cultural protections, and the provision of core public services. It is a particular issue in the context of the US FTA which uses a 'negative list' approach. Such an approach automatically binds all trade in goods and services to the liberalising commitments of the agreement unless specific exemptions from the agreement are identified. The negative list approach is discussed in more detail in the next section of this chapter.

6.73 The Committee notes the DFAT's strong reassurance concerning the retention by government of its right to regulate:

> Some commentators have questioned the value of an Australia-US Free Trade Agreement because they argue that pressure from the US will force changes to important domestic public policy programs. These observations do not take account of the following important points:
>
> - the Government, in the statement of Australian negotiating objectives released on 3 March 2003, explicitly committed itself to ensuring that outcomes from the FTA negotiations do not impair Australia's ability to deliver fundamental objectives in health care, education, consumer protection and supporting Australian culture and identity;
>
> - it will, of course, listen carefully to any issues that the US Government wishes to raise in the course of the negotiations. No government entering such negotiations would rule out areas for discussions before the negotiations start.[58]

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57 *Committee Hansard*, 8 May 2003, pp. 14, 15 (Waters, Community and Public Sector Union)

58 *Submission* 54, p. 41 (DFAT)

> USTR Zoellick's letter to Congress set[s] out US Objectives for the negotiations … While these proposals are broad-ranging in scope the Australian Government's objectives statement makes clear it remains committed to the underlying objectives of current policy settings (see also discussion of goals and strategy). The Government has committed itself to ensuring that outcomes from the FTA negotiations do not impair Australia's ability to deliver fundamental objectives in health care, education, consumer protection and supporting Australian culture and identity[59].

6.74 Notwithstanding these reassurances, many witnesses emphasised the risks to which domestic policies and regulations might be exposed as the FTA negotiations approached their difficult stages. Such anxiety has been compounded by the perceived relative weakness of Australia's bargaining position, captured in the statement of the APEC Centre study *Issues and Implications* that 'one way of viewing the economic association from the US perspective is to see it as the addition of another medium sized state roughly equivalent in GDP to that of Pennsylvania.'[60]

6.75 The following excerpts from submissions and evidence convey the general range and tenor of the public's concerns:

> The DRS [Doctors Reform Society] believes that public services such as health care and water services will be targeted that could result in a compromise of public policy. It is concerning that DFAT has stated that aims of an FTA with the USA "will be to liberalise trade in goods and services, to facilitate trade and investment and to address government-level impediments to increased commercial exchanges". US Trade Ambassador Robert Zoellick has also stated that they seek "enhanced access for US services firms to telecommunications and any other appropriate services sectors" (USTR Robert B. Zoellick, 2002). As US services firms already have access to commercial services in Australia the targets would be public services such as health care.[61]

> The AMWU does not support the type of investor/state compliance mechanism that has been so infamous in the NAFTA [North American Free Trade Area] agreement. Despite earlier assurances to the contrary the mechanism in the NAFTA agreement has been used to allow companies to sue governments for compensation where governments have merely enacted legislation to protect the environment or health of the communities that they represent.[62]

> I believe the department should be put under an onus to prepare what I call social and regulatory impact assessments of proposed commitments under … free trade agreements… so that it is possible—for the public and the

59 *Submission* 54, p. 45 (DFAT)

60 The Australia APEC Study Centre, Monash University, *An Australia-USA Free Trade Agreement Issues and Implications*, August 2001, p. 48.

61 *Submission* 148, p. 19 (Doctors Reform Society)

62 *Submission* 68, p 27 (AMWU)

> Joint Standing Committee on Treaties, the parliament and for non-government organisations that have an interest in this—to engage on a transparent basis with what commitments we are negotiating.[63]

6.76 Questions of governments' right to regulate are particularly relevant to controls over environmental and health matters. Food labelling issues and broader environmental concerns associated with the proposed US FTA were a significant consideration for many contributors to the Committee's inquiry.

> The US is the largest producer of food containing GMOs. Lobbying by agribusiness companies has ensured that there are no US rules for labelling to show GMO content in food. Australia has labelling requirements and a regulatory regime for GMO crops because consumers want to know whether food contains GMOs, so that they can make an informed choice. This attempt to remove the democratic right of informed choice from consumers should be rejected.[64]

6.77 The Committee notes that, whereas the government has commissioned studies into the economic impacts of the US FTA, it has not sought an assessment of the FTA's environmental impacts. Such an assessment, however, has reportedly been completed by OzProspect, a think-tank funded by the Myer Foundation, the Foundation for Young Australians and the Vizard Foundation. The findings are not encouraging.

> The study concludes that if the US market for primary products is opened up for Australian farmers, the resultant expansion in agricultural production would increase Australian water use by up to 1.3 trillion litres a year – almost as much as the entire national domestic water use…. [Michael Cebon, the report's author] calculates that Australia's annual energy-related greenhouse gas emissions from agricultural production would rise by two million tonnes, or by more than 25 per cent.[65]

6.78 Unlike Australia, the US Congress has passed legislation requiring that trade agreements must be accompanied by a review of their environmental impacts. These reviews must include 'significant opportunities for public involvement'.[66] Given that Australia is experiencing what has been described as a national water crisis, the Committee is concerned that the Commonwealth environment Minister and the State Premiers may not have given adequate consideration to the potential environmental impacts of the proposed US FTA.

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63 *Committee Hansard*, 8 May 2003, p. 28 (Murphy, National Tertiary Education Union)

64 *Submission* 86 (Rainforest Information Centre/Friends of the Earth)

65 Davidson, K 'A free trade pact will hurt our environment' *The Age* 3 November 2003, p. 11.

66 Davidson, K 'A free trade pact will hurt our environment' *The Age* 3 November 2003, p. 11.

Negative list approach

6.79 Several witnesses raised with the Committee their concern that, unlike the approach to liberalisation of services under GATS where the government makes commitments to liberalise certain services by specifically nominating them (a 'positive' list), the US FTA utilises a 'negative list' approach to trade in services and investment. Under such an agreement, all trade in services and investment is regarded as automatically 'free', apart from any items that are specifically excluded from liberalization (a 'negative' list). Governments normally achieve this exclusion by taking out 'reservations' with respect to certain services, thereby retaining their right to regulate or amend policies regarding those services into the future. These reservations are normally spelled out in annexes to the main agreement.

6.80 Australia had been a very strong advocate of a 'negative list' approach to its FTA with Singapore – an approach which took many months of negotiation to settle as a modus operandi. Negotiations with the US settled on a negative list approach from day one.

> We saw the inherent greater liberalising thrust of that approach and the transparency that comes with a negative listing as being pluses for our objectives to be best met in negotiations with Singapore.
>
> With the United States, a very similar approach occurs. They adopt a negative list approach in their NAFTA agreements. That is the approach we both stepped off from. We believe that approach certainly is appropriate to achieving very much a GATS-plus outcome on services as part of these negotiations. It is more transparent, it is inherently more liberalising but at the same time—in getting to some of the comments and criticisms perhaps of the negative list approach—it still provides government with the flexibility to take reservations to ensure that, where it has measures in place not in conformance with the obligations taken in terms of national treatment or market access, we can fully reserve those and commit to a standstill provision, and that is annex 1.
>
> Essentially annex 1 is a standstill where we have a measure that is inconsistent with the obligations but where effectively we agree to be bound. In Singapore—and we would do the same in the United States—we agree not to make that measure any more inconsistent and have it become any more trade restrictive than at the date of entry into force of the negotiations. That is the value of a binding. As I have said, the GATS-plus element is reflected very much in the liberalisation that has happened in Singapore over recent years. That standstill commitment from Singapore was locked in and was a key part of the outcome. That is very much one of the pluses we see in these processes.
>
> Annex 2, the second annex to this negative list, allows us to carve out whole sectors from the obligations in those two chapters of services and investment. That means the government maintains full flexibility to introduce new and more restrictive measures in relation to those sectors. The negative list approach—even though to my mind it is inherently more liberalising—has the capacity still to maintain flexibility, where necessary,

> and for the government to take whatever reservations it considers necessary in order to ensure there is that flexibility in the future. That is how we have approached it[67].

6.81 The Committee agrees that a negative list approach is 'inherently more liberalising', and acknowledges the use of annexes to reserve or 'carve out' certain specific services from the universal coverage of the agreement. However it is the very universality of the agreement -covering present and yet-to-emerge services, and binding governments into the future - that is problematic.

> The primary problem with a negative list approach is that all future services that have not been created—have not been developed, have not evolved—are automatically liberalised with a negative list approach…
>
> We find it difficult to understand the logic of precluding the regulatory options of future governments for future services whose dynamics and needs are not known. At least with a positive list approach, whilst there may well be arguments… about what should and should not be included on the list, you are not foreclosing the future for future regulatory needs…
>
> The other problem with a negative list approach is that with your existing service sector you have one opportunity to get it right—the first time—in deciding what provisions need to go on that annex that retains the ability to introduce new trade restrictive measures and what sectors go on that annex that only allows you to maintain your existing trade restrictive measures. They are the two concerns we have with that structure.[68]

6.82 In the Committee's view, the negative list approach raises several issues of accountability and responsibility that must be weighed against the argument for the inherently liberalising effect of the negative list. Parliamentarians have a special duty of care under these circumstances. They have a responsibility to the citizens that they currently represent to ensure that any commitments undertaken serve their constituents' economic and social interests. They also owe a duty of care to future generations who may have to live with adverse consequences flowing from commitments made.

6.83 For example, an agreement struck some years ago without foreknowledge of the advent of the internet, may have led to commitments in electronic communications that prevented later governments regulating to control pornographic content or email spam.

6.84 Parliamentarians of the future, too, will have to grapple with any issues that may arise if undertakings implied by the negative list approach deny them the capacity to regulate for desired social policy outcomes. Parliamentarians and ministers cannot

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67 *Committee Hansard* , 2 October 2003, pp505-506 (Deady, DFAT)

68 *Committee Hansard* 22 July 2003, p241 (Murphy, ACTU)

see into the future. The Committee therefore believes that a negative list approach militates against prudent and responsible decision-making.

6.85 Witnesses highlighted the difference in the approaches between the GATS and the US FTA, noting in passing that Australia's arguments in the WTO Uruguay Round for a negative list approach in GATS were 'not persuasive in terms of the final outcome'.[69]

> The government has tried to reassure us about GATS by emphasising that it is a positive list agreement—that is, that it only includes what each government actively decides to list in the agreement…
>
> The US free trade agreement negative list for services brings back the whole GATS agenda in a worse form because of the negative list. For example, if the government succeeded in its proposals to deregulate doctors' fees and university fees and the US free trade agreement was then signed, a future government could be challenged if it tried to reintroduce regulation to ensure more equitable access to these essential services.[70]

6.86 Given the agreement from day one that both Australia and the US wished to proceed with negotiations on a 'negative list' basis, the Committee acknowledges that such an approach would be enormously difficult to wind back. It is therefore extremely important that any reservations taken by the Australian government are carefully worded and thoroughly thought through.

6.87 In the Committee's view, a negative list approach is a highly risky strategy that appears not to be justified by the efficiency argument that it is 'inherently more liberalising'. Services and investment matters are becoming increasingly significant in the economies of developed nations that are engaged in global markets. A small error in the wording of a reservation, or an unanticipated technological development, or the devising of an entirely new service of major significance, could easily result in a country being deprived of the right, and a future government of its responsibility, to make policies about, and to regulate, that service in the national interest. The Committee does not relish the prospect of a future significant opportunity or benefit being 'spoilt for a half-penny's worth of tar.'

6.88 It is difficult to over-emphasise the importance of adequate parliamentary scrutiny of a process which involves automatic, binding commitments unless specific exemptions are identified. For all the reasons outlined above – attention to the national interest, accountability to citizens, intergenerational responsibility and incomplete knowledge of future developments – the Committee believes that the negative list approach should be avoided. The Committee notes that agreements such as the GATS eschew negative list in favour of a positive list approach.

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69 *Committee Hansard* 22 July 2003, p241 (Murphy, ACTU)

70 *Committee Hansard,* 23 July 2003, p. 275 (Ranald, AFTINET)

Recommendation 12

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

Specific issues arising from FTA negotiations

Pharmaceuticals

6.90 Concerns about the possible impact of a US FTA on Australia's regulations concerning the advertising of prescription drugs, and on the Pharmaceutical Benefits Scheme have agitated the public mind throughout the trade negotiation process.

> The PBS is widely reported to be a preoccupation of the USA, notwithstanding its omission from the USTR letter. This scheme is essential to the affordability of prescription drugs and hence critical to the maintenance of public health in this country. The ACTU would also strongly oppose any US suggestion that the Australian prohibition on advertising prescription drugs to consumers be replaced by the American model of setting standards for such advertising. There is enough evidence to suggest that advertisements promoting prescription drugs to doctors can have cost-escalation effects because of the displacement of generics from medical prescriptions. Allowing direct advertising to consumers would compound the problem. No commitments should be given that would undermine the PBS.[71]

6.91 The Committee probed DFAT officials concerning the threat to the PBS and related matters, and was assured that resistance to any such threat would be robust.

> At this point [2 October 2003] no specific proposal has been put to us by the United States on the PBS. We are open to continuing to explain the operation of the scheme to them, very much on the basis—and this is a very clearly stated objective of the government in this area—that we are not in any way negotiating in the FTA an outcome that would limit the ability of the government to provide a sustainable PBS and affordable medicines. That is very much the vision that has been articulated and that we have put very clearly to the United States.[72]

6.92 DFAT's submission to the Committee also spoke in similar terms:

> The Australian Government remains committed to providing Australians with access to quality and affordable medicines through a sustainable Pharmaceutical Benefits Scheme (PBS).
>
> - in this respect it should be noted that the Chief US Negotiator has stated publicly that the US is "not going after" the PBS (See The Australian and the Sydney Morning Herald, 22/3/03)

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71 *Submission* 125, pp. 7-8 (ACTU)

72 *Committee Hansard*, 2 October 2003, pp. 510, 511 (Deady, DFAT)

- US pharmaceutical companies in Australia have expressed support for the integrity of the PBS in relation to the Australia-US FTA negotiations.[73]

6.93 Barely three weeks after Stephen Deady's assurances to the Committee on the PBS, the press reported the Australian Medical Association as claiming that Australians could face paying twice as much for prescription drugs if the PBS was included in the FTA.[74] Health Minister Tony Abbott was quick to respond, declaring:

> The Pharmaceutical Benefits Scheme will not be a bargaining chip in these negotiations and frankly, it shouldn't be, because the [PBS] does not discriminate between overseas and locally produced drugs. It is not a trade instrument… it is an instrument for ensuring Australians get reasonable access to affordable drugs.[75]

6.94 *The Canberra Times* on 1 November 2003 reported that 'Australia and the United States have postponed free trade negotiations on key issues such as agriculture and pharmaceuticals until early next month'. It also stated that the US team 'had not yet provided a proposal on the ticklish issue of pharmaceuticals access to Australian markets.'

6.95 US negotiator, Ralph Ives, was reported as saying that the Australian government had been 'very clear on the sensitivity of this [PBS] issue and the fact that the fundamental nature of the program will not be changed' adding that the US is 'looking at some of Australia's own reports and commissions to see ways that the Australian government has identified that the system could be improved.'[76]

6.96 For the Committee, the US negotiator's remarks are code for 'We are not letting go of our aspirations for more favourable PBS arrangements'. AAP news service has also reported that the US 'has signalled [that] it plans to bring its most contentious demands, such as changes to the PBS, up at [the final round of talks set down for early December in Washington].'[77]

6.97 The Committee concurs strongly with the views of Health Minister Tony Abbott that the PBS should not be a 'bargaining chip'. In the Committee's view, any US proposal that undermines the fundamental integrity of the PBS, or leads to dramatic price increases, should not be entertained.

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73 *Submission* 54, pp. 41-42 (DFAT)

74 General news: 'A striking deal on balance in trade' *Daily Telegraph* 25 October 2003, p17.

75 Hon Tony Abbott MP quoted in 'Drugs threaten US trade deal' *The Australian* 27 October 2003.

76 Ralph Ives quoted in 'Aust, US postpone talks on free trade' *Canberra Times* 1 November 2003, p. 4.

77 'Doubts grow on US trade deal' *The Canberra Times* 3 November 2003, p. 6.

Recommendation 13

6.98 **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.**

Quarantine

6.99 Australia, as a largely disease free island continent, has always maintained a strict quarantine regime and has insisted that all its quarantine decisions are determined on a scientific basis. Trading partners have sometimes criticised Australia's quarantine rules as a disguised trade barrier. The EU has been a recent notable critic of Australia's position, claiming that many of the prohibitions have no scientific basis.[78]

6.100 Several witnesses believed that negotiations on the US FTA would produce a watering down of quarantine standards. One industry representative was quite explicit about the US's motives.

> Having failed over the years to break down Australia's quarantine regime on chicken meat, and having declined to contest Australia's decisions in the WTO, United States officials appear to be using the opportunity of this FTA negotiation to attack Australia's quarantine protection of its chicken meat industry, and to obtain results which could not be achieved in WTO processes.[79]

6.101 DFAT, however, has insisted that quarantine matters are of utmost importance:

> The Government will not enter into any arrangement that would compromise the scientific integrity of Australia's quarantine regime, nor the broader objective of protecting human, animal and plant health.[80]

6.102 Such assurances are still not sufficient to quell the fears of those agricultural and horticultural industries that have a strong interest in keeping diseases at bay:

> Australia's FTA negotiating objectives were announced on 3 March (MVT13/2003). This confirmed that quarantine will be "in play" in the negotiations in response to the US negotiating agenda. It is also relevant that reportedly extensive and detailed prior discussions on quarantine

78 European Union Delegation of the European Commission in Australia, *EU News* No.4, October/November 2003, p. 5

79 *Submission* 31, p. 3 (Australian Chicken Meat Federation)

80 *Submission* 54, p. 42 (DFAT)

> between Australia and the United States have been held throughout the last year (Zoellick 2002).[81]

6.103 The Committee believes it would be irresponsible in the extreme for Australian negotiators to make concessions on quarantine rules in response to demands from US agricultural export interests. It is confident that the government will adhere to its promise to retain the scientific integrity of Australia's quarantine regime.

Recommendation 14

6.104 **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.**

Genetic modifications and food

6.105 Consumer advocacy and environmental groups pressed upon the Committee their concerns about the differences between the US and Australia with respect to genetically modified foods and their labelling. Australia's gene technology labelling requirements are contained in FSANZ food standard 1.5.2. These were introduced in response to strong public concern about the risks posed to human health and safety by GM foods and a variety of objections relating to GMO production processes.

6.106 Referring to USTR Zoellick's letter to Congress seeking a Trade Promotion Authority, the Australian Conservation Foundation stated in its submission that:

> The U.S government has indicated that through the FTA negotiations it will seek to have Australia reaffirm its WTO Technical Barrier to Trade Commitments (TBT), including those relating to labelling requirements on U.S food and agriculture products produced through biotechnology, and eliminate any unjustified TBT measures. Although it is not yet entirely clear, this objective indicates that the U.S will seek the Australian government's commitment to remove or weaken Australia's food labelling laws relating to GMOs.[82]

6.107 This reading of the Zoellick letter was questioned by a trade consultant in the following terms:

> I have not seen that. It was run up early and a lot of the civil society groups are saying that it is an issue. When the Zoellick letter, the first letter of notification to congress, went in, right at the top it had biotech related to the food issue. A couple of groups thought that meant GMOs. I was over there and I asked the American negotiators what the issue was and they were

81 *Submission* 31, p. 6 (Australian Chicken Meat Federation)

82 *Submission* 24, p. 5 (Australian Conservation Foundation)

> surprised to be told that it was GMOs. They do not have a GMO agenda. Somebody has jumped the gun on that one.[83]

6.108 The Committee is aware that the preamble to the WTO's Technical Barrier To Trade Agreement states that 'no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, and plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate'. However, Members' regulatory flexibility is limited by the requirement that technical regulations 'are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to trade'. (Article 2.2)

6.109 The Committee agrees with Greenpeace that 'the requirement for labelling of genetically engineered food products in Australia is not a technical barrier to trade. Rather it fulfils a legitimate objective in protecting human health and safety, and as such is a justifiable TBT measure under the WTO/TBT Agreement'. The Committee notes that Australian labelling requirements for products from the United States are no less favourable than those accorded to national products or products from other countries.

> Labelling of genetically engineered food products is justifiable as the method of production of genetically engineered food, that is using genetically engineered organisms, is fundamentally different to the production of non-GE food products, and *could well result in altered product performance*. Long term scientific information about the health impacts of genetically engineered foods is limited, and therefore product information for GE food should be available in the form of labelling.[84]

6.110 In the Committee's view, it is important that Australia does not make any concessions to reduce labelling laws or standards for genetically engineered foods, and also that Australia ensures that future improvements in or extensions to labelling standards are not precluded by any undertakings in the US FTA.

Recommendation 15

6.111 **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.**

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83 *Committee Hansard*, 9 May 2003 (Oxley, AUSTA)

84 *Submission* 159, p. 3 (Greenpeace)

Local content rules in media

> A red flag for Australians is that according to all reports the US has ambitious services liberalisation objectives for the AUSFTA negotiations. It has long sought the abolition of our local content requirements for audiovisual services such as free to air television programmes, advertising, and radio music content. The… audiovisual services sector is highlighted by the USTR as one of the liberalisation gains from the recent FTA with Chile… Australia should reject any US overtures for the abolition of local content requirements. Australia should also refrain from agreeing in AUSFTA to reduce the various percentage content requirements for audiovisual sub-sectors. Whether the existing quotas are maintained or varied should be a matter for successive Australian governments to decide.[85]

6.112 The Committee encountered vigorous advocacy from screen writers, producers, artists and media workers in favour of strong protection for cultural policies such as quotas of Australian production in television and interests related to audio-visual services, copyright and the development and delivery of the so-called 'creative industries.'

6.113 The President of the Australian Writers' Guild, Ian David, expressed the core concern in the following terms:

> This is a vital issue for every Australian, because it is about whether we will have a distinctive voice with which to express ourselves in the future. To some this may just be about trade, commerce and access to markets. To us it's about our heritage, our identity, our livelihood.[86]

6.114 The Guild also drew to the Committee's attention the Government's position in respect of the audiovisual sub-sector as articulated in the Australian Intervention on GATS made in Geneva in 2001:

> Australia has long recognised the essential role of creative artists and cultural organisations in reflecting the intrinsic values and characteristics of our society, and is committed to sustaining our cultural policy objectives within the context of multilateral trade negotiations.…It is essential that Australia's media reflects Australian identity, character and cultural diversity and provides an Australian perspective on local and international events.
>
> Australia remains committed to preserving our right to regulate audiovisual media to achieve cultural and social objectives and to maintain the broad matrix of support measures for the audiovisual sector that underpin our cultural policy; including retaining the flexibility to introduce new measures in response to the rapidly changing nature of the sector.[87]

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85 *Submission* 125, p. 6 (ACTU)

86 *Submission* 40, p. 5 (Australian Writers' Guild)

87 Australian Intervention on Negotiating Proposal on Audiovisual Services, CTS Special Session, Geneva, July 2001. Cited in *Submission* 40, p5 (Australian Writers' Guild)

6.115 Notwithstanding such unequivocal commitments, reported statements by Prime Minister Howard and Trade Minister Vaile around the time of US President Bush's visit to Australia indicate that, while they retain support for existing quotas, the Prime Minister said that 'in looking at future or new media , we are prepared to be fairly flexible there'.[88] The US has been pushing hard to make further inroads into the Australian film and TV market, even though American programs already account for 69 per cent of the overseas fare shown on Australian televisions, and around two thirds of the films shown in Australian cinemas.

> [Y]ou may be aware of the 'soothing' comments… made by the US… about how they could go forward and live with and accept the regime that we presently have in place as far as our local content is concerned. That position in the parlance used in the trade areas is described as 'standstill'. We believe that the arguments about a standstill position are completely unacceptable…
>
> It is unacceptable because we are working in an area of very fast and dramatic changes in terms of technology and production, delivery and distribution of audiovisual services. It is impossible to predict the systems that will evolve to distribute and deliver audiovisual programming cultural product in the coming years—within five years, let alone 10 or 15 years. To agree to standstill now would be perhaps the equivalent—as I often like to say to people—of having an inquiry about radio in 1950, agreeing to lock off on certain conditions concerning radio and not being aware of a thing called television, which was about to burst on to the scene[89].

6.116 The problems with 'standstill' positions came to the fore in the late 1990s when New Zealand, having made full commitments to market access in GATS Modes 1, 2 and 3 for production, distribution, exhibition ad broadcasting of audiovisual works, found itself unable to re-introduce local quotas in free-to-air television in accordance with the new government's cultural policy. The Committee shares the concern expressed by witnesses about these and associated threats to governments' abilities to meet their preferred cultural objectives.

> It is imperative that cultural industries are not part of the same discussions that encompass wheat, lamb, sugar and steel. Culture is not transferable, nor is it replaceable. Australians must maintain their ability to tell their own stories to their own people, on film, television, interactive media and radio, through music, dance, Indigenous expression design, crafts and the spoken and written word.[90]

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88 John Howard MP quoted in 'Fears grow over free-trade deal concessions' *Sydney Morning Herald* 24 October 2003, p. 6.

89 *Committee Hansard*, 23 July 2003, pp. 258, 259 (Dalton, Australian Film Commission)

90 Brown, G 'Protecting our cultural diversity' *Australian Chief Executive*(CEDA) April 2003, p. 27

6.117 The US is pressing for much greater regulatory freedoms in products that are delivered digitally, but it is precisely in this form that, in future, most cultural product will be produced, stored and delivered. It was suggested to the Committee that, for the US, success in this area as part of the Australia-US FTA, would be a valuable precedent for its attempts to secure better access to other major markets – notably the European Union.

> We believe that this treaty is terribly important to the Americans. It is not important in terms of market access, because they have that—they have everything they want out of Australia really—it is important to the Americans because they are slowly building a series of bilateral agreements, and this is the first bilateral agreement they are negotiating with a developed country in this particular round they are pushing into at the moment and they do not want to have on that treaty in any way something which undermines their fundamental position.[91]

6.118 In its submission to the Committee, DFAT stated that the Government 'will take into account Australia's cultural policy objectives, and the need to maintain our capacity to support Australian culture and national identity. The Government recognises the need for appropriate regulations and support measures to achieve these objectives in areas such as audiovisual media.'[92] On 2 October 2003, Australia's negotiator Stephen Deady told the Committee:

> As I say, we are talking to industry about this, but the government's commitment in terms of its objectives here is very clear, and that is that we will be ensuring that our cultural objectives can continue to be met. Ralph Ives has said publicly that the US are comfortable with the current arrangements—the local content requirements on broadcast television and the other aspects of the existing arrangements. He went further in fact and said that the subsidies that are provided for those cultural activities in Australia are also not a concern to the United States. Those are significant statements. We are continuing to talk to the industry about precisely what that means and what the reservation, if any, would look like in relation to that sector.[93]

6.119 But barely a month later US negotiator, Ralph Ives, was reported as saying, with respect to arrangements for the future, that 'the proposal by Australia is too broad and we need to work on narrowing that.'[94]

6.120 The Committee is aware that Australia has a Free Trade Agreement with Singapore 'which many in the arts industry see as the optimum model to secure indigenous culture because it builds in protection for the local industry in

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91 *Committee Hansard*, 23 July 2003, pp. 265, 266. (Dalton, Australian Film Commission)

92 *Submission* 54, p. 42 (DFAT)

93 *Committee Hansard* , 2 October 2003, p. 511 (Deady, DFAT)

94 Quoted in Davis, M 'FTA progress on local content' *Australian Financial Review* 1 November 2003

perpetuity.'[95] This contrasts with the FTA that the US struck with Chile, whereby the Chilean government 'gave up its right to give preferential treatment to Chilean producers of any computer programs, text, video images, sound recordings and other products that are digitally encoded and transmitted electronically.'[96] The Australian government's recently declared willingness to be 'flexible' with regard to local content and similar rules for future media forms has prompted considerable alarm within domestic media production and other cultural industries.

6.121 The Committee believes that cultural protection is a critically important responsibility for government, and that any specified protections related to it must be technologically neutral. If e-commerce is defined as 'all digital products' this is a clear back door way to include cultural industries in a trade agreement. In the Australia-Singapore FTA a narrow definition of e-commerce was used that excluded Australia's cultural industries.

> The Australian Singapore Free Trade Agreement chapter on e-commerce is limited to dealing with trade transactions that use e-mail or electronic data exchange. Both countries agreed to base their domestic legal framework for electronic transactions on the United Nations Commission on International Trade Law (UNCRITAL) Model Law on Electronic Commerce. … None of [the wording of] this suggests that e-commerce is being defined as widely as it is by the notion of 'digital products'…. Cultural goods and services such as books, video, DVD, music and downloadable films are also now traded via e-commerce with few, if any, barriers. However, these goods and services do not lose their cultural characteristics because of the means by which they are traded.[97]

Recommendation 16

6.122 **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.

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95 Hackforth-Jones, P 'A Mickey Mouse trade agreement?' *Australian Financial Review* 18 October 2003, p. 30.

96 Letts, D (Music Council of Australia) in a Letter to the Editor, *The Australian* 27 October 2003, p. 10.

97 *Submission* 155, para 6.2 (Australian Film Commission)

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

6.123 Perhaps the most pertinent observation on the state of play has been provided by Tim Colebatch, the economics editor at *The Age* newspaper:

> Ultimately, this will be a deal between politicians, to decide what they can afford to give away and what they cannot. Taking on the film industry is the big risk for Howard, when Vaile has repeatedly told the industry and the public that "we will ensure our capacity to support Australian culture and national identity including audiovisual media is not watered down in the negotiations." Now the Government proposes to do the exact reverse. Time will show whether it is worth it.[98]

Investment

6.124 In the opinion of some commentators, the US FTA 'is not about trade at all. It is about investment flows'[99], and the Committee received an array of comments about perceived dangers in the closer Australia-US financial integration that an FTA would entail.

6.125 USTR Zoellick, in his letter to the US Congress, listed the following as the US's objectives on investment

- Seek to establish rules that reduce or eliminate artificial or trade-distorting barriers to U.S. investment in Australia, including investment screening by the Australian Government, while ensuring that Australian investors in the United States are not accorded greater substantive rights with respect to investment protections than U.S. investors in the United States, and to secure for U.S. investors in Australia important rights comparable to those that would be available under U.S. legal principles and practice.

- Seek to ensure that U.S. investors receive treatment as favorable as that accorded to domestic or other foreign investors in Australia and to address unjustified barriers to the establishment and operation of U.S. investments.

- Provide procedures to resolve disputes between U.S. and Australian investors that are in keeping with the goals of making such procedures expeditious, fair and transparent.

6.126 The model for investment provisions 'comparable to those that would be available under U.S. legal principles and practice' is the North American Free Trade

98 Colebatch, T 'New-look trade map a work in progress' *The Age* 25 October 2003

99 Hamilton, C 'Free trade deal won't produce the goods' *Australian Chief Executive* (CEDA) April 2003, p. 53.

Area agreement (NAFTA). In particular, Chapter 11 of the NAFTA agreement has drawn extensive criticism, with opponents alleging that it gives corporations too much power to bend to their will the governments of those countries in which they invest and operate. The concerns of such opponents are captured in the submission to the Committee from the Australian Fair Trade and Investment Network:

> NAFTA itself has been characterised as more an investment treaty than a trade treaty because of the significance of its investor rights regime. Investor rights in NAFTA have been enforced against governments by powerful multinational corporations, particularly in the past seven years. If an Australia-US Free Trade Agreement is to include provisions similar to those of NAFTA, the almost inevitable outcome will be a reduction in the capacity of all levels of Australian government to regulate.
>
> The US is seeking the abolition of the Foreign Investment Review Board … The Foreign Investment Review Board has the power to review other foreign investment in the national interest. Its discretion is very seldom exercised, but it is a power which the Australian government should retain. The US is also seeking a complaints mechanism for investors which is likely to be modelled on the NAFTA disputes procedure. This would enable US corporations to take legal action to force changes in Australian law if they could argue that the law was not consistent with the agreement. They could also sue the Australian government for damages…
>
> Chapter 11 of NAFTA defines 'investors' widely and grants them broad rights. Only the parties - that is, the governments - to NAFTA may be sued, but they may be sued by investors, that is, corporations. The government 'measures' which can be challenged as infringing on investors' rights include 'any law, regulation, procedure, requirement or practice' at all levels of government. Disputes are decided in one of two international arbitration panels originally set up for the resolution of disputes between private, rather than public, bodies. These bodies – UNCITRAL and ICSID – do not provide the levels of openness of national courts. While investors sue governments seeking public money and seeking rulings on the appropriateness of public policy decisions, members of the public are not informed of the disputes or afforded the opportunity to be heard.[100]

6.127 The Committee is aware that the rules of procedure for ICSID and UNCITRAL dispute settlement bodies all derive from a commercial arbitral model. They are 'ad hoc tribunals without the fundamental principles of transparency in procedure or open hearings, they do not have to notify the public in the event of registration of a claim, nor is their any public interests requirements as found in domestic administrative law.'

> These may not be pertinent issues when two international private actors are in arbitration over commercial matters, however, when one party is a state party, which is essentially a representative of a collectivity, of the people,

100 *Submission* 42, pp. 37-38 (AFTINET)

> "the policy goals of the state become implicated in the dispute" . Therefore… it is imperative that any dispute resolution process follow the principles underlying our domestic courts, the process must be open, transparent and accountable, and …amicus briefs from persons or sectors, whether industry, agricultural, human rights or labour, whose rights or interests may be affected must be allowed. A further [concern] … is the relationship between a private ad hoc dispute settlement mechanism and Australia's domestic courts, developing jurisprudence under NAFTA suggests the potential for conflict between the two legal systems.[101]

6.128 The Committee explored with Australia's lead negotiator Stephen Deady the extent of the investment issues being proposed for the FTA. Particular attention was given to whether NAFTA-style provisions were likely to be included in a US FTA, and, if so, the extent of any amelioration of the Chapter 11 problems. Mr Deady advised that:

> … there have been adjustments to the investor state dispute settlement mechanisms since NAFTA. There has been some refinement, certainly, in the US approach to these… Those clarifications or interpretations of the NAFTA articles, in terms of direct or indirect expropriation that it talks about, have themselves been reflected in trade promotion authority. They are also reflected in the US-Singapore and US-Chile agreements.[102]
>
> So there is greater certainty, I think, and greater clarity about precisely what these articles mean. There have been changes made to the chapter 11 type procedures and language in the subsequent US agreements, reflecting some of these interpretations. That is now the basis on which this discussion will take place between ourselves and the United States—if, in fact, we do get to discuss an investor state dispute process.[103]
>
> Neither [the US nor Australia] has yet introduced language on an investor state clause into the chapter on investment. [104]
>
> With respect to the third category—and I would say at the moment that this is where this investor state dispute settlement is—we have talked about it, we have explained our approach in Singapore, we have asked questions of the Americans and their experience with NAFTA, what they did with Singapore and what they have done with Chile. We have asked the question: with two developed countries, these are some of the issues this throws up; do we really need this sort of article? Both countries have reflected on that and gone back and had internal discussions, and they are still going on. It is certainly very much a possibility as part of the agreement, but neither

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101 *Submission* 14, pp 4-5 (Liberty Victoria)

102 *Committee Hansard*, 2 October 2003, p. 501 (Deady, DFAT)

103 *Committee Hansard*, 2 October 2003, p. 509 (Deady, DFAT)

104 *Committee Hansard*, 2 October 2003, p. 503 (Deady, DFAT)

> country as yet has come forward and specifically put down language saying, 'Yes, we want one and this is what we think it should look like.'[105]

6.129 The Committee notes that while Australia has investor-state clauses in a range of agreements, until recently these have always been with developing countries. They have been used to protect Australian investments from expropriation by governments in those countries where the rule of law is weak. The Australia-Singapore FTA is the first agreement with a *developed* country[106] that has included investor-state provisions.

> The investment chapter of the Singapore free trade agreement enables an investor to challenge laws or regulation and to sue governments for damages if such laws breach the terms of the agreement in a way which causes loss or damage to the investor. There are similar clauses in the US-Chile and US-Singapore agreements, and this is clearly part of a template and a beachhead about investor state complaints mechanisms that the US wants to establish in terms of the global trade scene.[107]

6.130 The Committee remains concerned that an FTA modelled on NAFTA would grant US corporations inappropriate powers to challenge government regulation at local, State and Commonwealth levels. If, as seems likely, the United States regards US-Singapore and US-Chile FTAs as 'a template and a beachhead about investor state complaints mechanisms', Australia should not be surprised if the US negotiators seek to introduce them into the Australia-US FTA even at a very late stage in proceedings.

6.131 Witnesses frequently drew attention to various examples of where corporations, using NAFTA Chapter 11 provisions, had sued governments.

> US corporations have aggressively challenged laws and sued governments on the grounds that their investments have been damaged… The US company, United Parcel Service… is suing the publicly owned Canada Post… arguing that Canada Post's monopoly on standard letter delivery is in violation of provisions on competition policy, monopolies and state-run enterprises…
>
> The US Metalclad Corporation was awarded $15.6 million because it was refused permission by a Mexican local municipality to build a hazardous waste facility on land already so contaminated by toxic waste that local groundwater was compromised. It won that suit. Ethyl Corporation, a US chemical company that produces a fuel additive called MMT which contains manganese and is hazardous to human health, successfully sued the Canadian government when it tried to ban MMT on health and safety grounds…

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105 *Committee Hansard*, 2 October 2003, p. 503 (Deady, DFAT)

106 Singapore is categorised by the IMF as an 'advanced economy' – a category that includes countries like Australia, Sweden, Belgium, Taiwan.

107 *Committee Hansard*, 23 July 2003, p276 (Ranald, AFTINET)

> I should also indicate that … the US Council of State Governments, the National League of Cities—which represents local government—plus the National Labor Advisory Committee to the US Trade Representative have all, in their reports to the US Trade Representative on the Chile and Singapore US free trade agreements, objected to the investor dispute process in those agreements. Although it is slightly different from NAFTA, they do not consider it is different enough to protect against these sorts of suits and to protect against the unreasonable restriction on the right of governments to regulate.[108]

6.132 To the Committee, it appears that the proposals listed in the USTR's statement of objectives are similar to key aspects of the ill-fated OECD Multilateral Agreement on Investment that drew broad, hostile and effective community criticism during the late 1990s. In the Committee's view, any threat to government's capacity to regulate foreign investment matters should be strongly resisted. The Committee also believes it is vital that dispute settling mechanisms built into any trade agreements, bilateral or multilateral, are transparent and provide an opportunity for bona fide NGOs and to express their views as part of any tribunal processes.

6.133 According to the evidence cited above (put by Australia's lead negotiator Stephen Deady) both the Australian and US negotiators have asked the question: 'Do we really need an investor-state provision?' and neither country had at that stage (October 2003) come forward with a specific proposal. The US FTA Briefing No.4 published by DFAT states: '…both Australia and the US have strong, robust and independent legal systems, which provide an effective avenue for our investors to pursue issues of concern to them. In that light, the need to create an alternative ISDS mechanism in an FTA… appears to be less compelling than it might be in other agreements.' The Committee concurs with the government's view, and regards such a provision as unnecessary.

Recommendation 17

6.134 **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.**

Agriculture

6.135 There is little doubt that agricultural issues have been a prominent aspect of negotiations for an Australia-US Free Trade Agreement, with broad general support

108 *Committee Hansard*, 23 July 2003, p. 276 (Ranald, AFTINET)

for an FTA coming from highly efficient Australian producers all very keen to export. Unsurprisingly, farm issues are also the issues that have proven most difficult to resolve, and at the end of the fourth round of officials-level talks in October 2003, agriculture continued to test the wit and try the patience of the negotiators.

6.136 The Committee sought to determine a clear sense of the position of Australia's major agricultural interests with respect to the US FTA. The following is typical of the quite categorical views that were expressed:

> The National Farmers Federation… will support the negotiation of a US FTA, on the condition that agriculture is at the heart of the negotiations and the final agreement. What does 'at the heart' mean; what are we seeking? …[T]he US is an important market, but we do face several restrictions into the US for several of our commodities. The NFF seeks the elimination of tariffs and tariff rate quotas on agricultural exports to the United States. We seek this elimination upfront when the agreement is signed—not subject to long time lines.[109]

6.137 The Committee notes that such views were entirely congruent with the government position stated by Australia's lead negotiator, Stephen Deady, in evidence to the Committee:

> [T]he government's position on the market access package in relation to agriculture and the United States has… been very clearly stated. We need a substantial market access outcome in negotiations with the United States. We need a significant, immediate improvement in access into that market and we need to be looking at the elimination of all border protections, tariffs and quotas on Australian exports of agricultural exports into the United States. That package… has to include those elements: significant and immediate improvements in the transparent process leading to the full elimination of tariffs and other quotas on agricultural products into the US market.[110]

6.138 At the close of the October 2003 round of negotiations, however, it appeared that the Australian negotiators were being confronted with a serious challenge to at least some aspects of that position. The original US farm trade offer had been described by Australian officials in mid-2003 as 'the big problem, too little, across the board'. In October 2003, Trade Minister Vaile described the revised US offer as only an 'incremental improvement'.[111]

6.139 The Prime Minister was quoted as saying to US President Bush that he would:

> ..understand if those benefits [for agriculture] build up over time, but there has to be an agreement that builds those benefits in. What [President Bush]

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109 *Committee Hansard*, 22 July 2003, p. 245 (Fargher, National Farmers Federation)

110 *Committee Hansard*, 2 October 2003, pp. 477, 478, 479 (Deady, DFAT)

111 Quoted in Wallace, C. 'Pack could cut a deal' *Weekend Australian* 25 October 2003, p. 26.

> had in mind there was what the US had done in a number of other agreements. You can stagger how you do things if that helps to facilitate getting them through.[112]

6.140 The Committee is aware that US agreements with Canada, Mexico and Chile included timetables for the removal of barriers that extended to 15 years. According to the National Farmers Federation, these 'exceptionally slow' timetables had 'undone the effectiveness' of these deals.[113] This is of some concern to the Committee given that, in the recent free trade agreement struck between Australia and Thailand, the producers of Australia's main agricultural goods will not achieve open access until 2020 – and 2025 in the case of the dairy sector.[114]

6.141 Following the Prime Minister's comments on a 'staggered' approach, Peter Corish, President of the National Farmers Federation, was reported as saying that Australian farmers are seeking 'significant improvements in market access up front… over very short transition times… For us, one to five years is probably an acceptable time.'[115]

6.142 Several witnesses pointed out that, even if tariff barriers to Australian goods were dropped, the US domestic farm subsidies would still place Australian producers at a competitive disadvantage – although at least one witness declared that this was not an insurmountable problem:

> It might not be a completely level playing field but it levels it a hell of a lot. We believe that we can compete against subsidised product when there is open access. We at the moment ship product to both Korea and Japan. Both those countries subsidise their domestic producers. Domestic subsidies—and at some other stage I can show you evidence of this—tend to inflate cost structures in an industry.[116]

6.143 DFAT stressed to the Committee that the key element of the FTA as far as agriculture was concerned was that of market access and not US domestic subsidies.

> The focus of FTAs, I have to say, is very much on… improving access for Australian agricultural exports into the US market...
>
> I certainly am very prepared to indicate today that the negotiations with the United States as part of the FTA are not about seeking reductions in Farm Bill domestic subsidies. That is beyond the scope of the negotiations. The

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112 John Howard MP quoted in Allard, T 'Fears grow over free-trade deal concessions' *Sydney Morning Herald* 24 October 2003, p 6.

113 NFF President Peter Corish quoted in Allard, T 'Fears grow over free-trade deal concessions' *Sydney Morning Herald* 24 October 2003, p. 6.

114 Wright, S 'Trade hurdles as US jumps at its chances' *The Canberra Times* 1 November 2003.

115 Quoted in McKenzie, D 'Access is vital to any deal' *Weekly Times* (Vic) 29 October 2003, p. 13.

116 *Committee Hansard*, 23 July 2003, p. 296. (Barnard, Meat and Livestock Australia)

> wording does reflect the objective that we took into the negotiations, and I do believe—looking at the language now—it is still broadly consistent with what we are trying to do. There are clearly some ambitions on export subsidies but not on overall reductions or the elimination of export subsidies as part of the FTA. Again, that is a bridge too far. That is for the multilateral processes..[117]

6.144 Other witnesses took a far less sanguine view of the subsidies issue, regarding them as problematic in themselves as well as setting unfortunate precedents for other trade agreements if changes to domestic subsidies were not included in a deal.

> The fourth element of the economic case is that the acceptance that agricultural subsidies will be outside a bilateral free trade agreement—as is likely—would be WTO-minus, a development that would corrode the position of free trade agricultural exporters in the international system and negate any benefits from increased market access to the United States. In some discussions of the Australia-US FTA it has been said that subsidies will not be included. That is a big step back from the principles of trade agreements that have already been established in the WTO. On the issue in the international trading system that is more important for Australia than any other, this would be a WTO-minus agreement if it did not control subsidies and it would be a dreadful precedent for other negotiations. I have heard from continental European and Japanese trade policy people that they are delighted by what they hear about the US-Australia FTA because it will not lead to constraints on subsidies.[118]

> The precedent unfortunately is already there in other arrangements that the United States has negotiated. But I think that because Australia is such a high profile supporter of agricultural trade liberalisation, Australia entering these arrangements with the United States would be more influential than Chile or Mexico entering these arrangements. So its demonstration effect would be costly, but even more important would be the demonstration effect of our accepting a trade agreement that did not provide a good model for subsidies.[119]

6.145 The Committee remains concerned about the levels of US domestic subsidies both in terms of making Australian products uncompetitive on the American domestic market, and also because they play such a huge part in American domestic political affairs – especially around election times. The Committee heard evidence of quite staggering levels of subsidy support in certain areas of US agriculture.

> The world price for peanuts is about $US250 a tonne. That is for farmer stock, not for the edible peanut component. US farmers are paid about $US550 a tonne … It is partly a farming subsidy. The government guarantees in the market loan $US355 a short tonne, and they get that

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117 *Committee Hansard*, 2 October 2003, pp. 477, 478, 479 (Deady, DFAT)

118 *Committee Hansard*, 22 July 2003, pp. 198, 199 (Garnaut)

119 *Committee Hansard*, 22 July 2003, pp. 208, 209, 210 (Garnaut)

> topped up to $495 – to the target price – per short tonne. They have a special phrase like 'loan deficiency payment' … and therefore is not considered a production subsidy…. They also then support the breeding program totally. Between the US government and US universities, they pay nearly $US30 million into breeding programs. Total agricultural research in the US is somewhere between $US60 million and $US100 million on peanuts per annum.[120]

6.146 Counterpointing Australian producers' views are the strong protectionist positions that have consistently been taken by American farmers and their representatives. As well, many American producers are unhappy about what they regard as unfair barriers (mostly quarantine-based) to their access to Australia's market for US chicken, pork, stone fruit, corn and coarse grains. Australia's monopoly wheat exporter, AWB Ltd, is also seen as a major impediment, with US wheat growers urging President Bush to 'walk away from an FTA if AWB… is not opened up to competition'.[121]

6.147 It has not been lost among many observers that the farm lobby is a powerful influence on Congress, that President Bush comes from a farming state, as does his brother Governor Jeb Bush, and that the farm vote is crucial in any American election. Congressional rejection of an FTA that does not please American farmers is a distinct possibility.

Recommendation 18

6.148 **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.**

6.149 The consistently reinforced commitment of President Bush and Prime Minister Howard to settle a deal before Christmas 2003 has put enormous pressure on negotiators to resolve the differences over agriculture. The Committee is concerned that political urgency or expediency could result in poor decisions about this notoriously complex and sensitive sector, or worse, that an FTA could be settled which goes nowhere near addressing the needs of Australia's agricultural exporters.

6.150 The timeframe and dynamics of the whole negotiating process have been keenly observed by a number of journalists and commentators. One of them has opined that:

> The US had set up a classic negotiating ambush. First, leave the biggest, most critical element of the deal to the last moment. Remember, there are just eight weeks to cut this deal if it is to get congressional approval before the election year makes its passage a practical impossibility. Second, make such a derisory offer that one's (much smaller) negotiating partner squirms

120 *Committee Hansard*, 24 July 2003, p. 349 (Hansen, Peanut Company of Australia)

121 AAP 'Doubts grow on US trade deal' *The Canberra Times* 3 November 2003, p. 6.

> in desperation at what it's going to take to get a decent offer. The unkind might call it negotiating in bad faith.[122]

Rules of origin

6.151 The Committee was advised by DFAT that a chapter of the proposed US FTA will be devoted to 'rules of origin' issues. Australia's objectives here are :

- Agree on a set of rules of origin that ensure that the benefits of preferential tariff treatment under the FTA apply only to Australian and US goods eligible for such treatment while avoiding unnecessary obstacles to trade.

- Agree on conditions to maintain the integrity of the rules and seek to ensure they are not unnecessarily burdensome to administer from the points of view of business and government.[123]

6.152 The US objectives were simply stated as : 'Seek rules of origin, procedures for applying these rules, and provisions to address circumvention matters that will ensure that preferential duty rates under the FTA with Australia apply only to goods eligible to receive such treatment, without creating unnecessary obstacles to trade.'[124]

6.153 Behind these seemingly straightforward propositions the Committee found a vigorous debate being conducted among economists about the extent to which the administrative and compliance requirements of rules of origin were burdensome and costly.

> I do not think you can have a free trade agreement without any rules of origin. That is one of the problems of a preferential or discriminatory free trade agreement. Genuine free trade does not have this problem at all. When we reduced most of our protection from very high levels to something between nought and five per cent we did it across the board so that we did not have to have the industry department and the trade department checking on whether businesses were deciding to purchase too large an amount of some supply from particular countries. That issue just does not arise if you trade on a most favoured nation basis. It only arises when you have some preferential arrangement and the rules of origin are necessary to confine the privileges that you are giving out to the people you intend them to go to. So rules of origin are inevitable if you have these discriminatory free trade agreements. It is one of the problems of free trade agreements, perhaps the biggest problem. It is why this is not the way to go. It is why leading

122 Wallace, C 'Pack could cut a deal' *Weekend Australian* 25 October 2003, p. 26.

123 *Submission* 54, Appendix C (DFAT)

124 *Submission* 54, Appendix D (DFAT)

> economists all around the world emphasise that free trade should be multilateral free trade, to maximise everyone's welfare.[125]

6.154 Australian negotiators were adamant that such criticism was ill-founded:

> I think there is an exaggerated concern about the rules of origin. I think it is based on an assumption from an earlier period when the external tariffs were very high and perhaps this was the result… Very clearly, only the preferential trade is impacted by the rules of origin. In a very large proportion of that trade the rules of origin are largely irrelevant, because clearly the product is from Australia or from the United States. There are no transaction costs in establishing that, particularly if you use the model that the United States pursues in these matters, which is that it is purely a change of tariff classification.
>
> If you import an engine and you export that engine in a motor vehicle, there is no bookwork required, and that qualifies as the rules of origin… Rules of origin are crucial. It is important that we get them right. They are very important, as I have said, in relation to textiles in this country. The approach of the United States certainly gives the Australian textile industry cause for concern. But I do not think that the claim that somehow it will lead to a significant rise in transaction costs is supported by the facts. That has certainly not been the reaction that we have had from Australian industry when we have explained the US approach to the rules of origin.
>
> We are still talking to the Americans. More importantly, we are still talking to Australian industry and explaining the US approach—whether it would be appropriate for Australia in the context of the FTA with the United States.[126]

6.155 The Committee notes Mr Deady's remarks that the approach of the United States 'certainly gives the Australian textile industry cause for concern'. The Committee understands that under current US rules of origin arrangement, the so-called 'yarn forward' rule would have huge implications for Australian textile, clothing and footwear (TCF) access to the American market.

6.156 The 'yarn forward' rule that currently applies to the American TCF sector allows for the make-up of goods in overseas countries *as long as US made fabric or yarn is used.* In the Australian TCF sector, manufacturers make extensive use of imported fabric or yarn, so if the 'yarn forward' rule is applied in the Australia-US FTA, very few goods currently made-up in Australia will qualify for tariff-free market access.

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125 *Committee Hansard*, 22 July 2003, p.208, p.209, p.210. (Garnaut)

126 *Committee Hansard* 2 October 2003, pp. 498-499 (Deady, DFAT)

Recommendation 19

6.157 **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.**

Consultation and transparency

6.158 A major issue for the Committee, both with respect to negotiations related to the GATS and the Australia-US Free Trade Agreement, is the extent to which the government has consulted with relevant interest groups and has facilitated transparency of the dialogue and decision-making between the respective negotiating teams.

> From November, we [DFAT] have asked and called for public submissions. There has been a very high level of interest in these negotiations and we have conducted, I believe, a very detailed series of consultations with Australian industry and other stakeholder's right through the process. It has been a very fast moving process that has required, I believe, even more consultations and negotiations than perhaps would be the norm. We have attempted to complement those consultations with the publication of a regular newsletter. We have put out three of those, reporting on the outcome of the three rounds that we have conducted.[127]

6.159 The Committee was pleased to discover that, broadly speaking, people were happy with the level of consultation undertaken by DFAT officials both in the lead-up to the US FTA negotiations and during the negotiating phase itself.

> Speaking on behalf of the Australian Film Commission, I think that the degree of consultation with the government at all levels has been entirely adequate, and we have gone on the public record regularly to make that statement.[128]

> I think that DFAT have made a conscious effort to try to draw the broader community in on some of these trade issues … I know that at the [consultation] that I attended in Sydney there were pretty wide ranging views expressed at the seminar there.[129]

> We have had opportunities at several different levels to consult and be consulted. We have participated in the regular industry forums that DFAT has organised… We have also had private consultations going back to November last year with DFAT and with DCITA… Those consultations

127 *Committee Hansard*, 2 October 2003, p.462 (Deady, DFAT)

128 *Committee Hansard*, 23 July 2003, p. 264 (Dalton, Australian Film Commission)

129 *Committee Hansard*, 23 July 2003, p. 299 (Barnard, Meat and Livestock Australia)

> have covered general issues and specific issues such as intellectual property rights, government procurement and so on.[130]

6.160 Community and union groups were somewhat less positive in their assessment of DFAT's consultative efforts. These groups conveyed a sense that the consultations were sometimes tokenistic, that DFAT often seemed unable to understand their concerns, and that feedback on negotiations was inadequate. It was frequently a case of 'access, yes; substantive detail, no.' [131]

6.161 The Committee has commented earlier on the problems that arise when citizens feel that the government is not apprising them of the matters being placed on the negotiating table, or when they sense that a veil of secrecy is being drawn over agreements that may have far-reaching consequences for their economic, social, environmental or cultural futures.

6.162 While the Committee appreciates that negotiating tough trade deals requires the parties to observe a considerable degree of discretion, and that to reveal one's hand is rarely an appropriate strategy, the Committee is also strongly of the view that the process by which major trade deals are initiated, developed and prosecuted must be as transparent as possible.

> The Australian people need to understand what it is that is being asked of them, and who is asking it in the case of multilateral talks because that will vary the impact from country to country. In the case of bilateral talks, they need to understand what is being asked of them and what we are putting on the table.[132]

6.163 A representative of the Local Government Association captured the sense of the attitude required of governments in trade negotiations when he declared:

> The collective commitment of Australian governments to advance the wellbeing of all Australians relies to a considerable degree on trust and confidence. I cannot be 100 per cent emphatic in a statement here that all that we desire and all that we understand as a consequence of our discussions with the Commonwealth will come to pass, but to the extent that a sphere of government can rely on the undertakings given to it by another sphere of government we believe that the Commonwealth will at the very least, if it runs into a roadblock directly relevant to the issues of concern to local government, come back and engage us in consultations again before a bottom line is agreed.[133]

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130 *Committee Hansard* 22 July 2003, p. 176 (Australian Information Industry Association)

131 *Committee Hansard* 22 July 2003, p. 240 (Burrow, ACTU)

132 *Committee Hansard* 22 July 2003, p. 240 (Burrow, ACTU)

133 *Committee Hansard* 22 July 2003, p. 189 (Chalmers, Australian Local Government Association)

6.164 The Committee is persuaded that the translation of that sentiment and principle into a standard practice by which Australia progressed its trade deals would overcome much of the public anxiety and suspicion. It would also encourage the public to engage more fully in the debate, enable citizens to be better informed, and most importantly assist the government towards a full appreciation of the views of its electors. In short, the public interest would be served.

> In talking about the public interest, we are really talking about two major themes. One is the provision by government of public benefits to the community; the second is the demonstrable operation of transparent public governance arrangements. With 'public benefit' it is the capacity of …[government]… to provide services and to make regulations and by-laws which ensure the community good. With 'public governance' it is the processes of government which are open, consultative, transparent and accountable.[134]

6.165 During its current inquiry, the Committee has been compelled to consider the US FTA without the benefit of knowing exactly what the final agreement will look like. While the Committee is satisfied that the analysis and assessments it has made thus far are consistent with the facts of the case as they are so far known, any final judgment on the US FTA can only be made once the detail of the agreement has been made public.

Recommendation 20

6.166 **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.**

134 *Committee Hansard* 22 July 2003, p. 194 (Chalmers, Australian Local Government Association)

Minority Report by Government Members

Senators Johnston and Macdonald

1.1 The Government Members of the Senate Foreign Affairs, Defence and Trade References Committee do not accept a number of the findings and recommendations of the Committee's (majority) Report into the World Trade Organisation General Agreement on Trade in Services and the Australia-United States Free Trade Agreement.

1.2 In conducting trade policy, the Government seeks to increase the opportunities for the improvement of Australia's trade performance. In so doing it leverages Australia's relatively open regime to secure benefits in the global trading environment. This open regime has been the product of decades of reform, and of parliamentary process. Our approach in trade negotiations overwhelmingly reflects this open regime.

1.3 Some of the recommendations in the report would undermine the Government's capacity to negotiate trade agreements in a way which maximised the benefits to the Australian community. Certain recommendations would take away the flexibility and timeliness of the Government's negotiating approach, and consequently, put at risk the very substantial gains this trade policy approach offers.

1.4 Moreover, there is no evidence that such a different approach would be practical, necessary or beneficial.

1.5 It is only proper that Parliament has a role in scrutiny of trade agreements. The current JSCOT system - a process initiated by the Howard Government - provides for this. 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 report's recommendation on Treaties and the Parliamentary process would be unworkable. It would circumscribe the capacity of the government to secure the best possible trade outcomes from the negotiations. It would undermine the Executive's constitutional authority to sign treaties.

1.6 The power to enter into treaties is an executive power within Section 61 of the Australian Constitution. Under the Constitution, treaty making is the formal responsibility of the Executive rather than the parliament. Decisions about the negotiation of international agreements, including determination of objectives, negotiating positions, the parameters within which the Australian delegation can operate and the final decision as to whether to sign and ratify are taken at Ministerial level, and in many cases, by Cabinet.

1.7 Proposed treaty action must be tabled in both houses of Parliament to facilitate public consultation and scrutiny by the Joint Standing Committee on Treaties (JSCOT). Treaties that represent major political, economic or social significance are

tabled for 20 days. Treaty texts are automatically referred to JSCOT which reports on the proposed treaty action within 20 sitting days.

1.8 Treaties are tabled in the parliament with a National Interest Analysis (NIA) which notes the reasons why Australia should become a party to the treaty. NIAs can include a discussion of the foreseeable economic, environmental, social and cultural effects of the treaty action; the obligations imposed by the treaty, its direct financial costs to Australia; how the treaty will be implemented domestically; what consultation has occurred in relation to the treaty action and whether the treaty provides for withdrawal or denunciation.

1.9 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. To this end, the Government has engaged in an extensive, and unprecedented, process of consultation on both the GATS and the US FTA, including extensive consultations with a wide range of stakeholders. The Committee during its deliberations heard much evidence about the painstaking consultative process undertaken in both these negotiations and welcomed the commitment the Government had made to ongoing consultation. It noted also that there is evidence that the diversity of community concerns evident during the consultative process had been taken into account in Australia's negotiating approach for both the GATS and US FTA.

1.10 In these circumstances our view is 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.

1.11 Finally, Government members of this Committee believe it is unnecessary for this Committee to examine or report on the final text of the Australia-US FTA.

Senator Sandy Macdonald
Deputy Chair

Senator David Johnston

Additional Comments by the Australian Democrats

Senator Aden Ridgeway

1.1 The Australian Democrats strongly endorse this Report and its recommendations. We believe that this Report appropriately addresses the broad range of issues that have been identified in respect of both GATS and the proposed Australia-US Free Trade Agreement, as well as more general issues regarding Australia's trade policy and the role of Parliament in the trade agreement making process.

1.2 The Australian Democrats support the promotion of fair trade that is first and foremost in the national interest. While efficiency and economic growth are vitally important, the concept of the 'national interest' is about more than basic economic considerations. We are committed to the high standard of Australian social and labour conditions and to the preservation and improvement of our environment and make these the primary consideration for any trade decision. It is vitally important that we resist any efforts to compromise on the protection of our national cultural identity.

1.3 Public concerns about the GATS and the proposed US FTA have brought the issue of Australia's international trade policy to the forefront of public debate. Given the significance of the potential impact these agreements will have on our social and economic future, we believe that this debate is timely and important. In particular, we strongly support the recommendations of the Report urging the Government to undertake more extensive research and greater public consultation before committing to international trade agreements to ensure that our commitments conform to Australia's national interest.

1.4 With respect to the proposed US FTA, the Democrats firmly believe that the important policy objectives inherent in the PBS, Australian content in both traditional and new forms of media, quarantine rules and foreign investment regulation must not be compromised through this agreement. The right of future Parliaments to freely regulate in the public interest is a critical aspect of our national sovereignty that must be retained, and this is reflected in the Report.

1.5 We are especially pleased that the Committee has elected to endorse the need for parliamentary approval of trade agreements. Parliamentary approval of treaties has been an important part of Australian Democrat policy for some time. Former NSW Senator Vicki Bourne introduced the *Parliamentary Approval of Treaties Bill* in 1995, which we continue to pursue. Throughout this year, we have continually called for agreements such as the proposed USFTA to be brought before the Parliament for scrutiny and debate.

1.6 We would like to make one distinction, however, between our policy in this regard and the approach taken in this Report. The Democrats appreciate that a

distinguishing feature of modern international trade agreements is that unlike other types of international treaties, trade agreements are strictly enforceable, and impose (as the Report states) 'binding justiciable constraints on government'.

1.7 However, the Report argues that this therefore establishes greater justification for parliamentary approval of trade agreements, as opposed to 'conventional' treaties. We understand that the focus of the Committee in this Inquiry is on the impact of trade agreements specifically, and can therefore appreciate why parliamentary approval of trade agreements is the main concern of the Report. However, it is our strong belief that parliamentary approval of treaties should not be restricted to trade agreements alone.

1.8 As a matter of principle, we believe Australia should consider itself strictly bound by all international agreements it enters into, irrespective of the nature of dispute settlement procedures contained within each treaty. The mere fact that one treaty is not as 'enforceable' as another is not, in our opinion, sufficient reason to consider it exempt from the need for parliamentary consideration. The Democrats will continue to support the need for parliamentary approval of all international agreements.

Senator Aden Ridgeway

Australian Democrats

Additional Comments by the Australian Greens

Senator Kerry Nettle

1.1 The Australian Greens support the Committee's (majority) report and the recommendations included. There are two main areas where the Australian Greens have additional comments to make. The first relates to Treaties and the Parliamentary Process (Chapter 3) and the second relates to how we believe trade agreements should be negotiated.

1.2 In relation to Treaties and the Parliamentary Process, the Australian Greens support the discussion and recommendation laying out an alternative process for trade negotiations that greatly enhances the involvement of the parliament and the public.

1.3 In its submission the Australian Fair Trade and Investment Network (AFTINET) recommended that that there 'be a specific Joint Standing Committee on Trade to deal with trade agreements and their environmental, social and economic impacts, which should allow adequate time for consultation and public hearings'[1]. AFTINET supported this recommendation with argument about the amount of work that is carried out by the Joint Standing Committee on Foreign Affairs, Defence and Trade and how this impacts on the Committee's capacity to thoroughly focus on trade agreements. AFTINET points out that trade agreements now cover a wide range of issues and as such require a greater level of scrutiny than has been required in the past.

1.4 The Australian Greens support the suggestion from AFTINET as a mechanism for ensuring greater parliamentary and public scrutiny of trade agreements and therefore make the following recommendation.

Recommendation 1

1.5 The Australian Greens recommend that the Joint Standing Committee on Foreign Affairs, Defence and Trade be split into two committees, the Joint Standing Committee on Foreign Affairs and Defence and the Joint Standing Committee on Trade to allow greater scrutiny of trade agreements.

1.6 The Australian Greens share the concerns of a number of submitters, and the Committee, as outlined in the majority report (Chapters 2 and 6), relating to bilateral trading agreements and their ability to undermine the multilateral trading fora. Vocal proponents of trade liberalisation have voiced concerns about the policy of pursuing bilateral trading agreements:

> …. a competitive scramble to form as many bilateral FTAs between pairs of countries around the world distracts attention from the main game – the

1 *Submission* 42 (Australian Fair Trade and Investment Network)

> multilateral reduction of barriers. FTAs do suffer from the problem that they are discriminatory and weaken the principal of non-discrimination that underpins the GATT.[2]

1.7 The Australian Greens have concerns about the discrimination that is occurring in the implementation of multilateral agreements such as those administered by the WTO and these issues are addressed in the main report.

1.8 The Australian Government claims that farmers, particularly in the beef, sugar and dairy industries, will benefit from reduced tariffs and increased import quotas in the US. However, US farmers are among the most highly subsidised in the world. A bill was passed in the US only last year which increased existing subsidies and guaranteed them to the US farmers for the next six years. US domestic agriculture subsidies are not being addressed in the Australia-US Free Trade Agreement. The multilateral framework is the forum for discussing these subsidies.

> I certainly am very prepared to indicate today that the negotiations with the US are not about seeking reductions in Farm Bill domestic subsidies. That is beyond the scope of the negotiations… There are clearly some ambitions on export subsidies but not on overall reductions or the elimination of export subsidies as part of the FTA. Again, that is a bridge too far. That is for the multilateral processes.[3]

1.9 Whilst these agricultural subsidies exist Australian exporters are competing in the US market at a disadvantage. They will be then further disadvantaged if the government trades away our quarantine regulations, GE regulations and the single desk export marketing system in a compromise deal with the US.

1.10 The Australian Greens do not think that it is politically wise to tie national security to trade agreements. Both governments have openly linked Australia-US Free Trade Agreement with their security/military alliance. The Committee found that:

> The harmonising of trade and security relationships is something that must be approached with considerable caution. There have been instances in the past where discriminatory trade action by the US – especially in relation to agriculture – has led to strong domestic calls for retaliatory action on the security front…Such controversies are best avoided. (Chapter 6)

1.11 Linking a trade agreement with national security issues threatens Australian independence in setting both domestic and foreign policy. The Australian Greens support the view of the Australian Council of Trade Unions that it creates the perception that we are a dependent client state of the US and could damage trade and diplomatic relationships with other countries, especially those in our region.[4] To link

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2 Centre for International Economics, Australia-United States Free Trade Agreement: Comments on the ACIL Report (Sydney) March 2003, p. 12.

3 *Committee Hansard,* 2 October 2003, pp. 477-479 (Deady, DFAT)

4 *Submission* 125, p. 2 (ACTU)

issues in this way jeopardises our national security by tying it to the insecurity and conflict inherent in international trading agreements.

1.12 Ultimately the Australian Greens believe that the risk posed by the Australia-US Free Trade Agreement to the provision of public services, investment rules, and the ability of the government to regulate in the future for new or emerging technologies is too high. The Australian Greens concur with studies that point to there being no economic benefits to Australia. Put simply the Australian Greens see no reason why the negotiations should continue.

Recommendation 2

1.13 The Australian Greens recommend that the government cease the current negotiations for an Australia-US Free Trade Agreement.

1.14 Instead, the Australian Greens believe that both the framework for the development of international trading agreements and their objectives need to be redirected and reshaped to accommodate a broader mandate which includes many policy objectives other than simply increasing trade or national GDP. As addressed in the majority report (Chapter 2, in the section titled trade for development and poverty reduction) the focus on increasing the aggregate wealth of a nation through trade and investment can undermine developmental and poverty alleviation goals of many countries in the majority world.

1.15 The Australian Greens share the concerns of submitters to the Committee[5] that international trade agreements have effectively forced countries into a regulatory and legislative race to the bottom as countries are bound by the agreement to the 'lowest common denominator'[6] of environmental, social, labour and human rights laws. Rather than aspiring to the lowest common denominator outcome during trade negotiations, Australia should be working towards social justice, environmental and human rights objectives through our trade negotiations. It is on this basis that we make our final recommendation.

Recommendation 3

1.16 **The Australian Greens recommend that all trading agreements are negotiated in a multilateral forum based on the principles of social justice, stringent environmental standards, human rights and international labour laws. These negotiations must occur in a transparent and accountable way.**

Senator Kerry Nettle
Australian Greens

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5 *Submission* 159 (Greenpeace Australia Pacific), *Submission* 24 (Australian Conservation Foundation), *Submission* 42 (Australian Fair Trade and Investment Network)

6 *Submission* 159, p. 2 (Greenpeace Australia Pacific)

Appendix 1

Submissions received by the Committee

1	The Hon. Doug Everingham
2	Mr Darryl Nelson
3	Mr Thomas Fletcher
4	Mr Robert Downey
5	Mr/s A Dykeman
6	Mr Jonathan Schultz
7	Mr Alan Miller, Ms Morag Hollway and Mr Andrew Miller
8	Australian Pensioners' and Superannuants' League Qld Inc
8A	Australian Pensioners' and Superannuants' League Qld Inc
9	Gippslanders Against GATS
10	Mr and Mrs EE and M J White
11	Dr Robin Endersbee
12	Mrs M Gluyas
13	Mr Bernie Bourke
14	Liberty Victoria – Victorian Council for Civil Liberties Inc
14A	Liberty Victoria – Victorian Council for Civil Liberties Inc
15	Institution of Engineers, Australia
16	Progressive Labour Party
17	Combined Pensioners and Superannuants Association of NSW Inc
18	Ms Eileen Kelly
19	Combined Pensioners and Superannuants Association of NSW Inc, Bathurst Branch

20	Mr Trevor Harrison
21	Mr Guy Caruana
22	The United Trades & Labor Council of SA
23	Mr Joe Bryant for Independent Small Business Australia
24	Australian Conservation Foundation
25	Mr Gerhard Weissman
26	Mr Tony and Ms Fay Waddington
27	Mr/s Lee Paterson
28	Parramatta Friends of the ABC
29	Queensland Nurses' Union
30	International Trade Strategies Pty Ltd
31	Australian Chicken Meat Federation Inc
32	One Nation (SA)
33	Mr R M Clifford
34	Mr Richard and Ms Maria Maguire
35	Mr/s B Little
36	Western Australian Council of State School Organisations
37	Ms Rosemary Davies
38	Ms Barbara Cliff
38A	Ms Barbara Cliff
39	Network Economics Consulting Group
40	Australian Writers' Guild
41	Mr Kevin Bracken
42	Australian Fair Trade and Investment Network
42A	Australian Fair Trade and Investment Network
42B	Australian Fair Trade and Investment Network

43	National Centre for Epidemiology and Population Health, Australian National University
44	Ms Betty Daly-King
45	Epping District Peace and Environment Group
46	Mr George Sanders
47	AUSTA Business Group
47A	AUSTA Business Group
48	Music Council of Australia
49	Mr Bill McClurg
50	Professor Ross Garnaut
51	Dr Mark McGovern
51A	Dr Mark McGovern
52	BHP Steel
53	Mr Geoffrey Edwards
53A	Mr Geoffrey Edwards
54	Department of Foreign Affairs and Trade
55	Uniting Care NSW.ACT; Uniting Justice Australia
55A	Uniting Care NSW.ACT; Uniting Justice Australia
56	ATTAC Australia
57	Amalgamated Manufacturing Workers Union Retired Members Association, Sydney Branch
58	Castan Centre for Human Rights Law, Monash University
59	Now We The People – Katoomba Branch
60	Mr & Mrs S Irvine
61	Mr Hamish Ta-me
62	Mr Alf Lelia
63	Cattle Council of Australia

64	Mrs G O'Connor
65	GeneEthics Network
66	Mr Alan Blackwell
67	Mr/s Lesley Morgan
68	Media Entertainment and Arts Alliance
69	AWB Ltd
70	Associate Professor Ann Capling
71	Australian Services Union
72	International Institute for Self-governance
73	Professor Peter Lloyd
73A	Professor Peter Lloyd
74	Mr William Blackburn
75	CONFIDENTIAL
76	Mr Phillip Scanlan
77	Mr/s K G Johnson
78	Mr Keith Luhrs
79	Mr/s Darani Lewers and Ms Tanya Crothers
80	Ms Jo Lewis
81	Ms Tara Cully
82	Mr Alan Taylor
83	Global Justice Network of The Grail
84	Mr Tim Edgar and Ms Ruth Gilovitz
85	Mr Desmond and Mrs Patricia Hegerty
86	Rainforest Information Centre/Friends of the Earth
87	Communications Electrical Plumbing Union (CEPU)
88	Mr Malcolm Cliff

89	Mr Robin Gaskell
90	WTOwatchACT
91	Ms Helen Lawrie
92	Australian Information Industry Association (AIIA)
93	Mr Richard White
94	Mr/s F M Waddington
95	Mr Joseph Karlik
96	Blue Mountains Community Interagency
97	Catholics in Coalition for Justice and Peace
98	Aboriginal Heritage Support Group
99	The Adelaide Day Centre for Homeless Persons Inc
100	Ms Gabrielle Harkin
101	Mr Michael Gogler
102	Mr Greg Mead
103	Dr Grant Mc Burnie and Dr Christopher Ziguras
104	Ms Michelle Lindblom
105	Global Justice Inc
106	National Tertiary Education Union (NTEU)
107	Mr Arnold Rowlands
108	No submission
109	Australian Coalition for Cultural Diversity (ACCD)
110	Ms Anne O'Brien
111	Australian Services Union Victorian Authorities and Services Branch
112	SEARCH Foundation
113	Mr Daniel Connell
114	Victorian Greens

115	Professor John Quiggin
116	Mr Laurence Hagerty
117	WTO Watch Queensland
117A	WTO Watch Queensland
118	Earthworker
119	Stop MAI (WA) Coalition
120	Australian Local Government Association (ALGA)
121	Friends of the Earth Brisbane
122	Dr Damian Mead
123	Mr Bill Pemberton
124	Dr Tissa Kalahe and Dr Kamaline Lokuge
125	Australian Council of Trade Unions (ACTU)
125A	Australian Council of Trade Unions (ACTU)
126	Australian Dairy Corporation
127	Ms Dee Margetts, MLC
128	Australian Broadcasting Corporation (ABC)
129	Newcastle University Students' Association
130	Rail Tram and Bus Union
131	Mr Alan Griffiths
132	Australian Screen Directors Association (ASDA)
133	Mr Andrew Adams
134	Mr John Rutherford
135	Victorian Trades Hall Council (VTHC)
136	Catholic Commission for Justice Development and Peace (Melbourne)
137	National Council of Women of Australia
138	Association for the Public University

139	National Farmers Federation (NFF)
140	No submission
141	Australian Council of State School Organisations Inc
142	Ms Genevieve O'Connell
143	Professor Jan McDonald
144	Whitehorse Branch of the Australian Greens
145	Mr Phil Bradley and Ms Annie Nielsen
146	Mr Dick Copeman
147	South West Trades & Labour Council Inc
148	Doctors Reform Society
149	Post Office Agents Association Limited
150	Australian Nursing Federation
151	Ms Anna McCallum
152	Public Health Association of Australia
153	Peanut Company of Australia
153A	Peanut Company of Australia
154	Community and Public Sector Union (CPSU)
155	Australian Film Commission
156	Trade Watch
157	Friends of the ABC (ACT and Region) Inc
158	Central Australian Aboriginal Congress Inc
159	Greenpeace Australia Pacific Ltd
160	Australian Manufacturing Workers' Union (AMWU)
161	Ms Frances Murrell
162	Mr Richard Sanders
163	Australian Manufacturing Workers' Union Retired Members' Association (Queensland)

164	Mr Peter Stratford
165	AID/WATCH
166	Dr Colin Butler

Appendix 2

Witnesses who appeared before the Committee at public hearings

Melbourne, 8 May 2003

Dr Carolyn Allport, President, National Tertiary Education Union

Mr Darrell Cochrane, Secretary, Australian Services Union, Victorian Authorities and Services Branch

Dr Pauline Gallagher, Assistant Secretary, Commonwealth Scientific and Industrial Research Organisation Staff Association, Community and Public Sector Union, Public Sector Union Group

Mr Leigh Hubbard, Secretary, Victorian Trades Hall Council

Mr Michael Kerr, Legal Adviser, Australian Conservation Foundation

Professor David Kinley, Director, Castan Centre for Human Rights Law, Monash University

Mr Adam McBeth, Postgraduate Research Fellow, Castan Centre for Human Rights Law, Monash University

Mr Jarrod Moran, Policy Officer, Victorian Trades Hall Council

Mr Ted Murphy, National Assistant, National Tertiary Education Union

Ms Anne O'Rourke, Assistant Secretary, Liberty Victoria

Ms Kristen Osborne, Trade Consultant, International Trade Strategies Pty Ltd

Mr Marc Purcell, Executive Officer, Catholic Commission for Justice, Development and Peace (Melbourne)

Mr Alistair Waters, Project Officer, National Secretariat, Community and Public Sector Union, Public Sector Union Group

Melbourne, 9 May 2003

Mr Brian Baulk, Senior Industrial Research Officer, Communications, Electrical and Plumbing Union

Mr Stuart Bell, Finance Manager, International Markets, BHP Steel Ltd

Ms Rosalind Eason, Senior Industrial Research Officer, Communications, Electrical and Plumbing Union

Mr David Goodwin, Executive Vice President, Corporate Affairs, BHP Steel Ltd

Mr Paul Kerr, President, Australian Dairy Products Federation

Mr Peter Lavery, Chief Executive, Lavery International; and Chair, Trade Commitee, Australian Dairy Industry Council

Professor Peter Lloyd (Private capacity)

Ms Marie McGrath-Kerr, Chairman, Post Office Agents Association Ltd

Mr Alan Oxley, Director, AUSTA

Mr Christopher Phillips, General Manager, International Trade, Australian Dairy Corporation

Mr Patrick Rowley, President, Australian Dairy Industry Council

Mr Michael Talbot, Consultant, Post Office Agents Association Ltd

Canberra, 22 July 2003

Ms Hilary Bambrick, National Centre for Epidemiology and Population Health, Australian National University

Dr Dorothy Broom, National Centre for Epidemiology and Population Health, Australian National University

Ms Sharan Burrow, President, Australian Council of Trade Unions

Mr Ian Chalmers, Chief Executive, Australian Local Government Association

Mr Rob Durie, Executive Director, Australian Information Industry Association

Mr Benjamin Fargher, Trade Policy Manager, National Farmers Federation

Professor Ross Garnaut (Private capacity)

Ms Victoria Gilmore, Federal Professional Officer, Australian Nursing Federation

Ms Leanne Hardwicke, Director, Public Policy Unit, Engineers Australia

Ms Kathryn Hurford, Policy Analyst, Public Policy Unit, Engineers Australia

Jill Iliffe, Federal Secretary, Australian Nursing Federation

Ms Kathryn Kelly (Private capacity)

Ms Pieta-Rae Laut, Executive Director, Public Health Association of Australia

Mr Ted Murphy, Australian Council of Trade Unions

Mr Richard Neves, Director, Economics and Information and Communications Technology Policy, Australian Local Government Association

Mr Casey Quinn, National Centre for Epidemiology and Population Health, Australian National University

Sydney, 23 July 2003

Ms Gillian Armstrong AM, Lifetime Member, Australian Screen Directors Association

Dr Peter Barnard, General Manager, Economic, Planning and Market Services, Meat and Livestock Australia

Mr Doug Cameron, National Secretary, Australian Manufacturing Workers' Union

Ms Marina Carman, Trade Campaigner, AID/WATCH

Mr Kim Dalton, Chief Executive, Australian Film Commission

Ms Anne Davies, Member, Media, Entertainment and Arts Alliance

Mr Christopher Dubrow, Campaigner, ATTAC Australia

Ms Megan Elliot, Executive Director, Australian Writers' Guild

Ms Lynn Gailey, Federal Policy Officer, Media, Entertainment and Arts Alliance

Mr Brian Harris, General Secretary, United Services Union, New South Wales

Mr Richard Harris, Executive Director, Australian Screen Directors Association

Mr Geoff Heriot, Chief, Corporate Governance and Planning, Australian Broadcasting Corporation

Ms Kim Ireland, Director, Policy, Research and Information, Australian Film Commission

Ms Claudia Karvan (Private capacity)

Mr Alister Kentish, National Research Officer, Australian Manufacturing Workers Union

Ms Samantha Lang (Private capacity)

Dr Richard Letts, Executive Director, Music Council of Australia; and Member, Australian Coalition for Cultural Diversity

Mr Andrew McCallum, Manager, Trade Policy, Meat and Livestock Australia

Ms Judi McCrossin, National Executive Councillor/Treasurer, Australian Writers Guild

Mr Gregory McLean, Assistant National Secretary, Australian Services Union

Mr Timothy O'Connor, Aid Campaigner, AID/WATCH

Dr Patricia Ranald, Convenor, Australian Fair Trade and Investment Network

Ms Louise Southalan, Policy Officer and Campaigner, Australian Fair Trade and Investment Network

Mr Christopher Warren, Federal Secretary, Media, Entertainment and Arts Alliance

Ms Robyn Watts, Director of Enterprises, Australian Broadcasting Corporation

Mr Simon Whipp, Assistant Federal Secretary, Media, Entertainment and Arts Alliance

Brisbane, 24 July 2003

Mr Geoffrey Edwards (Private capacity)

Dr Jeffory Fairbrother, Executive Director, Australian Chicken Meat Federation Incorporated

Mr Robert Hansen, Managing Director, Peanut Company of Australia

Professor Jan McDonald (Private capacity)

Dr Mark McGovern, Lecturer, School of International Business, Queensland University of Technology

Ms Beth Mohle, Project Officer, Queensland Nurses Union

Mr Richard Sanders (Private capacity)

Dr Tracy Schrader, National Committee Member, Doctors Reform Society

Ms Terrie Templeton, Committee Member, WTO Watch Queensland and The Alliance to Expose GATS

Canberra, 2 October 2003

Mr Stephen Deady, Special Negotiator, Office of Trade Negotiations, Department of Foreign Affairs and Trade

Ms Lisa Filipetto, Assistant Secretary, Services and Intellectual Property Branch, Department of Foreign Affairs and Trade

Mr Bruce Gosper, First Assistant Secretary, Office of Trade Negotiations, Department of Foreign Affairs and Trade

Mr Phillip Sparkes, Deputy Lead Negotiator, Office of Trade Negotiations, Department of Foreign Affairs and Trade

Appendix 3

Australia-US Free Trade Agreement:

Australian Objectives

Australia-US Free Trade Agreement: Australian Objectives

Free trade leads to higher economic growth, better living standards and more and better job opportunities. The Government is committed to negotiating a Free Trade Agreement with the United States that will reduce restrictions on the ability of the two countries to do business with each other. Australia will aim to ensure that the outcomes of the FTA negotiations complement and reinforce our objectives in the Doha Round of World Trade Organization negotiations and in Asia Pacific Economic Cooperation forums, and set a high standard for other FTAs in the region. Australia's shared approach with the United States on many issues in both the WTO and APEC provides a strong foundation for achieving that goal.

The higher incomes that free trade brings will enhance the ability of both the US and Australia to achieve fundamental economic and social policy objectives. Nevertheless, the Government will ensure that outcomes from the FTA negotiations do not impair Australia's ability to meet fundamental policy objectives in health care, education, consumer protection, cultural policy, quarantine and environmental policy. The Government will continue to place a high priority on consultations with the States and Territories, industry and professional bodies and community organisations as the negotiations proceed.

The Government's specific objectives for negotiations with the United States are as follows:

Trade in Industrial Goods and Agriculture

- Seek to eliminate tariffs and other barriers to trade between Australia and the United States on the broadest possible basis.
- Seek the removal of tariff rate quota restrictions on Australian exports to the United States, including those affecting exports of beef, dairy products, sugar, peanuts and cotton.
- Seek the elimination or reduction of United States agricultural subsidies that affect Australian exports to the United States or to third country markets, as well as agreement for the United States not to subsidise exports of agricultural products to Australia.
- Reaffirm our commitment to work together in the WTO negotiations towards substantial improvements in market access globally, eliminating all export subsidies on agricultural products, and substantial reduction in domestic support for agriculture.
- Seek the removal of legislative barriers to the export of Australian-built fast ferries and other vessels to the United States.
- Secure improved market access for Australian manufactured goods by addressing non-tariff barriers in such areas as standards certification and technical regulation.
- Pursue opportunities for harmonisation or mutual recognition of mandatory and/or voluntary technical standards.

Rules of Origin

- Agree on a set of rules of origin that ensure that the benefits of preferential tariff treatment under the FTA apply only to Australian and US goods eligible for such treatment while avoiding unnecessary obstacles to trade.

- Agree on conditions to maintain the integrity of the rules and seek to ensure they are not unnecessarily burdensome to administer from the points of view of business and government.

Quarantine / Sanitary and Phytosanitary (SPS) Measures

- Seek to have the United States reaffirm its WTO commitments on SPS measures and eliminate any unjustified SPS restrictions.
- Seek to strengthen cooperation between Australian and US quarantine authorities.
- Seek to reinforce mutual commitment to the development and application of science-based quarantine measures, consistent with the WTO SPS Agreement.
- Seek to strengthen collaboration with the US in implementing the SPS Agreement and to enhance cooperation with the US in relevant international bodies on developing international SPS standards, guidelines, and recommendations.

Trade Remedies

- Pursue exemption of Australian products from US general safeguards legislation.
- Seek provisions that minimise the impact of other US trade remedy laws on Australian exports to the US.

Customs Cooperation

- Ensure that the customs procedures of both parties are transparent, efficient, and consistent and that they facilitate trade.
- Strengthen cooperation in the investigation and prevention of infringements of customs law and in combating illegal trans-shipment of goods.
- Pursue harmonisation of customs policies, data and procedures, and develop cooperation in such areas as customs techniques and research and development.

Trade in Services

- Seek reduced impediments in accessing the United States market for Australian services suppliers such as providers of professional services, other business services, education services, environmental services, financial services and transport services.
- Explore the scope for improvementsin the recognition of the qualifications and experience of Australian professionals in the United States.
- Look for opportunities to reduce any unnecessary access impediments imposed on Australian service suppliers by licensing requirements, standards or other regulations in the United States, including Australians seeking access to US capital markets.
- Pursue opportunities to enhance the temporary entry of business persons and other Australians to the United States.
- Ensure that the negotiations take account of Australia's cultural and social policy objectives, and the need for appropriate regulation and support measures to achieve these objectives in areas such as audiovisual media.
- Ensure that the outcome of the negotiations does not limit the ability of government to provide public services, such as health, education, law enforcement and social services.

Investment

- Seek an enhanced framework to govern investment flows between Australia and the United States that will complement the outcome of the negotiations in relation to trade in goods and services.
- Look for opportunities to reduce any unnecessary impediments that licensing requirements, standards or other regulations in the United States impose on Australian investors
- Ensure that the negotiations take account of Australia's foreign investment policy, and the need for appropriate policies to encourage foreign investment, while addressing community concerns about foreign investment.

Intellectual Property Rights

- Reaffirm the standards established in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and other international intellectual property agreements to which the USA and Australia are signatories.
- Seek to ensure that the rights of Australian holders of intellectual property are protected according to international standards in the US, including the right to be remunerated fairly for use of their works.
- Ensure that Australia remains free to determine the appropriate legal regime for implementing internationally agreed intellectual property standards, maintaining a balance between the holders of intellectual property rights and the interests of users, consumers, communications carriers and distributors, and the education and research sectors.
- Deepen cooperation on intellectual property issues of mutual interest, advancing our common objectives in multilateral intellectual property negotiations; and strengthening cooperation between our respective intellectual property agencies.
- Explore opportunities to work with the United States to promote the implementation of effective and appropriate intellectual property systems in the Asia-Pacific region, without limiting the scope of existing activities of this nature.

Telecommunications and Electronic Commerce

- Develop agreed principles in the regulation of telecommunications on the basis of non-discrimination, transparency, predictability, consultation with stakeholders and independence and autonomy of regulators.
- Address licensing and other procedural constraints on participation of Australian companies in the US telecommunications market.
- Seek to promote international Internet charging arrangements that are applied on fair, non-discriminatory and pro-competitive terms.
- Seek to enhance the growth of electronic commerce in goods and services with the United States in terms that promote the use of electronic commerce globally.
- Reaffirm the current practice of not imposing customs duties on electronic transmissions between Australia and the United States.

Government Procurement

- Agree on rules for government procurement that are flexible, transparent and fair.

- Seek to expand access for Australian goods and services to US government procurement markets.

Competition Policy

- Build upon existing bilateral treaty arrangements to foster cooperation on competition law and policy, and provide for consultations on specific problems that may arise.

State-to-State Dispute Settlement

- Encourage the early identification and settlement of disputes through consultation.
- Establish fair, transparent, timely, and effective procedures to settle disputes arising under the agreement.

Environmental issues

- Seek to ensure that trade and enviroment policies are mutually supportive by maintaining Australia's ability to protect and conserve its environment and to meet its international environmental obligations.

Appendix 4

US Trade Representative Zoellick's Letter to Congress on US Objectives

The Honorable J. Dennis Hastert
Speaker
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

At the direction of the President, I am pleased to notify the Congress that the President intends to initiate negotiations for a free trade agreement (FTA) with Australia 90 days from the date of this letter. This notification is in accordance with section 2104(a)(1) of the Trade Act of 2002 (Trade Act).

As you are aware, the Administration is committed to concluding trade agreements that open markets to benefit our farmers, workers, businesses, and families. With the Congress' continued assistance, we can further advance America's trade interests.

We believe the United States has much to gain in pursuing a negotiation with Australia. Two way trade has grown significantly in the past decade, totaling more than $19 billion in 2001. The increased access to Australia's market that an FTA would provide would further boost trade in both goods and services, enhancing employment opportunities in both countries. An FTA also would encourage additional foreign investment between the United States and Australia, adding to the many jobs that the significant investment flows between the two countries currently support. In addition, an FTA would result in greater business integration, especially in the information technology sector, increasing efficiency and the competitiveness of U.S. industry.

We plan to use our negotiations with Australia to strengthen these commercial ties and address barriers that U.S. exports face today. We recognize that an FTA with Australia is of particular interest and concern to the U.S. agriculture community. Making progress on a number of issues of concern to U.S. agriculture will be essential for the successful conclusion of these negotiations. In this regard, we will work hard to facilitate the export of U.S. food and agricultural products to the Australian market and to address the full range of issues facing U.S agriculture exports. As an example, several U.S. agriculture interests have raised serious concerns about Australia's use of sanitary and phytosanitary (SPS) measures as a means of restricting trade. We have held extensive and detailed discussions with Australia on SPS issues throughout the past year to discuss these concerns. We have made progress on specific issues, including the opening of the Australian market to U.S. table grapes. In addition, we and Australia have agreed that SPS measures must be based on science and be fully transparent. We fully intend to continue these discussions on SPS issues even as we move forward with FTA negotiations.

In the light of the concerns that U.S. agriculture interests have raised and in accordance with the requirements of the Trade Act, we are immediately requesting a report from the U.S. International Trade Commission on sensitive agricultural

products. In addition, we will consult closely with Congress and the U.S. agriculture community in developing our positions on agricultural issues and during the negotiations.

We will also seek improved market access through eliminating high tariffs on industrial goods of export interest to the United States. As indicated in our specific negotiating objectives, we will also seek to improve protection of intellectual property rights in Australia, eliminate restrictions that make it difficult for U.S. service providers to operate in the Australian market, and address other barriers to U.S. goods and services.

FTA negotiations with Australia will further deepen the already close cooperation between the United States and Australia in advancing our objectives for the multilateral negotiations currently underway in the World Trade Organization (WTO). Australia was instrumental in helping to generate the momentum necessary to overcome the challenges we faced in launching a new round of trade negotiations last year in Doha and is continuing to play a key role in these multilateral negotiations. We believe that an FTA would further unite and strengthen the alliance of countries leading the effort toward global trade liberalization. FTA negotiations will provide the opportunity for even closer cooperation in the WTO agriculture negotiations in particular. Australia was the first strong supporter of the WTO agriculture proposal the United States made in July. In addition, Australia, working with other Cairns Group members, was instrumental in putting forward an ambitious Cairns proposal for global reform in agriculture. Given Australia's leadership role in the Cairns Group of agricultural exporting countries, the enhanced cooperation and communication resulting from the pursuit of an FTA will help us to achieve our common agenda in the WTO on agriculture.

In addition to complementing our partnership with Australia on global and Asia-Pacific trade issues, an FTA would also further deepen the ties between our societies and strengthen the foundation of our security alliance. We are already partners in the areas of intelligence, military inter-operability, command-and-control, and security planning. An FTA would facilitate the building of new networks that enhance our Pacific democracies' mutual interests, shared experiences, and promotion of common values so that we can work together more effectively with third countries.

Since mid-2002, the Administration has consulted with Members of Congress regarding the broad concept of a U.S.-Australia FTA. Our decision to move ahead with negotiations with Australia was strongly influenced by the many expressions of interest we have received in initiating an FTA with Australia. The Administration will continue to consult closely with Congress in accordance with the letter and spirit of the Trade Act. Moreover, to ensure that interested stakeholders are informed of the negotiations and have ample opportunity to provide their views, the negotiations will be conducted in a way that enhances transparency and accessibility.

Our specific objectives for negotiations with Australia are as follows:

Trade in Industrial Goods and Agriculture:

- Seek to eliminate tariffs and other duties and charges on trade between Australia and the United States on the broadest possible basis, subject to reasonable adjustment periods for import-sensitive products.
- Seek elimination of Australian government export monopoly arrangements for wheat, barley, sugar and rice. In particular, by requiring Australia to eliminate exclusive export rights for its state-trading enterprises (STEs), end any special financing privileges for these enterprises, provide more information on the activities of and special rights or privileges they accord to STEs and to require STEs to provide information on their operations.
- Seek to eliminate Australian government practices that adversely affect U.S exports of perishable or cyclical agricultural products, while improving U.S import relief mechanisms as appropriate.
- Coordinate with Australia so as to support achieving the U.S. objective in the WTO negotiations of eliminating all export subsidies on agricultural products, while maintaining the right to provide *bona fide* food aid and preserving U.S. agricultural market development and export credit programs.
- Pursue fully reciprocal access to Australia's market for U.S. textile and apparel products.

Customs Matters, Rules of Origin, and Enforcement Cooperation:

- Seek rules to require that Australia's customs operations are conducted with transparency, efficiency, and predictability and customs laws, regulations, decisions, and rulings are not applied in a manner that would create unwarranted procedural obstacles to international trade.
- Seek rules of origin, procedures for applying these rules, and provisions to address circumvention matters that will ensure that preferential duty rates under the FTA with Australia apply only to goods eligible to receive such treatment, without creating unnecessary obstacles to trade.

Sanitary and Phytosanitary (SPS) Measures:

- Seek to have Australia reaffirm its WTO commitments on SPS measures and eliminate any unjustified SPS restrictions.
- Seek to strengthen cooperation between U.S. and Australian SPS authorities.
- Seek to strengthen collaboration with Australia in implementing the WTO SPS Agreement and to enhance cooperation with Australia in relevant international bodies on developing international SPS standards, guidelines, and recommendations.

Technical Barriers to Trade (TBT):

- Seek to have Australia reaffirm its WTO TBT commitments, including those relating to labeling requirements on U.S. food and agricultural products produced through biotechnology, and eliminate any unjustified TBT measures.

- Seek to strengthen collaboration with Australia on implementation of the WTO TBT Agreement and create a procedure for exchanging information with Australia on TBT-related issues.

Intellectual Property Rights:

- Seek Australia's ratification of the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty.
- Seek to establish standards that build on the foundations established in the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement) and other international intellectual property agreements, such as the WIPO Copyright Treaty and Performances and Phonograms Treaty.
- Seek to enhance the level of Australia's protection for intellectual property rights beyond TRIPS in new areas of technology, such as internet service provider liability.
- In other areas, such as patent protection and protection of undisclosed test data and other information, seek to have Australia apply levels of protection and practices more in line with U.S. law and practices, including appropriate flexibility.
- Seek to strengthen Australia's domestic enforcement procedures, such as increasing criminal penalties so that they are sufficient to have a deterrent effect on piracy and counterfeiting.

Trade in Services:

- Pursue disciplines to address discriminatory and other barriers to trade in Australia's services market. Pursue a comprehensive approach to market access, including enhanced access for U.S. services firms to telecommunications and any other appropriate services sectors in Australia's market.
- Seek improved transparency and predictability of Australia's regulatory procedures, specialized disciplines for financial services, and additional disciplines for telecommunications services and other sectors as necessary.
- Seek appropriate provisions to ensure that Australia will facilitate the temporary entry of U.S. business persons into its territories, while ensuring that any commitments by the United States are limited to temporary entry provisions and do not require any changes to U.S. laws and regulations relating to permanent immigration and permanent employment rights.

Investment:

- Seek to establish rules that reduce or eliminate artificial or trade-distorting barriers to U.S. investment in Australia, including investment screening by the Australian Government, while ensuring that Australian investors in the United States are not accorded greater substantive rights with respect to investment protections than U.S. investors in the United States, and to secure for U.S.

investors in Australia important rights comparable to those that would be available under U.S. legal principles and practice.

- Seek to ensure that U.S. investors receive treatment as favorable as that accorded to domestic or other foreign investors in Australia and to address unjustified barriers to the establishment and operation of U.S. investments.
- Provide procedures to resolve disputes between U.S. and Australian investors that are in keeping with the goals of making such procedures expeditious, fair and transparent.

Electronic Commerce:

- Seek to affirm that Australia will allow goods and services to be delivered electronically on terms that promote the development and growth of electronic commerce.
- Seek to ensure that Australia does not apply customs duties in connection with digital products or unjustifiably discriminate among products delivered electronically.

Government Procurement:

- Seek to establish rules requiring that Australia's procurement practices be fair, transparent, and predictable for suppliers of U.S. goods and services who seek to do business with the Australian government.
- Seek to expand access for U.S. goods and services to Australian government procurement markets.

Transparency/Anti-Corruption/Regulatory Reform:

- Seek to ensure that Australia's procedures for administering trade-related measures are fair and transparent, including by ensuring that interested parties can have timely access to information on measures and Australia's procedures for administering them.
- Seek to ensure that Australia applies high standards prohibiting corrupt practices affecting international trade and enforces such prohibitions

Competition:

- Address issues of anticompetitive business conduct, state monopolies, and state enterprises.
- Seek cooperation and consultation provisions that foster cooperation on competition law and policy, and that provide for consultations on specific problems that may arise.

Trade Remedies:

- Provide a bilateral safeguard mechanism during the transition period.
- Make no changes to U.S. antidumping and countervailing duty laws.

Labor, including Child Labor:

- Seek an appropriate commitment by Australia to the effective enforcement of its labor laws.
- Establish that Australia will strive to ensure that it will not, as an encouragement for trade or investment, weaken or reduce the protections provided for in its labor laws.
- Establish procedures for consultations and cooperative activities with Australia to strengthen its capacity to promote respect for core labor standards, including compliance with ILO Convention 182 on the worst forms of child labor.

Environment:

- Seek to promote trade and environment policies that are mutually supportive.
- Seek an appropriate commitment by Australia regarding the effective enforcement of its environmental laws.
- Establish that Australia will strive to ensure that it will not, as an encouragement for trade or investment, weaken or reduce the protections provided for in its environmental laws.
- Seek to develop ways to work with Australia, including through consultative mechanisms, to address environmental issues of mutual interest.

State-to-State Dispute Settlement:

- Encourage the early identification and settlement of disputes through consultation.
- Seek to establish fair, transparent, timely, and effective procedures to settle disputes arising under the agreement.

In addition, the FTA will take into account other legitimate U.S. objectives including, but not limited to, the protection of legitimate health or safety, essential security, and consumer interests.

We are committed to concluding these negotiations with timely and substantive results for U.S. workers, ranchers, farmers, businesses, and families, by pursuing these specific objectives and the overall and principal U.S. negotiating objectives set out in the Trade Act. We look forward to continuing to work with Congress over the coming weeks and after negotiations with Australia begin. Working together, we can reach a successful conclusion that will benefit the United States and Australia and support our broader objectives.

In addition to launching FTA negotiations with Australia, we are hoping to conclude our FTA with Singapore this year, for consideration by Congress early next year. We also have recently announced a new Enterprise for ASEAN Initiative, under which we hope to enhance our trade and economic ties to ASEAN countries. Given the integration of the economies of Australia and New Zealand, New Zealand has been advocating its case to the Administration, as well as to

Congress, that an FTA with New Zealand would complement our FTAs with Singapore and Australia. We will be soliciting the views of the Congress on this matter as we move forward with the Australia FTA. In any event, we of course will continue to work closely with New Zealand in the WTO, APEC, and bilaterally to promote our common interests in trade.

Sincerely,

Robert B. Zoellick