

23 June 2004

Secretary
Senate Select Committee on the Free Trade Agreement
between Australia and the United States of America
Suite S1.30.1
The Senate
Parliament House
Canberra ACT 2600
AUSTRALIA

QUESTION ON NOTICE – ECONOMIC ANALYSIS OF THE AUSTRALIA/US FTA

During my appearance before the Committee on 8 June I took on notice a question as to a view of the economic analysis of the FTA, particularly the copyright provisions, by Dr Brain, NIEIR (“An assessment of the direct impact of the Australian-United Free Trade Agreement on Australian trade, economic activity and the costs of the loss of national sovereignty” on behalf of the AMWU). I have had the opportunity to review that analysis and in addition I have reviewed the assessment of the FTA undertaken for the Committee by Dr Philipa Dee, ANU (“The Australia-US Free Trade Agreement – An Assessment”).

My comments on the two reports are based on the following points:

- I focused my comments on the aspects of the reports that addressed the copyright provisions (Chapter 17) of the FTA text, bearing in mind the aim of the Committee to assess the FTA to “ensure it is in Australia’s national interest”; and,

- In examining the 2 reports I drew on the economic analysis of the copyright provisions of the FTA by CIE (undertaken for the Department of Foreign Affairs and Trade) and the recent study by Allen Consulting on term extension.

As an opening comment, I do need to point out that Dr Brain and Dr Dee would appear to have coloured their respective analysis by flagging a common disagreement with the concept of copyright. Dr Dee refers at one point to the “pernicious” provisions of the IP chapter in the FTA while Dr Brain signals that copyright is a restriction to trade and knowledge.

It would appear that both academics are unaware that any measure which benefits creators of copyright works (be they US or Australian film producers or Japanese or Australian interactive game developers) also benefits the distributors, exhibitors and retailers of these products. Obviously growth in the distribution chain in Australia grows Australian commercial interests and jobs.

But I recognise that I do need to state that I advise Australian copyright holders in the film and interactive games industries which some may see as a bias on my part.

In examining the economic analysis of the copyright provisions of the FTA by Dr Brain and Dr Dee, I do need to state that each is deficient but in different ways: Dr Brain’s analysis is misleading and the analysis by Dr Dee is superficial. Further their analysis concentrated exclusively on the term extension issue while Australian copyright holders in the film and interactive games industries see significant commercial benefit from the coverage in the FTA text of measures on ISP liability and anti-circumvention devices (although the latter will not be fully implemented for 2 years).

As put to the Committee in evidence on 8 June the Australian copyright holders in the film and interactive games industries welcome the opportunity offered by the changes to copyright legislation through the FTA to explore business models which would allow the delivery of products and services to consumers via the Net. Australian companies could pursue with confidence such opportunities as the improvements to Australian copyright law through the FTA would offer the means to ensure that piracy could not undermine commercial prospects. With such business opportunities we will see chances for increased investment and employment in Australia.

A further benefit of the FTA ignored by Dr Brain and Dr Dee is enhanced legal tools to tackle piracy. On this aspect alone we are looking at immediate substantial benefit to industry. A study undertaken by Allens Consulting last year into piracy (“Counterfeiting of Toys, Business Software and Computer and Video Games”, Nov 2003) found that in 2002 Australian companies lost \$445.7m in sales, representing \$200m in lost profits .

For the film Australian industry piracy levels are estimated at around \$215 million per year, impacting on returns for theatrical release and lost DVD and VHS sales.

I agree it cannot be argued that the enhanced piracy measures in the FTA would overcome all piracy but it would, as a minimum, equip Australian companies with stronger legal tools to more effectively tackle criminal activity that hurts Australian companies and threatens Australian jobs.

Any reduction in the combined level of piracy of over \$650m per year has to be of real value and in the national interest.

Further the FTA provides balance in areas such as ISP liability with incentives for ISPs to co-operate with copyright holders and terminating repeat infringers' accounts. In exchange the FTA provides for limits on the liability of the ISP.

In regard to term extension I was very disappointed in the quality of the analysis by Dr Brain and Dr Dee. In the case of the analysis by NIEIR I would add that it is in fact misleading. Not only does it ignore the fundamentals of the operation of copyright, the analysis introduces a very questionable method of calculating the cost of term extension.

The Committee will be well aware that the basic measure of the "cost" of copyright is royalty payments. Dr Brain, bearing in mind his declared opposition to copyright, offers us a formula that derives a cost via the alleged existing capital value of one company, Disney. The formula then adds 10% to this existing capital value for the provision of term extension (even though term extension already exists in the US and Europe) and then assumes all copyright will maintain market value through its extra 20 years and then moves to a per capita measure to produce a number of \$450m. The report then argues that having already assumed that "all relevant copyrights are held by the Disney Corporation", for good measure we should double the number (\$450m) to cover another "benefiting copyright owner" which were already included in the original calculation.

Dr Dee started with an identification of current overseas royalty payments as shown by the ABS. She identified \$350m in 2002/3 as being royalty payments for overseas copyright material and then extrapolated over the full term of the copyright to generate a cost of \$88m per year and a discounted present value of \$700m cost to Australia.

Unfortunately this analysis ignores market reality. Identified in the CIE analysis and in the Allen Consulting report was the need to recognise a loss in value of some copyright items over the life of the copyright. The CIE does point to an Office of Regulatory Review report (OOR 1995, p.36) that states: "the market life of most copyright material does not exceed a few years."

Evidence from the Copyright Agency Limited (CAL) acknowledged that over time the value of copyright in the marketplace can decrease in value and cost. CAL found that in relation to books the implications of an extra 20 years of copyright extension would be 0.02%. In the case of interactive games their shelf life is very short, and for many films their economic life is shorter than most literary works.

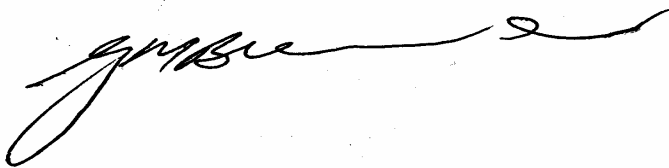
Allens Consulting estimated that in a market economy the possible cost of term extension would be “\$43m in the 20th year after extension” and even less on net present value terms.

The Allens Consulting report does go into detail on several aspects of calculating the net benefit to Australia through term extension, aspects overlooked by Dr Brain and Dr Dee. These aspects include:

- Benefits to Australian companies of extension of copyright
- Value to consumers of providing incentives for copyright owners to invest in costly forms of restoration and dissemination
- Value to Australian companies of harmonisation of copyright laws
- Value to Australian business of strong copyright laws in attracting and growing foreign investment
- Failure to recognise value of various exceptions under copyright law that allow access to material by for instance libraries and fair dealing provisions

In conclusion, and in the context of addressing copyright provisions of the FTA text as meeting the ‘national interests’, I submit that there are, on balance, significant benefits to Australian companies - and to consumers - in the copyright provisions of the FTA. I argue these provisions do “meet the national interest”. Australian copyright holders in the film and interactive games industries believe the copyright provisions should be seen - and implemented - as a package as the provisions represent a balancing of the interests of rights holders, consumers and internet service providers (ISPs).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'G M Brennan', with a long, sweeping flourish extending to the right.

G M Brennan
Managing Director