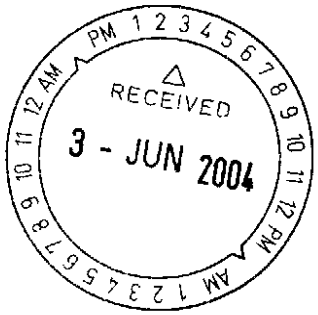
The Hon Mark Vaile MP

Minister for Trade

Deputy Leader of the National Party of Australia

- 2 JUN 2004

Senator the Hon Peter Cook
Chair
Senate Select Committee on the AUSFTA
Parliament House
CANBERRA ACT 2600



Dear Senator

I refer to your letter to Mr Doug Chester, Deputy Secretary of the Department of Foreign Affairs and Trade, on 19 May requesting that a response to a list of questions on notice be provided to the Senate Select Committee to assist in its inquiry into the Australia United States Free Trade Agreement.

I understand that Mr Chester has now provided a formal response to these questions.

Your letter also made a further request for substantial documentation relating to the negotiation of the Australia-US Free Trade Agreement to be lodged with the Senate Committee. The documents requested are internal documents central to the deliberative processes of the Government. It is not appropriate for the Department to respond to your request to provide these documents.

Yours sincerely

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Senate Select Committee on AUSFTA
Questions on Notice to DFAT from hearing 10 May 2004

1. If the FTA is signed on the 18 may in Washington, is there any room for the document to be changed apart from the current 'legal scrubbing' – eg can Australia renegotiate certain aspects of the texts – particularly in relation to PBS, Intellectual Property and local content?
a. What are the implications if the document is signed but the parliament doesn't ratify the document – keeping in mind that Australia and the US are going to the polls this year?

REPLY:
From a legal point of view the signing of the Agreement on 18 May precludes the possibility of making further changes to the text currently before the legislatures of each Party. Should both Parties agree to re-open the negotiations on the text with a view to making substantive changes to it, the resulting text would be treated as a new treaty text for the purposes of domestic legislative consideration. In the case of the United States this would require a repeat of the processes of Congressional consideration involving for example, sixty calendar days notice to the Congress that the Administration wished to sign the Agreement, followed by a re-signing and then a maximum of ninety legislative days for consideration by Congress of the agreed text and implementing legislation ahead of a Congressional vote. In Australia it would be necessary to submit a new text to the JSCOT and provide 20 sitting days for its consideration etc, together with new implementing legislation where this was necessary to implement the Agreement. This process would necessarily delay the coming into force of the Agreement, particularly in view of the known and expected elections in both countries.

From a practical negotiating viewpoint the wish of either Party to re-open the Agreement with a view to making substantive changes would be considered a significant stepping back from the commitment to the Agreement implied by the conclusion of the negotiations in February. It would signal that one of the Parties was no longer of the view that the Agreement was balanced. Should the other Party agree to re-open the text there would be no certainty about the outcome of the negotiations and would risk unravelling the balance of the entire Agreement. For the United States any re-opening of the text would, as a practical matter, involve considerable further consultations with the Congress and affected interests, again with no certainty that a new balance could be found to the treatment of issues covered by the Agreement, nor that the objective of re-opening the text would be secured.

Following the 18 May signing of the text of the Agreement by both Parties each Party must conclude its own domestic legislative processes. In the case of the United States, this will involve a vote in both Houses of Congress to ratify the treaty and agree implementing legislation. In the case of Australia, there is no requirement for the Parliament to ratify the Agreement. Where, however, changes are required to existing legislation to bring the Agreement into force for Australia, that legislation will be need to be passed by both Houses of Parliament. The Government will also be required to consider the report of the JSCOT on the Agreement.

2. How will the domestic legislation amendments be brought before parliament to enable implementation of all the FTA provisions?
a. What legislation is needed to address the Intellectual Property aspects of the FTA?
b. What process is in place to work out the legislation needed and when is it likely to occur?

REPLY:
The implementing legislation to give effect to the Agreement will be presented to Parliament as an Omnibus bill accompanied by a small number of 'money bills' – including the Customs Tariff Act 1995. Additionally Australia has a two year grace period to implement the obligations in intellectual property chapter of the FTA relating to anti-circumvention and these will be introduced at a later stage.

a. The legislation needed to address the IP aspects of the FTA were identified in Annex 8 of the Regulation Impact Statement tabled in Parliament on 30 March 2004. This includes amendments to the Copyright Act of 1968, the Australian Wine and Brandy Corporation Act 1980, the Therapeutic Goods Act 1989, the Agricultural and Veterinary Chemicals Act 1994 and the Patents Act 1990. This is elaborated in more detail in the RIS Annex.

b. The process of assessing the legislation needed to implement the Agreement has been an ongoing one. Throughout the negotiations agencies assessed the commitments in terms of the likely need for legislative or regulatory amendment. The process of preparing the National Interest Analysis and Regulation Impact Statement formalised the assessment of the legislative impact of the Agreement. With the exception of the drafting instructions in relation to anti-circumvention measures, drafting instructions for all necessary legislative amendments are currently with the Office of Parliamentary Counsel.

3. Why does the FTA contain provisions such as safeguards, restrictions on local media content and review provisions linked to the PBS while the Singapore Agreement does not?
a. Why can't this be seen as a demonstration of Australia's lack of clout in being able to negotiate a strong position, thereby giving credence to the points raised by Dr Faunce in his submission to the Committee last week stating that this is the beginning of the thin edge of the wedge?

REPLY:
Each negotiation is different and takes place in a different context reflecting the differing priorities of each treaty Party. The AUSFTA reflects the particular interests of Australia and the United States which differ from those that were in play during the negotiation of the SAFTA. We refer to the Committee to the statements on the record by Mr Deady on 10 May.

4. The gains to the US from this agreement are clear – the omission of sugar, the relaxation of FIRB screening, the inclusion of safeguards, intellectual property, ongoing reviews of the PBS and a technical working group on quarantine. Can you point out where the US caved in and where it cost them commercially (not just in terms of process)?

REPLY:
We refer the Committee to the testimony by Mr Deady at the JSCOT on 14 May, and Senate Select Committee on 10 May regarding the balance of negotiations and the value of the final package.

5. Did Australia get anything substantive out of the investment chapter in return for relaxing FIRB screening?

REPLY:

The commitments by Australia on our foreign investment screening policies were made as part of the overall balance of the negotiations, and not in return for outcomes in one particular area of the negotiations. They need to be assessed within the context of the overall balance, rather than in relation to commitments in any one area.

On the issue of the specific benefits to Australia of the Investment Chapter, and the closely-related Chapters on Cross-Border Trade in Services and on Financial Services, these establish a strong framework for liberal services trade and investment flows between the two countries. The commitments in these chapters go beyond those that the US and Australia have made in the WTO, both through the extension of commitments to additional sectors and the inclusion of additional commitments to ensure strong protections for investors.

The Investment Chapter will ensure that Australian investors enjoy a liberal regime for investment in the US, with only a limited range of foreign investment restrictions as exemptions to their receiving non-discriminatory treatment. The Chapter will also ensure strong protections in relation to expropriation and the transfer of their funds, and includes a prohibition on the use of a range of trade and investment distorting performance requirements. These are all significant commitments given that the US is the largest overseas destination for Australian investment. They also have added significance given the strong and growing linkages between investment and trade flows.

In addition, the Services and Investment Chapters have liberal 'rules of origin', which mean that all enterprises organized under Australian law, and branches of foreign corporations that are located in Australia and carrying out business operations here, will benefit from the commitments in these Chapters. These liberal rules of origin should be conducive to encouraging investment from third countries into Australia, as both subsidiaries and branches of companies based in them will be able to enjoy the benefits of the FTA for their Australian operations.

6. With Article 11.16 the door is still left open for investor state dispute settlement. What sort of change in circumstance would trigger further consultations?
a. Would a change in political circumstances suffice?

REPLY:
The issue of investor-state dispute settlement was extensively discussed during the negotiations. As part of the final outcome it was agreed not to include an investor-

state dispute settlement mechanism in the Agreement in view of the confidence of each country's investors in the fairness and integrity of their respective legal regimes, as well as their open economies and shared legal traditions. Consultations under Article 11.16 could only be invoked if either Party considered that there had been a change in these circumstances that might warrant some reconsideration of the value of an investor-state dispute settlement mechanism. A change in political circumstances, such as a change in government, would not be sufficient to warrant such reconsideration. Instead, there would need to be a significant change in the legal institutions of one of the Parties, such that investors of the other Party could no longer have confidence that they would be treated fairly and objectively. Such a significant change would occur if there was widespread corruption in the judiciary, maladministration of the judicial process or political interference in legal processes. It is difficult to envisage any situation in which such a change in circumstances would be at all likely in either Australia or the US.

7. How will we get anything out of the mutual recognition processes in the professions when there is no chapter on the temporary entry of business people, so no way for easing the immigration issues?

REPLY:
Australia and the US already maintain relatively open regimes with respect to entry of each other's business persons. Many Australian professionals already obtain entry to the US but the lack of mutual recognition of their qualifications and experience limit their opportunities to practice, or curtail the type of work they can do, or impose significant costs to obtain recognition by US authorities. The AUSFTA will contain strong binding commitments ensuring non-discriminatory treatment of Australian professionals and other service suppliers when they are present in the US, and will establish a robust framework for pursuing an ambitious mutual recognition agenda. While a temporary entry chapter was not included in AUSFTA, Australia and the US agreed to look at issues related to the temporary entry of business persons as part of a separate but parallel process. Key issues which Australia has identified in this area are ones which have not traditionally been addressed in trade agreements, such as automatic work rights for the spouses of professionals granted temporary entry, but which may be capable of being pursued in such a parallel process.

8. We have promised to ratify the WIPO Copyright Treaty of 1996, which concerns the copyright treatment of material on the internet. Do you think that Australia needs to adopt something like the US Digital Millennium Copyright Act in order to achieve compliance with this treaty? Or is our current legislation already consistent with the treaty?

REPLY:
Subject to a requirement to extend the duration of copyright in photographs Australia's legislation is already compliant with the provisions of the WIPO Copyright Treaty 1996 as a result of the passage of the *Copyright Amendment (Digital Agenda) Act 2000.* Australia does not need to adopt the US Digital Millennium Copyright Act to comply with the WIPO Copyright Treaty or the FTA. For further elaboration, we refer the Committee to response provided by Toni Harmer in her testimony to the Joint Standing Committee Hearing on 14 May, and her testimony to

the Senate Select Committee on 18 May.

9. In the chapter on cross-border trade in services, why did Australia only carve out market access measures affecting services delivered by the temporary movement of people, while the US carved out market access measurers affecting all modes of service delivery?
a. How many more concessions has Australia made than the US as a result?

REPLY:
Under the chapter on Cross-Border Trade in Services, the United States has reserved its rights to take measures inconsistent with the Market Access obligation where such measures are allowed by its commitments in the WTO's General Agreement on Trade in Services (GATS). Australia has a similar reservation in relation to measures taken by State and Territory governments, and measures relating to the supply of a service through the presence of US natural persons in Australia. In addition, Australia has included a number of separate schedule entries in both Annex I and Annex II that allow other existing measures to be maintained that are inconsistent with the Market Access article and also to adopt new measures inconsistent with this article in relation to certain sectors and activities. This approach means that Australia has accepted some commitments on Market Access at the Commonwealth level that go beyond those we have accepted in the GATS.

This approach to Market Access commitments is similar to the approach which Australia has taken in the Singapore-Australia Free Trade Agreement (SAFTA). Australia was prepared to extend similar commitments to the US in AUSFTA as part of the overall balance of the negotiations, particularly given the liberal commitments that the US was prepared to undertake in the services and investment part of the negotiations.

10. Why did Australia not carve water supply out of the chapter on trade in services, given the government's statements that water was carved out of the WTO agreement on services?

REPLY:
AUSFTA has a different structure to the GATS so that comparison between the two agreements is not straightforward. However, the position the Government has taken in this area in AUSFTA and the WTO services negotiations is consistent. Nothing in either AUSFTA or the GATS restricts the ability of Australian governments, at any level, to provide services related to the supply of water. Neither agreement requires Australian governments to privatise the provision of water services. Nor do they restrict the ability of governments to regulate such services for public policy reasons, such as the protection of human health and the environment. In addition, in the unlikely event that Australia had any non-conforming measures in relation to the supply of water services that came within the scope of the services commitments of AUSFTA, these would be covered by our reservations. In particular, any such measures would be covered by the Annex I reservation on all existing non-conforming measures at the State and Territory level, and the Annex II reservation preserving our ability to maintain measures inconsistent with the Market Access obligation where these measures are permitted by our GATS commitments.

11. The Agreement sets a number of precedents that could affect Australia's credibility in future negotiations in the WTO. An obvious instance is the exclusion of sugar. But so too is the inclusion of chapters on labour and the environment. So too is accepting the US concept of 'digital products', rather than using the more limited language of the Doha Round ('electronic transmission'). Can you comment on how this will affect Australia's future WTO negotiations?

REPLY:
AUSFTA complies with the requirements for FTAs set out in Article XXIV of the General Agreement on Tariffs and Trade (GATT). A key requirement is that tariffs be removed on "substantially all the trade" in goods between FTA partners. In this regard, under the AUSFTA, Australian and US tariffs on all non-agricultural products will be eliminated within 10 years of entry into force. The AUSFTA also amply meets Article XXIV requirements with regard to agricultural products: all the limited Australian tariffs on US agricultural products will be removed from day one, while all United States tariffs on agricultural products imported from Australia will be eliminated over time, with only two exceptions (dairy and sugar). However, the Agreement does provide for a significant increase in the volumes of duty free quota access for dairy products, and Australia will continue to have access to the US market for sugar under WTO arrangements. By contrast, many existing FTA's would not meet the standards set by the AUSFTA. A further requirement of GATT Article XXIV is that a free trade agreement should not raise barriers against third parties to the Australian or US markets. The AUSFTA complies with this. AUSFTA also complies with standards under the WTO General Agreement on Trade in Services (GATS) through its substantial coverage in the services sector. Moreover, the AUSFTA achieves 'WTO plus' standards by extending its scope beyond traditional FTAs to include provisions on investment, competition policy, consumer protection, government procurement, intellectual property and e-commerce.

For further elaboration, we refer the Committee to the response to this question provided by Mr Bruce Gosper in his testimony of 10 May.

While the Government of Australia would have preferred no chapters in the Agreement dealing with environment and labour, the United States Trade Promotion Authority requires such chapters in all its FTAs. The obligations on each Party in those chapters however are modest and relate to the requirement that each Party not fail to enforce its own laws. Australia would not see its agreement to including these chapters in the AUSFTA as a precedent for FTAs it may wish to pursue with other trading partners. Nor would other trading partners.

The Parties specifically limited the effect of using the term "digital product" in this Agreement through footnote 16-4 which reads: "The definition of digital products should not be understood to reflect a Party's view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods." Australia accepted the use of the term without prejudice to our position in the ongoing WTO discussions.

12. In several places the agreement takes us backwards, compared with our WTO commitments. For example, the safeguards chapter allows for safeguards

in the event that there is a surge in imports, and injury to domestic producers, but it does not require there to be a causal link between the two, as in the WTO agreement. Please justify this.
a. Consistency with the WTO should also require us to multilateralise our concessions. Why have we agreed to provisions that are less stringent than in the WTO? And do you think we should multilateralise our concessions?

REPLY:
Article 9.1 provides: "During the transition period, if as a result of the reduction or elimination of a customs duty under this Agreement, an originating good of the other Party is being imported into the territory of a Party in such increased quantities, in absolute terms or relative to domestic production, and under such conditions that the imports of such originating good from the other Party constitute a substantial cause of serious injury, or threat thereof, to a domestic industry producing a like or directly competitive good, that Party may:".

While not identical, this language is consistent with that of Article 2.1 of the WTO Agreement on Safeguards and clearly requires a causal link between the three elements of the equation: the tariff reduction, a surge in imports, and serious injury of threat thereof to a domestic industry.

13. This committee has heard concerns that aspects of the FTA could undermine Australia's science based quarantine system.
a. Why does the US feel it is necessary to establish a technical working group on sanitary and phytosanitary issues when there is already an established mechanism to deal with these issues through the WTO?

REPLY:
The integrity of Australia's quarantine regime and our right to protect animal, plant and human health will not be affected by the Agreement. Decisions on matters affecting quarantine will continue to be based on science. Moreover, quarantine disputes are exempted from the dispute settlement mechanism established under the Agreement.

As outlined in the Frequently Asked Questions on the DFAT website, the establishment of a Committee on Sanitary and Phytosanitary Matters under AUSFTA and a Standing Working Group on Animal and Plant Health reflects an approach common to many bilateral agreements in providing a forum for discussing specific trade-related issues. Because Australia and the United States enjoy a significant trading relationship in agricultural products, it is likely that there will, at any point in time, be an agenda of market access issues for which quarantine risk assessments are underway or pending, and which may benefit from scientific and technical discussion.

The Working Group builds on the cooperative relationship that already exists between the Australian and United States agencies with major responsibility for technical market access issues relating to animal and plant health (Biosecurity Australia and the US Animal and Plant Health Inspection Service (APHIS)). Its stated objective is to resolve specific bilateral animal and plant health matters with a view to facilitating trade and, where possible, achieving consensus on scientific issues. This does not necessarily mean that it will be possible to reach scientific consensus in every

instance.

This questions was further elaborated by Virginia Greville in her testimony before the Committee on 18 May.

14. Is it the case that US agricultural lobby groups, seeking greater access to the Australia market, have identified Australia's quarantine system as a barrier to trade that they would wish to see addressed through this FTA?
a. Is it true that the wording of the FTA closely reflects the wording the publicly states aims of various American agricultural lobby groups?

REPLY:
Refer to the Committee to the response provided above for Question 13 and to the response to this question provided by Ms Virginia Greville in her testimony of 18 May 2004

15. The states objectives of the SPS measurers and the Working Group on Animal and Plant Health include facilitation of trade between the parties. How do you respond to the arguments put; to this committee that the establishment of groups with this objective could ultimately give political considerations, such as trade facilitation, greater weight than they currently have in Australia's quarantine system?

REPLY:
Refer to the response provided by Virginia Greville in her testimony on 18 May and Bruce Gosper in his testimony of 18 May.

16. We already have liberalised parallel importing. Draconian laws on technical protections measures can lead to back door entrance. However it appears that parallel importing will be able to come in the back door under the FTA Can you expand on this issue?

REPLY:
No, this is incorrect. The Agreement specifically provides that nothing in the Agreement shall affect the right of party to permit parallel importation of copyright material.

17. What are Australia's obligations with regards to environmental review as stated in Article 21.1.7

REPLY:
Australia's obligation under Article 21.1.7 is to consider each Party's review of the environmental effects of the Agreement at the first meeting of the Joint Committee, and to provide the public an opportunity to provide views on those effects. While it is not a requirement under Australian law or treaty practice to carry out such a review, the Australian Government decided that, in view of US Government expectations, and of interest in Australia in the environmental aspects of the Agreement, a review would, on this occasion, be carried out. That review was included in the analysis prepared for the Department of Foreign Affairs and Trade by the Centre for International Economics (CIE) of April 2004 (available on the DFAT website). A number of

NGOs and industry organisations with an interest in the environment were consulted during 2003 on the environmental aspects of the FTA and made known their concerns at that time. They were invited to provide written submissions to DFAT. None took up this invitation. A number of submissions were made to the JSCOT and Senate Select Committee examining the Agreement. Known concerns, including a number of those reported to DFAT during the consultations in 2003, were addressed in the CIE analysis.