# Government Senators Response

## Introduction

4.1 This Interim Report is being presented to the Senate before critical evidence to the Committee has been heard; before the Committee has had the opportunity to consider the Report of the Joint Standing Committee on Treaties (which was tabled in the House of Representatives on the morning that this Interim Report went to print); before the Committee has had the opportunity to consider the domestic Australian legislation which will give effect to the Free Trade Agreement ("FTA")(which was to be introduced in the House of Representatives after this Report has gone to print); and before the economic modelling commissioned by the Committee has been considered and critiqued. In those circumstances, the Interim Report is not merely premature; it is a useless and wasteful exercise, whose recommendations, although expressed in a preliminary way, must be regarded as wholly lacking in substance.

4.2 The Chairman's draft report was prepared with no consultation whatever with Government Senators, thereby entirely foreclosing the possibility of the Committee seeking to come to a consensus view on any issue. The draft was, in fact, first circulated at a time obviously calculated to prevent careful analysis or criticism. In those circumstances, the Government Senators' Report has been prepared with ridiculously little time to deal with the matters raised in the Chairman's Report. This is consistent with the evident tactic of the Chairman in persistently refusing to give Government Senators equal opportunity to question witnesses.

4.3 One striking feature of the Chairman's Report is the uncritical treatment of evidence which "raises concerns", while remaining entirely silent on the answers which were given to relieve such concerns. Most of those concerns, when scrutinized, amounted to nothing more than a failure to understand the language of the FTA (or, in the case of some witnesses, it must be said, failure even to read the relevant sections before essaying criticisms.) The FTA is a long and complex legal document, proper understanding of which requires a level of knowledge of international trade law and the law of treaties. It is not likely to be readily understood by those without appropriate expertise. However, the Committee had the advantage of having evidence from members of the team which negotiated the agreement, led by the Chief Negotiator, Mr. Stephen Deady. The commanding expertise of Mr. Deady is undeniable. Mr. Deady was able to give a detailed, informed, specific and convincing response to each of the many "doubts" expressed by witnesses who, in some cases, simply did not understand the technical language used in the FTA. It is a matter of gravest concern to Government Senators that the Chairman's Report, while choosing to ventilate those concerns, consistently omits to set out the explanations given by Mr Deady, the other negotiators and other officials. There can be few more disappointing examples of scaremongering than the approach which the Chairman's Report has decided to adopt.

4.4 The gravest omission of all has been the failure to give any serious treatment to the large number of witnesses who spoke with enthusiasm about the benefits to their particular industries or sectors which would result from the FTA, and the unique opportunity which it will present for Australia. Typical of many such witnesses was the evidence on 5 May of Mr. Alan Oxley, a trade analyst with extensive experience of international trade negotiations:

> You asked, Chair, what would be the downside for Australia if we rejected the agreement. We would probably be regarded as the most bizarre country in the world for having rejected a free trade agreement with the world's biggest economy – an agreement that would actually give us access in agriculture, which is one of the most difficult areas, notwithstanding the fact that it is not perfect – when many other countries are lining up to have an agreement with them. I honestly do not know how any serious Australian government could justify that to the world at large.

4.5 Government Senators incorporate in their Report a series of Annexures, which explain the real meaning and effect of particular provisions of the FTA, and record the reactions of a wide variety of industry groups.

# Economic modelling of the FTA

4.6 There have been several modelling exercises and reports undertaken in relation to the proposed FTA seeking to determine the costs and benefits of the agreement. While there is some disagreement among the reports that have been published, the vast majority have identified an overall benefit to the Australian economy arising from the Agreement.

4.7 The most substantial studies – those carried out by the Centre for International Economics – demonstrate unequivocally the enormous benefit of Australia entering a Free Trade Agreement with the world's most powerful economy. It will deliver access by Australian companies and exporters to the world's largest market, encourage enhanced investment flows between the two countries, and enable Australia to benefit from the technological, managerial and financial know-how and resources of the world's leading companies.

4.8 Government senators are satisfied that the rigour and comprehensiveness of the CIE modelling justifies the conclusion that the benefit to Australia is an average annual equivalent of $2½ billion – with the range between $1 billion and $7 billion, and with the most frequent observation delivered by the various CIE modelling scenarios to be $3 billion per annum additional gain.

4.9 In any event, the success of the FTA is not predicted solely by, nor dependent wholly on, the outcomes of economic models. It is probably even more important to look at what are the opportunities created by the agreement and what are the risks created by the agreement. The evidence is clearly in favour of the opportunities.

4.10 Australian businesses overwhelmingly regard this agreement as one that will significantly help the transition of trade and investment between Australia and the United States. The United States will remain the world's most competitive economy. Australia's close engagement with it will further enhance the competitiveness of Australian companies.

4.11 This agreement opens up investment and reduces trade barriers. Government senators agree that wherever possible investment liberalisation and the liberalisation of trade barriers should be multilateral. The Australia-US FTA sets standards to which multilateral processes through the WTO can aspire.

# Key Topics

4.12 The majority report has addressed a number of the key areas in the FTA that have been the subject of extensive discussion and debate in hearings and more broadly in the public domain.

4.13 However, the so-called *Issues for consideration* put forward in the majority report are profoundly misleading to the extent that there has been no account taken of the assurances – let alone actual facts – that government officials have provided to the Committee in response to many of the concerns raised. These facts and assurances demonstrate clearly that the fears that have been expressed in some quarters – and somewhat mischievously promoted in others – are completely without foundation.

4.14 The following sets out briefly the important considerations and rejoinders that the majority report has simply failed to include in its characterisation of the evidence surrounding the various *Issues.*

## Pharmaceuticals

4.15 A constant claim by critics has been that the FTA will result in increases in the prices of drugs in Australia. Not only are the Trade Minister and the Prime Minister on the record as declaring that drug prices will not rise as a result of the FTA. The officials negotiating the agreement (from both DFAT and the Department of Health) have painstakingly explained to the Committee why that will not be the case.

4.16 Critics have argued that the FTA will open Australia's PBS up to institutionalised pressure from the US government (on behalf of the US pharmaceutical lobby) to recognise "the value of innovative pharmaceuticals" in the PBS listing and pricing system. It has also bee argued that establishment of Medicines Working Group could result in, over time, more expensive patented medicines being listed on the PBS due to continued pressure on Australia to recognise the value of "innovative pharmaceuticals", and that this would increase the overall cost of maintaining the PBS.

4.17 It has been explained thoroughly to the Committee that these fears are unfounded. It will remain the case, after the implementation of the FTA, that the Pharmaceutical Benefits Advisory Committee (PBAC) will remain the sole authority

in terms of recommending to the government which drugs shall be listed on the PBS, and that cost-effectiveness will continue to be a key criterion that PBAC considers. The PBAC always takes into account 'comparators' when assessing the merits of a proposed new drug. Indeed, PBAC is **required** to consider both the effectiveness and the cost of therapy involving the use of the proposed new drug.

4.18 The Committee has been assured that the Medicines Working Group is simply an arena for discussion between health officials. It has **no** operative or decision making power and is therefore not in a position to bring any pressure to bear on PBAC.

4.19 There have also been allegations that the Independent Review Mechanism will also act as a pressure on PBAC to list more expensive pharmaceuticals, and that somehow this mechanism will undermine the operation of PBAC. This is simply not so.

4.20 It has been pointed out to the Committee, and the FTA text makes it clear, that the independent review mechanism is only available where PBAC has made a decision **not** to list a proposed drug on the PBS. The independent review mechanism will report its findings to PBAC, but it is PBAC that remains the authority that will decide whether a drug is listed or not. If the PBAC refuses to list a drug, under Australian law it is not open for anyone, even for the minister, to require that the drug be listed.

4.21 The assertion that the FTA may lead to higher pharmaceutical prices is untenable. That is particularly so in view of the facts that:

(a) there are no changes to the PBS in the legislation to give domestic effect to the FTA. In particular, there are no amendments proposed to Part VII of the National Health Act1953 (which establishes and regulates the PBS);

(b) the review mechanisms created by the FTA do not provide for price review.

4.22 The assertion by some witnesses that the review mechanisms established by the FTA could expose pharmaceutical prices to upward pressure does not bear scrutiny when the text of the FTA is examined. In that regard, Government Senators point out that those witnesses who chose to make that case were unable, when challenged, to explain how it could be that a review mechanism which could only review listing (as opposed to pricing) decisions, could have the effect of altering prices. The evidence of the Chief FTA Negotiator, Mr. Stephen Deady, was firm and unequivocal on this issue.

4.23 The provisions of the FTA to which critics pointed were (a) cl. 2 (f) on Annexure 2-C (which creates an "independent review process" specific to pharmaceuticals); and (b) Article 21, the overall dispute settlement procedure. Properly understood, neither provision allows for price reviews.

4.24 Cl 2(f) of Annexure 2-C provides:

> To the extent that a Party's federal healthcare authorities operate or maintain procedures for listing new pharmaceuticals or indications for reimbursement purposes, or for setting the amount of reimbursement for pharmaceuticals, under its federal healthcare programs, it shall:
>
> > (f) make available an independent review process that may be invoked at the request of an applicant directly affected by a recommendation or determination.

4.25 The meaning of those words was refined by a "side letter" dated 18 May 2004 from the American Minister (Mr. Zoellick) to the Australian Minister (Mr. Vaile). That side letter (which has the same status, for the purposes of interpreting the treaty, as provisions of the treaty text themselves), confirms that the only decisions which may be the subject of the "independent review process" established by cl. 2 (f) are "PBAC determinations, where an application has not resulted in a PBAC recommendation to list." [Side letter, para. 2; emphasis added].

4.26 The jurisdiction of the PBAC to list new pharmaceuticals is set out in s. 101(3) of the National Health Act1953. Neither that provision, nor any other section of the National Health Act, gives the PBAC any jurisdiction to make recommendations in relation to prices. The provision states:

> The Pharmaceutical Benefits Advisory Committee shall make recommendations to the Minister from time to time as to the drugs and medicinal preparations which it considers should be made available as pharmaceutical benefits under this Part and shall advise the Minister upon any other matter concerning the operation of this Part referred to it by the Minister.

4.27 As the section does not enable the PBAC to make any recommendation other than as to listing, and since the side letter makes clear that the only reviewable decisions upon which the independent review mechanism establish by cl. 2(f) may operate are refusals by the PBAC of a listing application, it is simply not possible for the independent review process to be seized with issues of pricing. Dr. Ruth Lopert of the Health Department, in her evidence to the Committee on 21 June, made it abundantly clear that PBAC recommendations are limited to listing, not pricing.

4.28 Government Senators note that witnesses who suggested otherwise made their submissions in evident ignorance of the clarifying provisions of the side letter and of the jurisdictional limitation upon PBAC recommendations by s. 101 of the National Health Act.

4.29 The other basis upon which it was suggested the review mechanisms established by the FTA could result in pressure upon pharmaceutical prices was the operation of the dispute resolution Chapter (Article 21). However, as Mr. Deady pointed out to the Committee, such a provision is a commonplace one in trade treaties. What it is directed to is the compliance by parties with their obligations established under the FTA; not to the review of particular decisions taken within the framework

of those obligations. As Mr Deady (whose commanding expertise in this field is acknowledged at least by Government Senators although not, disappointingly, by Opposition members of the Committee) said in evidence on 21 June:

> Senator Brandis – So in your opinion it is wrong that a provision like article 21.2 could be used to collaterally attack review mechanism set up by this agreement.
>
> Mr Deady – Absolutely wrong. If Australia did not set up an independent review mechanism then we would be in reach and the Americans may challenge it. That would be the breach.

4.30 Another concern related to what has been described as the 'patent evergreening' provisions of changes to patent law required by FTA Chapter 17 – especially clause 17.10.4. The argument goes that the introduction of generic drugs in competition with patented medicines almost invariably lowers the cost of treatment for users of the drug (or for governments, in the case of drugs subsidised through the PBS or in hospitals). If changes to patent laws do delay the introduction of generic drugs, as has been argued before this Committee, then the line that 'drug prices in Australia will not rise as a result of the FTA' would be difficult to sustain.

4.31 This matter was explored at considerable length with government officials from both Health and DFAT. The particular focus of the discussion related to clause 17.10.4 , especially the provision that there shall be measures provided in Australia's marketing approvals process (through the Therapeutic Goods Administration) to prevent a person from marketing a product where that product is claimed in a patent by someone else.

4.32 Critics argue that the experience in other countries is that pharmaceutical patent holders will persist in claiming patents beyond the original patent period that will automatically result in injunctions and hence delays in generic medicine producers being able to get on with introducing to the market a generic version of the 'patent claimed' pharmaceutical.

4.33 Officials have assured the Committee that the change in the marketing approval process is simply an extra step to ensure the approvals process is thorough and transparent. The modified process makes it clear that a generic medicine can enter the market if it will not infringe a patent. It has also been agreed that in those **limited** cases where a generic manufacturer considers a patent to be invalid and intends to enter the market before a patent expires, that the patent owner will be notified.. The TGA will only grant marketing approval if it is satisfied that the generic sponsor has notified the patent owner.

4.34 All this is entirely consistent with Australia's existing intellectual property regime. The Committee has been assured by officials that the measure does not add any additional protection to the patent holder. Officials have also advised the Committee that they have been in constant consultation with the generic medicines industry. The Agreement does not compromise the generic medicines industry and reinforces Australia's existing framework for intellectual property of pharmaceuticals.

4.35 Regarding the issues concerning blood, an exchange of letters (attached to Chapter 15 dealing with Government Procurement) deals with trade in blood plasma products and blood fractionation services. Should a current review (in Australia) of arrangements for plasma fractionation services result in suppliers of such services being selected through tender processes, these services will fall under the FTA provisions. While Australia's TGA will continue to regulate blood products, wherever they are produced, and while Australia can preserve its policy on using plasma collected from Australian donors, concerns have been expressed about our capacity to ensure the implementation of such policies and regulations.

4.36 Procurement of Plasma Fractionation Services has been excluded from coverage of the Government Procurement Chapter (See Annex 15-E Services). If the review of plasma fractionation arrangements results in agreement to move to tender processes consistent with the Government Procurement Chapter, Australia has undertaken to remove this exception to the provisions of the Government Procurement Chapter.

4.37 The government Senators draw attention to 7.4. Regulatory Requirements (Paragraph 4). This paragraph acknowledges the importance of each party maintaining regulatory requirements for ensuring the safety, quality and efficacy of blood plasma products and supply of blood fractionation services. In the case of Australia, the Therapeutic Goods Administration (TGA) will continue to regulate blood products. The TGA will keep regulatory control of standards, wherever the fractionation process takes place, and who ever is the fractionator

4.38 As well, Australia has ensured under 7.5. its Policy on Self-Sufficiency (Paragraph 5). This paragraph acknowledges the right of governments to have policies that blood plasma products are derived from blood plasma collected in their own territory. This allows Australia to preserve its policy on using plasma collected from Australian blood donors.

## Intellectual property

4.39 There has been some debate about whether it is appropriate to include IP in an agreement that has the aim of advancing free trade. This seems a somewhat odd debate given that IP issues have been an important focus of WTO considerations for several years, and that the *TRIPS Agreement* has been established to address precisely the trade dimensions of such issues.

4.40 Moreover, in what is generally regarded as a global 'knowledge economy', issues of intellectual property lie at the heart of any trade in services in particular. Robust intellectual property regimes are imperative if innovation is to be encouraged and rewarded.

4.41 Critics have argued that Chapter 17 represents a failure of proper policy making and that the level of detail and lack of flexibility in the FTA is inappropriate.

They have also argued that this may restrict future development of IP law and policy in Australia by making Australia's position irreversible regardless of success or failure of measures under the FTA, unless the United States consents to any future changes.

4.42 Australia's lead negotiator, Ms Toni Harmer from DFAT, has disagreed with these assertions, arguing that the IP chapter strengthens Australia's IP protection at the same time as providing flexibility to create appropriate exceptions.[1]

4.43 Intellectual property is a very important sector of Australia's economy, particularly in developing value added exports. The government Senators cannot see how strengthening our IP protection at the same time as providing the ability to make exceptions where they are appropriate in the national interest is a bad policy outcome for Australia.

***Copyright extension***

4.44 The key benefit of copyright term extension is in the benefit that that will provide to Australian artists and musicians for the protection of their works, in terms of an extended term of copyright protection and therefore royalties for a further 20 years. Australia has not agreed to claw back information which has already entered the public domain.. If things are in the public domain, it is not proposed to bring those back into copyright.

4.45 As well, the sorts of exceptions we have within our system in Australia, or exceptions that we may put in place in the future—for example, with respect to educational use—will continue to apply throughout that extended copyright term.

***Harmonisation of laws***

4.46 Some concerns have been expressed that Chapter 17 will require Australian laws to move closer to the systems and practice that applies in the US – so-called harmonisation. The benefits here significantly outweigh any perceived costs.

4.47 In relation to both copyright and intellectual property laws, there is an advantage to industry to the extent that similarity of laws creates a more familiar legal environment and certainty the ability not only to protect rights but to enforce them. To the extent that it creates confidence in the Australian system about the similarity of those laws to those in the US, such harmonisation will encourage investment in Australia.

4.48 The government Senators appreciate that the IP chapter does contain elements of the US Digital Millennium Copyright Act, but Chapter 17 also contains flexibility for Australia to implement that in a way that is appropriate for Australia. Government Senators believe it is an incorrect reading of the IP chapter to think that it

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1 *Transcript of Evidence*, 18 May 2004, p. 101 (Harmer, DFAT).

requires Australia to implement US law word for word in our system. Whilst we have treaty level obligations, we will be implementing those within our own legal context.

***Anti-circumvention provisions***

4.49 There have been issues raised regarding anti-circumvention measures (or TPMs). Chapter 17 requires Australia to ban devices for circumventing TPMs and extends the scope of criminal offences relating to the manufacture and sale of circumvention devices. The open source software industry is arguing that the provisions will severely limit the industry's ability to function and develop.

4.50 The government Senators note that with respect to TPMs, there is a two-year transition period to implement those obligations. The reason the FTA provides for the prohibition on anticircumvention is that they are seen to assist copyright owners to enforce their rights.

4.51 Open source software developers have argued that the FTA will require Australia to extend Australia's patent laws to a small extent—that is, to all fields of technology—and that this will effectively stifle the open source software industry.

4.52 Government Senators sought advice on this matter during the Committee's hearings and was told unequivocally by officials that the free trade agreement does not change in any way the scope of what is currently considered to be patentable or what would be patented in Australia. Australia currently allows patents for software, and there will be no change to that. Australia is not being required to take a US approach in relation to that type of patent. It will be 'business as usual' for IP Australia in terms of granting patents.

***ISPs and 'safe harbours'***

4.53 Evidence provided to the Committee outlined that a very significant gain provided by the FTA will be through the creation of enhanced legal tools to tackle piracy and associated criminal activities conducted via the Internet. These measures would equip Australian companies with far stronger means to more effectively tackle this criminal activity that harms Australian companies and consumers, and threatens Australian jobs. This was made clear in evidence before the Committee.

> The interactive entertainment industry, which has been in a high-growth phase for quite some time, relies somewhat on the technology that we are debating in terms of copyright and the ISP area. We have seen that the growth of the industry could be stronger with a stronger intellectual property protection regime, so we are very supportive of the outcomes of the FTA in bringing our copyright laws to the levels of those in the European Union and the United States of America. We were basically after two particular elements of the FTA, and we think it is excellent that they are there: the expeditious process to allow for copyright owners to engage with ISPs and to deal with allegedly infringing copyright material on the Internet. We understand from our counterparts overseas that ISPs overseas are able to accommodate this and do not see it as an imposition. They have

> the technology. We do not think that that technology changes because it comes to Australia. We believe the ISPs have that technology available to them.
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> ….. Also, we are very much in favour of the tighter controls in circumventing the technological protection of copyright material.[2]

4.54 The Allen Consulting Group has also produced a detailed report on copyright and the cost of counterfeiting and piracy in this area. The report states that:

> The maintenance of a strong intellectual property regime (i.e. with an emphasis on enforcement) is particularly important in attracting foreign investment. This is because Australia competes in a world with increasingly mobile capital and that the strength of a country's intellectual property laws is a key determinant in attracting foreign investment across many sectors of the economy. Indeed, the Department of Foreign Affairs and Trade has noted that 'It is generally accepted that maintenance of such a regime has served to attract state-of-the-art technology and overseas copyright works to Australia.[3]

4.55 Regarding the matter of increased burden on ISPs, including obligations relating to 'safe harbours', the FTA requires Australia to introduce a more prescriptive regime than it currently has for creating 'safe harbours' for ISPs. It has been argued that the level of detail may not allow sufficient flexibility in the implementation process for Australia.

4.56 As well, the FTA differs from current laws in Australia in relation to the process of temporary reproduction (caching) of material as part of a telecommunications process. In Australia, the 'caching' exemption under the Copyright Act 1968 does not distinguish between automatic and non-automatic caching. The FTA gives ISPs 'safe harbour' immunity only if caching is carried out through an automatic process. Educational institutions have also expressed concerns about issues relating to temporary copying.

4.57 The government Senators are satisfied that the balance achieved through the FTA is appropriate to both protect copyright holders, while ensuring adequate access to copyright material for users. What the agreement does is put in place a set of rules so that Internet service providers, copyright owners and users are clear about their rights and obligations.

4.58 Chapter 17 puts in place a 'take-down notice regime and provides Internet service providers with certain safe harbours. If they comply with those safe harbours then that assists them to limit their potential liability for copyright infringements.

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2 *Transcript of Evidence,* 8 June 2004, p6-7 (Jenkin, IEAA)

3 The Allen Consulting Group *Counterfeiting of Toys, Business Software and Computerand Video Games* November 2003 p(ix)

4.59 Government Senators believe that this is very much of benefit to ISPs in providing certainty, and of benefit to copyright owners in providing the ability for a take-down and notice regime. It would also assist users to have certainty about how the system works.

4.60 In short, the ISP provisions will assist copyright owners to enforce their copyright at the same time as introducing appropriate safeguards for users and ISPs.

## Sanitary and Phytosanitary Measures

4.61 First and foremost, the AUS-USFTA reaffirms existing commitments to the WTO SPS Agreement. There is not a separate provision for dispute settlement on SPS matters within the AUS-US FTA as the WTO dispute mechanisms will apply. The Government is committed to the WTO processes and supportive of the approach outlined in the AUS-US FTA with regard to SPS matters. Evidence heard by the Select Committee from the Australian negotiation team stated that:

> "We are absolutely committed to and more than capable of defending our standards, but we are also willing—as WTO members and upholders of the SPS agreement to consider alternative approaches which achieve the same level of protection. What this agreement [AUS_USFTA] does—rather than characterising it as institutionalising pressure on us—is to provide a regular forum for ongoing dialogue on matters of bilateral interest. This does not mean that the parties will always agree with each other's decisions, but it will hopefully prevent a situation where the United States or Australia is presented with a quarantine decision at the end of a process for which it does not understand the basis."[4]

4.62 Critics of the Agreement are wrong in their assumptions that Australia's quarantine measures will be eroded under the proposed arrangements with the establishment of a SPS Committee and Standing Technical Working Group. The Government is aware that there may be challenges to decisions but is firmly committed to a science based assessment processes on quarantine matters. Members for the negotiation team have repeatedly stated to the Select Committee that decisions on quarantine matters will continue to be based on science. -

> The "decision-making process is challengeable, but it can only be challengeable on the basis of science."[5]
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> "The FTA agreement does not change the rights or obligations or expectations that we each have and, in determining our own appropriate

4 Committee Hansard, (AUSFTA Inquiry), 18 May2004, p:8 (Greville, DFAT)

5 Answers to Question on Notice, received on 3 June 2004 (DFAT)

level of protection, will apply in accordance with the rules and obligations of the SPS agreement".[6]

4.63 The point of the SPS Committee and the Standing Technical Working Group is to build on the cooperative relationship that already exists between Australia and the United States. They will help to facilitate better understanding and provide a forum to exchange of information on scientifically based decision made by either Party. The integrity of Australia's quarantine regime will not be affected by the AUS-USFTA[7].

The whole objective is to allow countries to achieve the level of protection that they determine as a sovereign right but to do so in a way that does not provide merely a tool for trade protection. So countries logically work through the approach to these sorts of issues.[8]

## Agriculture

4.64 It has been suggested that Australia's acceptance of the omission of sugar from the FTA will weaken Australia's negotiating position when seeking an ambitious reform package for agricultural products in the WTO.

4.65 This matter was discussed in hearings with the DFAT officials most immediately concerned with WTO negotiations. They have absolutely no concerns about Australia's capacity to continue to play an ongoing leadership role in efforts to improve agricultural trade multilaterally.

4.66 According to these senior officials the Cairns Group continues to operate very effectively. It had a very successful meeting in February 2004 in Costa Rica and continues to operate in Geneva and at ministerial level with focus on the WTO. Australia continues to put in as much effort as ever—arguably more than ever— to restore some momentum in these negotiations.

4.67 The Committee was also advised that Trade Minister Vaile had been attending meetings in Paris, including a series of ministerial meetings and informal negotiations on parts of the agricultural text that is being addressed as part of the Doha round.

4.68 The government Senators are of the view that the specific initiatives that have been put forward, the breadth of Australia's coverage and interest in the Doha round and the energy and activity Australia has put into the Cairns Group and into the

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6 Committee Hansard (AUS-USFTA Inquiry), 18 May2004, p:8 (Gosper, DFAT)

7 Answers to Question on Notice, received on 3 June 2004 (DFAT)

8 Committee Hansard, (AUS-USFTA Inquiry), 18 May 2004, p:7 (Gosper, DFAT)

overall negotiations, belies any suggestion that Australia is being denied a leadership role in agriculture.

4.69 There has been some concern expressed over the need for an 18 year phase-in period for beef, and also extension of safeguards beyond that time. It is recognised that the immediate removal of the tariff and increased quota over the 18 year period is of significant benefit to the development of the beef industry. In any event, quotas thus far have seldom been met. The phase in period will allow the beef industry time to build up its capacity to supply.

4.70 The government Senators agree that there are aspects of the FTA in agriculture where the government wanted even better outcomes. But even in agriculture the FTA remains a big deal. It is a balanced package and one that both governments believe is a substantial outcome for both their economies. That is what the governments have taken the decision on. There has been overall support from the agricultural industries on the outcome of the FTA.

4.71 The government Senators wish to emphasise the fact that small access gains to the US market deliver potentially very substantial benefits for industries the size of those in Australia's agricultural sector. The dairy industry is a good example. Having come back and reviewed the deal, that industry has made it clear to the Committee that they regard the access gains as significant for the scale of the Australian dairy industry as it looks forward to taking investment decisions and other things over time.

4.72 Government senators note that the single desk arrangement for export marketing of Australian commodities has been preserved under the FTA.

**Manufacturing and Labour**

4.73 Concerns have been expressed that the rules of origin are complex and overly detailed and may not be sufficient to ensure that only products which are substantially produced in Australia or the United States will obtain concessional entry under the FTA. It has also been argued that the FTA will have a significant adverse impact on the manufacturing sector in Australia, including considerable exacerbation of job losses, particularly in the textile, clothing and footwear and the automotive components industries.

4.74 The government Senators are in no doubt that, as a result of the FTA, there will be some adjustments in the distribution and scale of various industries. This is part of the ongoing experience of remaining competitive in global markets and would be the case regardless of whether an FTA was operative or not.

4.75 In the context of Australia's manufacturing sector, government Senators note that liberalisation measures with respect to foreign investment are an important component of AUSFTA and have the potential to improve the resources, productivity

and skills base of firms across many sectors and industries. This should not be underestimated.

4.76 The government Senators note that the impact of the rules of origin established under AUSFTA have been considered through adopting a 'common sense' approach and, where the rules of origin are more restrictive, discussing the possible ramifications with government and industry representatives.

4.77 The CIE report states that for primary products and processed foods, the required change in tariff classification is unlikely to prove difficult to meet. Furthermore, primary products and processed foods predominantly use domestically sourced inputs, with imports typically accounting for only around 5 per cent of production inputs: any RVC requirement should therefore not pose a problem.

4.78 The government Senators concede that in terms of manufactures, the rules of origin may be more restrictive. Some of the potentially restrictive rules of origin requirements include the yarn forward rule as it applies to textiles and clothing exports and, on first cut, the requirement for automotive exports to have 50 per cent RVC (by the Net Cost Method).

4.79 Also noted is the CIE assessment that it will be difficult to say whether it will make commercial sense for Australian producers to switch the sources of production inputs to US suppliers (and thereby satisfy the rule of origin). Some producers will be able to change the source of their inputs to US suppliers in order to meet the yarn forward rule while others will not be able to do so. Local production of inputs may also commence.

4.80 The CIE report also advises that discussions with the Federal Chamber of Automotive Industries (FCAI) and the Federation of Automotive Products Manufacturers (FAPM) indicate that the local automotive sector is not overly concerned about the ability of Australian automotive exports to meet the rules of origin requirements. Indeed, FCAI and FAPM representatives believed that all Australian produced passenger motor vehicles and component parts would meet the change in tariff classification and/or RVC requirement.

4.81 One of the case studies undertaken by CIE related to the light metals industry. It is a notable exemplar of the benefits that will accrue under the FTA.

4.82 Under AUSFTA, virtually all tariffs on metals will be eliminated immediately. This will lead to improved opportunities for exports of Australian light metals to the US. Scheduled tariff reductions in downstream industries using light metals as production inputs, such as the automotive sector, are expected to have positive flow-on effects for all three light metals industries as a result of increased (downstream) demand for their products

4.83 AUSFTA measures on investment may also benefit the light metals industries. Initial capital costs in these industries are typically high. Lifting the threshold for notification and objection procedures for foreign investment in Australia

could increase the attractiveness of investing in the Australian light metals industries to potential investors by reducing some of the administrative costs associated with the regulatory process.

**Cross-border trade in services**

4.84 The main issue arising in relation to cross-border trade in services arose in the context of the protection of local content requirements in the entertainment industry. It is alleged that under the FTA, the Australian government would lose its ability to negotiate or impose higher local content requirements for broadcasting. This is a particular concern in relation to subscription television and new media services, where the current local content and expenditure requirements are much lower than for free to air television. This, it is claimed, may effectively shut the Australian entertainment industry out of subscription broadcasting and new media, as they compete with inexpensive, readily available American programming.

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

4.86 It does this through three reservations in Australia's schedules to Annex I and Annex II. An Annex I reservation allowing Australia to maintain the existing 55% local content transmission quota on programming, and the 80% local content transmission quota on advertising, on free-to-air commercial TV on analogue and digital (other than multichannelling) platforms. Subquotas may also be applied within the 55% programming quota.

4.87 An Annex II reservation allows Australia to both maintain existing measures and introduce new measures, subject to a number of conditions, in relation to:

- transmission quotas for multichannelled free-to-air commercial TV;
- expenditure requirements for subscription TV;
- transmission quotas for free-to-air commercial radio broadcasting;
- ensuring that Australian content on interactive audio and/or video services is not unreasonably denied to Australian consumers;
- broadcasting licensing and spectrum management; and
- taxation concessions for investment in Australian film and television production.

4.88 An Annex II reservation allows Australia to maintain existing co-production arrangements with other countries and to introduce new ones.

4.89 Some concerns were also raised about government services, especially those delivered on a commercial basis, being 'caught' by the FTA.

4.90 The government Senators are satisfied that here is nothing in the Agreement that affects the ability of either Party to provide public services, and subsidies and grants are explicitly excluded from the scope of the Chapter. Therefore, reservations are not required in Australia's schedules in relation to publicly provided cultural activities, such as the public broadcasters (ABC and SBS), public libraries or archives, or in relation to Government funding available to Australian artists, writers and performers.

4.91 Government Senators also note that Australia and the United States also have obligations on trade in services under the World Trade Organization's General Agreement on Trade in Services (GATS). This has its own obligations in respect of domestic regulation, and it requires the future development of new obligations in respect of authorisation requirements for the supply of services. Under Article 10.7.3, if any such new obligations enter into effect (either through the GATS or through other international negotiations that Australia and the United States participate in) then the Article will be amended, as appropriate, so that it reflects these results.

**Financial Services**

4.92 Australia and the USA both have sophisticated systems of prudential regulation to ensure that financial services are only undertaken by appropriate service providers, and to ensure that the industry handles clients' funds with probity. Concerns have been raised asserting that the FTA must not become a means by which Australia's prudential regulatory regime is undermined.

4.93 The Chapter sets up a Financial Services Committee which, amongst other things, is charged with considering ways to further integrate the countries' financial services sectors (Article 13.16 and Annex 13-C).

4.94 An exchange of side-letters to the Chapter records the agreement of the Parties that the Committee provides an appropriate forum to discuss certain cross-border issues pertaining to securities, and that the Committee should report on its work on these issues within two years of the entry into force of the Agreement. The side-letter also records Australia's proposal that these issues that the Committee should discuss include cross-border access for foreign securities markets and foreign collective investment schemes.

4.95 There is nothing in the operation or powers of the Financial Services Committee that can oblige Australia to change its laws or regulations in relation to financial services. It merely provides an arena for discussion of matters of mutual interest in trade in financial services.

4.96 In particular, government Senators draw attention to Article 13.7 which provides that nothing in the Chapter requires that a Party furnish or allow access to:

(i) information related to the financial affairs and accounts of individual customers of financial institutions or cross-border financial service suppliers; or

(ii) confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice the legitimate commercial interests of particular businesses.

(iii) information related to the financial affairs and accounts of individual customers of financial institutions or cross-border financial service suppliers; or

(iv) confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice the legitimate commercial interests of particular businesses.

4.97 In addition, Article 13.10 provides that the Chapter does not prevent a Party from taking actions for prudential reasons (e.g. to protect people who deposit money in banks or who take out insurance policies. As well, the Chapter does not prevent a Party's public entities from taking non-discriminatory actions of general application in pursuit of monetary and related credit policies or exchange rate policies. The Chapter does not prevent a Party from taking actions needed to secure compliance with laws or regulations that are not inconsistent with the Chapter (e.g. those dealing with deceptive conduct or default on financial services contracts).

**Government Procurement**

4.98 Concern was expressed that the FTA may limit or remove the Australian government's capacity to implement policies to prefer services delivered by local companies, particularly in regional areas.

4.99 The Government Procurement Chapter consists of 15 Articles, eight Annexes and a side letter dealing with blood plasma. The annexes determine which government entities are covered by the Chapter and the specific types of procurements and procurement arrangements that each Party has specified for exemption from application of the Chapter.

4.100 By virtue of the non-discrimination provisions in Article 15.2, Australia will become a 'designated' country under the US Trade Agreements Act. The US will provide Australia with a waiver from the Buy America Act for contracts to which the Chapter applies. The Buy America Act imposes a 6% penalty on foreign goods (not services). The waiver will enable Australian suppliers, for the first time, to compete

in the US procurement market on equal terms with suppliers from the US and from over 60 other designated countries.

4.101 In return, Australia has agreed to tender procedures and transparency arrangements that will require some changes to the way procurement is conducted in Australia and the adoption of regulations to ensure compliance by procuring entities.

**4.102** However, Australia is still able to undertake support for local small to medium enterprises. In Annex 15-G, the US has reserved their preference policies in respect of small and minority businesses. Australia has similarly specifically reserved in Annex 15-G **a right to continue with procurement policies that assist small and medium enterprises and those which provide economic and social assistance to indigenous persons.**

4.103 Article 15.2.5 specifically bans offsets, defined broadly to cover any requirement built into a procurement, for such things as local content, technology transfer or export performance. However, this ban is itself **subject to the Chapter exclusions mentioned above and therefore does not apply to Australian policies supporting small and medium enterprises.**

**Investment**

4.104 Some submitters expressed concern about the proposal to relax the FIRB notification thresholds by several orders of magnitude. They argued that an 8-fold rise in the threshold in the case of new businesses is extremely significant, and that it was inevitable that this would result in a reduction of the FIRB's capacity to protect Australian national interests.

4.105 The Investment Chapter provides investors with an open and secure environment for investment. It ensures that investors from each Party and their investments receive national treatment or most-favoured-nation treatment (whichever is better) in the other Party. It also provides protection for investors and their investments through prohibitions on a range of distorting performance requirements and on restrictions on transfers, and through requiring compensation equivalent to fair market value for any expropriated investment.

4.106 The Investment Chapter does not impose any obligation on a Party to privatise.

4.107 The Schedules to Annex I and II represent a carefully negotiated balance of commitments between the Parties. The outcome of the negotiations liberalises Australia's foreign investment policy while retaining the right for the Government to examine all investment of major significance.

4.108 An Annex II reservation allows Australia to continue to examine all foreign investments in urban land (including residential properties), other than developed non-

residential commercial real estate. An Annex I reservation allows Australia to examine investment in other sectors including the right to screen, in defined circumstances: direct and portfolio investment of 5 per cent or more in media; investment in Australian businesses in telecommunications, transport and defence related industries valued at $50 million or more; investments representing stakes in financial sector companies of 15 per cent or more; and investments in Australian businesses in other sectors valued at $800 million or more.

4.109 Separate reservations preserving Australian foreign investment limits relating to the media, Telstra, CSL, Qantas and other Australian international airlines, federal leased airports and shipping.

4.110 The government Senators regard the Investment chapter as a key element of the Australia-US FTA and one which will underpin an investment regime that is secure, transparent and attractive.

**Environment**

4.111 There are some concerns that:

- an assessment of the potential environmental impacts as a result of this FTA has not been undertaken;
- even though there is not an explicit provision for investor-state dispute there are some concerns that private investor/s may, through their respective governments, raise a matter of concern;
- the United States lack of disclosure of labelling of genetically modified food, as well as its challenging of EU labelling laws through the WTO suggests a likelihood of the US bringing pressure to bear on Australia's labelling laws; and
- the inclusion of water and water services (by not excluding them through any reservations) has the potential to limit or bring to a 'standstill' future state and local government regulation.

4.112 There is no basis whatsoever for any of the concerns raised above. In fact, the environment Chapter sets out a number of provisions designed **to ensure that neither Party fails to enforce its own environment laws** in a way that affects trade between the Parties.

4.113 The Chapter also provides for environmental cooperation, including through the signing of a Joint Statement on Environmental Cooperation, and by seeking means to enhance the mutual supportiveness of multilateral environmental agreements and international trade agreements to which Australia and the United States are both parties, in particular in the negotiations in the WTO regarding multilateral environmental agreements.

4.114 Nor will there be any inhibition on government's capacity to enforce environmental laws. The Parties recognise that 'each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority' (Article 19.2.1(b)).

4.115 The governments of both countries are deeply committed to preserving environmental benefit. That commitment is reflected in the fact that under the Institutional Arrangements (Chapter 21) the Joint Committee will, at its first meeting, consider reviews by each Party of the environmental effects of the Agreement and afford the public an opportunity to provide views on those effects (Article 21.1.7). The Australian Government will be preparing an environmental assessment of the Agreement in the context of an overall analysis of the Agreement. The US Government has already prepared a draft review (December 2003) available on the USTR website

**Institutional Arrangements and Dispute Settlement**

4.116 There have been some concerns regarding the power and influence of the Joint Committee established under Chapter 21 on Australia's domestic decision making processes. This is especially the case given that the Joint Committee is responsible for the interpretation and operations of the FTA.

4.117 The government Senators wish to emphasise that the Chapter on institutional arrangements and dispute settlement establishes a fair, transparent, timely and effective procedure for settling disputes arising under the Agreement. Importantly, it does not allow private investors to directly challenge government decisions under the Agreement. It provides high standards of openness and transparency in the resolution of disputes between the Australian and United States Governments, and provides for flexible compensation arrangements for resolving disputes.

4.118 The Joint Committee is central to the ongoing evolution of this Agreement and the early identification and settlement of disputes through consultation. At its annual meetings, it will review the current functioning of the Agreement, consider any improvements or amendments that either country may wish to propose and, where further clarity is required, issue interpretations of the Agreement.

4.119 Contrary to the implications of some of the critics, this is entirely appropriate and in Australia's interests because this last function clearly reserves the power to interpret the Agreement **to the Australian and United States governments** operating together.

4.120 The government Senators also draw attention to the fact that the Agreement emphasises settlement of disputes through consultation and gives the predominant role

to the Parties in interpreting the Agreement. As well, the Article notes the continuing importance of soliciting and considering the views of members of the public on matters under dispute.

4.121 The Chapter requires high standards of openness and transparency through open public hearings, public release of legal submissions by both governments and opportunities for interested third parties to submit written views to the panel.

4.122 Consistent with the Agreement's commitment to maintaining the prominence of the two governments in resolving disputes between them, this Chapter:

(a) restricts panels to making findings of fact and determinations regarding consistency of a government's action with the Agreement. Panels may only make recommendations for the resolution of disputes where specifically requested to do so by the two governments; and

(b) panels must base their report only on the relevant provisions of the Agreement and the submissions and arguments of the Parties

4.123 Clearly there is no basis for any concerns that Australia's sovereignty is threatened with respect to decision making. The level of transparency at all levels will ensure that there is easy scrutiny of all the operations of the Joint Committee.

**Senator George Brandis** **Senator Jeannie Ferris** **Senator Ron Boswell**