Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (AUSFTA).

Supplementary submission following appearance before the Senate Select committee (by telephone) on Tuesday, 8 June 2004

1. Expropriation and Compensation.

In reading the transcript of the session in which I was appearing before the Senate Committee (Tuesday, 8 June, 2004, by telephone), while I have some minor corrections to the proof copy, more, I would like to correct the content of some statements.

In wishing to avoid a direct contradiction of the propositions put to me, I was rendered a little uncertain of my facts in the stage glare of the Senate Committee hearing. I have since checked with an International Law Expert and would like to add the following to my statements at the time.

Re: Senator Brandis's point on expropriation, the WTO and International Law, I would like to add the following comments:

1.1 Expropriation cannot be arbitrated under the WTO dispute settlement mechanism. Despite comments to the contrary by Senators, investment is not part of the WTO system. Both the EU and USA have attempted to get investment into the WTO but have been unsuccessful. Indeed the push for an investment agreement in the WTO was part of the reason for the failure of the Cancun Round; developing countries strongly resisted the attempt by developed countries to put the 'Singapore Issues', which included investment, on the agenda. Thus, investment and the issues of Expropriation and Compensation do not come within the ambit of the WTO.

This is a particularly important point in the context of the proposed AUSFTA, as this opens up a whole new field for Australia, and the nub of my concerns on sovereignty.

1.2 Senator Brandis is correct that expropriation is a part of customary interantional law and indeed there have been many cases under international arbitration and expropriation. However NAFTA introduces a new factor into the equation. It is the first treaty that allows multinational companies to sue host governments. Under traditional international arbitration the action is either one private action taking another private action to arbitration (ie. business vs. business) or a government taking another government to arbitration on behalf of its national. It is not investor-state arbitration. In addition, the interpretation of expropriation under international law is less expansive than under American 'takings' law. If the Senators examine the expropriation cases under NAFTA and those that occurred under the US-Iran tribunal, they will see the difference in interpretation of expropriation. Under international law, government regulations designed to protect the public interest – in terms of health, safety, and environmental standards – would not be threatened. Indeed, under international law, the investment must be rendered virtually valueless, while any regulation that is likely to impact on a companies profit is being litigated under the NAFTA.

This supports and highlights the point I was making on page FTA93 of the proof booklet.

1.3 I would also like to make comment on Senator Brandis' distinction between property rights and labour and environmental standards. Yes, there is a conceptual distinction; however human rights and the health and welfare of people should never be subordinated to property rights. People are not means to an end, but an end in themselves, as enunciated in the moral philosophies of Immanuel Kant.

1.4 In summary, investment and expropriation are not litigated under the WTO. Secondly, customary international law and the US 'takings law' are substantially different and the direct suing of host governments by multinationals does not occur under International law.

This means that the annexure 11-A and annexure 11-B(1) are misleading at best, that article 11.7 is much more than a restatement of rights already existing under customary international law. Rather than debate this point, we can refer to the chapter 11 cases under NAFTA, some already upheld, to show that this is very much the case.

1.5 While there is a note regarding chapter 11 provisions that where these contravene other clauses, the other clauses will hold, the environmental and labour provisions of the agreement are not mandatory, and so this exclusion clause will have no effect for these regulations. This has also been seen within the NAFTA.

1.6 These distinctions raised above mean that the AUSFTA would break new ground, and that given the liberal interpretations on expropriation in regard to access to resources and other changes of legislation, the AUSFTA would represent a considerable restriction on the Australian government's ability to make new laws on resource management and taxation without actions from US investor companies. To me, that constitutes compromising our sovereignty and our economic and environmental wellbeing - and for dubious returns.