

Brief Opening Statement

Michael Baume AO, Former Consul-General, New York

My appearance before this committee stems from my role, when Consul-General in New York from 1996 to 2001, in joining with the Australian Ambassador to the US, Mr Michael Thawley, in generating widespread corporate support in the US for the concept of an Australia-US Free Trade Agreement. I should add that in my official capacity I had several meetings with US pharmaceutical companies, particularly Pfizer which is headquartered in New York. I am patron of the American Australian Association in New York and received the medal of the US Foreign Policy Association for my role in improving Australian-US relations, the only other Australian recipient of which is Prime Minister Howard.

My appearance here also emerges from my deep involvement with the Arts in Australia, having been Shadow Minister for the Arts as a member of the Senate, a member of the Council of the National Gallery of Australia, and I am still a director and Trustee of the American Friends of the Australian National Gallery, am on the Council of the Sydney Symphony Orchestra and have been involved as a patron of the Bell Shakespeare Company.

My concerns rest on what I consider, at best, to be a misguided and, at worst, a dishonest campaign against the proposed Free Trade Agreement, which appears to rest more on ideological and political agendas than on the evidence in the words and spirit of the agreement. The nature of much of the evidence presented to this committee, and to the concurrent Senate committee, reinforces this impression, as the great bulk of it rests on the same polemic restated over and over again, as if the frequency of ill-founded assertions gives them added substance.

As a result, I want to focus my appearance here to challenge much of the evidence presented against the FTA in the areas of the Arts and Health. In that context, recent articles I have written for the Australian Financial Review form part of my formal submission.

In particular, my submission deals with overseas evidence that demolishes the unsubstantiated claim by arts lobbyists that Australian drama will be forced off TV screens by a collapse of the revenue of free-to-air TV under pressure from a doubling of PAY-TV audiences to match the US proportion of 50 percent.

In many of the Arts and Health submissions there was a heavy anti-American bias evident, indicating an agenda that had little to do with the merit or otherwise of the specifics of this agreement.

**SUBMISSION BY MICHAEL BAUME AO, Former Consul-General,
New York.**

This submission is aimed at repudiating much of the anti-FTA evidence presented so far to this committee and to the parallel Senate committee in relation to the arts and the Pharmaceutical Benefits Scheme. I would also ask that three of my articles published in the Australian Financial Review dated 17.11.2003, 8.3.2004 and 3.5.2004 be considered as addenda to my submission.

THE ARTS:

The real agenda behind the false allegation by sections of the Arts community that Australian culture is threatened by the Free Trade Agreement with the US, has now become evident; Australia's success in effectively protecting Australian content on Television and other new media is simply not what they actually wanted out of the FTA. From negotiations that were supposed to be an exercise in reducing protection, they demanded, instead, that they should get unlimited protection against American cultural imports compared to the levels that currently exist (but which are capable of being considerably increased under the FTA) -- and some have used it as an excuse to demand additional government funding (Senate enquiry evidence 4/4/04).

Their attack on the Howard government over the FTA is despite Trade Minister Mark Vaile's achievement in extending the existing Australian content rules, in the face of very heavy American pressure, to get clearly defined rights to increased protection, particularly in pay-TV and new media. This was based both on the national interest issue of the need to foster Australian talent, and on the reasonable justification that no anti-dumping rules apply in this area even though American product, whose costs have been covered by domestic sales, are sold here at what are effectively dumped prices. But Australia's success did not bring the amount of increased protection the cultural activists wanted, so they are seeking to sabotage the FTA, whatever the cost to the rest of Australia.

Their campaign rests on the unfounded assertion that irreparable damage will be done by the flood of US material that will be free under the FTA to swamp the Australian performing arts on TV, film and new media resulting in a serious threat to Australians' ability to view local drama and other product. This is exactly the opposite of the outcome that is revealed in the agreement's fine print which has wrongly been held out to be where Australia was "done over" by the Americans; rather than "the devil being in the detail", the fine print clearly reveals the negotiators' achievement of significant cultural protection.

The FTA's fine print clearly shows that Australia is entitled not only to maintain its existing 55 per cent local content rules for free-to-air TV (effectively giving about a 25 per cent content to Australian drama) but also can extend it to up to two extra

channels if multi-channelling ever comes, thereby having the potential to treble the volume of Australian content on free-to-air. The fine print also gives the government the right to double the present 10 percent expenditure requirement on pay-TV drama to 20 per cent and to extend the 10 percent minimum to four new pay-TV areas -- the arts, children's programs, documentaries and educational programs. Similarly for commercial radio broadcasting,, the agreement permits Australia both to maintain existing, and introduce new, measures. And for new media, the Australian government can intervene in the future on interactive media services if adequate Australian content is not made available. Critics' attempts to cloud the issue by questioning the definition of "interactive" are demolished by the reality that interactive in this context is agreed as covering any program which can be accessed at a time determined only by the action of the consumer rather than the dictates of a scheduled program; ie. not a regular scheduled program.

The major flaw, however, in the criticism that the FTA's limiting of Australia's policy flexibility to prescribed increases poses a serious threat to Australian electronic content emerges from the deliberate refusal to provide the committee with evidence of the impact of pay-TV on free-to-air overseas, for example in the US and UK.

The main case against the FTA rests on the unsubstantiated assertion by arts activists to this committee that the prospect of a doubling of Australian pay-TV audiences from the present 25 per cent of homes to the US level of 50 per cent would result in such a loss of advertising revenue as to make it uneconomic for free-to-air to maintain their 55 percent Australian content, with the result that the Australian government would have to lower it, massively damaging Australian drama. One arts witness did concede to your committee that this may not happen for 20 years ("free-to-air TV will be the paradigm for the next 20 years").

The impact of pay-TV on free-to-air is an issue that is subject to detailed analysis by the major finance houses in both the US and Australia. There is no available evidence from their studies that I have been able to find that supports what is, in effect, no more than a badly informed guess by arts activists that free-to-air faces this economic crisis in Australia.

One such Australia-US study recently reported: "US evidence suggests free-to-air ad[vertising] revenues and costs per thousand [viewers] (CPM) have grown at a rate of 6 per cent compound since 1980. This is in the face of non-premium (ie non pay-for-view) TV penetration increasing to 85 percent in the same period. The UK experience shows us that since 1992 f-t-a ad revenues have grown at 3.6 per cent compound while CPMs have grown at 5.3 per cent. Both cases illustrate that despite pay-TV taking away f-t-a audiences, advertisers are still willing to place an above-CPI rate of growth on CPMs. We expect this revenue growth to be maintained".

Of two studies conducted in the US and UK, the US one showed that the continued growth in US f-t-a advertising revenues has been despite Pay-TV not only picking up all the 34 per cent population rise since 1980 but also taking away 8 per cent of what was then the f-t-a audience. The UK one showed that since the introduction of pay-TV in 1989, the expected reduction in f-t-a advertising revenues simply did not happen.

And for Australian f-t-a, the Australian study predicted a continuation of the last eight years' 3.7 per cent compound growth rate in advertising revenues. "although pay-TV has been in Australia since 1992 and the internet since 1997, the resultant fragmentation of audience has not caused advertising revenues for f-t-a networks to fall". It found a drop from 29.5 per cent to cent in commercial f-t-a prime-time viewers from 1995 to 2003 despite a rise in potential viewers from 11.78 million to 13.41 million, with the difference being made up by pay-TV with no net leakage of audience from TV to other media such as the internet.

The reason given in these studies for f-t-a revenues to keep rising despite falling viewer numbers is that as audiences fragment to pay-TV (most of the 40-odd Australian pay-TV channels get less than one percent of the TV viewing audience and are only useful for modest niche advertising) "the value of a given large audience goes up" and advertisers pay a premium in order to access the mass audiences that are only available on f-t-a. As a result, US pay-TV gets only 10 per cent of the advertising dollar despite having 50 percent of the TV audience. In addition, pay-TV stations may feel buyer resistance to excessive advertising levels that are accepted when viewers are not paying for the service.

The FTA's critics not only failed to provide this overseas evidence to your committee, they also failed to provide any analysis or forecasts by major Australian advertising agencies to support their guess about the future impact of pay-TV on f-t-a revenues.

Another furphy from critics of the FTA is the claim that governmental support for the arts is at risk, despite the fact that there is no reduction whatsoever under the FTA in Australia's ability to provide taxation concessions for investment in Australian film and television production or in the provision of public services such as in broadcasting (the ABC and SBS), public libraries and archives and that public subsidies and grants to cultural bodies and to Australian artists, writers and performers are unaffected. There is also the unsubstantiated claim that the FTA allows the US industry to access the funds of the Film Finance Corporation and the Australian Film Commission which has been denied by the responsible officials and has no basis in any of the fine print of the agreement.

The "consolation prize" the US got for failing to reduce Australia's cultural protection barriers is that while Australia has the capacity to increase its protection of Australian content to agreed limits, the US has been guaranteed that the Australian market will not be

closed to it in the future and that Australia will not introduce significantly restrictive new measures against US product.

For domestic political purposes in a Presidential election year, and in the hope of easing the FTA's passage through Congress, the US negotiators have naturally focussed on this guarantee of continued market access rather than their lack of success in knocking down our level of protection. Their comment that the agreement contains "Important and unprecedented provisions to improve market access for US films and television programs over a variety of media including cable, satellite and the internet" has been seized by the critics, who prefer to interpret this as a defeat for Australia rather than to read the reality of success evident in the fine print. It is curious that in an election year in both nations, Australian official assurances about the implications of the agreement are dismissed by Australian critics of the FTA in favour of the politically-oriented pre-election claims by a few American politicians!

It is significant that one of the objections by critics is that the FTA allows e-cinema to operate without limits. But as this will take place in an area of cinema that has traditionally been uncontrolled anyway, possibly replacing the need for film prints, it represents no change and no threat.

The Screen Producers' Association says the capacity to increase our protection is not enough and complains there is very little scope to extend the local content rules. With no supporting evidence whatsoever, it nevertheless complains that "The government could be prevented from increasing the commercial television sub-quotas on Australian drama, documentaries and children's programming (SMH Feb 10). So the SPAA "will continue to oppose the specific provisions of the agreement and will be seeking the support of the Opposition parties in this regard". So here is an industry whose existing protection against US imports has been fully maintained and even increased, but is nevertheless prepared to undermine the FTA no matter what damage this does to Australia's overall best interests. And without providing any substantive evidence, representatives of the Media, Entertainment and the Arts Alliance and the Australian writers Guild say the FTA threatens Australian culture (SMH 10/2).

This element of their anti-FTA case depends on their curious redefinition of the word "consultation" with the US to mean "granting the US the power to prohibit". The FTA does no such thing. Consultation before making significant changes is a proper element in an agreement so that any case against that change can be considered before it takes place. Australia's politically activist actors and producers publicly expressing their ill-informed but highly imaginative objections to the US Free Trade Agreement in such forums as the Logies awards should do what they do best -- stick to the script; the actual written words in the agreement are far more realistic than the "unreality" show they have been putting on since the FTA was successfully negotiated.

THE PHARMACEUTICAL BENEFITS SCHEME

The theme repeated throughout the agenda-laden submissions and evidence of FTA critics is that the FTA will cause not only significant price rises for drugs in Australia but that the fabric of the PBS is being put at risk -- despite agreement by both the US and Australian officials that the architecture of the PBS is not to be affected by the FTA and denials by Australian officials that the FTA will lead to higher drug prices.

The sources of these repeated claims appear to be a flawed series of polemics masquerading as research from the left-wing think tank the Australia Institute (Drug Prices to Double under the FTA), and a set of fanciful hypotheticals by an ANU academic, who is also associated with the Australia Institute that ignore the key elements of the agreement, and an emotional rather than rational attack by a medical practitioner and academic active in the consumer movement on Australia having links with the US which he claims has the world's worst public health system. He does not mention that it is the world's greatest source of research-based breakthrough life-saving drugs.

I'll deal with the issues claim by claim:

Claim: The review process under the FTA for listing pharmaceuticals gives US pharmaceutical companies the opportunity to force price rises and new drugs at prices not justified by pharmacoeconomic evidence and that Department of Health and Ageing's assurances that the review process will not be able to overturn a PBAC decision is unsupportable.

Answer: DoHA is correct. The structure of the review process is entirely a matter for the Australian government, apart from the requirement in the FTA that it will be independent. Nothing in the FTA gives the review process any power to overturn a PBAC recommendation to the Minister and the Minister remains the only person capable of making a determination -- and that must be and will continue to be, on the recommendation of the PBAC.

Claim "If reviews cannot result in PBAC decisions being overturned then what is the point of them?"

Answer: Greater transparency of process, in keeping with the near-universal trend to having administrative decisions subject to appeal in Australia and meeting the old Industry Commission's conclusion that "The lack of administrative appeal processes for recommendations of the PBAC reduces transparency and accountability. There are complaints, noted by the Audit Office and the Industries Commission, about the bureaucratic delays in decisions by the PBAC, let alone the complaints from patients, often featured in the popular media, about the non-listing of some drugs. The public, and medical practitioners, will now be able to be better informed.

Claim: The review process will result in the "numerous lawyers, large budgets and formidable public relations machines" of US pharmaceutical companies wearing down the PBAC.

Answer: The review process is to be independent of the

PBAC and not amenable to other than the same sort of submissions made to the PBAC, to which the outcome of the review must be submitted. There is no basis for claiming that the PBAC would be under any more pressure from the US industry than currently exists -- possibly less, as the pressure for lengthy internal reviews may be considerably diminished once there is a formal review process -- with the possible result that final listing decisions may be quicker.

Claim: Disputes between the US and Australia over the effectiveness of the review system could lead to the fate of Australia's PBS being in the hands of a three-person international dispute resolution panel, so that the fundamental principles of the PBS may be irrevocably altered.

Answer: The wording and spirit of the FTA leave the nature of the independent review entirely to the Australian government to establish; there is no prospect that an Australian government would risk dispute intervention by failing on the one central criteria -- that it be independent. There is no capacity for a dispute to be initiated under the words and spirit of the agreement in the event that the US protests that the review procedures set up by Australia are shown not to be capable of overturning a PBAC decision. The facts are that under the basic architecture of the PBS which both sides of the agreement have publicly acknowledged cannot be affected by the FTA, the Minister is and remains the only person capable of making decisions and then only on the recommendation of the PBAC (which has no power to make decisions on listings, only to make recommendations to the minister). Under the basic architecture of the PBS, no review committee can usurp this power or, under the FTA, be expected to do so. In any event, in the highly unlikely event of a successful use by the US of the disputes mechanism relating to any element of the PBS, it need not be resolved by alterations to the PBS; there are many alternative penalties, including financial, an Australian government may prefer to take if it is determined, as the present one is, to protect the PBS. It is absurd to put this as a serious threat posed by the FTA that merits its rejection by Parliament..

Claim: The FTA's endorsement of the existing rule that the industry can apply to the PB Prices Tribunal for price adjustments means that the US expects that under this clause it can "instruct the PBPT to recognise the value of innovative pharmaceuticals by adjusting the price upwards".

Answer: This is nonsense, because all the FTA does is put the present system, which is subject to administrative tampering at any time, into the cement of a difficult to change international agreement. And the same goes for all the other instances where the FTA simply confirms existing processes -- but which some ill-informed critics say should be voted out as purely "cosmetic".

Claim: That US officials believe the US-Australian officials working group to be set up under the FTA

"will lead to drug price hikes", based on a US Senator's comment that consumers in the rest of the world should carry some of the cost burden of the expensive R & D burden of US pharmaceutical companies -- and that there is no merit in linking with the world's worst health system.

Answer: There is nothing in the fine print of the agreement to provide any potential for the official working group to have any capacity to change anything. Its role is purely advisory, but provides Australia with an opportunity to be informed about the most innovative R&D-oriented health community in the world

Claim: Subtle changes in patent law will make it harder for, and delay access to, cheaper generic drugs when brand-name patents expire, at substantial cost to Australian patients and the PBS.

Answer: The DFAT website on the FTA says "The agreement reinforces Australia's existing framework for intellectual property protection of pharmaceuticals", and there are very few additional requirements. It is true that new provisions under the FTA will not only prevent entry of a generic before the patent on the original product has expired, which is existing Australian patent law, but will also require notification to patent owners. The suggestion that this could encourage time-consuming and phoney legal challenges that delay the introduction of lower-priced generics is a matter for resolution, by way of damages, in the courts -- or if proved necessary, by legislation.

Claim: The American push to increase Australia's already high standard of intellectual property protection is really aimed at "weakening the PBS and raising pharmaceutical prices".

Answer: Whatever the objective may be, the outcome is that, beyond some possibly minor delays in a few instances of disagreements over the expiry of some drug patents, there is no potential for delays of a nature that would have any impact of substance on the general level of pharmaceutical prices -- and would certainly not weaken the PBS. It is entirely up to the Australian government to determine whether the PBS should be strengthened or weakened, whether it should receive greater financial support or less; the FTA does not directly affect the basic architecture of the PBS -- only the government (or, by inaction on essential reforms, the parliament) can do that.

Claim: Transparency in the listing process will only be acceptable if the pharmaceutical industry abandons its commercial-in-confidence restrictions on product information.

Answer: It is in the national interest to balance the benefits of full public information that is of major benefit to practitioners, with the potential disadvantages of damaging the principles of intellectual property that are a major factor in encouraging the private sector to spend so much on the expensive R&D that has led to the introduction of so many life-saving drugs. If a requirement of full disclosure discouraged some drug companies from seeking to have their products listed on our PBS so that few Australians could then afford them, that outcome may not be in the national interest. This is an issue which is raised by the FTA, but not an element in

determining the merits of the FTA, that requires consultation among Australian stakeholders.

Claim: The reference pricing system under the PBS is at risk and must be strengthened.

Answer: As reference pricing is part of the basic architecture of the PBS, it is immune from change under the FTA. In any event, there is nothing in the FTA wording that puts it at risk, despite unsubstantiated allegations that proposed changes to the intellectual property regime do so.