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SENATE

SELECT COMMITTEE ON THE FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND THE UNITED STATES OF AMERICA

(Subcommittee)

Reference: Free Trade Agreement between Australia and the USA

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SENATE

SELECT COMMITTEE ON THE FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND THE UNITED STATES OF AMERICA

Tuesday, 8 June 2004

Members: Senator Cook *(Chair)*; Senator Brandis *(Deputy Chair)*; Senators Boswell, Conroy, Ferris, Harris, O'Brien and Ridgeway

Senators in attendance: Senators Brandis, Cook and Ferris

Terms of reference for the inquiry:

To inquire into and report on:

1. The Free Trade Agreement between Australia and the United States of America to ensure it is in Australia's national interest; and
2. The impacts of the agreement on Australia's economic, trade, investment and social and environment policies, including, but not limited to, agriculture, health, education and the media.

WITNESSES

BRENNAN, Mr Geoffrey, Adviser, Australian Film Industry Coalition; and Member, Interactive Entertainment Association of Australia 2

GIBBS STEWART, Ms Christine, General Manager, International Trade and Business Solutions; Australian Business Ltd 18

GOULD, Mr Stephen George, Chair, Management Committee, XLM and E-commerce Special Interest Group, Open Interchange Consortium 70

GRIFFITHS, Mr Ellis John, Director, Planning and Policy, Department of Culture and the Arts, Western Australian Government 26

HALL, Ms Karen, Principal Policy Consultant, State Development Strategies, Department of Industry and Resources, Western Australian Government 26

JENKIN, Ms Beverly, Chief Executive Officer, Interactive Entertainment Association of Australia 2

JUDGE, Mrs Petrice Anne, Executive Director, Office of Federal Affairs, Department of the Premier and Cabinet, Western Australian Government 26

KENNEDY, Mr Philip Grant, Convener, Australian Film Industry Coalition 2

KILBY, Mr James Pitt, (Private capacity) 88

PATTERSON, Mr Murray, Chief Pharmacist, Department of Health, Western Australian Government 26

PEACH, Mr Stephen Philip, Chief Executive Officer, Australian Record Industry Association 2

REID, Mr Sean Edward, Principal Labour Relations Adviser, Policy and Economic Analysis, Labour Relations Division, Department of Consumer and Employment Protection, Western Australian Government 26

STEINGIESSER, Mr Henry, Executive Director, Trade and Development, Department of Agriculture, Western Australian Government 26

STOLER, Mr Andrew L., (Private capacity) 52

TSONIS, Dr Con, Group Marketing Manager, Bioscience, Baxter Healthcare Pty Ltd 66

WILLIAMS, Mr Michael, Representative, Australian Film Industry Coalition 2

WYLIE, Dr Brenton Russell, National Blood Products Manager, Australian Red Cross Blood Service 79

YOUNG, Ms Ruth, Principal Policy Officer, Office of Federal Affairs, Department of the Premier and Cabinet, Western Australian Government 26

Subcommittee met at 9.05 a.m.

CHAIR—I declare open this meeting of the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America. Today in Canberra the committee commences the seventh of its public hearings. The terms of reference set by the Senate are available from the secretariat staff. Today's hearing is open to the public. This can change if the committee decides to take any evidence in private. Witnesses are reminded that evidence given to the committee is protected by parliamentary privilege. It is important for witnesses to be aware that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. If at any stage a witness wishes to give part of their evidence in camera, they should make that request to me as chair and the committee will consider that request. Should a witness expect to present evidence to the committee that reflects adversely on a person, the witness should give consideration to that evidence being given in camera. The committee is obliged to draw to the attention of a person any evidence which in the committee's view reflects adversely on that person and to offer that person an opportunity to respond. When witnesses are first called upon to answer a question, they should state clearly their names and the capacity in which they appear. Witnesses will be invited to make a brief opening statement to the committee before the committee embarks on questions.

[9.07 a.m.]

BRENNAN, Mr Geoffrey, Adviser, Australian Film Industry Coalition; and Member, Interactive Entertainment Association of Australia

JENKIN, Ms Beverly, Chief Executive Officer, Interactive Entertainment Association of Australia

KENNEDY, Mr Philip Grant, Convener, Australian Film Industry Coalition

PEACH, Mr Stephen Philip, Chief Executive Officer, Australian Record Industry Association

WILLIAMS, Mr Michael, Representative, Australian Film Industry Coalition

CHAIR—I welcome our first witnesses from the Australian Film Industry Coalition. I see from my program that you are joined by ARIA, the IEAA and the BSAA. As you are sitting in the middle, Mr Brennan, are you leading the group?

Mr Brennan—In a sense, yes. I am a quasi-convener.

CHAIR—But all of these organisations will wish to speak in their own name.

Mr Brennan—Yes.

CHAIR—We have your submission and we have had a look at it. You now have the opportunity to address us on it.

Mr Brennan—Thank you. Before I begin, let me ask my colleagues to introduce themselves.

Mr Speck—I am the General Manager at Music Industry Piracy Investigations, which is the sound recording industry's antipiracy operation.

Mr Peach—I am the Chief Executive Officer of the Australian Record Industry Association. The association represents the Australian recorded music sector. We have close to 100 members comprising the local subsidiaries of five multinational companies, two leading Australian independents in Festival Mushroom Records and Shock Records, and about another 90 smaller labels. As such, we represent the broad interests of the sector.

Mr Williams—I am a lawyer from the law firm Gilbert and Tobin and I appear here in the capacity of representing the Australian Film Industry Coalition.

Mr Brennan—I am with the company Gavin Anderson and Co. I am here in my capacity as an adviser to the Australian Film Industry Coalition and the Interactive Entertainment Association of Australia.

Mr Kennedy—I am the Convener of the Australian Film Industry Coalition. The coalition represents the Australian film industry; producers—both majors and independents; theatrical exhibitors; theatrical distributors; and video and DVD distributors and retailers. I am also Manager of Business and Legal Affairs at Roadshow Films.

Ms Jenkin—I am the Chief Executive Officer of the Interactive Entertainment Association of Australia. We are an Australian not-for-profit trade association dedicated to serving the business and public affairs needs of companies that are responsible for the sales and marketing distribution and development of computer and video game software, hardware and accessories. We have the major players in Australia and we represent an industry market that in 2003 earned somewhere in the region of $796 million—that is, $2.1 million per day or $106 per household per year. So we believe we represent a good 99 per cent of that particular industry in Australia.

Mr Brennan—Our colleagues from BSAA were unable to attend but, in view of the fact that a lot of the issues here are fairly common across the sector, they have asked us to look after their interests. If there are particular questions relating to business software we will take them on notice and pass them on. I do not think we have any particular opening statement but I would like to make the comment that, as a very mixed group, we approached the negotiation of the FTA with the intent of seeking to secure from it an outcome that would help grow and develop business and promote investment and employment, and we believe the outcome of the negotiation has secured the tools that will enable us to do that. We find the outcome is very positive for our industry and puts us in a better position to take advantage of the business opportunities in the coming years for our industry, both in investment and in employment. It is also worth bearing in mind that, in seeking our goals and outcomes in the FTA, we negotiated in detail with both the US and the Australian governments. So we believe this is a very strong outcome for our industries.

CHAIR—Does anyone else wish to address their written submission lodged with us?

Mr Williams—I would like to add to what Mr Brennan has said and I will address a couple of points that specifically relate to the Film Industry Coalition submission. The first point is that, as we say in our submission, the coalition views the FTA provisions as a total package with interrelated provisions that cannot be picked apart piece by piece according to particular likes or dislikes. Fundamentally the FTA process and the FTA provisions involve a balancing across a number of different interests and priorities, both for copyright owners and for users and other interest groups. We would view with great concern a suggestion, which perhaps has already been made to this committee, that some of those foundations could be excised without affecting others. I will provide an example. In the contexts of Internet enforcement and online responsibility there are a number of different interests that operate together whenever there is evidence or suspicion of Internet piracy. One is the interest of the copyright owners to identify those involved in infringing activity. Another is the interest of ISPs to protect themselves or investigate. In broad terms we see a need to keep together the relationships underlying those provisions and not abandon them in this process.

The second short point is that we do not believe that the FTA provisions will revolutionise the Australian copyright position. They will not revolutionise it when it comes to online infringements and they will not revolutionise it when it comes to circumvention measures. What they do is expand some areas and they also provide some greater detail—for example, in the

online environment. The third point is on a very contentious issue, which is the liabilities of ISPs and safe harbours. We see those safe harbours as an essential trade-off for other obligations that we believe should be maintained and implemented to their fullest. They are the obligations to control or monitor to the extent possible activities of individual customers of ISPs and also to take appropriate action where that information comes to the knowledge of ISPs along the way. Perhaps some of the submissions that have been put forward raise more extreme, and in our experience hypothetical, examples of how Internet service providers might be exposed to liability to their customers, when no real world examples have ever existed to our knowledge.

There is then the issue of how to regulate. In short, we do not believe that leaving the regulation of the online liability arena to the industries is the appropriate course. The industries have tried over many years to negotiate a code. Some of my colleagues here will address that point in due course. Essentially, the FTA process is one which would enable a super-imposition of a scheme which has been operating in the United States and which will not be delayed by further negotiations between the industries.

In addressing the question of anticircumvention provisions, we note that the committee has had many submissions, both oral and written, on these issues. I make these couple of points in summary in addressing our paper. The first is that the principal change in the anticircumvention or technological protection measure arena which would be the result of the FTA implementation is to bring Australia into line with the rest of the world, with the major copyright law countries around the world, that make it an infringement to circumvent technological protection measures as well as dealing in devices that have that effect. There is no evidence of which we are aware anywhere in the world to the effect that extending those provisions to prohibit the use of a circumvention device would have, or has had, significant impact on consumers or other interest groups, and it would certainly deny access to information.

The second point is that the Film Industry Coalition has lobbied extensively over the last two years in support of the extension of these provisions to use of a circumvention device. We believe there are very sound reasons for that in copyright law alone. Perhaps articulating it at its simplest, one of those reasons is that the current provisions in Australia, by not affecting the activity of circumvention itself, leave open and create a potential ambiguity for consumers who are not prohibited from circumventing protections on copyright works but simply cannot deal in devices that have that effect. Under our copyright law scheme as it has existed in Australia, we have both primary and secondary infringements for other forms of copyright infringement. In other words, it is a primary infringement to copy or reproduce a copyright work without licence; it is a secondary infringement to actually deal in an unauthorised copy, to put it at its simplest. The ambiguity in the circumvention provisions is that there is a mixed message, we believe, being sent to consumers where there is no prohibition of the act of circumvention even though the provisions only address the question of devices.

As a final point, we believe there is a real irony in some of the current debate before this committee on the part of various interest groups who are opposed to the circumvention provisions and in fact are seeking the ratcheting back of those circumvention provisions. I leave the committee with this thought: five years ago, the great debates in the copyright world were about how copyright owners could protect themselves in the digital world from potentially infinite perfect copyright infringements from any given work, whether it be a sound recoding or a film. Copyright owners were strongly encouraged to take matters into their hands and develop

technologies to limit and prevent copying. In fact, many interest groups these days still press that as a primary obligation of the copyright owners. Having done so, and having spent enormous amounts of money investing in those technologies, the coalition sees it as rather curious that there are now many suggestions that the whole regime should be wound back. We feel that, in a sense, this has turned a full circle from where it has been.

CHAIR—Thank you, Mr Williams. Does any other representative wish to enlarge on the submission?

Mr Peach—I would simply like to endorse the broad scope of what Mr Williams was saying about some of the issues that have come before this committee over its last few sessions and to amplify that, from our industry perspective, a lot of these issues are about creating an environment that allows investment—continued investment—and, hopefully, growth in the recorded music sector, particularly as our sector, perhaps more than some of the others at the moment, is rushing headlong into Internet based distribution, meaning we are obviously under challenge from other Internet based distributors who choose not to pay for the copyright licences. The measures that are contained in this agreement will certainly assist our sector in protecting that investment, encouraging the growth of legitimate online businesses and moving industry forward. Beyond that I will not say much more at the moment.

Mr Speck—I would like to make some short observations. It seems that we have another opportunity to revisit a debate on the Internet industry that has been had many times before. The sound recording industry has been negotiating a take-down protocol with the Internet service providers for at least four years, not 18 months. Negotiations have never been concluded because the Internet industry cannot accommodate our view of the immunities, liability or otherwise that should exist. The Internet industry is the principal beneficiary of the traffic in illegal sound recordings on the World Wide Web or Internet. As much as 20 per cent of ISP customer activity is driven by this.

It is trite to say that there is a vast quantity of copyright infringements on the Internet. Our web surveillance program in the year 2002, for example, identified and took down 700 million infringing files globally. The Internet industry, unlike any other industry, does not want to be held responsible for transactions on the infrastructure that it profits from. The industry speaks of immunity as a divine right and hopes that, in uttering the word 'immunity', it becomes a fact—without question.

The Internet industry routinely tell the sound recording industry or its investigators that they are unable to identify customers who infringe sound recording copyright. These are the very same customers they can identify for breaching download limits, the very same customers they can identify for online advertising, the very same customers they can target for a raft of other commercial activities and the very same customers they can identify in the cybercrime protocol for police—and the information that we need is the very same information that they provide in the cybercrime protocol but that they tell us does not exist.

The Internet industry already submit themselves to a pro-forma take-down protocol. We have for five or six years sent a single document—a one-page letter—to ISPs in Australia and indeed many other countries around the world when we have identified sound recording copyright

infringements, and invariably Australian ISPs take that material down without complaint within 24 hours. Yet they come to this committee and revisit the entire issue.

They further accommodate their own concerns, and I suggest the most fanciful is their fear of being sued by a customer for wrongfully taking material down. Apart from the protection afforded by section 202 of the Copyright Act, most ISPs protect themselves with comprehensive terms and conditions. I have an analysis of those terms and conditions of the ISPs that constitute about 70 per cent of the market that I would like to tender. In all cases the ISPs in this document prohibit copyright infringement—I should say in almost all cases—and require the customer to indemnify the ISP against any loss caused by infringements. There is also a take-down right, a termination right, a limitation of the ISP's liability to the customer, a right to disclose personal information to copyright owners, a right to investigate and in almost all cases a right to unilaterally amend the terms and conditions of a consumer agreement.

In short, as an industry they cannot be better protected than they have already protected themselves in the process. They cannot be surprised by any of the provisions in the FTA. They imply variously that they are unwilling participants in the American legislation, when in fact they were one of the loudest voices. When asked by this committee what they want from this process they said that they only want better immunity, but they already have the best possible immunity you can have. All that you can give them by displacing the process with the recommendations that are in place or the legislation that now exists is the kind of immunity that no other business gets, and that is immunity from any responsibility for activity you profit from, you facilitate and you require your customers to indemnify you from.

CHAIR—Ms Jenkin or Mr Kennedy, you are the only two who have not spoken. Do you wish to take the opportunity to do so?

Mr Kennedy—I just want to reiterate from the Australian film industry's perspective that we make a major investment in producing quality films and recoup that investment significantly through DVD sales. We see the Internet and the ability to distribute films via the Internet as an opportunity that we wish to protect and we see the free trade agreement provisions assisting us in doing that.

Ms Jenkin—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.

Interestingly, Mr Speck commented today about their liability and indemnity from their customers, and they already have that. That has been the argument when we have gone into

discussions. We have been disappointed with their inability to finalise the negotiations in which we thought we were working towards a positive result with them last year. Despite their claims otherwise, they withdrew from those negotiations. I would like to make that statement here. Also, we are very much in favour of the tighter controls in circumventing the technological protection of copyright material. Apart from that, we endorse everything that has been said by this group.

CHAIR—Yesterday we had the Australian Consumers Association before us, speaking on behalf of consumers. Clearly, that is a demographic that we as legislators have to listen to and take account of. Their argument in this area was that the treaty requirements as they are now set out do not take account of the fact that, while in the United States you have a constitutional right to free speech, there is no equivalent constitutional right in Australia, and, while in the United States you have fair use legislation, there is no equivalent fair use legislation in Australia. They say that to impose this set of conditions upon Australia without those safeguards for consumers would be unfair. I think that is a reasonable exposition of their point of view. It seems a reasonable point of view to me. What do you gentlemen and Ms Jenkin have to say about that?

Mr Williams—As to the second issue first, I would like the opportunity to clarify an issue which we have certainly seen present itself before the committee extensively in this process, and that is the discussion about the fair use legislation in the United States. Without professing to be an expert in US copyright law, I can say that there are very strict guidelines that apply in the US context to making copies of copyright works. One of the most popularly held misconceptions is that the notion of fair use in America enables a consumer to make multiple copies of, for example, a DVD or a CD. In fact, it does not. There are specific legislative procedures which mandate technology that allows only one type of copying to be made at a time, so in the case of a CD the digital home recording act specifically says a first generation copy can be made and no more. What I would say in answer to this issue of fair use is that it has no wider operation in practice with respect to the copyright works we are talking about here than would be the case in Australia.

CHAIR—So you are putting to us, Mr Williams, that we do not need to duplicate the American fair use legislation because we already have it. Is that what you are putting to us?

Mr Williams—I am putting a slightly different point, which is, in practice, the fair dealing law in America does not permit the kind of copying and consumer level copying that is being suggested by the Consumers Association. In fact, there are strict safeguards to protect the copyright industries from the proliferation of infringing copies—

CHAIR—I understand the point, but essentially you are saying they have misunderstood the American legislation and the rights it confers on American consumers; therefore, they have a wrong impression of what is required to protect Australian consumers.

Mr Williams—Yes.

CHAIR—That is essentially your argument?

Mr Williams—Yes.

Senator BRANDIS—I think, in fairness to the gentlemen from the Australian Consumers Association, none of them were lawyers and certainly none of them purported to be experts in intellectual property law.

CHAIR—That is true, but you will recall, Senator Brandis, that Mr Williams is.

Senator BRANDIS—That is the capacity in which he appears before us.

CHAIR—That is a matter of fact and it is an observation of fact. Thank you very much for that. It is also distracting me a little from my—

Senator BRANDIS—Sorry, Senator Cook. I did not mean to interrupt your train of thought.

CHAIR—I know you did not, and I did not mean to confess that you had either. When we had the department of communications here I put a series of questions to them. You may—and I do not know whether you have or not—have seen the *Hansard* of that hearing. I do not have all those questions to hand but one, for example, referred to my having to leave Perth, my hometown, on Sunday just as the delayed telecast of the Melbourne-Dockers football match was being broadcast in Perth. I know Mr Brennan had the advantage of seeing that live; I did not. I asked for it to be recorded so I could see it when I returned. I am advised that in so doing I am in breach of copyright. To me that seems a common practice. Maybe I am just commonly, like everyone else, in breach of copyright.

It was unfortunate that I was not able to be in one place at the relevant time. Being able to record the match and watch it later is a service that I appreciate. It was a delayed telecast. However, even if it had been live and there were ads inserted into it and I recorded the whole broadcast including the ads, according to the department of communications I would have been in breach of copyright. And if, as there were—I assume because it is the pattern of this type of broadcast—action replays inserted into the live sporting telecast I would have been in breach of copyright if I had copied it.

My understanding—and Senator Brandis is right, I am not a lawyer; nor was the ACA person—is that the American fair use legislation would protect me in those circumstances whereas, according to the department of communications, in Australia I am exposed. And the reason no action is taken against me and millions of other Australians who do this is that it is not worth recovering the damage to copyright in a single-use instance. That is the explanation given to me. You seem to be putting a different complexion on it, Mr Williams. Why I have laid that out somewhat at length is to enable you to dissect it and tell me where you think it is right or wrong.

Mr Williams—At length.

CHAIR—At whatever length it takes you to do it.

Mr Williams—I will try to be as brief as I can. The advice you have been given from the department about that being an infringement of copyright is correct. Under Australian law it is likely to be an infringement of copyright. Under the US law it is likely not to be an infringement of copyright by reason of the fair dealing common law. However, what I was putting to the

committee was not in relation to recording a broadcast for viewing of the broadcast later but the key issue of making copies of the copyright works themselves. The best indication of this is perhaps the likely damage and harm suffered by the copyright owners and why, with respect, we would suggest that that is not a serious or a critical focus either of the copyright industries or of the Australian copyright law. That is because when copies are made of copyright works particularly in a digital form they can be freely distributed as many times as they will. One of the great difficulties is that it is very difficult to restrict distribution, particularly under copyright law, unless the copy itself that has been made is infringing.

To put it at its simplest, if there were a right, Senator, for you to make a copy of a CD, a DVD, in addition to a program recorded from a television broadcast then it would make it incredibly difficult for the copyright industries and owners to restrict your distribution of those copies. That is because all of copyright law depends on restricting illegal copies, not restricting legal copies.

CHAIR—I will farm the call out to my colleagues but can I just come to this point first. You will have to bear with me, Mr Williams, because I am not a lawyer but I have always taken the view as a legislator that unless it is clear to me it is not likely to be clear to a lot of other people. There are a lot of people much brighter than me that it is obviously clear to instantly, but what it not clear to me about that explanation is that if I were in America in analogous circumstances I would not be infringing copyright because of the fair use legislation but because I am in Australia in the circumstances I have laid out I am. That is the bottom line, isn't it?

Mr Williams—It is, because of the specific way in which the fair use legislation has been found to apply to that precise scenario. Perhaps I can put it another way. The fair use legislation in America is not free ranging; it does not, for example, say, 'I am a consumer, I have bought a CD and therefore I can make as many copies as I like for myself or my friends or whatever.'

CHAIR—I am not talking about people who misunderstand the American legislation. I am talking about what I regard as the common use of the ability to record, in absentia, programs that you want to watch later, for your own use. I am one of those people who believe that legislators actually have a harsher standard of law to uphold and that, if we break the law, more serious penalties should be visited on us because we as law makers are expected to be paragons. So I apply a higher standard to myself—and here I am carrying around a burden that I am a serial infringer of copyright. I do not like that burden, and I could remove it by simply doing what the Americans do, couldn't I?

Mr Williams—No, what the Americans have done is allowed the court to recognise a fair dealing if someone defers the watching or the viewing of a television program—that is what they have done.

CHAIR—Is that jurisprudence arising from their fair use act?

Mr Williams—It is jurisprudence arising under the American copyright law. Fair use under American copyright law has always been given a slightly open-ended set of provisions, so that the courts—

Senator BRANDIS—It is based on the same concept, isn't it? It just applies differently because the scope of the application of the doctrine varies between jurisdictions.

Mr Williams—It varies in the way in which it is applied by the courts. Under the Australian scheme—and the committee has already been extensively addressed on this issue so I will not cover that ground—fair dealing is given a very specific framework. Under the American scheme it is left open-ended, to an extent, for courts to apply.

CHAIR—Okay. I have abused my position by taking up too much time, but the message I am hearing is that we do not have the same rights as the Americans. Whichever way those rights are arrived at—by judge-made law or black-letter law—we do not have the same rights. And if we are going to accept a series of changes to our domestic law which brings us into conformity with American law, then if conformity is the requirement it seems to me that ought to extend across the board. You treat unequals equally and you perpetuate the inequality. So if our laws are not the same in terms of consumer rights but you apply a common standard, you perpetuate, on that principle, the inferior rights of Australian consumers.

Mr Williams—There will be a myriad of differences between Australian copyright law and American copyright law even after the FTA provisions.

CHAIR—Yes.

Mr Williams—So I would suggest that in fact that is one example—and, with respect, a most extreme example—of a series of different uses that consumers may want to put their copyright works to.

CHAIR—You are suggesting it is a extreme example that I—

Senator BRANDIS—It is a pretty commonplace example. Lots of people do that.

CHAIR—Lots of people do it. In fact, there is a bipartisan view that lots of people do it.

Senator BRANDIS—I am not saying they should. In fact, you should not, Senator Cook.

CHAIR—I know I shouldn't.

Mr Williams—I feel at this point I should actually caution the committee!

Senator BRANDIS—The problem is that Senator Cook has told this anecdote to every group of witnesses who have addressed us on intellectual property. He is obviously driven by some Dostoevskian urge to purge his guilt.

CHAIR—That is probably true.

Mr Williams—Or mindful of privilege.

CHAIR—I actually believed I was acting lawfully until I was told that I was a copyright infringer. I do not like carrying that burden, you are right, Senator Brandis. You now have the call.

Senator BRANDIS—I have two areas to raise. First of all, on the point you just made about the myriad differences that there will continue to be between Australian and American law: do you nevertheless think that, if Australia does subscribe to the FTA, with the passage of time greater and greater consistencies will evolve between Australian and American intellectual property law, either as a result of the operation of the agreement itself or as the synergies between the industries in the two countries become closer? Is our law more likely to merge with the American intellectual property law if this agreement is ratified?

Mr Williams—In my view, no. Clearly there will be areas where there appears to be more synergy because the underlying provisions look the same, and there might in fact be identical wording. But we have an entirely different court system, we have our own courts and our own judges, and our own established copyright law. In my view, as I have said before, there will remain a myriad of differences between those. Even US decisions on identical language will not automatically be imported into Australian law as law.

Senator BRANDIS—Mr Williams, is it customary in intellectual property cases in Australia—I just do not know—for the courts to seek much guidance from the American authorities at the moment?

Mr Williams—I think it is too difficult to answer that question generally. There are certainly examples of American authorities that are brought before Australian courts, particularly in the copyright area. But they are not, I would suggest, given undue weight. In fact, they are perhaps not given any more weight than decisions of other countries.

Senator BRANDIS—The second question I had is perhaps for you, Mr Brennan. At an earlier hearing we had a representative of the Australian Society of Authors, who at least claimed to speak on behalf of authors. This particular witness was quite hostile to the FTA and was not persuaded that the greater protection of the intellectual property rights of authors was a sufficiently attractive consideration, having regard to the limitations that she said the FTA would impose on the research use of copyrighted works. Without getting into that debate, I was just wondering if anyone can tell me this: among the total class of copyright owners and persons or entities whose intellectual property is protected in Australia, what are the relativities in terms of the size of trade between the written word and recorded works or works of the kind that it is in your industry's interests to protect? In other words, is the amount of trade in Australia in records or recorded works more substantial than the volume of sales and books? Is there a disaggregation of the total class of intellectual property protected as between the different sectors? Are you able to tell us?

Mr Peach—I do not know that anyone at this table would be aware of an aggregated market for intellectual property and how it is broken down into particular sectors. Perhaps we could take that question on notice and see whether we can dig up some information. Certainly, from the record industry's point of view, we have a fairly good idea of the size of the recorded industry market.

Senator BRANDIS—What is the size? It is in your submission, I think. What is the total value of the industry this year?

Mr Peach—It is of the order of 650 million, I think, but I would just have to check that. I can certainly let the committee know the exact numbers.

Senator BRANDIS—Of that 650 million, would it all be material that is protected by some form of intellectual property right?

Mr Peach—Yes. That is the recorded music sector, so it would be made up of primarily audio recordings. An increasingly important part would be the growth of music DVDs, which are an audiovisual product but still primarily music focused.

CHAIR—I think the value of the Australian music industry has just shot up overnight as ALP members rush out to buy the complete works of Midnight Oil.

Senator FERRIS—Once they read the words they may wish they had not. I am not sure who I should put this question to, so I will begin with you, Mr Brennan, but others may wish to comment on it. We had some evidence yesterday from Dr Peter Brain, who has done some research on the text of the free trade agreement and has reported to us that amongst other things the free trade agreement would be very bad for Australia. He suggested that the knowledge based industries would suffer significantly 'with American companies likely to overwhelm their small Australian opposition, wipe out competition, withdraw domestic investment and take profits offshore'. Who would like to comment on that?

Mr Brennan—I will make an opening comment and others might want to contribute as well. I saw that coverage only this morning in the newspaper and I really need to see the detail of what he actually based his conclusions or thoughts on. I am extremely surprised by what is there. It is not the view of the world that we have. We believe that what in fact is in the FTA provides us with the ability to explore and pursue business models which allow us to actually deliver to consumers better product through better means—for example, through the Internet. That this growth, that is employment and that is good for Australia. But we really need to take that on notice so we can sit down and read more detail as to how the good doctor came to his conclusions. I just find it is a rather blinkered view of the world and not one that we would share. In fact, it is worth making the point—and this comes back to a comment Senator Cook made earlier in relation to the consumer association—that they do not have a monopoly on the views of consumers. You have before you now industries which work very closely on delivering a product to consumers that they are looking for. They are interpreting market trends to ensure that consumers have access to a quality product in a timely manner. That is what the industries basically drive themselves on. I think that the views you have here are very important in looking at what are the best ways to deliver product in Australia in the new environment.

Senator FERRIS—It was interesting that the Consumers Association revealed that they have 500 members but had not actually consulted with them, so their views would not be entirely consistent with those of the rest of the Australian population, I would have thought.

Senator BRANDIS—There are 20 million consumers in Australia.

Senator FERRIS—Quite so, Senator Brandis.

CHAIR—I do not think anyone ought to go into this line of questioning because I could ask all of you gentleman how you decided things in your organisations. It is an endless question.

Senator FERRIS—Yes, but I did think it was interesting that that was a very small number. Would somebody else like to comment on Dr Brain's comments?

Mr Peach—I have not read the report, but I could put the view of the recorded music sector. As I mentioned in my opening address, we have five local subsidiaries of multinational corporations being key members of the Australian Record Industry Association. Each of these companies, despite the fact that they are primarily owned offshore, invests heavily in Australian recordings. From what we can see, there is nothing in the FTA that would change their investment decisions. Indeed, we see that a lot of the success of the local companies is driven by local recordings. We have in Delta Goodrem an artist whose record was the largest selling record of all records last year. She sold over a million copies in Australia alone of that album, her debut album, in a market this is about 50 million CDs at the moment. Investment in Australian artists is a key driver of the revenues and, ultimately and hopefully, the profitability of the sector in Australia, whether they be local subsidiaries of multinational companies or, as the rest of our members are, Australian companies investing in Australian recordings. I do not see, certainly from the view of our sector, that there is any validity in the observation that the FTA will result in those five members and perhaps others deciding that they are not going to invest in Australian product anymore.

Senator FERRIS—Gentleman and Ms Jenkin, after you have had an opportunity to have a look at the finer details of Dr Brain's submission, we would appreciate any other comments that you might like to make. I appreciate that I have given you only a summary and that the newspapers have only carried a summary this morning. I am also interested to hear whether you think the agreement provides an appropriate balance between the interests of copyright owners and of ISPs, particularly on the issues of the take-down and safe harbour provisions, the circumvention devices and the criminal enforcement provisions of the agreement.

Mr Speck—If anything, the agreement improves the ISPs' position, which is already very favourable for that industry. I have already indicated to you the difference between their position here, their rhetoric more generally and the true situation for these industries. Quite simply, the one thing they want is less responsibility than any other corporation for activity that takes place in their own infrastructure that they profit from. They already have protections in their contracts almost universally with their customers. They already take down material almost instantaneously on the provision of a letter asserting copyright infringement, contrary to what was said to this committee. They invariably can find customers when they are served with discovery or preliminary discovery orders, but they consistently take a position that there is an Internet cloud through which passes a stream of data into the ether and it is beyond their control—when otherwise it is likely to have the consequence of diminishing revenue opportunities for that industry. Nothing in this agreement should come as a surprise; nothing in this agreement does anything other than slightly improve their position. As a total package, it provides an effective balance.

Senator FERRIS—That is interesting. We had some evidence from the Australian Libraries Copyright Committee, and I think it was similar to evidence that we got from the Australian Digital Alliance. They said—and I will quote it because you might like to respond to it:

What we would see with the—

free trade agreement—

and the possible changes to Australian law that might be embraced if one followed the chapter 17 provisions … would be an environment in which litigation and action around a number of issues would develop rapidly.

You are putting to us almost the opposite.

Mr Speck—We have been sending notices to those institutions as well as tertiary institutions and corporations and ISPs for six or seven years and rarely have a problem with any of them. When we do have a problem, there is a complete revisitation of all the issues. Privacy gets raised, only to be abandoned at the bar table. All the technical fantasies about not being able to identify customers and not being able to identify information get revisited and then abandoned in the face of evidence. From the cases we have taken it is very obvious that (1) the nature of cases is not likely to change and (2) we have been applying no more than the established copyright law. Of the 120 or so take-down notices in 2003, there was effectively one case that arose from those notices. Unless the ISPs or those associated with them become total anarchists, nothing is likely to change. The prosecution rate is not going to change because most of these corporations do want to obey the law; they do want to comply and do want to minimise risks and liabilities.

Senator FERRIS—So how could some of the witnesses who come here see this as such a threat, yet Mr Brennan's evidence typifies it—as I would see it—as an opportunity? How could it be that people as intricately involved as you are in this particular sector would see this so differently from the outside? How could that be, do you think?

Mr Speck—It is driven by a range of fallacies with a view to achieving future commercial positions. The Internet industry makes a great deal of money from the traffic in illegal sound recordings. It does so by turning a blind eye or adopting some of the fictions or mythology of the Internet: it is a stream of data in the ether; they cannot identify customers that are doing the wrong thing against anyone other than themselves. At the end of the day, when the people who make those propositions to people like you have to subject those propositions to a test they abandon them or they are abandoned for them by courts.

I can give you some examples. In the last few years we have pursued a number of Internet service providers and they consistently raised the mythology as part of the defence: 'We don't monitor customers.' One managing director of an ISP said this while standing in front of the interactive real-time screen monitoring users. One press of a key on a keyboard downloaded data in relation to a pirate directory where the ISP's customer had created a web site from a suburban home in Brisbane where some 200 million visitors had attended and 140 million-plus downloads were made.

The ISP had negotiated a deal with the customer to make sure they could hang on to the customer. They gave him the service for free on the guarantee that it would stay. We see that consistently. There was a $50-a-month site belonging to a 16-year-old with seven million hits. When we raid with a search warrant the first thing the chief technical officer says is: 'I know why you're here. Let me download the site for you.' These people would like to be completely immune from liability for the kind of activity every other species of corporation would be

responsible for. Indeed, at some level it must be their objective to get the very best situation in relation to immunity in any of these processes, whether it is a negotiation with the industry proper over four or five years or it is any legislative opportunity to revisit those issues.

Senator FERRIS—I wish you had been at our intellectual property roundtable. It would have been very interesting to have heard the response following your comments. I realise we are 15 minutes over time, Chair. I am happy with those answers. Thank you for your evidence.

Mr Williams—If I may be so bold, could I add a further comment in answer to your question?

Senator FERRIS—Yes.

Mr Williams—We see the FTA as not only not driving more litigation in the online environment but doing the exact opposite. The simplest example is that the notice and take-down procedures and the procedures for quick and easy discovery or production of names and identities of Internet infringers or alleged Internet infringers is all designed with one aim in mind: to reduce the number of cases that would otherwise be running. Our courts have the capacity right now, as has been demonstrated in Australian cases, to make orders across those different areas, but that is after you run a whole case with all the costs attendant upon that. So we see the FTA as actually part of the solution to what might otherwise be an environment with a lot of litigation.

Senator BRANDIS—I will just raise one other matter and invite any of you who wish to do so to comment on it. I will preface it by saying that the Australian film industry and the Australian recording industry would both, in their different ways, have to be marvellous exemplars of the vibrancy and sophistication of Australian culture and the recognition of that overseas. We have heard evidence from some people that one of the consequences of Australia subscribing to the FTA is that it would materially and detrimentally impinge on Australia's cultural autonomy or cultural identity by causing Australia to be swamped with American product. We heard that in particular from the TV people. As spokespeople for your industries—which have, I think at least, the reputation I have described—what do you say about that?

Mr Peach—Perhaps I can quickly address that by way of reiteration of my earlier comments. We have as members five local subsidiaries of multinationals—which certainly make up the majority or, say, somewhere between 70 or 80 per cent of the market between them—who could easily make the decision to do nothing but release overseas recordings in Australia because they are already made, the promotional videos are already made, the marketing and advertising campaigns are already done and the artwork is already done. It would just be delivered. It does not cost them anything to get that. They pay a licence fee for each CD that they then sell. But, in the face of that, they make a conscious decision to invest heavily in Australian recordings because Australian recordings sell. They make that business decision because it drives the business. This year we have seen Australian artists being extraordinarily successful in the sales charts. We do not see anything in the FTA that would ever change that equation because Australians are interested in and want to buy Australian recordings, and that is what the companies make.

Senator BRANDIS—What about from the point of view of the film industry?

Mr Kennedy—Village Roadshow is a major film producer in its own right. From a distribution perspective, Roadshow Films is a very enthusiastic supporter of distributing quality Australian films. We do not see that changing.

Ms Jenkin—I speak on behalf of the entertainment arena. One of the things of interest here is a particular story about a good Australian product called AFL, a video game developed in Melbourne. Within a day of it being put on the market it was on the Internet and by the next weekend it was for sale in markets. This is one of the inhibiting factors for development of our industry in Australia and to develop studios et cetera. Local investment is hard to find when you are likely to have your product piloted very quickly. We know of Electronic Arts, an American owned company, the subsidiary of which is very big in Australia. Our industry employs many people within Australia and the capacity to grow is inhibited by the incapacity, necessarily, to develop business locally. We see the FTA as giving us that advantage to perhaps develop more locally and not close down studios, as has happened in the past.

Senator BRANDIS—I am delighted to hear what you have to say. Some of the criticisms of the FTA on a cultural basis sounded to me, when you scratched the surface, as little more than an appeal to parochialism and insularity and reminded me of nothing more than the nonsense I used to hear from Pauline Hanson in the backblocks of Queensland a couple of years ago. It is good to hear people confident of their industry expressing the sorts of views that confident industries express.

CHAIR—With that editorial—

Senator BRANDIS—Yes, it was a bit of an editorial. I am taking a leaf out of your book, Chair. I do not usually indulge myself as you do.

CHAIR—I get a feeling that there are many more questions than those we have been able to put to you this morning because you are a diversity of interest groups, although broadly under 'entertainment', I suppose. It might be that we would like to invite one or two of you back in future when we are beginning to focus on the final terms of our report. I wonder whether that would be okay with you if we did that. I think the intellectual property chapter of the report is going to require the most thought—because the issues are more complex, I suspect.

If I can take up the invitation of my colleague and editorialise just a little, one of the big problems that give trade agreements a bad name is that sufficient attention is often not given to the transitional or adjustment effects that adopting a trade agreement creates in an economy. My questioning about downloading of entertainment and the fair use provisions in the United States—I suppose this is not editorialising—comes to this question: would you have an objection if we were to say, for example, that we would give passage to the implementing agreements for this FTA if a fair use provision, which may not be identical to the American legislation but which reflects the rights American consumers have, were to be enacted by the parliament at the same time?

Mr Brennan—We would like to take that question on notice.

CHAIR—Okay.

Ms Jenkin—It is not fair use that is the issue for us; it is unfair use that is the issue.

CHAIR—I took your point, Ms Jenkin.

Ms Jenkin—That is really the problem.

CHAIR—The fact that your game, AFL, could have been downloaded so instantly to deny the owners of that intellectual property a fair return is something that the government could have dealt with domestically. It does not require the negotiation of a free trade agreement to deal with that problem. But if that problem is dealt with on the coat-tails of a free trade agreement, so be it; it is a useful step forward. Thank you.

[10.10 a.m.]

GIBBS STEWART, Ms Christine, General Manager, International Trade and Business Solutions; Australian Business Ltd

Evidence was taken via teleconference—

CHAIR—I welcome the representative of International Trade and Business Solutions. Thank you for being prepared to address our hearing. Would you like to make an opening statement?

Ms Gibbs Stewart—I would. I am representing Australian Business Ltd and I am the General Manager of International Trade and Business Solutions. For those of you who are not familiar with our organisation, we are a membership based business improvement organisation, representing some 19,000 associate members and member companies. Twenty-eight per cent of our members are exporters and 90 per cent of our members are small to medium enterprises.

One of our core focuses is international trade facilitation—specifically, helping Australian exporters achieve success offshore. We are a provider of the TradeStart program, we issue Australian certificates of origin and we have country specialists who consult with experienced exporters to improve their offshore performance. With the services that we provide, including networking and educational programs, we probably work with 1,000 exporters each year to help them get their products and services offshore.

With respect to my background, I have 16 years experience in international business development. I am originally from the US, if you had not picked that up. My area of specialty over the last 10 years has involved helping Australian companies enter the US market. I have worked across a range of sectors in the business area—obviously in the manufacturing area and in primary products. I understand how the US works, what it takes to get an Australian company into the US, what barriers there are and certainly what opportunities there are.

Australian Business Ltd has received overwhelming support from our members and clients for the FTA. They see it increasing transparency, reducing cost and certainly creating opportunities. We know already that companies are looking at their strategy for the US market and seeing how they can benefit from the gains. Even industries where the market access is not as rapid or as free, if you will, see opportunities. We know this is especially true in the dairy industry and in the textile, clothing and footwear industries.

Companies are also commenting that the reduction in tariffs may offset some rise in the Australian dollar and help profit margins and that, with the framework around technical standards, it will be easy to understand those technical standards and regulations and reduce compliance costs, which will aid in the reduction of commercial barriers, which are a great cost to Australian companies entering the US market. Even in the areas of labelling and packaging, gains will be made as those become more transparent. Certainly, with respect to government procurement, our high-tech members in particular—health care companies and innovative companies with unique technologies—see increased opportunities to supply to the US and state governments.

One of the interesting things, perhaps, is the very positive feedback that is coming back from the US market. Some of our member companies and clients have fed back to us that their potential clients and current clients are saying that the free trade agreement will make it easier to do business with Australia and therefore they can expect increased business from the US companies. We are even seeing that some companies are using the free trade agreement to leverage opportunities in other markets, such as Canada, and in particular leverage opportunities against developed countries. We see this in the manufacturing sector, the construction industry, the building industry and the railway industry, where their main competitors are coming out of Europe and the free trade agreement will make Australian products more competitive and put a good psychological focus on Australia to do business with.

No-one can deny—and we certainly do have some member companies that were not winners in the free trade agreement—that all the barriers are not coming down all at once, but the free trade agreement, based on feedback from our members, will enhance the opportunities for Australian companies. We think there has been too much negative press and that we need to concentrate our efforts on now identifying where the opportunities will be in the US market for Australian companies and solidifying the gains which the agreement will make. I am happy to take questions.

CHAIR—Do I understand your company to be a not-for-profit organisation?

Ms Gibbs Stewart—We are; that is correct.

CHAIR—How do you describe yourself—you are not an association?

Ms Gibbs Stewart—We are a membership based business improvement organisation. We used to be called the Chamber of Manufactures of New South Wales.

CHAIR—Now I appreciate where you are coming from. In essence, you are running a member subscribed service for trade facilitation, which can broadly be put as competing with Austrade.

Ms Gibbs Stewart—We do not compete with Austrade. In fact, we work quite closely with them and, through running the TradeStart program, we work in partnership with Austrade.

CHAIR—That is a pity. I think Austrade can do with a bit of private sector competition to sharpen their focus a little, not that I am complaining about their focus but competition does improve performance and Austrade could do with that.

Senator BRANDIS—You should join the Liberal Party.

CHAIR—I have always held that view and that is why I am in the Labor Party. Are you able to say what particular areas your members are interested in pursuing in the United States?

Ms Gibbs Stewart—In terms of business opportunities?

CHAIR—Yes.

Ms Gibbs Stewart—We have seen wide support from our membership base across many areas, and it is really about increasing their sales into the US market. We work with companies in the railway industry who supply parts into that industry, we work with companies in the industrial design area—so, services companies—and we work with companies who make large machinery and those who produce software. I think it is the view of these companies that anything that is going to make the flow of trade easier and make things more transparent will certainly benefit what they are doing in the market. I think it is particularly true—and I made the point before—against other developed countries. So whereas some of the Australian manufacturers have stiff competition from companies in Europe, Australian products may potentially be more cost competitive with the reduction of tariffs going into the US market vis-a-vis these countries. I do not know whether that answers your question.

CHAIR—What I was looking for were the particular sectors you are most focused on, and what I have taken down from that description is the rail sector, heavy machinery, industrial design and software. Are they the main focuses?

Ms Gibbs Stewart—Not necessarily. We represent a large number of companies. We work with a large number of companies as well. On the TradeStart program alone we assist 120 companies to get into the market each year, and our members represent diverse views. How we have gotten feedback on the free trade agreement is through our international trade committee, which is made up of exporting companies. They represent textile, clothing and footwear manufacturers, machinery manufacturers and services companies. We also have what we call councils, or committees, throughout regional New South Wales, which have received feedback from macadamia producers and citrus producers. We also have what we call a state council, which is made up of representatives from those various councils who come together and discuss issues affecting businesses. So, while I have just highlighted a few industries that we work with, we certainly have a very diverse membership base.

CHAIR—Could you indicate how many companies you expect now to either enter the American market or, if they are present in it, significantly upgrade their presence?

Ms Gibbs Stewart—I certainly do not have an exact figure on that. While the free trade agreement will open up opportunities, the US market is still highly competitive. You have to have a competitive product to go in there and you have to know what you are doing. But I think that one thing the free trade agreement is doing is turning the attention of some newer exporters to the US market to look at opportunities there, and I know that companies that are already exporting there are looking at enhancing what they are doing there. But I cannot put an exact dollar figure on it or an exact number on how many that would be.

CHAIR—I do not want to be exact. Could you give us a ballpark figure?

Ms Gibbs Stewart—I do not have a number. How long is a piece of string?

Senator BRANDIS—This is because, as we have heard from the evidence of many others, Ms Gibbs Stewart, the main benefits here are going to be what are called the dynamic effects—that is, the opportunities that are taken advantage of in as yet unpredictable ways by Australian entrepreneurs.

Ms Gibbs Stewart—That is right. It is hard to predict what will happen but, as market access increases, you would think that the natural flow-on effect would be for more companies to look at that market and be able to compete more effectively in that market and for companies that are doing business there to leverage the advantages that the free trade agreement brings to expand what they are doing in the market.

CHAIR—I know that Senator Brandis is endeavouring to assist me. You say, 'How long is a piece of string?' Your organisation has a finite membership and you are saying that you have got a lot of interest. I am trying to get an idea of the scale of that interest. Is there some way in which you can assist me to obtain that idea?

Ms Gibbs Stewart—Do you mean the scale of interest in terms of what I think our membership will do in that market? I guess I do not understand your question.

CHAIR—People say it is going to mean tremendous opportunity and fabulous new challenges—all of these words. I work in the field of politics, where people make statements of that sort about almost everything that happens when they are selling their programs. My interest is to try to get clear what the practical, real-world effects are. My question was to obtain from you, if you are in a position to provide it, some sort of concrete idea of what the response has actually been.

Ms Gibbs Stewart—Again, it is difficult to say. I am happy to take that question on notice and try to come back to you with some views on that. It is hard to say what gains companies will make. We do have anecdotal evidence that people are looking at expanding in that market and are considering that market, and that the psychological impact in the States is very positive and so people are looking to do more business with Australian companies. Again, companies have to have the strategies to be able to go into the US market and leverage it properly and be able to compete.

We feel in the US, because it is such a large consumer market, that there is a market for almost everything Australia makes. Obviously, products have to have a competitive advantage. I think the opportunities are pretty much limitless. I do not have an exact number for you but I am happy to take it on notice and come back to the committee with some more detail.

CHAIR—As I say, I am not necessarily looking for an exact number; I want to get a rough handle on it. Have any of your member companies positioned themselves in the United States in anticipation of this agreement going through?

Ms Gibbs Stewart—Some of them are looking at the US market—for instance, dairy companies are now looking at the US market more seriously than they have in the past. Some who have been totally inactive in the market are saying, 'With this agreement, even though dairy doesn't have unfettered access in the beginning, it could be an interesting market for us,' so they are actively studying the market and doing market research to see where the opportunities may lie.

CHAIR—They are putting their dollar where their ambition is; they are actually spending money to do this?

Ms Gibbs Stewart—That is correct.

CHAIR—Are there any other examples you can call to mind?

Ms Gibbs Stewart—I know that with the textile, clothing and footwear industry, again, free access to that market is over a long period of time. We hear from people that they are looking at the market, deals are still being done and it will be a market that they will continue to look at regardless of the slow reduction in tariff.

CHAIR—They have not positioned people in the market—

Ms Gibbs Stewart—Not necessarily any more than they are doing right now.

CHAIR—Do you offer any services that might be bracketed under the heading of encouraging companies to be market ready—market ready services? You have mentioned that the US market is a highly competitive one. I have always been an advocate of Australian export companies venturing into the most competitive markets because of the old story that if you can succeed in New York you can probably succeed everywhere. Are you offering any training, outreach or liaison services under the general heading of market readiness?

Ms Gibbs Stewart—We do through the TradeStart program—it is all about mentoring and advising companies.

CHAIR—It is an existing program that has been going for aeons.

Ms Gibbs Stewart—That is an existing program; that is correct. It used to be the Export Access Program, as you know. We work with companies one on one to help them prepare for the US market. From time to time we also hold seminars on the US market—what the opportunities are—but they are more industry specific, such as food to the US et cetera, so we provide information in that way.

CHAIR—How many seminars have you held, and in which sectors, focusing on the Australia-US free trade agreement?

Ms Gibbs Stewart—We have not had any seminars specifically on the US free trade agreement because, as you might be aware, the Department of Foreign Affairs and Trade and others have been holding a lot of seminars on it. We tend to work with people to hold the seminars and promote those to our membership base rather than doing things off our own bat at this point.

CHAIR—In your program planning, do you plan your activities a year or six months out?

Ms Gibbs Stewart—A year out.

CHAIR—In the coming year, how many programs have you got related to the Australia-US free trade agreement for your members?

Ms Gibbs Stewart—We have three or four programs planned.

CHAIR—What are they?

Ms Gibbs Stewart—They are not necessarily specifically about the free trade agreement but looking at different sectors in the US and helping companies become more prepared. The US free trade agreement will naturally be a topic of discussion in those seminars.

CHAIR—Perhaps my question is wrong. It does not need to be about the agreement, but I am thinking still in market readiness terms.

Ms Gibbs Stewart—When you are going into the US market you have to know what niche you are going into. You have to know how to position and market your product in the US.

CHAIR—I understand that but I am just trying to get a fix on it. In your forward program, you have got three—

Ms Gibbs Stewart—I do not have my marketing program in front of me right now. We have planned maybe three or four seminars throughout the year looking at the US market.

CHAIR—These will be seminars in particular sectors, will they?

Ms Gibbs Stewart—Yes, we are currently planning them in particular sectors—for instance, food into the US market.

CHAIR—Can you make your forward program available to us?

Ms Gibbs Stewart—Sure.

CHAIR—Thank you.

Senator FERRIS—Could you make a comment or two on the material that is in the newspapers this morning, following our evidence yesterday, that suggests that this agreement may result in the loss of 200,000 Australian jobs, as Australia becomes overwhelmed by the size and capacity of America. Did you see that material in the newspaper this morning?

Ms Gibbs Stewart—I have not yet had time to look at the newspaper this morning.

Senator FERRIS—I will summarise. The research came from Dr Peter Brain, and it was presented to us yesterday. It suggested that the free trade agreement was a threat to Australia's sovereignty and capacity to make decisions in the national interest as a federal government and that we should oppose it. Nothing that you have said this morning suggests that you see it as anything other than an opportunity. Would you like to make a comment on those remarks of Dr Brain? We will make available his research papers, so you can perhaps respond in writing at a later time.

Ms Gibbs Stewart—And I will certainly look at the newspaper today. I think that both the US and the Australian markets are very sophisticated economies. They are very mature and they have well-developed supply chains. Not knowing exactly what Dr Peter Brain's comments were, except what you said about national interest and sovereignty, I can only say that I do not see how

there will be a flood of American products into the Australian market. Sure, American manufacturers can produce at a lower cost because of economies of scale but, again, because of the maturity and sophistication of the Australian market, it will need to be a product which is competitive not only in terms of its functionality but also in terms of its price. There are transport costs in getting those products here, and those products need to be competitive when they get here. I do not see any sectors where things will come flooding into this market. It just seems unrealistic to me.

Sure, there will be products that might more freely enter the Australian market from the US, but the other thing we have to remember is that Americans are not good traders. Like Australia, only about four per cent—I think it is a little less—of US companies export. Australia is far away from America, and Americans are very isolated in terms of looking at opportunities beyond their shores. That a large US corporation would focus on a market of 20 million people and try to overrun us with their product is, I think, unrealistic.

Senator FERRIS—What about the suggestion that our access to the procurement market in the United States will be much more difficult than we expect, because of the 'buy American' regulations?

Ms Gibbs Stewart—You are right that government procurement will not be easy. Again, you need to offer a very competitive product to the market, and there are forms you have to fill in and regulations you have to comply with. It is like selling any product to the States but perhaps, because it is the government, more red tape is involved. The hurdle of 'buy American' will be a hurdle; I think you are right. Americans are very nationalistic, so they like to buy things that are made in the USA. That is with any market, not just in the government market, but hopefully with the free trade agreement Americans will see us more as a friend, as someone who they are working with in partnership. Therefore, if we can put forward a credible offer and a competitive product, they might be willing to consider Australian products in their purchasing decisions.

Senator FERRIS—What about the outcomes delivered in the agreement dealing with the barriers created through technical regulations and standards, and also the suggestion that there are difficulties with professional recognition of regulations and that they are not adequately dealt with, in some people's view?

Ms Gibbs Stewart—The agreement calls for a framework to look at those issues. What that framework will be and what will happen with those issues is yet to be seen. It is extremely complicated and complex for Australian companies entering the US market to comply with different standards across states, whether that be in technical regulations, whether you are shipping a gas heater or a gas barbecue into the states or whether you are looking at an industry like the food industry where there are certain labelling requirements. While the agreement does not outline what specifically will happen in those areas, I think that people are heartened that those areas are being looked at and that perhaps some streamlining and harmonisation can occur as a result of the agreement.

Senator FERRIS—Representing Australian business, as you do, what do you think would be their reaction to the proposition that was put to us by a delegation of high-level trade unionists yesterday, who accompanied Dr Peter Brain, who all asked us to reject this agreement and to not pass the legislation required to bring it into effect?

Ms Gibbs Stewart—People would think it was a step backwards. It is a rare opportunity for Australia to be offered a free trade agreement with the US market. I think a lot of other countries are looking at Australia with envy, particularly other developed countries, where now Australian products will be more competitive in that market. Again, it goes back to the psychological impact as well in terms of trading with that market. I also think that we have seen the potential to negotiate a free trade agreement with China, and there are other free trade agreements—the Thai free trade agreement is about to be signed. The feedback that we get is that business is supportive of these free trade agreements because they open up market access for them. They realise they need to be competitive in these markets. To turn down an opportunity such as a free trade agreement with the US, the largest economy in the world, I think people would think it was a step backwards in Australia's economic development.

CHAIR—On behalf of the committee, thank you very much.

Proceedings suspended from 10.37 a.m. to 11.05 a.m.

GRIFFITHS, Mr Ellis John, Director, Planning and Policy, Department of Culture and the Arts, Western Australian Government

HALL, Ms Karen, Principal Policy Consultant, State Development Strategies, Department of Industry and Resources, Western Australian Government

JUDGE, Mrs Petrice Anne, Executive Director, Office of Federal Affairs, Department of the Premier and Cabinet, Western Australian Government

PATTERSON, Mr Murray, Chief Pharmacist, Department of Health, Western Australian Government

REID, Mr Sean Edward, Principal Labour Relations Adviser, Policy and Economic Analysis, Labour Relations Division, Department of Consumer and Employment Protection, Western Australian Government

STEINGIESSER, Mr Henry, Executive Director, Trade and Development, Department of Agriculture, Western Australian Government

YOUNG, Ms Ruth, Principal Policy Officer, Office of Federal Affairs, Department of the Premier and Cabinet, Western Australian Government

Evidence was taken via videoconference—

CHAIR—I welcome online from my hometown in Perth representatives from the government of Western Australia. We can see you on screen. We have before us the Western Australian government submission under the signature of the Premier, Dr Gallop. We invite you to speak to your submission before going to questions.

Mrs Judge—I will make some introductory comments on behalf of my colleagues and then we are open to questions. The government of Western Australia appreciates this further opportunity—

Senator BRANDIS—Chair, could I just ask a process related question, which I think is probably best asked at the start. The process related question is this: this being a submission on behalf of a government, it does rather surprise me—and I mean absolutely no disrespect by this—that the submission is being presented by senior public servants rather than on behalf of the government by a minister. It may be my inexperience that causes me to say that, but I would have thought that any submission on behalf of a government to a Senate inquiry is most appropriately made on that government's behalf by a minister.

Mrs Judge—Is that a question?

Senator BRANDIS—It is an observation, but you might like to respond.

CHAIR—I think in the first instance it is a question is for the chair.

Senator BRANDIS—I am not saying it is disorderly, but it does strike me as being a little irregular.

CHAIR—I think the analogy—subject to what the public servants themselves may say, Senator Brandis—is a bit like that of the chairman of the board of a company and the executive officers of that company. While, obviously, many companies as well as industry associations appear before us, rarely if ever do they appear with their chairpersons; almost exclusively they appear with their executive officers. I take it that this is a similar situation. But if there are matters that are appropriately directed to the political level of government then I am sure these officers are capable of referring them on.

Senator BRANDIS—I hear what you say. I do not think the analogy with commerce is that direct when we are talking about governments. In any event, the public servants cannot and should not be expected to answer any questions which involve political sensitivity, and that is the main functional reason why I think there should have been a minister presenting the submission on behalf of his government. Let us see how we go—it may be that nothing in this instance turns on it.

CHAIR—I will take it as a point of order. Do you wish to respond to the point of order, Mrs Judge?

Mrs Judge—I would just like to say that this is the usual procedure in Western Australia: if it is an important submission, the Premier signs it on behalf of the state, and public servants then present in response to questions, and if there is anything of a political nature we take that on notice and have the Premier respond at a later time.

CHAIR—Thank you. With everyone noting their position, I think that disposes of the point of order at this stage. Please proceed.

Mrs Judge—Thank you. You have received the state's submission, as you have acknowledged. I wanted to limit my introduction to some general comments about the treaty and the treaty consultation process. I wanted to mention that, unfortunately, the officer who has deep understanding of the government procurement issue is overseas and not able to be with us today, so if you have any questions that go to the heart of government procurement we would like to take those on notice and get back to you subsequently.

Overall I would say that Western Australia is disappointed with the outcomes of the AUSFTA. We see the agreement as a compromise that represents lost opportunities to significantly expand our trade with the US. During the negotiations, Western Australia provided in-principle support for the development of the AUSFTA, believing that free trade offers substantial benefits to nations and on the basis of potential gains identified in the early analysis by the Commonwealth and the Department of Foreign Affairs and Trade. However, our preliminary consideration of the agreement suggests that the beneficial outcomes for Western Australia are likely to be relatively modest.

Overall we welcome the move towards trade liberalisation in the agreement. There appear to be some gains for Western Australia—for example, the potential for increased lamb and wine exports and cheaper manufactured goods. However, moves towards liberalisation in some areas

have been disappointingly small and we have missed the chance to expand Australia's exports in such industries as shipbuilding. The Western Australian submission expands upon these concerns and other major implications for Western Australia of the actual content of the proposed treaty. In addition, Western Australia has suggested there are some areas worthy of greater examination by the committee—for example, rules of origin and intellectual property.

Today I would particularly like to place emphasis on the treaty making process itself. Western Australian officials appreciated receiving briefings before and after the majority of the rounds of negotiation, and the provision of a number of papers on various aspects of some chapters. However, given the wide-ranging consequence of the free trade agreement across areas of state responsibility, we strongly recommend that in future negotiations it be made clear to the other party at the outset that Australia will have at least one representative of the states and territories on the Australian negotiating team. This would avoid the problem we experienced last year, where the states and territories' representative was told at the last moment that he could not attend the negotiations. It was disappointing and unsatisfactory, as all states put a lot of work into preparing briefings of their key issues. State and territory representation is in keeping with the COAG 96 principles and procedures for Commonwealth-state consultation on treaties that aim to increase transparency and cooperation in the treaty making process.

Moreover, although we understand the difficulties experienced by DFAT in conducting the negotiations, there were as a consequence extremely pressured deadlines also imposed on state officials and ministers. Realistic time periods are necessary to enable all governments to undertake analysis; consider the impact on stakeholders and on existing legislation; identify problem areas; and prepare submissions and reservation lists. That concludes my preliminary comments. We welcome comments or questions from the committee.

CHAIR—Thank you very much. Does that conclude your comments on behalf of everyone? Do individual officers now want to take an opportunity to supplement your remarks or can we just move to questions?

Mrs Judge—We would prefer that you just move to questions.

Senator BRANDIS—Can I deal first with the complaints you make about process. Do I take it that there is some particular contribution to the negotiation of this treaty that you say a representative of the state and territory governments could have made that was not taken account of by the Australian negotiators? If you do say that, what is it?

Mrs Judge—I would say that it is very important that we do have the views of the states and territories represented at the negotiations, because so much of the treaty goes to the heart of state responsibility.

Senator BRANDIS—Thank you, but that is not an answer to the question I asked. I asked whether there was any particular matter you could point to that was not paid sufficient regard to by those who negotiated the treaty, and I asked you to tell me what it was. Everybody likes to have their feet under their table at these things—that is human nature. But what has been the particular negative outcome that you assert, if you do, has resulted from there not being a state and territory representative?

Mrs Judge—If I could just clarify, the states and territories representative was there for the subsequent rounds of the negotiations. It was in particular for the third round that the states and territories representative was not able to get on the plane because the US, as I understand it, objected to having his presence there. Overall, because we were not able to have the feedback from our representative, we felt that we were put at a disadvantage. He did go to subsequent meetings, and we felt that the feedback we got from the discussions was greatly improved. Overall, it was the way it put us behind in terms of the actual content of the negotiations that we missed out on.

Senator BRANDIS—Having asked the question twice and received the answers I have, I think I can conclude that you do not say that there is any particular provision of the treaty that is less favourable than it would otherwise have been had a state or territory representative been present. You merely are complaining that you were not, as it were, in the loop and that you did not get feedback.

CHAIR—How can anyone possibly know that?

Senator BRANDIS—Let me ask my question, please, Senator Cook.

CHAIR—How can anyone possibly know whether the outcome would have been different or not?

Senator BRANDIS—I am asking if there is a particular complaint. I have asked the question twice, and I have been told what I have been told. Mrs Judge, or anyone else who wishes to respond: were representatives of any of the American state governments there, on the American side of the negotiating table?

Mrs Judge—Not that I understand, but there were representatives of the US states in relation to government procurement.

Senator BRANDIS—Around the negotiating table?

Mrs Judge—I do not have that information.

Senator BRANDIS—You do not know.

Mrs Judge—That is right.

Senator BRANDIS—We will have that checked. Is it common for a representative or representatives of the Australian states and territories to be present when commercial treaties that apply generally across the country—as opposed to treaties that deal with matters of special interest to a particular state, like the Timor Gap treaty, for instance—are being negotiated with a foreign government?

Mrs Judge—Yes, it is. It is part of the COAG agreement that was made to ensure greater involvement of the states and territories in the treaty-making process. I could point, for instance, to the climate change negotiations over the Kyoto protocol. It is long-established that states attend those negotiations.

Senator BRANDIS—Correct me if I am wrong, but you are not saying that they attend as negotiators, are you? You are saying that they attend merely as persons within the party to be consulted?

Mrs Judge—They are a member of the delegation and they go as an observer. But they are consulted and their views are taken to represent the states and territories as a whole. They do not represent their individual state's interests but they are available to the delegation and are a member of the delegation.

Senator BRANDIS—I do not want to be disrespectful but I have never heard of a state representative who did not or should not represent their particular state interests.

Mrs Judge—It is one of the things that we have accepted as part of trying to get a greater voice for the states and territories in the treaty making process. So we have set up processes to try to ensure that the person who goes takes on board all of the issues for all of the states and territories.

Senator BRANDIS—There is of course the Senate, which represents the corporate interests of the states. Here we have a Senate committee looking at this treaty. Are you not confident that the states house fulfils that role?

Mrs Judge—With respect, it is not usual that the Senate has a look at a treaty.

Senator BRANDIS—Mrs Judge, I imagine that you will have to take this question on notice. Can you give me a list of all of the commercial treaties that have been negotiated by Australia since the election of the Howard government in 1996 at which an observer or observers on behalf of the states and territories have been present as part of the delegation?

Mrs Judge—Would that question more appropriately be directed to the Department of Foreign Affairs and Trade?

Senator BRANDIS—I am directing it to you. You are the one who has made the generalisation. I am not in a position to test it, so I am asking you to demonstrate that what you have told us is right.

Mrs Judge—We will undertake to consult with the Department of Foreign Affairs and Trade and give you some information back.

Senator BRANDIS—Do you also say that the engagement of parliament in relation to the treaty is insufficient or unsatisfactory?

Mrs Judge—Again, I am not sure what you are referring to there. Could you tell me a bit more?

Senator BRANDIS—I am asking you whether your criticism of a lack of consultation extends to a criticism, which others have made, that the opportunities for oversight of this process by the Commonwealth parliament have not been sufficient.

Mrs Judge—No. Western Australia does not make that suggestion.

Senator BRANDIS—I want to turn away from process issues and move to issues of substance. You said in your opening remarks, and it is reflected in the introduction in section 1 of your submission, that the treaty represents a compromise, which undoubtedly it does. You said that there is a lost opportunity to significantly expand trade with the United States and that moves for the liberalisation are disappointingly small. May I take it that, to the extent to which you have criticisms of the outcome as reflected in the text of the treaty, those criticisms are—I am generalising, of course—in the nature of criticisms that it should have gone further and that as far as it goes you like it but it is a shame that it did not go further?

Mrs Judge—I would say that is so.

Senator BRANDIS—So the position of the Western Australian government is that, whilst expressing disappointment that the treaty did not go as far as you would have liked to see it go, you nevertheless support the treaty with the limitations that it has.

Mrs Judge—The Western Australian government has not actually said that it supports the treaty—

Senator BRANDIS—That is why I am asking you and, knowing that I was going to ask that question, that is why I made that preliminary procedural point about my inability to direct this question to a minister. Perhaps you will feel emboldened to answer it, or perhaps you will want to refer it to your Premier. But at the end of the day, allowing for your criticisms, which are no doubt made seriously and in good faith, and all the limitations that you say the treaty contains, is it nevertheless the position of the government of Western Australia that the treaty should be ratified?

Mrs Judge—The government of Western Australia has not made a decision, because it had commissioned some analysis and was looking forward to considering it in more detail and also the results of the inquiry by the Joint Standing Committee on Treaties.

Senator BRANDIS—And presumably by this committee, too, on behalf of the states house?

Mrs Judge—Of course.

Senator BRANDIS—There are two federal parliamentary inquiries—one being undertaken by the Joint Standing Committee on Treaties and the other by this Senate select committee. I take it you are going to have regard to the findings of both of those committees?

Mrs Judge—Of course.

Senator BRANDIS—In telling us that the Western Australian government does not have a position on the ultimate question—whether we should go ahead with it or not—you seem to be at variance with at least some of the other Australian state governments. I think Senator Ferris was going to direct your attention—if I may pass the call to her, Chair—to some remarks by Premier Beattie of my own state of Queensland.

Senator FERRIS—Thank you, Senator Brandis. I was simply going to point out that, in a recent speech that he gave in Queensland, in talking to the American Chamber of Commerce on Thursday, 6 May, Mr Beattie made comments in relation to this agreement. He said:

Finally, I want to touch on a topic ... much of interest—

that is, the agreement. He continues:

I ... believe the Agreement will prove positive for Queensland and Australia as a whole.

Particular sectors in Queensland that will benefit are beef and light metals, including magnesium, and to a lesser degree aluminium.

… … …

Generally speaking ... the FTA will make it easier for US capital to invest in Australia ...

He says that 'that can only be very positive'. I noted in your earlier comments in your submission—

CHAIR—What has that got to do with Western Australia?

Senator FERRIS—I am just about to link it to Western Australia. I do think it is interesting that the Premier of Western Australia, which has many similarities to Queensland, welcomes the agreement and goes through a number of the areas that will benefit—very similar areas to those in Queensland—including the minerals industry, the beef industry and, as you say yourself, horticulture, strawberries, olives, dairy products, beef, lamb and wine. But you seem reluctant to endorse Premier Beattie's comments. I am wondering why that would be so, given the similarities between the two states.

Mrs Judge—I think that cabinet is still to consider the results of the analysis and also the results of the two inquiries you have mentioned. If you would like to have some discussion about what we see as the impact on our industries, perhaps you could ask the questions of Karen Hall.

Senator BRANDIS—Before we do, can I say, speaking as a senator for the state of Queensland, that it strikes me as remarkable that the two great resource states—Queensland and Western Australia—should have a different position. The Premier of Queensland, Mr Beattie, not only in the speech from which Senator Ferris has read but also in television interviews which I have seen, has been emphatic and enthusiastic about the free trade agreement. The Queensland government has not been unable to make up its mind about this, awaiting the JSCOT and the Senate select committee findings. I do not want to make a parochial, state based point about the Western Australian government perhaps being a bit slower than the Queensland government, but if Mr Beattie and the Queensland government can arrive at a conclusion now—it is months since the text has been published—why can't the Western Australian government arrive at its conclusion with the same alacrity?

CHAIR—I think you have been given an answer. The cabinet has not yet decided, as I understood the answer.

Senator BRANDIS—Yes, but why not?

CHAIR—Then it may well be a question for the Premier to answer. Any analogy between Western Australia and Queensland omits the salient fact that they both have different constituencies to whom they are answerable. The Western Australian government can answer for itself to its own constituency—

Senator FERRIS—Of course, it can, Chair, but they are very similar states.

CHAIR—If I may, I will finish the point—as appropriately the Queensland government can answer to its constituency. We can pursue this line of questioning if you want, but I suspect the answer is the same irrespective of what passion or political rhetoric you bring to the questioning.

Senator FERRIS—I object to that; it is not political rhetoric.

CHAIR—However, if you wish to hazard an answer—

Senator FERRIS—We need a minister here to answer these questions. It is crazy—these are important questions.

CHAIR—Mrs Judge, if you wish to hazard an answer or if we are going to be subject to a stunt about—

Senator BRANDIS—It is not a stunt.

Senator FERRIS—It is not a stunt.

Senator BRANDIS—This is absolutely not a stunt.

Senator FERRIS—I object to that.

Senator BRANDIS—I did not know who was going to appear here on behalf of the Western Australian government. I would not have been surprised to see Dr Gallop, but if he were not fronting up I would certainly have expected to see a minister to whom these questions, I agree, are more appropriately directed. But these are the questions I want to ask. This submission—

Senator FERRIS—Signed by Gallop.

Senator BRANDIS—in a half-hearted way endorses the treaty, and yet we are told, 'We don't really want to say we support it; we would rather just criticise it.'

CHAIR—Because no decision has been made yet. That is the evidence of the officers.

Senator BRANDIS—A decision has been made to make these statements in a submission signed, as Senator Ferris points out, by Dr Gallop.

Senator FERRIS—It is submitted by Dr Gallop.

Senator BRANDIS—It is not really appropriate to take public servants to task in the way that one would take ministers to task. I am genuinely perplexed as to why, if it is good enough for the Queensland government to have made up its mind and for Mr Beattie to emphatically endorse the treaty, it is not good enough for the Western Australian government at least to have made up its mind by now.

CHAIR—That is a question for the Western Australian government.

Senator BRANDIS—Exactly—that is my point.

Senator FERRIS—Why are you defending them?

CHAIR—And the answer is—and correct me if I am wrong, Mrs Judge—that the Western Australian government has not yet completed its consideration of the agreement at cabinet level. Is that right?

Mrs Judge—That is right.

Senator BRANDIS—It is 8 June. The treaty was published on 4 March. Does it take the Western Australian government three months to do something?

CHAIR—The treaty's terms, I point out, were not available until it was signed last month.

Senator BRANDIS—This document was circulated to us shortly after 4 March.

CHAIR—That is the draft. Can we have an answer? Are you in a position to answer, Mrs Judge?

Mrs Judge—I am sorry, I did not hear.

CHAIR—We have been having a slightly fractious discussion between ourselves here. The point about the discussion is that apparently some line is being drawn between the ability of the Queensland government to answer its attitude to the agreement and the Western Australian government's ability to answer at this time—

Senator FERRIS—That was not my question at all.

CHAIR—on the agreement. Do you have anything further to add to your earlier answer?

Senator FERRIS—That was not my question at all.

Mrs Judge—I will just say that cabinet is still to consider the various pieces of analysis they have brought to bear. They also want to take into account the findings of both inquiries.

Senator BRANDIS—The problem with saying that, with respect, is that you come before this committee in the capacity of a submitter. At the end of the day, we have to reach an ultimate conclusion and the ultimate conclusion is: does this committee recommend that Australia go

ahead with the treaty or not? As a matter of logic, how can you speak to that ultimate conclusion if you are telling us you are not going to make up your mind until you hear what the conclusion is? Don't you perceive a degree of circularity about your position?

Mrs Judge—I repeat that cabinet is still to consider the analysis that they have commissioned on the treaty. I have colleagues here who are available to give you some information, should you require it, on their areas of expertise on the treaty.

Senator BRANDIS—You have made your written submission and you have made your verbal remarks, as you are at liberty to do, and senators here can ask you anything they might think helpful. But what would be helpful to me is to know what the Western Australian government thinks about the treaty. You have said, 'Well, the cabinet is not going to tell us; it's not going to make up its mind until the two parliamentary committees, including this committee, have made up their minds.' So I cannot see how this helps us at all. I reiterate: that is not a problem had by Mr Beattie or, as I understand it, by other state premiers, who have welcomed this treaty.

CHAIR—Next question.

Senator BRANDIS—I do not think I can take it any further. I have asked whether or not they support the treaty. They seem to but then say, 'We don't have a conclusion, because cabinet is waiting to see what you, the Senate, say.' That is very flattering, but it does not help us very much.

Senator FERRIS—I have a question which again—

CHAIR—I was going to ask a few questions at this juncture, Senator Ferris, so that the call is at least balanced between us. I would start by thanking you for making your submission to this inquiry; it certainly deepens and broadens the body of information we have before us to make a decision on. Let me start first in my questioning with the issue that we have just been discussing: procedural matters. Can you tell us what the agreement or understanding at COAG is between the Commonwealth and the states about dealing with treaties of the stature and weight—since we are constantly reminded of how important it is—of the Australia-US free trade agreement?

Mrs Judge—Some commitments made at COAG are outlined in 'principles and procedures'. I could undertake to send that to your inquiry; it will outline the agreement that has been reached.

Senator BRANDIS—Will that also refer—

CHAIR—Order!

Senator BRANDIS—I raise a point of order.

CHAIR—I am asking the questions at the moment. I never interrupted you.

Senator BRANDIS—Yes, you did.

Senator FERRIS—You did, many times.

CHAIR—What is your point of order?

Senator BRANDIS—My point of order is that it would assist matters if, when we receive those speeches or statements to which reference has just been made, the witness could also refer us to particular terms of COAG agreements that contain that obligation.

CHAIR—The witness may or may not, as far as my question is concerned.

Senator BRANDIS—I would like the witness to. It would be illuminating.

CHAIR—You may well like the witness to but, if you do not mind, I will persist with my line of questioning. You have indicated that you will provide us with, as I understand it, commitments entered into at COAG; is that right?

Mrs Judge—That is right.

CHAIR—The emphasis in my question is 'commitments made at COAG'.

Mrs Judge—I am sorry; I do not understand the difference.

CHAIR—These are not minuted remarks; these are formal commitments entered into between the Commonwealth and the state. It is the level and significance of what has been agreed at a Commonwealth-state level that I am concerned about establishing.

Mrs Judge—This is a communique that was issued by all the premiers, chief ministers and the Prime Minister. It commits to setting up some processes to enable better understanding by the states and territories about treaties in general. There is a whole range of things in these principles that I would like to send you the information on.

CHAIR—Being a joint communique, it is jointly issued in the name of the Commonwealth and the states and territories as their position on relations between all of those disparate bodies in dealing with treaties.

Mrs Judge—That is correct.

CHAIR—You are going to send it to us, but can you just go to the main point of this joint communique in terms of what it is that the Commonwealth has undertaken to do with the states by way of consultation?

Mrs Judge—One of the primary requirements is that, if it is an important treaty, there will be consideration given to representation for the states and territories on the negotiating party. So not every state and territory would be represented, but there would be some process whereby a state represents the views across the states and territories. Also a standing committee called SCOT—Standing Committee on Treaties—has been set up whereby Foreign Affairs and Trade regularly tries to provide information in advance of negotiation to help the states prepare their positions on these treaties. Also, as part of the principles that were agreed at COAG, there is a commitment

given to the Treaties Council, which is for the consideration by premiers and the Prime Minister and chief ministers of significant treaties.

CHAIR—When you say 'consideration given', is that something to be negotiated in each instance or is the actual language stronger than considering whether this be done and is more in the form of a commitment that it shall be done?

Mrs Judge—It is a commitment that it shall be done.

CHAIR—It is not, therefore, a consideration on each occasion; it is an obligation that it be done. Is that a correct representation of it?

Mrs Judge—I would say so, yes.

CHAIR—Your objection—I am not sure how to describe it—or the point you have made about process is that you do not believe this commitment has been honoured fully?

Mrs Judge—I would say that Foreign Affairs and Trade tried to keep us informed and they did give us lots of sessions, but we did not see the text of a lot of the negotiations until well and truly after the general outcomes made for the treaty had been concluded.

CHAIR—I understood you to say earlier that you were not able to catch the plane to the final round of talks in Washington because, among other reasons, the United States government objected to a representative of the states being part of the delegation. Do I understand that correctly, in the terms I have just set out?

Mrs Judge—It was not me who was not able to go to the negotiations; it was a representative from Victoria. They day before, he was told that the US delegation did not agree that a states and territories representative should have been there. We believed that at the start of the negotiations it should have been established that Australia would have a states and territories representative as part of their delegation.

CHAIR—Did we ever—this may be a question for DFAT—object to the composition of the American delegation in these talks?

Mrs Judge—I have no knowledge of that.

CHAIR—Since an objection had been lodged by the US about the composition of the Australian delegation, am I to understand the fact that the Victorian representative did not attend indicates that Australia acquiesced in the US view as to how our delegation should be composed?

Mrs Judge—For the third negotiating session that is true, but they were able to sort it out for the next set of negotiations and the Victorian representative did attend that particular round.

CHAIR—Thank you. For the record, I intend to pursue this matter with DFAT. I think it is outrageous that a country should tell us how we are best represented to pursue our interests in a negotiation of this sort.

Senator BRANDIS—Chair, could I ask some questions on that topic?

CHAIR—I would be appreciative if you would wait for me to complete my questions.

Senator BRANDIS—I really have only one question. Perhaps you might listen to it so that, while it is fresh in the witness's mind it might be more—

CHAIR—I am sure you will be able to bring the witness back to those questions in due course, Senator. Can you tell us, having viewed the text of the agreement, whether or not there are any administrative or legislative changes which the Western Australian government will need to make, assuming the agreement is implemented?

Mrs Judge—My understanding is that we do not need to introduce any particular legislation to retrospectively change any of our commitments, but all legislation that now comes to parliament must have regard to the commitments under the US free trade agreement.

CHAIR—So that, as a consequence of Australia adopting this agreement, if it does, you are required in future to institute a new process administratively in dealing with any state legislation. Is that a fair statement?

Mrs Judge—Every piece of legislation that is passed by the parliament must not give less treatment to the US, apart from some areas that have been committed to in attachments. I will ask my colleague Ruth Young to provide some more information on the legislation component.

Ms Young—Any future legislation passed by the Western Australian parliament now has to be compliant with Australia's obligations under the free trade agreement.

CHAIR—What procedure would you introduce to ensure that is done?

Ms Young—That has not been considered at this stage.

Mrs Judge—Mr Chairman, may I just point out that it is a bit disconcerting here because we can hear our voices on a delay, so it is very difficult to present comment.

CHAIR—I appreciate that, and I appreciate that we are all working with the benefits of technology as they are at this level but they are not perfect. The only thing I can say is that we should soldier on and do the best we can. But if we require further and better particulars on an issue we might need to find some way of doing that outside of this process.

Senator BRANDIS—I think we will need Dr Gallop back on a subsequent occasion, won't we, Mr Chairman? On some of the questions I asked, the public servants said quite properly that they were unable to respond.

CHAIR—They can be put on notice, as we have to put questions on notice to the Minister for Trade. Did I understand correctly that the Western Australian government is undertaking its own analysis?

Mrs Judge—Yes.

CHAIR—Can you tell us what the nature of that analysis might be?

Mrs Judge—I will defer to my colleague Karen Hall, from the Department of Industry and Resources.

Ms Hall—We commissioned the Allen Consulting Group to undertake a report. No additional modelling was done and they were dependent on the modelling done for the South Australian study, which was dealt with prior to the conclusion of the agreement. They surveyed the issues by looking at the text to see how they might impact on Western Australian business, and that report is to go before cabinet very shortly.

CHAIR—Is there a deadline as to when this analysis is to be completed?

Ms Hall—The analysis has been completed by the consulting group, and my understanding is that cabinet will consider it on 14 June. I am not sure whether anyone else here has a confirmation on that date.

Mrs Judge—We are not sure when it goes before cabinet.

CHAIR—But it is imminent? All I am trying to establish is whether, as far as your processes are concerned, the analysis has been completed and that it is now a matter for the government to digest that analysis, and that it is scheduled to do so in the immediate future.

Ms Hall—Yes, that is correct.

Mrs Judge—I would like to add to that. We were very hopeful that the research that was commissioned by the Commonwealth would contain a greater degree of analysis of the impact on states and territories than has proved to be the case. We were very keen to have a term of reference in that consultancy that went to our particular circumstances. It has not been as illuminating as we thought it would be.

CHAIR—Do you have an opportunity to iteratively engage the Commonwealth on what you see as the limitations of the work it has done in analysing this agreement? Or are you in a situation where the Commonwealth is saying, 'That's what we've done; work it out for yourself'? I am not trying to make a point here. I am just trying to find out what the nature and the character of the discussions have been.

Mrs Judge—What we now are committed to is the national interest analysis process—

CHAIR—Yes.

Mrs Judge—which was established under the COAG agreement, and so we have to await the results of that consideration.

CHAIR—One last question on process: can you briefly describe for us the nature of the consultations between the state and the Commonwealth as far as these negotiations are concerned. What I am trying to get to here—and I will cut short a line of questioning in order to make the point about what I am asking you to comment on—is whether, when the

Commonwealth brief you on a matter, they do it for your information, listen to your feedback and then proceed, or whether they seek your agreement on a position before proceeding?

Mrs Judge—I would say it was the former.

CHAIR—So they brief you, listen to your feedback and proceed, but they do not necessarily seek your agreement to the negotiating position they are putting. Is that right?

Mrs Judge—That would definitely be so, with the exception of government procurement, which required the actual decision of the state to commit their government procurement market.

CHAIR—At the conclusion of this, isn't what the Commonwealth is seeking from each state a letter indicating their support for the agreement?

Mrs Judge—No.

CHAIR—They are not?

Mrs Judge—They have to seek the state's view on government procurement and they had to agree to include the government procurement market in Australia's offer, but not for the rest of the treaty.

CHAIR—I see. I will explain my understanding and you can tell me whether I am in error. I thought the Prime Minister had written to the premiers and chief ministers seeking an indication of agreement to the Commonwealth concluding the FTA. Is that not true?

Mrs Judge—That is not true.

CHAIR—What was the nature of the consultation?

Mrs Judge—It was only for government procurement that the Prime Minister was required to write to the premiers. Chair, one of my colleagues needs to leave shortly and he has some knowledge about the arts and the intellectual property area—arts and culture—so I wondered whether, if anybody had any questions for him, we could bring that forward on the agenda and he could then leave, if that is possible.

CHAIR—I have three final questions before I give the call to Senator Ferris. The first is about IP, intellectual property. In your submission you raise the concern that the intellectual property provisions may increase the cost of drug prices in hospitals by in effect delaying the introduction of generic medicines. That is true of your submission, isn't it?

Mrs Judge—That is true of the submission.

CHAIR—Are you able to quantify what the cost to the public hospital system in Western Australia would be if this provision were adopted?

Mrs Judge—I will defer to my colleague Murray Patterson.

Mr Patterson—We have not undertaken any analysis to date of what that could potentially cost our public hospital system.

CHAIR—By saying 'to date', does that suggest that you are going to undertake it at some particular time?

Mr Patterson—There are no plans at present to do that analysis. It was in some ways hoped that the analysis done on a national basis would pick up some of those sorts of components.

CHAIR—By virtue of these provisions, extra costs may be incurred by the state. Under your understandings with the Commonwealth, who will pay those extra costs—the state, or will the Commonwealth pick it up on behalf of the states?

Mr Patterson—The comment was made regarding the funding that the state provides to the public hospital system for medicines, in which case the state would pay those dollars. The dollars that the Commonwealth pays are directly related to the PBS system itself.

CHAIR—I put the question this way: any extra costs—this may not be just in health; it may be in other areas—imposed on the Western Australian government as a consequence of the implementation of the FTA are to be picked up by the state. The state is not indemnified by the Commonwealth in the case of those costs. Is that a correct statement of the position?

Mr Patterson—As far as I am aware, the state government would pick up those additional costs that attribute to this agreement.

CHAIR—If I understand what you said earlier, you were saying you are not required to agree to any position advanced by the Commonwealth in these negotiations, but you are obliged to bear the cost of any increases as a consequence of these negotiations. Does the state therefore have a view as to whether or not they were adequately consulted about likely areas of increased costs to the state?

Mrs Judge—At officer level I would say there were not consultations over areas of increased cost to the state.

CHAIR—Obviously yours is a wide ranging submission. I have a lot of other questions but, in view of the time, I pass the questioning to Senator Ferris.

Senator FERRIS—I am happy to defer to Senator Brandis for the moment.

Senator BRANDIS—Thank you. I want to go back to the answers you gave the chairman in relation to the question of the alleged exclusion of a state or territorial representative from a stage of the negotiations. I was not completely sure what you were trying to say. Do you say that that only occurred in relation to one stage of the negotiations?

Mrs Judge—There had been three rounds of negotiations that happened prior to our representative actually attending. There were two rounds when they had not tried to get the representative to those meetings. At the third, when it was agreed, he was not able to go, because the US said no.

Senator BRANDIS—After the third, were there further rounds?

Mrs Judge—Yes, there were; there were six rounds in all and then three further rounds.

Senator BRANDIS—At the fourth, fifth and sixth round the representative was welcomed as an observer member of the Australian delegation; is that right?

Mrs Judge—For the fourth and fifth rounds he was welcomed as an observer but for the sixth round he was informed—I am just being corrected by my colleague.

Ms Young—For the sixth round, the state and territory representative did not attend. This was due to his understanding that he would have limited access to the final discussions rather than him being denied attendance.

Senator BRANDIS—The sixth round, I take it, was the 'wrapping it all up' round? After the details had been negotiated, the final round was to bed the package down, I assume. Is that right?

Mrs Judge—But there were still considerable negotiations going on in that sixth round.

Senator BRANDIS—So the first two rounds he did not try to get to; the third round he was told he was not to be in attendance; the fourth and fifth rounds he was welcomed to; and the sixth round he did not attend and understood that he was not to attend. Is that the position?

Ms Young—It was not so much that he was not attend. It is just that he thought he would be denied access to those final discussions.

Senator BRANDIS—So he was not told he would be denied access; he made that decision for himself?

Ms Young—That was his understanding.

Senator BRANDIS—So of the six rounds, you say the position is that he was denied access to the third?

Mrs Judge—That is right.

Senator BRANDIS—All right. Now—

Mrs Judge—Can I just interrupt to say that our expert on arts and culture really needs to go now—my apologies—but if there are any questions we could perhaps take them on notice and respond to them later.

Senator BRANDIS—Sure.

CHAIR—I do have a question but I will put it on notice.

Senator BRANDIS—The questions I am proposing to ask do not depend upon all of you being there. Just a couple of other things—

Mrs Judge—Thank you.

Senator BRANDIS—I can understand—I am sure we can all understand—why the agreement of the state and territory governments would have been necessary for those parts of the treaty concerning government procurement, because ex hypothesi it dealt with something specifically within the province of governments. Are you saying that, under the COAG arrangements, or informal understandings, there were other areas of the treaty—that is, other than government procurement—where the states and territories were entitled to be represented, or are you merely saying that you would have wished to be represented in relation to subjects other than government procurement?

Mrs Judge—If I can just clarify, on the government procurement issue the procurement ministers were represented by somebody who had knowledge of the states' and territories' government procurement issues.

Senator BRANDIS—That is what I thought you were saying. So, you have got no complaints about—

Mrs Judge—I am sorry—

Senator BRANDIS—Am I right in thinking that you have no complaints about the extent of your involvement—and when I say 'your' I mean corporately the states and territories—in the government procurement issue?

Mrs Judge—That is right. They have kept us informed and kept checking our position.

Senator BRANDIS—And obviously you are happy with those provisions of the treaty about government procurement, because you have signed off on them.

CHAIR—No, they have not.

Senator BRANDIS—Your representatives went along, didn't they?

CHAIR—Not according to their submission.

Senator BRANDIS—Chair, let me ask the questions—

CHAIR—It is in the submission.

Senator BRANDIS—Let me ask the questions of the witnesses and let the witnesses answer the questions. Now, did your representatives go along with what was being proposed in relation to government procurement by the Australian negotiators?

Mrs Judge—The person who knew about government procurement kept giving feedback to all of the government procurement people in each state, but then it was a decision that was taken

by the cabinet generally in each state and territory as to whether or not they would include their government procurement market on balance after the agreement had been concluded. So this person was representing—

Senator BRANDIS—And they all did, didn't they?

CHAIR—No.

Senator BRANDIS—Did they not? Which did and which did not?

Mrs Judge—They all have now, and Western Australia has—

Senator BRANDIS—They have all agreed, have they? That is what I thought.

Mrs Judge—had a consideration through cabinet and has advised the Prime Minister that the Western Australian government procurement market is in.

Senator BRANDIS—Okay. And—

CHAIR—Can I just interrupt you on this point. Your submission indicates that, from the point of view of government procurement, that decision had not been made.

Mrs Judge—That is right. It has now subsequently been made.

CHAIR—Thank you.

Senator BRANDIS—I am glad you told us that, Mrs Judge; that is good. So, to the extent to which that part of your submission has now been overtaken by events, the Western Australian government's position is that it is in on the procurement side of the deal—correct?

Mrs Judge—That is right.

Senator BRANDIS—Okay; that is good. Were any of you who are participating in making these oral submissions personally party to the discussions with the relevant DFAT officers, officers from the Australian Embassy in Washington or members of the negotiating team—whoever they were on the Commonwealth side—which led to what you have said was the exclusion of a state and territory representative from round 3?

Mrs Judge—I am not sure how to answer that.

Senator BRANDIS—Were you part of those discussions or weren't you?

Mrs Judge—Some of us were part of discussions about trying to get a states and territories representative to the meeting, but subsequently we were not involved in the discussion with the US as to whether or not our Victorian representative could attend.

Senator BRANDIS—After what you say was a discussion between the Commonwealth officers and their American counterparts, were any of you to whom we are speaking this afternoon personally involved in the subsequent discussion with the Australian officials?

Mrs Judge—Yes.

Senator BRANDIS—Which of you were?

Mrs Judge—I would say just generally Ruth Young and myself—and I believe, Karen, you were there also at the briefing?

Ms Hall—I have the same dilemma as Petrice, because of the way I suppose the question is put and also the way in which the discussions happened, as to the point at which the decision was taken because there were a number of teleconferences with DFAT officials where the matter of state and territory representation was raised. It all kind of contributes and you are then party to hearing about it. So it is a little difficult to pinpoint the conversation that you might be actually meaning while not quite knowing what it is that you are meaning.

Senator BRANDIS—That is what I am trying to pin down. The view that one of you put a little earlier which caused Senator Cook to express some serious concern was that, if I can put it shortly, you understood that the Americans had vetoed the presence of an observer member of the Australian delegation representing the states and territories.

CHAIR—That was not what caused my concern. My concern was caused by my understanding that Australia had acquiesced in—

Senator BRANDIS—That happened; that is alleged to have happened.

CHAIR—agreeing to its delegation being determined by its negotiating partner.

Senator BRANDIS—I have a very strong prejudice against asking questions of the wrong people. If we are going to get excitable about that, Senator Cook, I actually think it would be more useful tracking it down to the source and to ask questions of those who were involved in the discussion with the Americans rather than any of the people to whom we are speaking this morning or this afternoon where it is about as clear as anything can be—

CHAIR—Are you debating me or asking a question?

Senator BRANDIS—that their knowledge is at second-hand.

CHAIR—If you are debating me, forget it. Ask a question, Senator Brandis.

Senator BRANDIS—Your knowledge is at second-hand, isn't it? You weren't part of the discussion with the Americans on this topic, were you?

Mrs Judge—No, we were not part of the discussions with the Americans and it was conveyed to us second-hand.

Senator BRANDIS—So you do not actually know what happened but you formed an impression, from what you were told in a secondary way, as to the consequence of the discussion with the Americans.

Mrs Judge—I was informed over the telephone by the chief negotiator that the US had a difficulty with having on the Australian delegation a representative of the states and territories.

Senator BRANDIS—Was a reason given?

Mrs Judge—Not that I understand.

Senator BRANDIS—Did you ask what the reason was?

Mrs Judge—Yes.

Senator BRANDIS—What was the answer?

Mrs Judge—I was just told that the US had not agreed.

Senator BRANDIS—So you asked for a reason and a reason was not given; is that what you are telling us?

CHAIR—No; a reason was given.

Mrs Judge—The reason was that the US—

Senator BRANDIS—Senator Cook, stop interrupting my questions. I will ask my questions in the way in which I choose.

CHAIR—Yes; and I will chair this inquiry in the way that is appropriate under the standing orders.

Senator BRANDIS—I am asking you if a reason was given. Was a reason given?

Mrs Judge—I do not remember that a reason was given.

CHAIR—Can I ask a question? I thought you said a moment ago that the reason was given that the US objected to Australian representation in that form. They were not your words but that is my recollection of what you were saying: when you asked Mr Deady over the telephone, the reason given to you was that the US objected.

Mrs Judge—That is true.

CHAIR—So a reason was given.

Senator BRANDIS—For God's sake, Senator Cook, she just said a reason was not given—

CHAIR—You are verballing the witness.

Senator BRANDIS—in an unprompted way, and now you are trying to encourage—

CHAIR—You are verballing the witness.

Senator BRANDIS—No, I am not. I asked whether there was a reason given and the answer was no. Then you tried to change the answer by putting propositions to her. We all know what the witness said. We also know that you interrupted my question, so I am going to resume.

CHAIR—Let me ask this question—

Senator BRANDIS—Are you applying different standards to yourself in the chair than you are applying to government senators, when it comes to interrupting questions?

CHAIR—If you want me to put my question at the end, I am happy to do that.

Senator BRANDIS—So it is abundantly clear—at least to me—is it right to say that the submission that the Western Australian government makes to this inquiry is that it does not oppose the adoption by Australia of the free trade agreement? You are not telling us today that we should not adopt the free trade agreement, are you?

Mrs Judge—That is correct.

CHAIR—Because of the way the question was framed, it is necessary to ask this question: has the Western Australian government decided one way or the other whether or not it supports the free trade agreement with the United States?

Mrs Judge—That is still a decision to be made by cabinet.

CHAIR—When you say it has not made a decision not to support it, it has not made a decision to support it; it just has not made a decision yet. That is the proper representation of the circumstances, isn't it?

Mrs Judge—That is correct.

CHAIR—When we were dancing on the head of a pin about whether or not a reason had been given to you about the composition of the Australian delegation insofar as state or territory representation was concerned, can you tell us in your own words what the conversation was and whether you regarded that a reason was or was not given in the remarks made as to why the territories and states were not represented?

Mrs Judge—As I recall, Stephen Deady said they asked the US if they could take a representative of the states and territories as part of their delegation and the US said no. That was the reason why our delegate was not able to attend the negotiations.

Senator BRANDIS—I think you also told us that there were no US representatives as part of the American delegation; that just was not the way these negotiations proceeded.

CHAIR—Or obviously we did not select the American delegation for them; they chose how to compose it.

Senator BRANDIS—Stop being argumentative. You are supposed to be chairing this.

CHAIR—You stop being argumentative. We have a different constitutional system and, under our constitutional system, it is appropriate that these matters be canvassed.

Senator BRANDIS—You are supposed to be chairing this committee in an even-handed way, Senator Cook. This is disgraceful.

CHAIR—What is disgraceful is your continual interruption. If that is a reflection on the chair—and I do not take it at this point that it is, but if it were—you would be required to withdraw it. Stop interrupting me when I am speaking from the chair. Senator Ferris, do you have any questions?

Senator FERRIS—I do have some questions, Chair.

CHAIR—I have a lot of questions of them, too, but I have not had a chance to ask them.

Senator FERRIS—I am really pleased to have the opportunity to put them. The submission that Dr Gallop has put in argues that the free trade agreement might seriously undermine the Pharmaceutical Benefits Scheme. That argument appears largely based on the claim that the independent review process which is established under the agreement will put pressure on the PBAC and force up the price of listed drugs. As a government, can you explain why another government would agree to something that would cause the cost of the PBS, which is currently $5 billion a year, to increase when it has to foot the bill? Can you explain the logic of the argument in this submission that that is the only basis for an increase in the PBS, when the federal government itself pays the cost of it? The logic of it defies me, and I am interested in exploring it with you. I appreciate, once again, that this is a question about a submission signed off by the Premier and it might be difficult for an officer to answer.

Mr Patterson—The issue regarding the PBS was concern that there was potential in the agreement which could increase the price that the Commonwealth government pays for PBS drugs and the flow-on effects of those price increases to the state public hospital system. The question you have asked, I think, more concerns the negotiation of the overall agreement and I am not qualified to comment on that area.

Senator FERRIS—Does anyone else want to make a comment?

Mrs Judge—No.

Senator FERRIS—We have a large amount of evidence from DFAT, the department of health and others which says that this is absolutely not the case and that, in fact, the Australian government has not surrendered the opportunity to price the PBS as a result of the establishment of this committee. But to make a sweeping statement such as the one that has been made in this submission signed by your Premier really is quite extraordinary. Any increase in the patient copayment for PBAC listed drugs requires legislative change. You might be interested to know

that, for the last three years now, stuck in the Senate has been a proposition that the PBS go up by $1—a proposal made three budgets ago. I just do not understand where the suggestion comes from that in some way the government, outside of legislation, would be able to increase the PBS when proof refuting that currently sits in the Senate and has been sitting there for three years.

Senator BRANDIS—Senator Ferris, it is entirely possible that Dr Gallop made a mistake. If he were here, we would be able to ask him whether he had the opportunity to consider those matters before signing that submission; but because he is not we cannot.

CHAIR—Are you sermonising or asking a question?

Senator BRANDIS—No; I am making an observation.

CHAIR—Is there a question here to the witnesses?

Senator BRANDIS—There is a question: do you know whether—

CHAIR—You do not have the call, Senator Brandis.

Senator FERRIS—I am happy for you to ask the question, Senator Brandis.

CHAIR—We are well overdue and I will close this session down if there are no questions. If we are going to have debate and hectoring, this session will be closed down.

Senator BRANDIS—Senator Ferris has yielded the call to me, Senator Cook. Just as your colleagues Senator Ray and Senator Faulkner share the call at these committees, Senator Ferris and I propose to do the same.

CHAIR—I am the chairman here and I decide the calls. Senator Ferris, have you surrendered the call?

Senator FERRIS—I surrendered the call because Senator Brandis just said to me that he wanted to make a point on this particular issue. I do have more questions.

Senator BRANDIS—Can I just interject this question: do any of you know whether, before he signed this submission—which apparently does contain a misleading statement—Dr Gallop had the opportunity to read the DFAT documents and other documents to which Senator Ferris has just referred you?

Mrs Judge—I do not know what the Premier had the opportunity to read and what he did not.

Senator BRANDIS—If Dr Gallop, who no doubt is an honest and scrupulously scholarly man, made an error in his submission because of something not being drawn to his attention which would have demonstrated its erroneous character, he no doubt would have wanted the opportunity to correct the error.

CHAIR—Assuming that there is an error—and it is a political point as to whether or not there is one.

Senator FERRIS—Can I just proceed? It is quite obvious that, without Dr Gallop or one of his ministers here, this is another issue that cannot be answered. Can we move on to the statements in the submission in relation to the minerals industry? I find one of these statements quite extraordinary, particularly when considering Premier Beattie's comment I quoted earlier in this hearing. In the submission that Dr Gallop has signed off on, it says:

For the most part ... there will be little change to significant areas for Western Australia, such as exports of minerals and energy.

Can I draw to your attention a statement made by the Minerals Council of Australia, just after the agreement was released, in which it says, 'The free trade agreement provides just the fillip the Australian Minerals industry is looking for from these trade negotiations.' The Minerals Council provided extensive evidence to this committee on the benefits and opportunities the free trade agreement provides to the industry. How can the peak body of the minerals industry make such a comment when Western Australia—arguably, one of the most significant minerals producers and exporters from this country—says that it will make no difference at all?

Senator BRANDIS—Would it be that the Western Australian government is out of touch with the mining industry, Senator Ferris?

Senator FERRIS—I have no idea. I am asking the question of these officers.

CHAIR—Order! You have asked your question, Senator Ferris.

Mrs Judge—I will defer to my colleague Karen Hall, from the industry department.

Ms Hall—Our comment there is that there will be little change to significant areas for Western Australia, so it is not saying there will be no change at all. It recognises that there will be some change. But we already have very good relationships there, with high levels of investment in the US, and we would expect those to continue. We find that the minerals have only marginal tariff rates, so we do not see that the changes in those will make significant changes to our export arrangements.

Senator FERRIS—It just seems quite extraordinary when the minerals coming out of Western Australia are the same as those coming out of Queensland and the Queensland Premier says how fantastic this agreement will be but the Western Australian Premier cannot make a decision on whether he approves of it or not, despite having sent in a submission. I do not have any other questions.

Senator BRANDIS—Mr Beattie is a much more decisive man, Senator Ferris.

CHAIR—You sound as though you would vote for Mr Beattie in Queensland, Senator Brandis, which I very much doubt.

Senator BRANDIS—I am saying that as a loyal Queenslander. I am wearing my Queensland colours here today.

CHAIR—I thank the representatives from the Western Australian government departments for making both their submission and their time available to us. I do have a lot of other questions, but I will proceed to put them on notice. I indicate that the areas covered will relate to your understanding of the investor-state provisions, to the extent that there is a reference in the text to that. I have further questions on intellectual property that go to copyright as well as other elements of intellectual property. I have questions about how the changes in the health area might impact on the state, and I want to follow up those issues about the extra costs to the state budget as a consequence. There are a number of other matters that I will cover as well—for instance, there is a bit about sugar in your submission and I would like to explore that and a few other matters. So, in foreshadowing those questions on notice, there are no further questions from us.

[12.22 p.m.]

STOLER, Mr Andrew L., (Private capacity)

CHAIR—Welcome. I do not think we have a submission from you, Mr Stoler, but we do have some documents. Would you care to take the opportunity to address us?

Mr Stoler—Thank you, Mr Chairman and members of the committee, it is a pleasure to appear again before you. As I made clear the last time at which I appeared before the committee, I am appearing in a personal capacity. I have followed this negotiation closely and I favour approval of the agreement by the Australian parliament and the US Congress. I have been asked to keep my remarks brief and I will do that; however, there are a couple of points that I think are important to get on the record at the start.

First of all, some people in Australia and in the United States have complained about this agreement because, they say, it is not really a free trade agreement where all barriers between the two countries for goods and services trade will vanish as a result of the FTA. I think this is a little unfair because, from the very beginning, it was abundantly clear that neither the United States nor Australia actually sought a totally free trade agreement. I am confident that nobody in this country went into the negotiation with the idea that Australian broadcast quotas would be eliminated through the services chapter or that government restrictions on Qantas ownership should be scrapped. Quarantine measures were always going to be preserved on both sides and the government was clear at the start that the FTA should not be allowed to undermine the effective operation of the PBS. Similarly, in the United States the sugar sector was probably never on the table nor were the Jones Act restrictions on foreign built bottoms.

We all know that trade negotiations and agreements are an exercise in political economy, so nobody should be surprised at the outcome in this particular negotiation. Few should really be disappointed either. Individuals, sectors and companies in both countries will likely realise substantial rewards as a result of taking advantage of new opportunities opened by the agreement, even if the overall result is not susceptible to dramatic numerical estimate. Why is the overall result not quantifiable as 'dramatic'? It is mainly because existing barriers to bilateral trade, investment and services are not major problems for most companies.

This point is made in the recently released study of the FTA produced by the United States International Trade Commission, which was not available when I last appeared before this committee. The USITC, like many others that have studied the likely impact of this proposed agreement, is careful to restrict its quantitative analysis to the effect of tariff reductions. Today, according to the ITC, the average US tariff on imports from Australia is 1.7 per cent and the average Australian tariff on imports from the US is 4.3 per cent. The ITC's quantifiable estimate of the implementation of the agreement is correspondingly small. With the full implementation of the tariff cuts, the USITC estimates that the gains to US welfare will be in the order of just $US434 million. Taken against the size of the American economy, which is about 20 times the size of the Australian economy, these are pretty small gains. If the story that appeared in the *AFR* this morning is correct, it would seem that Dr Dee has come to similar conclusions.

The ITC study also points out that bilateral trade and investment flows are significant—American investment in Australia amounted to $36.3 billion in 2002, while Australian investment in the United States at the end of that year totalled $24.5 billion. Here it is worthwhile noting the disproportionate amount of Australian investment in the United States relative to the size of the population and economy.

Finally, the ITC states in the executive summary to its 200-plus page study that the FTA effects that are attributable either to the liberalisation of the supply of services or to the FTA provisions regarding intellectual property rights or investment remain unmeasured. As the review of literature shows, these FTA effects could be more significant than the effects of removing tariffs. I have been making this point for some time. It was echoed yesterday in an article in the *Australian Financial Review* by Professor Peter Lloyd.

Let me say that in the case of these two countries, where most existing barriers are already low, where there is a tremendous and integrated ongoing business exchange, where both countries have managed to preserve their most sensitive policies from elimination under the agreement, and where it also seems clear that many sectors and firms can reap real gains, I wonder why we would be opposed to the establishment of the FTA. When you add to the equation that both the United States and Australia are working harder than ever to secure a positive outcome to the multilateral WTO negotiations, and where we are now seeing some light at the end of the tunnel, I think we have to conclude that this is an agreement worth having.

Before I conclude, I have a small request. Last Friday an opinion piece was published in the *Australian Financial Review*'s review section that grossly and unfairly misrepresented the content of this FTA. I have prepared a rebuttal to this piece which I have sent to the *Australian Financial Review* in the hope that it will be published. I cannot, of course, guarantee that the *AFR* will accept it for publication, so I would like to ask your permission to table my rebuttal as part of my appearance before the select committee if that is possible.

CHAIR—On the last point, I have no objections to your rebuttal being tabled but I think we ought to know what it is a rebuttal to. Subject to your view, I suggest we include the article then readers of the *Hansard* can understand your rebuttal in context.

Mr Stoler—I certainly have no objection to that. In fact, I based my rebuttal on quotations taken directly out of the author's opinion piece.

CHAIR—That being the view of the committee, it is so ordered.

Senator BRANDIS—On the opinion piece in the *Financial Review*, I do not know Mr John Mathews—one of the three authors—but the other two authors, Professor Linda Weiss and Dr Elizabeth Thurbon, have appeared as witnesses before this committee. I propose to put a couple of propositions to you by way of example from the written submissions made by Professor Weiss and Dr Thurbon before this committee and to invite you to comment on them. I supplied a copy of the submission, and the text of the opening statement which accompanied the submission, earlier this morning. Would you agree with my characterisation of the written submission of Professor Weiss and Dr Thurbon as a flimsy polemic dressed up as scholarship yet unadorned by a single scholarly reference and entirely lacking in the rigour, the intellectual integrity or the

analytical objectivity one would be entitled to expect of people who represent themselves as expert witnesses?

Mr Stoler—I would agree with that with one exception: I really do not see any evidence that this is even dressed up as scholarship.

Senator BRANDIS—Let me direct your attention to it. In the first sentence of the opening statement, Professor Weiss—who I am sorry to say is a professor at a distinguished university, the University of Sydney—and Dr Thurbon pretentiously say:

We would like to point out that we are presenting a submission as experts in the politics of international economic relations ...

I will pause there. The very first words uttered by those two people characterise their submission not as an exercise in polemic—to which, of course, as citizens they are perfectly entitled—but as expert evidence.

Mr Stoler—I take your point on that. I would agree with your characterisation. I am new to the academic life, but I find it objectionable that somebody that has the title of 'Professor' and works at a university would engage in such obvious misrepresentation of an agreement.

Senator BRANDIS—Can I reassure you, Mr Stoler, since you say you are unacquainted with the academic life in Australia, that the university of which I am a political science graduate, the University of Queensland, would never permit any of its staff to put their name to such a flimsy polemic and dress it up as a work of scholarship. The scholarly standards at the institutions in which these two persons hold positions are obviously inferior to those in these departments of other Australian universities. Let me put you, Mr Stoler, the fourth paragraph of the opening statement, where Professor Weiss and Dr Thurbon say:

Our submission presents compelling evidence that the deal on the table will cause irreversible damage to Australia's short and long-term economic interests, ushering in a new era of economic serfdom under the adoption of US-inspired economic laws.

Can I, without being tendentious, invite you to comment on that remark.

Mr Stoler—Yes, I am prepared to comment on that remark. That remark in their opening statement seems to be the basis of the opinion piece that they had published in the *Financial Review* last Friday. I would like to start with the area of government procurement. They have made a number of misrepresentations both in their submission to you and in the article about government procurement. To quote from the article that was published last Friday, they characterise the government procurement sector of the agreement as an area where:

The Australian negotiators have given all this away by agreeing to abandon any "Buy Australian" clauses or conditionalities—and these are totally unreciprocated by the US side.

If you say something is 'totally unreciprocated' from the US side it means that you are giving something and getting nothing back. That is not the case. If you read chapter 15 of the agreement and check what is posted on the DFAT and USTR web sites and look at the annexes you will see

that there is a great deal of covered procurement on the US side that is on the table, for a dollar value that is probably many times the value of the Australian procurement covered in the FTA. If one looks at what the authors of this opinion piece have submitted to your committee in their paper—

Senator BRANDIS—You mean 'expert evidence', Mr Stoler—they say it is expert evidence.

Mr Stoler—If you look at their expert evidence, they have a number of paragraphs under 'Grounds for rejection'. The first paragraph they cite as grounds for rejection of the deal in procurement seems to be that Australia has a chronically huge trade deficit with the United States and the fact that the bigger market in the United States offers more benefits for Australia is not a logical one, that:

... Australian firms will find themselves up against proportionately many more US businesses (not to mention other foreign competitors). Moreover, in our own procurement markets, US companies will far outnumber Australian bidders for public contracts.

It is important to clarify the current situation in the United States market for Australian suppliers in government procurement. Right now they are forbidden—not facing a preference, but forbidden—from bidding on contracts that are covered under the WTO government procurement agreement and they are allowed to compete under a bilateral defence agreement. What this agreement in the FTA will do is not only remove the prohibition on government procurement covered purchases but also waive the 'buy American' percentages there in effect for certain types of purchases.

In the second paragraph of their grounds for rejection, they have said something which is true but which I do not think argues against participating in this agreement. In the third paragraph they have said:

While more US firms will gain unconditional access to our market, our firms will be faced with increasing hurdles, in the light not only of new US legislation to render waivers of the Buy American Act illegal, but also of the resurgent emphasis on the 'national security' clause, which is being invoked ever more frequently to overturn tenders awarded to foreign companies. Just two examples of foreign tenders recently overturned include a British company which had a contract to supply 10 million berets to the armed forces cancelled because the berets would not be produced in the US, and a German company producing handguns for use in commercial cockpits.

This paragraph is a good example of how you can mislead the public with a false statement. The first part of the paragraph is incorrect because there is no possibility that the US would reapply 'buy American' provisions to anything covered under this agreement and be able to do so legally. If that were done, Australia would be within its rights to challenge the Americans. The two examples of foreign tenders recently overturned are not the types of tenders that will be covered under this agreement because they involve either textile and clothing sales to the Department of Defense or sales of weapons, which I am sure are also not covered under this agreement.

I do not know how much more detail you want me to go into, but there is another allegation made in this article in the *Financial Review* last Friday which I think is particularly interesting. They say at one point in the article:

The worst (most nationally damaging) feature of the agreement is the way in which it dictates the 'harmonisation' of Australian institutions, procedures and laws with their US counterparts, ensuring that any remaining differences (differences that might give Australia competitive advantages) are systematically eliminated.

If this is the worst and most damaging feature of the agreement, one wonders why Professor Weiss and Dr Thurbon have not told us what they are talking about. They do not give us any clue in the article published last Friday what they mean when they talk about harmonisation of US institutions and Australian institutions and laws. I suspect in light of the discussion we had earlier today that they might have in mind intellectual property rights, and of course there are some elements there that might tend to harmonise certain aspects of the two countries' laws. Some people have objected to those provisions and I understand those objections. However, if that is one of the areas they have in mind, it is certainly not an area where maintaining different laws and rules in Australia could lead to competitive advantages. If this harmonisation through the FTA is the most damaging feature of the FTA, I think somebody should ask Weiss and Thurbon what they have in mind. There are a lot of other misrepresentations in the article, too. The piece of paper I handed over to the committee this morning goes through those.

Senator BRANDIS—What is your advice to the committee as to the status we should give this document that purports to be expert evidence based on the claimed expertise of the authors in the politics of international economic relations?

Mr Stoler—Senator, if you are accepting evidence from anybody, then I expect you can accept evidence from these two, but I do not think it could be accepted as expert evidence.

Senator BRANDIS—But perhaps as a flimsy polemic, as I said at the start, expressing a view which is no doubt held sincerely and in good faith but unsupported by any empirical basis?

Mr Stoler—It is certainly not supported by any empirical basis.

Senator BRANDIS—Nor any scholarly reasoning?

Mr Stoler—I would not say it was supported by scholarly reasoning.

Senator BRANDIS—Thank you.

CHAIR—I have heard the remarks delivered here by both these academics. I have not read the article and I have not read your rebuttal, Mr Stoler. But I do not think that, from the point of view of the Senate, reflecting on the professionalism of people appointed at the level of professor at a distinguished university such as the University of Sydney, or indeed any university in Australia, is appropriate—and I do not take your remarks as doing that, Mr Stoler. We can disagree with what they say, but I think we have to say that they are entitled to their view. I take your remarks as disagreeing with what they say and arguing about the accuracy of it but, for the record, I want to say that I do not necessarily reflect at all on their right to the quite distinguished titles that they hold.

Senator FERRIS—Mr Stoler did not reflect on that; Senator Brandis did.

CHAIR—I know, but I think that that is a problem because privilege does not necessarily cover him in those circumstances.

Senator FERRIS—But Mr Stoler did not—

CHAIR—No; and, as I said, I did not take his remarks to do that.

Mr Stoler—I did not intend to reflect in any way on the institutions or on the individuals but I think that the opinions they have expressed cannot possibly be characterised as accurate expert opinions.

CHAIR—I understand what you are saying. I would think from their titles that they do have some claim to represent themselves as experts, because they are a professor of government and international relations and a lecturer in international relations. However, Mr Stoler, my questions are not about this at all; they are about the other matters that you have brought up in your evidence. From what you have said to us, I understand that the analysis of the American International Trade Commission effectively supports, as far as goods trade is concerned, the remarks by Dr Philippa Dee reported in today's media from—quite disgracefully—a leaked document.

Mr Stoler—The International Trade Commission report came out late last month—May 2004. In the report they made it clear that they were bifurcating their analysis between elements that could be quantified and those which had to be given a quality assessment. On those that could be quantified they restricted themselves solely to the tariff aspect and they came to the conclusion that the quantifiable result was really quite small—of the order of, as I think I said, a gain to the US economy of about $US434 million. They also pointed out though, in another part of their report, that they were really incapable of assessing or assigning a number to aspects of the agreement like intellectual property rights, investment services and the like—which are quite important in this case—which they are not capable of quantifying. So they did not give a full answer to correspond to some of the other economic studies that have been done.

CHAIR—I am grateful to you for drawing our attention to the ITC's report. I understood that the ITC reports to the administration, not to the Congress.

Mr Stoler—No, the US International Trade Commission is an independent agency of the US government. It is neither part of the Congress nor part of the administration but it has a remit which allows both the Congress and the President to ask it to do certain things. In this particular case the US trade representative asked it to do this analysis.

CHAIR—I think the US trade representative asked it to do the analysis prior to moving to commence negotiations on an FTA but its report on what the prospects were for the United States was confidential to the USTR. That is my understanding. Is that correct?

Mr Stoler—No, a slight clarification has to be given to that. There are two different studies that the US International Trade Commission does in connection with an exercise like this. The study that takes place prior to the market access negotiations, either in a WTO context or an FTA context, is a study of sensitivity of particular products in the United States to having the barriers removed. That is the study I think you are probably referring to that negotiators had and which

they had to keep confidential. In other words, if you cut the tariff on autos, what will happen to the auto industry? This particular study that I am referring to now was requested on 18 February 2004 after the conclusion of the negotiations with Australia, and it has produced an estimate of the economy-wide and selected sectoral effects of the agreement. So it is a study done subsequent to the conclusion of the agreement.

CHAIR—I see. We still do not know what the initial study shows—that is confidential to the administration?

Mr Stoler—The initial study is confidential but it has been overtaken by events now. There is no longer any reason to care; we know what the results are.

CHAIR—I am grateful to you for drawing my attention to the fact that there are studies available. The committee should obtain a copy because it is related to our considerations.

Mr Stoler—It is available on the ITC web site.

CHAIR—This is where I intended to start my remarks but I was diverted by the academia issue. You have had long experience in trade negotiation, working for the USTR and the WTO in Geneva, and you are now putting the benefit of that experience to use in Australia at the University of Adelaide. How do you characterise the perspective you come from in giving evidence to us? Is it an American perspective, an Australian perspective or an international trade expert's perspective?

Mr Stoler—I would like to think it is an international trade expert's perspective. I have been cleansed of my American origins by the long period of time I spent in Geneva, including the last three years at the WTO, and even that was more than two years ago. Naturally I understand the way some of these things work in the US, and in looking at this negotiation in its early stage, it was already fairly clear, by looking at what had been negotiated between the United States and Singapore and the United States and Chile, the direction in which this agreement was likely to go. In fact, I wrote an article on this FTA negotiation with Australia that has been published as part of a book that has recently come out from the Institute for International Economics in Washington DC in which some of those points were made. I am trying to take an objective view of this as an international trade expert.

CHAIR—Under the articles of the WTO, there is recognition of bilateral trade agreements under certain conditions and terms which go to their comprehensiveness. One of the threshold questions is: does this FTA meet that test as far as the WTO is concerned? Do you think it does? Have you had a chance to study it from that perspective? To give you some background to that question, Australia has had, within the WTO context, a constant and constantly argued position about the meaning of that segment of the text, and that constantly argued position puts great weight on the comprehensiveness of an FTA. Given that perspective, do you have any comments to make on that issue?

Mr Stoler—There are two tests that an FTA agreement needs to pass in the WTO these days. One has to do with its coverage of goods, and the other has to do with its coverage of services. In the case of the coverage of goods, the qualifying phrase is that the agreement needs to cover substantially all the trade between the parties. In the case of services, it is significant sectoral

coverage with no a priori exclusions. To take the services side first, I would certainly have to say that this agreement has significant sectoral coverage with no major a priori exclusions, so I think on services we are probably all right.

The question on trade in goods is a little more complicated, because an understanding reached during the Uruguay Round provides, for example, that in any area where protection is to be phased down over time it should be phased down completely over a period of just 10 years. As we know, there are certain features in this agreement, even where the trade is being liberalised, where the period goes longer than 10 years. Whether the number of those exclusions or departures from the general rule is so significant as to take it outside the scope of 'substantially all the trade' I do not know, but I would doubt that it would disqualify the agreement, for the simple reason that there is a disagreement among WTO members today—and it is under negotiation in the Doha Round—as to what is meant by 'substantially all the trade'. There is one group that says it should be substantially all the potential trade and another group that says it should be substantially all the trade that takes place. So that makes it difficult to be definitive.

CHAIR—Historically, Australia has been in the second group, hasn't it?

Mr Stoler—Yes, certainly. And I am sure Australia would still take that position today.

CHAIR—Yes. It has been put to me that the gaping hole in this agreement is the absence of an agreement on sugar. Given what you have said, does that affect the argument about comprehensiveness, from an Australian traditional point of view?

Mr Stoler—I am not sure that the volume of sugar exports that have taken place to the United States over the years is such that you could say that it is a gaping hole. It is obviously an important sectoral exception. I recently returned from a trip to Mauritius, where I talked a lot about the sugar industry and its characteristics world wide. It is pretty clear that there is almost nobody today who can compete with the Brazilians in sugar. In the article that I wrote last May I suggested that if Australia were to gain access to the US market for sugar and if Brazil were also to gain access for sugar as part of an FTA arrangement under negotiation there, it would not be much of a victory for Australia, because they would not be able to compete with the Brazilians.

CHAIR—Unless the Australian sugar industry became more efficient.

Mr Stoler—The Australian industry would have to become much more efficient and reduce its costs dramatically. I understand that the Brazilians can make a profit producing sugar and selling it at 5c a pound.

CHAIR—But the Australian government has announced a package which is a redundancy package, an industry efficiency package and a compensation package for the Australian sugar industry in order to make it more efficient and competitive internationally. I am sorry, but *Hansard* does not record a nod of the head.

Mr Stoler—I am just acknowledging what you have said. I do not think you asked me to comment on it.

CHAIR—The other question about FTAs is about the proliferation of them. One of the arguments that is put to us is that we should be in FTAs because everyone is in them. The impression, therefore, is that we will miss the bus if we are not actively seeking FTAs. Yet it has been said at WTO level that the proliferation of FTAs is, to quote the former director-general, 'sucking the oxygen out of the round'. Is that true? Does the fact that the balance of effort by trade ministries is directed at FTAs add to the difficulties of the round getting mobilised?

Mr Stoler—The answer to that question is a little bit complicated. It has to do in part with the nature of the FTAs that are being negotiated. Last winter—that is, winter in Australia—the World Trade Organisation came out with their first world trade report. They have changed their publications and now have a sort of overview document. That document had a substantial discussion of this issue of regional trade agreements or preferential trade agreements in a multilateral system, recognising that obviously there was a proliferation of these agreements. A number of interesting observations were made in that article. One is that when you look at the sheer number of FTAs that have been negotiated since the WTO came into being in 1995 you need to take account of the fact that a very large percentage of those were agreements between members of the former Soviet Union that were seeking to re-establish their trade ties. A second observation that the WTO made is that there are different types of FTAs: there are those which by their very nature would complement the WTO and those which maybe would inhibit it and, as you say, suck the life out of the WTO in the negotiations.

The WTO drafters of this report suggest at the end of the section that maybe what we should do in the case of each individual FTA that is under negotiation is ask two questions about the motives of the countries negotiating the FTA. The first question is: is there anything in this agreement that the two parties would refuse to see included in a WTO agreement? In other words, are they negotiating on some sort of special exclusionary basis that they do not want others to take advantage of? If the answer to that is no then we probably are on our way to a complementary free trade agreement. The second question they ask is: is the agreement one which the two parties would not be willing to eventually extend to other parties provided that other parties met reciprocity considerations and the like? Again, if the answer is yes, they would be willing to extend it to others, then it is a good thing; if it is no then it is a bad thing.

In the case of this particular agreement between the United States and Australia, I do not think there is anything included in the coverage that either Australia or the US would not be willing to see covered in WTO. I think that, by virtue of the Bogor declaration and other aspects of APEC participation, both countries have also made it clear that they do not have any difficulty extending this sort of liberalisation to others over time. So you have to look at each individual agreement. I think in this particular case I would conclude that it is probably an agreement that does not undercut the WTO.

CHAIR—Is there anything in this agreement, to take the next version of this argument, that you can point to that would—to use the jargon—energise the round or get the round moving more rapidly, that we could lever into it as a positive advantage?

Mr Stoler—Certain things like the enhanced coverage of services and the willingness to go further. The market access parts of the agreement have been criticised by many as not being all-inclusive, but if Australia and the United States can go further in a number of areas to developed countries then certainly they should be in a position to improve their market access offers in the

WTO as well. It is like government procurement for Australia—why should Australia now not join the WTO agreement on government procurement once it has opened up to the United States? It may as well get the benefit of participating in a broader global deal. I think we can say that, in the market access areas, both sides, now having agreed to do this for each other, should be in a position to offer more to third countries.

CHAIR—In services trade, though, under the GATS we reciprocate to individual countries in terms of what we bind ourselves to do. What you are suggesting—and I am asking you this to confirm whether my understanding is correct—is that we are now in a position to bind ourselves under the GATS to the services level of liberalisation to all the other services trade that we are engaged in. Is that what you are saying?

Mr Stoler—No. Actually the services negotiations work very differently in the WTO than they do in a bilateral free trade agreement context. In the WTO we have what is often referred to as—

CHAIR—You have to opt in.

Mr Stoler—In the WTO it is a bottom-up positive list, approach; in the FTA it is a negative list top-down approach. So Australia is offering much broader coverage to the United States than it would be prepared to offer unless others were going to offer something on their own in the WTO. As I said before, it still remains a fact that, if you are going to open this up to one of the major trading partners, the downside risks of including it in a WTO exercise are probably less than they would otherwise be.

CHAIR—Given that, for services, the WTO is a positive opting in—a positive list—and the services in this FTA are a negative list, anything not mentioned is automatically included. So I am trying to work out how this FTA can somehow energise the WTO round, in the services part of it.

Mr Stoler—It is only because, I think, both Australia and United States, having now made broader commitments to each other, should be less nervous about opening up those sectors to third parties in exchange for some concessions over there.

CHAIR—You wrote in the *Australian Financial Review* a month or so ago that this was a positive agreement and that we should opt in as quickly as we can. But, as I read it, your article had a big caveat, which was that the extension of access on government procurement was a significant breakthrough but—and these are my words, not yours—meaningless unless Australian companies were market ready to take advantage of that opening, and some effort should be made to bring them up to that standard. Can you explain that point more fully? Firstly, have I got you right? Secondly, can you give me some details?

Mr Stoler—Yes, you have got me right. I think Christine Gibbs Stewart, a witness who talked a little earlier today, was also alluding to the same thing—that a certain amount of preparation goes into getting into the US market in certain areas, and government procurement is a particularly difficult area. The government procurement requirements in the US are probably very little understood by many Australian companies that have the potential to sell there. I have had a number of conversations about this with Austrade and they tell me they are beginning to

gear up for a program later that will try to help Australian companies to take advantage of these government procurement opportunities. They have told me they are holding back because they do not want to get into a big exercise until they know the agreement is going through. But, assuming that the agreement goes through, Austrade is working to identify experts and begin to think about seminars that would help get these companies up to speed so that they can take advantage of the opportunities in the government procurement market.

CHAIR—You have had experience in both economies. What is the gap? How much more work do we have to do to be competitive in the US market?

Mr Stoler—In government procurement, or generally?

CHAIR—Government procurement.

Mr Stoler—Like in many other areas, I think the first thing Australian industry should do is identify those areas where Australia has particular competitive advantages. There are certain industry sectors and types of products which would probably be quite attractive to the government procurement officials in the United States. It would be wrong to try and go across the board because, if you go across the board with a shotgun approach, you are going to involve too many people and spread your resources to thin. So I think the initial exercise needs to be to identify those products and services in Australia where, let us say, there has been a lot of success selling to Australian governments, for one reason or another. Maybe these are areas we should focus on identifying and getting ready for the market in the US.

CHAIR—But it is not just a matter of competing with potential American competitors in the product and service lines that we are efficient at; it is a matter of competing with other countries that also have the same access that this agreement would now confer on us.

Mr Stoler—That is right. Essentially, you are talking about all the countries—most of them developed countries—who are already in the market by virtue of the government procurement agreement in the WTO.

CHAIR—Do you know what number of countries that is?

Mr Stoler—Of course it depends on how you count the European Community, but I think it would basically be the OECD countries minus Australia and New Zealand, plus a number of developing countries and transitional economies that have joined the WTO since 1995 and where joining the government procurement agreement was an aspect of their accession process. They would be another six or seven. So there are probably 25 countries in the agreement.

Senator FERRIS—There are two areas that I want to put to bed, as it were. One relates to some evidence that we have received on quarantine and the effect that the free trade agreement might have on our science based quarantine arrangements. The second is the Pharmaceutical Benefits Scheme. I noticed that you have made comments in the material that you submitted to us this morning on both these issues. Given the importance both of them have not only to the wider community but also in terms of the amount of evidence that has been given to this committee relating to both of them, I would like to go through them. Perhaps I could begin by mentioning the evidence that was given to this committee by Professor Weiss and her colleague

Dr Thurbon, which is covered in the material that was published in the *Financial Review* the other day, which says in relation to the quarantine matter:

> ... under the agreement Australia is voluntarily abandoning its long-established independent quarantine procedures. The deal stipulates the creation of a new "oversight" committee—including US trade representatives—to monitor Australia's science-based quarantine decisions. In effect we are about to downgrade the scientific rigour of risk assessment in favour of trade politics.

That is a very concerning statement for Australians who know that currently import risk analysis is based on science and is at arm's length from the political process. Can I ask you to go through the comments that you have made in relation to the comments made by those previous witnesses—and, I might say, several other witnesses as well. I think that statement is a particularly worrying one. Can I ask you to take us through your view on why that is an unsubstantial claim.

Mr Stoler—First of all, it will not come as a surprise to you that Australia has a reputation for having very strict quarantine measures. In fact, many countries have complained over the years that perhaps they were a little bit too strict and that, although they were based on science, maybe they were unnecessarily strict. I think the basis of this aspect of the agreement dealing with sanitary and phytosanitary measures and quarantine is to recognise that in both the United States and Australia there may be good reason for maintaining quarantine and SPS measures but perhaps the measures could be structured in a way that is still sufficient to provide protection to domestic plant and animal health but at the same time facilitate trade along the way. In fact, the Australian negotiators have told me that there are just as many Australian exporters of products to the United States who are interested in US quarantine matters as there are Americans interested in selling into the Australian market.

There is nothing that one can find anywhere in the text of this agreement that suggests that either side has the slightest intention of moving away from scientifically based risk assessment procedures as the basis for quarantine actions. You will not find anything in the text. You will find references to facilitating trade to the greatest extent possible while preserving the rights of the parties to protect animal and plant life or health but nowhere will you find the suggestion that we are going to abandon that concept. In the evidence that Professor Weiss and Dr Thurbon have given you, they have provided a certain number of quotations from farm lobby groups and others, like the California Farm Bureau Federation, which they are asking you to take as being evidence that the people have a problem with scientific based risk assessment, but I do not think you actually find that in the quotations. What the quotations usually say is that we have got a trade problem, not that we have a problem with the scientific risk assessment procedures. So, provided that you can find a way of addressing the underlying scientific problem and at the same time facilitate trade, that is what this chapter is all about.

Let us take an example. Recently there was a case between the United States and Japan on apple trade whereby the US alleged that the Japanese restrictions designed to prevent fire blight infections in Japan were not based on strict scientific evidence. That same sort of case might be brought against Australia. It has not been brought to date, as far as I know, although the Europeans have brought a number of challenges to quarantine measures. What this agreement says is that, rather than bringing dispute settlement charges against each other, we are going to

set up a committee whereby we can talk about problems that might be identified and resolve them in the context of maintaining scientifically based risk assessment.

Senator FERRIS—The things that disturb me about the article, which is called 'The FTA: pandering to Rome', is this suggestion:

Reading the small print of the FTA, it is amazing that a deal so utterly lopsided could have been negotiated by an Australian government.

I have read through the fine print of this document many times, particularly covering quarantine and the sanitary and phytosanitary measures and also in relation to the Pharmaceutical Benefits Scheme, which we will get onto in a minute, and I simply cannot see the substantiation that is being claimed here. The article goes further and suggests that Biosecurity Australia did a recent 'backflip' to allow banana imports from the United States and the Philippines. That is a case in point which it uses to suggest that, in the context of the article, this is proof that Australian trade pressures are dictating this. In fact, Australia is not taking bananas from the Philippines. There has been a draft IRA which is currently in the process of being heard.

My concern, and to some extent you have covered it, is that there does seem to be a suggestion that institutionalised pressure is to be applied to this issue to compromise our science based criteria and also the United States science based criteria. Speaking as a South Australian, I can tell you it took us many years to be able to get oranges into the United States because America's biosecurity equivalent rejected them on the basis that we had a particular type of septoria which they did not have in the United States. It took us 15 years to be able to show that in fact that was not the case, and happily we now send some oranges to California and they send some here. To suggest that that has been compromised is a very dangerous suggestion in relation to this agreement.

I will move to the Pharmaceutical Benefits Scheme. This article says that the Pharmaceutical Benefits Scheme will be made 'unsustainable' as a result of changes to Australia's current arrangements for the PBS under the free trade agreement. It will be 'unsustainable' or the government will be forced to channel resources away from other parts of the health system to support the scheme. I wonder if you could address that, because I think that particularly applies to the advisory committee that is to be established under the free trade agreement. Are you able to make a comment on that? Not only Professor Weiss but also Dr Thomas Faunce and a number of other witnesses have argued, along the same lines, this particular point, which is also of great concern to the wider community.

Mr Stoler—Again the situation of the PBS has been misrepresented, at least in terms of what is in the agreement or what is potentially in the agreement. In fact, the real obligations in terms of anything that could potentially be considered to be enforceable on the pharmaceutical side are the transparency provisions in paragraphs 2(a) through to 2(f). There is a specific footnote in the agreement to the Medicines Working Group, paragraph 3(b), which makes it clear that there is no requirement to review or change decisions on specific recommendations. In other words, that is the sort of thing that is going to stay out of dispute settlement under the agreement. The only thing that would be covered with dispute settlement would be, for example, if Australia did not take steps to disclose procedural rules, methodologies et cetera. The transparency provisions are there for that.

So there is nothing in this agreement that suggests, as Dr Faunce, Professor Drahos or the authors of the article the other day suggest, that we have somehow institutionalised a provision which is going to lead to overturning PBAC decisions or forcing up the price of drugs in Australia as a result of this annex to the FTA. I think, in fact, that you will find that there is quite prominent attention given to the recognition in the agreed principles to the need to promote timely and affordable access to pharmaceuticals. 'Affordable' is an important term there. Dr Faunce and Professor Drahos in a separate article they wrote suggested that Australia needed the sort of coverage that was included in the recent declaration on TRIPs and access to medicines in the WTO. Of course that applies to Australia already and cannot be undercut by virtue of anything that might be in the FTA. I do not believe that the arguments that have been made on this are supported by anything you can find in the agreement.

CHAIR—Thank you, Mr Stoler, for your evidence.

Proceedings suspended from 1.17 p.m. to 1.46 p.m.

TSONIS, Dr Con, Group Marketing Manager, Bioscience, Baxter Healthcare Pty Ltd

CHAIR—Thank you, Dr Tsonis, for making yourself available. We have your submission from Baxter. You have an opportunity now to address us on that. Please proceed.

Dr Tsonis—I would like to take this opportunity to read a short statement to put into perspective our submission.

CHAIR—By all means.

Dr Tsonis—The Stephens review of March 2001 was seen as the catalyst for change in the blood sector, particularly in relation to the national management of resources and the procurement of lifesaving plasma derivatives. Baxter emphasised then and still does now that the original supply arrangement, the PFA—that is, the Plasma Fractionation Agreement—properly reflected the age and stage of the industry in 1994 but, by the millennium, it had become seriously outdated. We feel that 10 years in the blood industry is a very long time, and things have changed dramatically. Due to globalisation, Baxter sees that blood is local but plasma is global, meaning that access to derivatised biopharmaceuticals—that is, critical medicines isolated from one's plasma—from overseas sources is both safe and accessible to Australians, whilst blood and its components for transfusion purposes are best derived through agencies like the ARCBS, the Australian Red Cross Blood Service.

The current plasma derivatives market in Australia is still a very closed market and only accessible to the local fractionator—namely, CSL. Baxter Healthcare has taken action to bring it to the attention of the Australian government that the plasma derivatives market needs to be made an open market and accessible through open tender. Baxter referred its concern to the United States government, which then added the issue to its agenda and, in 2003, the topic was discussed at length in the FTA negotiations. The side letter describes the results of those particular negotiations.

CHAIR—Thank you. That is a fairly abbreviated summary of your submission.

Dr Tsonis—Yes.

CHAIR—Do you have any other remarks to make apart from that statement?

Dr Tsonis—Not particularly. I am happy to address questions.

CHAIR—From your submission, it appears that you have been instrumental in putting this issue of blood fractionation on the agenda at the FTA. That is by making your representations in the United States to the US Trade Representative.

Dr Tsonis—That is correct.

CHAIR—My only question is: if this agreement went ahead and the provisions in it were implemented and if Baxter were to then win a contract for blood fractionation to state hospitals

in Australia, would it be the case that you would do all your blood fractionation work in Australia?

Dr Tsonis—There are two ways to approach that. One would be to gain access to Australian plasma, transport it to facilities in the United States for fractionation and then return finished product. The other approach would be to bring finished product from overseas that has been extracted from plasma sourced from overseas.

CHAIR—Which of the two would be the Baxter strategy?

Dr Tsonis—Baxter have put both proposals to Health, and more recently to the National Blood Authority. Baxter have had a number of discussions with the Blood Authority and are able to accommodate both options depending on which way the Australian government wanted to move. At the end of the day, our view is that a biopharmaceutical is registered by the Therapeutic Goods Administration in Australia or the FDA in the US and so obviously for that product to be used it will meet stringent efficacy and safety requirements. So the source of the biopharmaceutical should not necessarily be an issue. Baxter Healthcare is really open to either taking plasma from Australia, extracting it overseas and returning the finish good or providing finished product the alternative way.

CHAIR—I am wrestling with the public policy implications of all of this. I think they are that the supply of blood for Australian needs should be cost-effective, it should be available on call and it should be made safe and beyond reproach from a health point of view. I think those are the public policy concerns. There is a sort of quarantine consideration that enters that at the health and safety point of view—that is, is imported blood from foreign sources likely to be as safe as blood produced for fractionation in Australia? Is there anything you can tell us about how we would weigh those considerations from Baxter's point of view?

Dr Tsonis—If I understand your question correctly, you are asking what the risks are.

CHAIR—I am asking: what are the safety precautions? If the second course of action were adopted—that is, importing America generated supplies—what would you say to anyone querying whether or not they would meet our safety and health standards?

Dr Tsonis—That is a good question. I think there certainly is a perception, both at community level and even within the government health level, that foreign plasma is not safe, particularly because the donors are actually paid donors—whereas the Australian policy is that you donate freely. The perception is that the motive behind giving blood is to earn an income and therefore perhaps the quality of that plasma or blood product may not be as high. The evidence shows—and it has been tabled at a number of international conferences—that that is not the case: plasma or blood products derived from donors who are paid, as is the case in the US, is of the same standard or higher from a safety point of view.

Added to that, to obtain the biopharmaceuticals from this base product of plasma we have to meet very stringent regulatory requirements—at the FDA level, the European level or indeed the TGA level. So, from that point of view, the facilities, the quality, the safety and the efficacy of the product are fully audited by those regulatory authorities. Obviously unless they meet those very stringent standards, they are not acceptable for use in the public domain.

CHAIR—My understanding is that this process of auditing—and correct any of these statements because I am not an expert in this area; I do not have a lot of knowledge in this area—and checking to see that the supplies conform with our standards of safety and health requirements is a risk management approach. So you do not check every single drop but randomly check various samples to see that overall the probability is that the lot is okay or that there might be a problem. Is that how it is done?

Dr Tsonis—It is done that way. Baxter Healthcare has very stringent processes in place that speak exactly to what you have just alluded to. They test batches of product and they have very strict regulations for the quality of the donor. If the donor does not come back to donate again, that plasma is excluded. They undergo very stringent testing, including a test called PCR that reduces the window that you are able to detect if there are any problems with the actual plasma. I believe Baxter's standards surpass other international standards in the way it treats its plasma to make sure that there is no situation where infective blood can come through the network.

CHAIR—That is a tick for Baxter, but what does the independent regulatory authority—in this case the Australian government—do?

Dr Tsonis—On behalf of the government, the TGA will review the process of how that plasma is collected and how it is treated and, therefore, needing to meet the Australian standards of safety. We have already supplied and currently supply products that are both registered and unregistered in this country through the FTA. These come from the plasma that would be the very same source for other products that currently we are unable to access into the Australian market.

CHAIR—Please understand I am working my way delicately through this because I do not understand all of it, but it is an important consideration. You supply blood to Australia now from the United States under a protocol that is in existence. You have got these in-house procedures that you have described for us. What does the Australian government do to assure itself that your supply meets our standards? Do I take your last answer to suggest that it does it by relying on your ability to regulate yourself, or does it rely on an independent screening process or risk management process of its own? That is the information I am seeking.

Dr Tsonis—I guess it is a combination of both. Baxter needs to meet very high standards. Those standards are developed by various bodies, but the ultimate test is that for any product to enter into this country it has to be registered through the Therapeutic Goods Administration. It is the body that will screen the facilities, will look at the process and will assess the efficacy and the safety of the product. Collectively it is, in my view, the final judge of whether a product meets those high standards for the Australian market.

CHAIR—How do they do it? Can you briefly explain to me what regime they have in place to conduct that screening?

Dr Tsonis—They would access a number of people who have technical expertise to review—we would need obviously to make a submission, which we do. That submission is very detailed and comprehensive about every step that is involved, from the sourcing of raw materials through the process that is taken to make the product, the quality of that product, how it is developed, produced and labelled. The TGA, as does every other regulatory authority, goes through and

screen all of that process. The regulatory authorities reserve the right to inspect facilities, as they do regularly, to continually maintain the high standards and to keep organisations honest about doing what they say they are going to do.

CHAIR—Do I understand, from your answer, that the arrangements for how they might do this are as yet not in place, it is in contemplation or expectation? Should be FTA go through, there is a commercial opportunity; you access that and then the arrangement would be put in place. Or is there a risk management arrangement in existence now?

Dr Tsonis—Is this from an Australian perspective?

CHAIR—Yes.

Dr Tsonis—There is a process in place now in terms of importing finished product. We would obviously have to work with the regulatory authority if the situation arose where we won a contract for taking plasma offshore, fractionating it and bringing it onshore. We would then have to go through the process where they would come and review our facilities to be absolutely sure that the protocols that we have in place meet the Australian standards to be satisfied that when the product comes back it meets all the requirements.

CHAIR—Thank you. I now have a better appreciation of what is involved. You said earlier that a number of papers had been given in some forum. On the point that blood produced in the US by paid donors met the 'same standard or higher'—I think those were your words—than blood produced by voluntary donors in Australia, or in other countries where there are voluntary donors, who were the authors of those papers?

Dr Tsonis—I do not have those to memory, but I am very happy to make available those abstracts and indeed, in some cases, the actual publications in peer review journals to provide that evidence.

CHAIR—Were they independent commentators assessing the empirical evidence or were they associated with any of the blood plasma suppliers or were they government authorities? Who were they?

Dr Tsonis—Again, I would have to refer to the proceedings of those conferences. From memory, they are a combination of those. There are obviously those from a company perspective that provide data and information, but I believe there are some from other sectors as well.

Senator FERRIS—I found that commentary really interesting; I think the answers that Dr Tsonis gave reflect the questions that I would ask. I had no idea that people were paid to give blood in the United States.

CHAIR—It is one of the reasons why I think we have a better health care system.

Senator FERRIS—One of the reasons.

CHAIR—Thank you, Dr Tsonis.

[2.02 p.m.]

GOULD, Mr Stephen George, Chair, Management Committee, XLM and E-commerce Special Interest Group, Open Interchange Consortium

CHAIR—Welcome, Mr Gould. We have received your submission and thank you for making it available to us. It is an interesting submission, and you have the opportunity now to speak to us about it.

Mr Gould—There are several issues that I would like to bring to your attention. The first one is that I am chairman of a management committee. We have had several seminars about the FTA, and various people have submitted questions. I have brought a list of 10 of those questions: why does the Centre for International Economics report not identify losses on tariffs in the FTA; why does the CIE not explain how tariff losses are going to be recovered by government; why does the CIE report not include figures on GDP services; why does the CIE report not provide information economy projections for the next 20 years—we are moving into the information economy; what about the other 23 US-state governments in the FTA—there are only 27 listed; how will central government encourage state procurement standards; how can GDP reflect SME contributions to FTA government procurements; what caused the proliferation of the FTAs; what is the CIE justification for the FTA; is the CIE justification for the FTA acceptable to the inquiry—the justification being, because everybody is doing it, if we do not do it, we will not be in the game, whatever the game is; and, is there sufficient time to change or reject the FTA? When I came to this meeting, I did not understand that Andrew Stoler was a US citizen and I find it very strange that the Department of Foreign Affairs and Trade would commission a report from an American to—

Senator FERRIS—No, that was Andrew Stoeckel. You are confusing the two: Andrew Stoler was giving us evidence and Andrew Stoeckel, who is an Australian citizen born in South Australia, is a totally different person.

Mr Gould—That is why I looked at the list. So he actually did not write the report—

Senator FERRIS—He had nothing to do with the CIE report.

CHAIR—This is the sixth day of hearings—

Senator FERRIS—He is just another witness.

CHAIR—Mr Stoler heads up an agency or a unit at the University of Adelaide, I think the proper title—I might be wrong—is the Centre for International Economics, Legal and Business Studies. However, Mr Gould, it is not appropriate for us to answer the questions you are putting to us. We will answer those in our report, should we deem to do so; but the purpose of this procedure is that it is an inquiry and it is for you to put to us your submissions in your field of expertise.

Mr Gould—As you are probably aware, quite a few people are concerned at the whole speed at which this FTA has occurred and why it has happened. The reason I mentioned those questions is that I was looking at the reports in the US trade web site which is www.ustr.gov and a speech given by Robert Zoellick one week after the FTA was signed. It was a speech given to the Electronic Industries Alliance in the US. My background is electronic commerce; I have been involved with e-commerce now for the last 20 years. I have represented the Australian Small Business Association on a number of e-commerce standards. I have been invited by the European community to chair the Asia-Pacific SME e-commerce seminars.

When I saw this report from Robert Zoellick and reviewed the Electronic Industries Alliance, I thought it was important to bring it to this committee's attention. The Electronic Industries Alliance in Washington is accredited to the American Standards Institute and it provides the forum to develop standards and publications throughout the electronics and high tech industries. It promotes the market development and competitors to the US high-tech industry both domestically and internationally. It has six members: the Consumer Electronics Association; the Electronic Components, Assemblies and Materials Association; the Government Electronics and Information Technology Association; the Joint Electronic Device Engineering Council; the National STEP training organisation; and the Telecommunications Industry Association—I have a copy here for the committee. The reason I mention that is that it says it is affiliated to the American ANSI standard.

Australia is affiliated to ISO standards. One of the treaties that Australia has to follow is ISO standards. In 1988 I represented the Australian Small Business Association on the EDI standards committee here in Australia. A group tried to push through ANSI X-12 as an interim standard for two years until the EDIFACT standard was adopted. I pointed out that the cost to small business in particular of having to write software in one standard, then rewrite it two years later, was unacceptable. From what I can gather is now happening with this government procurement process that has been put forward, the USA is trying to bring in through the back door electronic standards based on the ANSI standard rather than the ISO standard that Australia should follow as part of its treaty obligations. I would like to draw to your attention several comments out of Zoellick's speech which illustrate something that I think has to be considered by this committee. Let me say I am in full agreement with the FTA, but I think we have to make sure that at least there is a balance in Australia's favour, not totally the US way and not a way that is going to put future generations in perpetual debt to the Americans. I would like to point out one or two of the statements here. Ambassador Zoellick said:

> Well, in the spirit of your special honored guest, gutenacht. It's a great country isn't it. I mean, it's a really a tremendous thing which I probably associate with your group about the possibility of an open society and drawing the best from around the world and trying to make it all happen in the United States which is a lot about what all of you stand for. And I want to thank my friend, Dave, for inviting me to be here this evening. Dave has been a very strong advocate of international trade, both when he served in the Congress, when I first had a chance to work with him, but also now as president of the Electronic Industries Alliance, and I very much appreciate his leadership then and his leadership now.
>
> … … …
>
> Of course, the high-tech industry is in the business of being at the forefront of economic change. You operate in a world where product lifecycles are measured in months, not in years, and in which the global sourcing networks are now the lifeblood of your business.

Tonight, I'd like to talk with you a little bit about how America's trade policy agenda is trying to respond to the needs of a globalized, fast-paced industry such as yours, because rapid technological change poses both challenges and opportunities for America's trade agenda.

… … …

The global rules that were written then for international trade didn't protect copyrights for digital downloads. The world trading system took only its first initial steps liberalizing services markets. Rules for e-commerce didn't exist, because e-commerce didn't exist. And countless new high-tech products that were never even imagined in the mid-nineties have been invented and marketed since the Information Technology Agreement took form in the mid 1990's.

… … …

And that's one reason why President Bush decided to push a multi-tiered trade agenda that doesn't depend entirely on the WTO trade negotiations to move forward our trade liberalization agenda. With our strategy of moving forward simultaneously on multiple fronts – globally, regionally and bilaterally – we're trying to spur momentum at the same time that we're customizing to meet special needs.

… … …

Now, this strategy is producing some real results. Since winning Trade Promotion Authority with the help with many of you in 2002, this Administration has already negotiated free trade agreements with 10 countries, and we're in the process of negotiating or about to start negotiating with 13 more—

CHAIR—Mr Gould, I do not want to cut across your ability to make your presentation to our committee but, while I do not know that any of us are word-for-word familiar with Mr Zoellick's speech, the sentiments expressed so far are fairly common knowledge to the committee. Is there a point in the speech that you wish to draw our attention to?

Mr Gould—There is. The point is that, out of all the submissions that have been put forward to both JSCOT and your committee, as far as we have been able to ascertain, we are the only group that is making any comments about the e-commerce chapter 16 of the FTA.

CHAIR—That is why we invited you to come forward.

Mr Gould—The point I am making is that part of that FTA includes chapter 6 on Customs administration and chapter 8 on international standards. I spent two years in Brussels between 1991 and 1993. I was invited there as part of a Customs project that we had worked on with Austrade in 1988. There I learned that the whole strategy for putting in e-commerce was to use government trade and peak body associations to push the FTA out to their members. What concerns me about this FTA—and because of the number of FTAs proliferating—is that all the peak bodies in various countries are being encouraged to push out to their members that they ratify and support the FTA. Mr Zoellick goes on to say:

Now, I know these tariff cuts remain a very top priority for EIA, so I encourage you to continue to help us by working with industry associations in other countries to try to build a critical mass of countries that are willing to participate.

What this document really spells out is that the American strategy is just to promote American products worldwide and why the FTA itself does not provide a level playing field. It is the American government's intention to be able to push out that the various electronic documents that have to be used would all be based on the American ANSI standard, which is against the Australian commitment to ISO standards. Particularly once you start getting involved in government trade documents, if you are an American company and you want to deal with an Australian government and they say, 'You've got to use our standard,' and it is not the ISO standard, Australian business is not then going to be able to deal with European countries. Australia's small businesses, further down the track, are going to have this real problem that the software that they are using may be very good to work with American companies and with American government, but it will not be suitable for use with European or other ISO countries. That really is what I think is the hidden agenda behind this FTA, and why chapters 6, 8 and 16 need to be considered very carefully by the committee.

CHAIR—Thank you, Mr Gould. That is in my view a worthwhile submission. I was drawn in your submission—your pages are not numbered but I think it is the fifth page, where you say what the key issues are, in your view, for Australian small to medium enterprises involved in trade with the US, and you have listed five of those. But essentially your oral submission emphasises the point that, as you read the agreement, we are required to meet the US—did you say ANSI standard?

Mr Gould—Yes.

CHAIR—I will come back to what that standard is. I am familiar with ISO but I am not familiar with this standard. Also, one of the problems with a proliferation of FTAs is that, rather than having one universal standard, you deal with countries which each have different characteristics and you end up imposing on business, particularly small business, transactional costs because they require different form filling for different economies. That is one of the inherent problems that is broadly recognised. I am not familiar with this US ANSI standard. Can you tell me what that is, compared to ISO?

Mr Gould—Yes. ANSI X-12 was first developed in—

CHAIR—What is the correct spelling of it?

Mr Gould—It is ANSI, which stands for the American National Standards Institute, then X-12. This was the first e-purchasing system that was developed, as I said, in about 1986. When I was on the EDI standards committee, which is Standards Australia EDI standards committee, back in 1988 there were 19 members. I have the list of members here, and it turned out about 13 of them represented American organisations with different hats on. Obviously, the push was to try to get Australian standards to accept ANSI X-12 as an interim standard for two years. They said that once EDIFACT had been developed then it could be incorporated into the business community. I pointed out that ISO EDIFACT had in fact been released in April 1987, so Australia was committed to taking that standard.

The politics were very interesting on that committee. Suffice it to say that the Americans—all the major American companies—all use ANSI X-12. All the European countries use EDIFACT.

So you have literally got these two different trade blocs that cannot exchange information electronically, or, if they can, somebody has got to act as the translator.

CHAIR—So, if I understand what you are putting to us, it is a bit like railway gauges at the time of the federation of Australia.

Mr Gould—It is exactly the same.

CHAIR—Different groups have different gauges and, as a consequence, you cannot have a uniform national rail system and a century later there is a huge amount of expenditure to try and get uniformity.

Mr Gould—Exactly. In the meantime a huge cost will be spent on electronic translation. With the railways at least people were employed taking the goods off one train and putting them on another.

CHAIR—In the e-commerce area, what is the equivalent of that?

Mr Gould—You will have to pay for what is called a 'value added network service' to do that translation. That means that every small business, with every transaction they send, will have to keep a record to say which standard they use. All countries throughout the world could be based on different standards and that then becomes an enormous cost, which is then pushed down invisibly to the small business and adds to their trading costs.

CHAIR—You have defined the problem; what is the answer to it?

Mr Gould—In our submission, we believe that Australia should set up a committee, develop a procurement standard based on our submission for an e-government tendering system and then say, 'Fine, we will conform with international standards.' I have brought with me here various documents to show my background from 1988 with the various European and American standards—

CHAIR—I very rarely query people's credentials; I prefer to look at their argument and see whether it holds water. I have found that people with excellent credentials have weak arguments from time to time and people with no credentials have strong ones. It does not matter to me what their credentials are; it matters to me what the merit of their argument is. Are you saying that we should set up a committee to try and get some uniformity?

Mr Gould—Yes.

CHAIR—You support this agreement, I understood you to say.

Mr Gould—Yes, I do.

CHAIR—In the event of this agreement going through, there is a disuniformity with respect to the Americans and the Europeans.

Mr Gould—Yes.

CHAIR—Is there some technological way of bridging that for small business so they do not have to pay the excessive transactional cost?

Mr Gould—There is. Perhaps I can just take a step back. In December 2003 the Treasury put out for public consultation *Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business*. One of the submissions came from Sydney Ports. It was not somebody actually putting forward a solution; it was pointing out the problems that Australian ports had. It states:

Several months ago Sydney Ports Corporation commissioned me to prepare a review on e-commerce. Specifically the report's main aim was to determine the advantages and benefits of e-commerce with regard to online communication with the port community of Sydney.

It then states:

Three issues have caused me concern. The first is that there is little or no understanding of the application and effective use of e-commerce within industry nor the complete transport cycle. Whilst many ports, particularly cargo ports, have their own electronic cargo systems, there is no standard online system within Australia for stakeholders, and the ports have been involved with e-commerce for 20 years now.

Secondly, each port in Australia has its own manifest system that requires the same ship visiting each port, for example, to send cargo manifests in different formats. For each Australian port when a ship visits, duplication of manual data entry processes is commonplace resulting in errors of information, misinformation and potential misreporting of cargo itself.

This is exactly the same problem that is now occurring with the Australian government e-tender sites. Each Australian state government has e-tenders; every one of them has a different format. The Australian federal government has one format, South Australia has another and New South Wales has another. If you then start adding in the 27 American states and their federal covenants, each of them with a unique and different tendering system, small businesses will not be able to do any trade at all unless they have a standard e-tendering system.

CHAIR—I sympathise absolutely with this, having sat on ministerial committees for a number of years trying to get national uniformity about standards and knowing that each state proudly proclaims theirs as the best. They will not bow to anyone else's, arguing that to settle on the lowest is a race to the bottom, not an elevation of standards. I have been through this argument endlessly. It is very difficult to obtain a common national standard, and it is even harder to get people to conform to it. I sympathise with the goal. This is a necessary thing. I can see how that is amplified when you add the complexity of the American system to it. Having now got clear what I think the issue is, I am searching for what the answer to that issue is. After all, parliament is supposed to be about solving problems and making industry and commerce work smoothly. You are from this sector of industry. Do you have a proposal to put to us or do you want to take it on notice and come back to us with what you think is the solution to this—for the best endeavours to try to achieve uniformity?

Mr Gould—The solution is in our submission. We have spent four years developing an e-tendering system that conforms with international standards. We have submitted it to—

CHAIR—I understand that, but the problem with the solution is that it has not been taken up and it is not reflected in this agreement. You are supporting this agreement.

Mr Gould—Yes.

CHAIR—If on your vote this agreement went through, this problem would be writ large for you, and it is then a question of whether or not the government would move to try to modify the arrangements to meet the proposal you have put. Is that what you are saying to us?

Mr Gould—That is right. I think the terms have to be renegotiated, particularly taking into account that the report from the CIE does not include anything about intellectual property and it does not put any emphasis at all on the significance of what is going to be happening with e-business. I think Australia could be in a position to say that we would like to develop our own e-tendering system and use that as the model, because the Americans, like Australia, have an e-tendering system but none of it conforms to international standards.

CHAIR—Thank you very much.

Senator BRANDIS—Like a lot of witnesses to this inquiry, you have come before us, as you are very welcome to do, to express a view on behalf of your own industry or your own sector of the economy. Probably most of the witnesses we have had, I should think, have been here to do that. Some of them, like the dairy people, have said, 'This agreement is terrific; it suits our industry very well.' Others have voiced criticisms of one form or another. This is not meant to be a criticism, but I just get the impression that your evidence is not intended to offer an overall appraisal of the FTA, is it? You are not here to tell us that the FTA is a good thing or a bad thing. You are here to say that, from the point of view of your industry, it is a good thing.

Mr Gould—No. I am saying that free trade in this ideal situation has to be beneficial to everybody. There is no dispute about that. Obviously, we are just making sure that it is enacted in a way that is to everybody's advantage and not to the advantage of a small, select group. You see, from now on in, the FTA is always going to be electronic. It cannot be done by a paper based system. Customs have now been electronic for the last five years. If you want to import or export, you have to do it on an electronic document.

Senator BRANDIS—And there are bound to be adjustment issues.

Mr Gould—Yes.

Senator BRANDIS—Thanks, Mr Gould.

Senator FERRIS—My concern is about how this is going to be resolved. I have listened to your evidence and the questions you raise in relation to CIE, which I am sure this committee will send to CIE for their response. How do you see a resolution? You talked about the committee, but it seems to me we are talking about two quite large forces, if you like, in international e-commerce. How do you see this problem being resolved?

Mr Gould—By taking a very different approach and saying that the background underlying e-commerce is that it has been approached as a way of raising revenue electronically; it has not

been a way of disseminating information speedily and at a minimal cost. It can be resolved, and I believe Australia is probably the only country that can do it. The reason I say that is that, back in 1988, when I first got involved in electronic commerce, for some reason 21 of the 99 experts worldwide were based in Australia. Two Australians were at the head of the Customs Cooperation Council in Brussels when I went there. In fact, Australian Customs was the first to implement e-commerce. So Australia has always been used as a test site, particularly in the e-commerce world. That is probably because sending information between Sydney and Perth is the same as sending it from London to Athens or from New York to San Francisco: communication costs are always the issue. We do not have all the fights that they have in America between the 50 different states when they have to send information down all the different state lines. In Europe you have to go through all the different countries and the translations. So Australia is a very well poised to set the standards for e-business.

The reason that government procurement is so important is that we have been monitoring what has been happening in Europe, the States and obviously here in Australia and nobody has been unable to get small businesses involved in electronic commerce with governments because, at the moment, there is nothing in it for small businesses. That is why we say as part of our submission that you should be able to say to small business: 'If you spend the time and effort and put in a submission, that contributes to the assets of your company; that becomes an asset for your business'—which is why part of the proposal says that we have to extend economics to start looking at gross domestic product to include people's contribution. If somebody makes a submission to a government tender they may lose it but it should be recognised as an asset and a contribution that they have made.

Does what I am saying make sense? If you like, these are the new rules of economics now coming out whereby a council can now value a piece of pavement or a tree as an asset. The same thing has to happen to small business to encourage small business to get involved in these types of applications. If they put in a submission or attend one of these public hearings, that is time that should be recorded as an asset in that company somehow. That is really what the new information economy is about: finding ways of being able to recognise that so that people can say: 'I am trying to contribute to make a more worthwhile society'—for want of a better term.

Senator FERRIS—Should the market determine how this resolves itself, or should there be some top-down program, driven to change things, with the appropriate training courses and so on, as one of our witnesses talked about this morning?

Mr Gould—No, government has to do it. The market, as we all know, is all controlled by cartels anyway. It is put forward as being an open market, but government has to drive this. It has to become part of government policy on small and medium business to recognise that, if these businesses are going to put their staff on courses, that is not only a cost to the company but also an intellectual property asset of the company. This is the only way small businesses are going to be encouraged to take on new technologies and send people on training courses.

Senator FERRIS—I am thinking back to when videos first came out and we had the VHS and the Beta systems. For a long time we had two systems, and the market eventually sorted it out. I imagine it was quite painful for people who still have Beta video recorders tucked away in their cupboards. My question was trying to determine whether you think this should be a driven process or one that would evolve. I accept the comments that you made.

Mr Gould—At the moment e-commerce is being driven by government; it is not being driven by the market. But it is up to us to make sure that the government understand the issues.

Senator FERRIS—That is a thoughtful note to finish my questions on.

CHAIR—To use the jargon, are you saying there is a competitive asymmetry between Australia and the US in terms of standards here? Americans operate on their standard and Australians operate on ISO. As a consequence, in a competitive market the Americans will have no extra cost, if their standard is extended into our market, in meeting the needs of our market; but Australian small business will have the extra cost of changing their e-commerce facilities to meet the American standard. Therefore, we are not competing on a level playing field. There is an initial, introductory cost for Australians to compete if these terms are proceeded with.

Mr Gould—Yes.

CHAIR—That is what I thought you were saying. Are you able to quantify that? Do you know the amount of e-commerce done in Australia by small business? Are you able to give us a sense of scale or proportion?

Mr Gould—Can I come back to you? I do not have those figures with me.

CHAIR—I am not looking for rubbery figures. I am looking for some sort of indication so that we have an idea of scale.

Mr Gould—The great difficulty is that obviously importers, exporters, customs agents and people like that have to send their trade documentation to Customs. That is called e-commerce. What they are not doing is trading with their suppliers. It is how many orders that enable us to know how it is being pushed further down the track. When somebody wants to export do they send their documentation electronically to the importer or the exporter, who then sends it on to Customs? This is where it is so hard to get that information. Originally Tradegate was brought in to do that, and Australian Customs, the AAPMA, Qantas and, I think, six industry associations were part of that. But I believe Tradegate has really folded in terms of trying to get Australian businesses to adopt e-commerce. So the figures are very hard to get.

CHAIR—This is the eye-glazing part of trade negotiations for most people, but it is a very necessary part for the operation of commerce. There was an effort to harmonise standards in APEC, and I think that had made considerable progress. That involves the United States, Japan, China, Australia, ASEAN and a number of Latin countries as well. Thank you for that. I will put the details of your proposition to the government to get its response, if I may. You had a number of documents that you wanted to table. Please do so.

Mr Gould—Thank you. I congratulate the committee. The number of different submissions you get and have to read through is incredible.

CHAIR—That is our job. We are not paid for our good looks; we are paid because we are elected and someone has enough faith in us. Thank you very much.

[2.40 p.m.]

WYLIE, Dr Brenton Russell, National Blood Products Manager, Australian Red Cross Blood Service

CHAIR—Welcome, and my apologies for keeping you waiting, Dr Wylie. At least you have had the opportunity to observe how we proceed, and we proceed by inviting you to make some oral remarks based on your submission.

Dr Wylie—First of all I would like to thank the committee for the opportunity to speak with you today. The Australian Red Cross Blood Service welcome this opportunity to provide our views on matters of national interest in the free trade agreement process. Our major interest lies in the side letter on blood plasma products, which forms part of the government procurement chapter of the agreement. This side letter raises a number of issues relevant to the collection of blood plasma, its fractionation, the supply of plasma products to the Australian community and the relationship of these to Australia's longstanding policy of national self-sufficiency in blood and blood products. These issues are of significant concern to the community and the maintenance of high standards of care in the Australian health system. In particular, the Red Cross Blood Service wish to emphasise the importance of ensuring the ongoing safety and security of Australia's supply of blood and plasma products as well as support for our volunteer donors. As stated in our written submission, we believe this can be best achieved through ongoing and enhanced support for a national policy of self-sufficiency in blood and blood products as far as this is practicable, given local and global circumstances in the blood industry.

To summarise, there are three key points we wish to raise: firstly, that Australia's current policy of self-sufficiency is recognised and the reasons behind this longstanding policy are understood; secondly, that the Australian Red Cross Blood Service, as a central agency in the collection and provision of plasma and distributor of products, is engaged in the deliberations on Australia's future fractionation policy; and, thirdly, that the committee and government in general understand the consequences that may come with an open market in this part of our health system. I would be happy to answer any questions that the committee may have.

CHAIR—You have put to us those three points: Australia's self-sufficiency, the Red Cross's involvement in the future of fractionation in Australia and the consequences of an open market. Would you care to address us on the last point?

Dr Wylie—Australia at the moment is completely self-sufficient for what we would term fresh blood products—the bags of blood and platelets that we see in hospitals and may receive as patients—and is largely self-sufficient for plasma products. We recognise that in times of shortage or where a product is very specialised and it is not practical to make it in Australia we do need to have access to international sources of products.

The whole system in Australia has been achieved with voluntary non-remunerated donors—we have 500,000 Australians donating. In a sense, as a humanitarian organisation, with government, we provide it as a service. In many parts of the world, blood, blood products and plasma in particular are regarded as commodities which are traded. They may have a spot price

and there are contracts. That is a very different ethos, if you like, to what we have here in Australia. If the market were to be completely opened and we were to move away from self-sufficiency, there is the potential that the service-donor-altruistic aspect, which most of us have grown up with, could be replaced by the best priced, most easily available product, based on an ethos more in the direction of a commodity.

CHAIR—You may have been in the room when I was talking to Baxter earlier.

Dr Wylie—I was.

CHAIR—I was trying to define what the public policy interest is here. With Baxter I defined it in terms of a cost-effective supply, a ready supply—so the availability is there—and a healthy supply. Are you suggesting that that is an incomplete definition of the public policy interest and that self-sufficiency and the maintenance of a voluntary donor system are also matters that we should take into consideration?

Dr Wylie—Very much so. The volunteer donor system in Australia is, in a sense, part of our cultural heritage. Few countries in the world have been able to achieve what Australia has. In the majority of countries when the issue of self-sufficiency is discussed it is on the basis, firstly, of being nowhere near self-sufficient. They have a long way to go and a lot to invest to even begin to achieve that goal. Secondly, it is usually in the context of the country not having its own capacity to fractionate plasma. In Australia we have a fractionation plant in Melbourne which is run by CSL Ltd. So, yes, there are issues beyond the physical supply of the product.

It might be worth summarising the overall benefits of self-sufficiency as we see them. Firstly, we have control over what we are going to collect in Australia. We can designate which centres we are going to open and what equipment we are going to use and quite accurately determine the amount of plasma that we are going to supply for fractionation. Secondly, as an island continent we have a relative advantage—and I use that word carefully—of being able to exclude ourselves from infectious agents in other parts of the world. I emphasise that it is true that fractionation standards are very high in the US, even with their paid donor system, but the question our community needs to pose to itself is: what about the next infectious agent—what guarantees are there that the existing system will capture that? We have a relative isolation, as has been demonstrated with mad cow disease and variant Creutzfeldt-Jakob disease.

Thirdly, we avoid the use of paid donors. We have touched on that. We also exclude ourselves from the vagaries of the world market, where it is traded as a commodity. Currently there is a surplus of plasma world wide and it would be very attractively priced, but the industry is busy consolidating and in two or three years time the prices of products internationally could be very different to what they are today. Then there is the trade balance aspect. Lastly, there is the interesting issue that in order to be self-sufficient for all plasma products you need to collect enough plasma to have enough of all; so one product will drive the total amount of plasma that the country needs to collect. In doing that, because we can harvest other products from the same plasma, we have the potential in Australia to generate surpluses of some products which could be made available to the rest of the world either through foreign aid or by other means. So we think that the longstanding policy, going back to 1975, of self-sufficiency is based on some sound principles.

CHAIR—One of the arguments about an open market is that it would enable you to consider earning an income by exporting from Australia to foreign markets. From your description, we would start with an advantage. All the advantages you have mentioned that apply to Australia because of our isolation and island nature would be a safety premium for our product. The fact that it is donated, not bought, would mean that production costs were cheaper; so if we were to enter the global market we would presumably have an advantage and would win in that market. That possibility is behind open-market thinking as well. Do you have any comments to make about that?

Dr Wylie—As a humanitarian organisation and a registered charity we are careful about expressing views about selling product in the market overseas, although we do recognise that potential. Our statement on the matter is that it would give the Australian government and the Australian community an opportunity to develop a process whereby potential surpluses could be best utilised with a variety of goals in mind. You have outlined one, and I suggest that foreign aid is clearly another. Those things would need to be explored not by us in isolation—obviously it is a matter of government policy—but there is the potential for a number of those outcomes, yes.

CHAIR—But you are saying that the approach of the Red Cross is understandably—and I think reasonably—not to seek commercial advantage from its position in the market; it is rather to be a low-cost or no-cost supplier. Does your blood service to the Red Cross cross-subsidise any of your other activities?

Dr Wylie—No, it does not.

CHAIR—It is stand-alone and a non-profit organisation.

Dr Wylie—Yes, and government funded.

CHAIR—That brings into the discussion the concept of competitive neutrality: if you are in receipt of government funds to do these thing, it is an open market and you are meeting in that market commercial producers then for the market to be fair you have to be handicapped to the extent that you are in receipt of public assistance otherwise you are unfairly competing. Is that an issue you have looked at?

Dr Wylie—The direction we are coming from on this matter is: what best meets the needs of the Australian community based on cultural heritage, the safety of voluntary non-remunerated donors and the fact that we need to have an available supply. The best way to look at this is we recognise that the world exists out there as a contingency should something happen to the Australian system. The problem we pose is: if we were to wind back from self-sufficiency, it is not easily regained and, at the end of the day, if something happened to the international supply—bear in mind that 60 per cent of the world's plasma comes from one country and that is the United States of America—and an agent entered their blood and plasma supply that current systems would not get or some other event happened, we would have great difficulty maintaining a supply to the Australian community.

CHAIR—We heard from Baxter what their in-house processes are to maintain the integrity of their blood supply—if I can put it in those terms—and a description of what the Australian

government does to blood supplied by them in our market to verify or guarantee safety standards and that if this FTA were to go ahead and the market were to open there would need to be a protocol developed.. We heard further from them that in international fora papers have been presented comparing the integrity of blood supplied from paid donors to voluntary donors. They came to the conclusion that the standards are the same or higher from paid donors. Do you have any comments on those remarks?

Dr Wylie—I think there are two points here: first of all the incidence of all the infectious markers that we are trying to keep out of our blood supply are higher in paid donor populations. I have not come here today to say that Baxter products or similar products are more dangerous than our own. I am happy to have on the record that for the current agents that are known, the current systems of viral inactivation that Baxter and other companies use render pharmaceutical products that are of comparable safety to those made by CSL in Australia from our volunteer plasma. But the key question is: if a new agent enters the supply or there is some sort of system breakdown starting with a donor source which inherently has higher levels of infectious agents, that is a risk that needs to be considered in any opening up of our market.

It is difficult to quantify because I cannot sit before this committee today and predict what the next agent will be or what its characteristics will be or what would be needed to inactivate it. No person on the planet can do that, but that is the risk equation we have to consider bearing in mind—and I am happy to state again for the record—that for current agents and current systems, Baxter and other companies do have products of comparable safety. There can be no argument with that.

CHAIR—On page 7 of your submission, in 2.2, the 'Side-letter to the agriculture chapter on bovine spongiform encephalopathy'—I pronounce those words in an amateur way, not a professional way—it says that in its human form the variant Creutzfeldt-Jakob disease has the potential to be transmitted to the human blood stream. What we are talking about here is a blood infection in cattle migrating to human blood. You also say:

Precautionary measures in the form of donor deferrals for donors who have spent time in BSE-affected countries are now in place in most developed nations.

Is the United States a BSE-affected country—or are parts of it affected?

Dr Wylie—There has been a single case of BSE in one cow in the United States of America. In fact, the cow originally came from Canada.

CHAIR—We are talking about mad cow disease, are we?

Dr Wylie—Yes.

CHAIR—That simplifies it for me.

Dr Wylie—That is right. This is a very difficult agent. I think it is relevant to this committee's inquiry to advise that in the United Kingdom, where this is obviously a massive problem, even though it has been questionably transmittable through plasma products, they are burning 500,000 kilos of plasma a year and bringing in their plasma from the United States for fractionation. So I

put that on the table—as you have raised the particular infection agent—as an example of what can happen in a plasma supply. Is the United States BSE affected? No. With one cow, I do not think that anyone would say that they have a BSE epidemic. But this agent raises and highlights the potential for this or some other infectious agent to enter blood supplies, countries and food chains anywhere in the world.

CHAIR—Do the Americans import blood from paid donors outside the borders of the United States?

Dr Wylie—They have a completely open market in that as long as a product is registered with the FDA they are able to use that product in the United States. So there is product going in and out.

CHAIR—So the stories we hear about American companies buying blood from Latin American countries by paid donor systems are true—they do import blood from those sources?

Dr Wylie—I do not have an encyclopaedic knowledge of the various plasma sources, except to say that they are many and varied and that, in the rest of the world where it is treated as a commodity, the source generating that commodity should be of great interest to regulators and people working within the health system.

CHAIR—What can the Australian government do if we accept at face value your concerns about infection in imported blood compared to our local self-sufficient supplies? Is there a way in which, on either a risk management basis or some other basis, screening can occur that would assure Australians that blood consumed from outside Australia was safe?

Dr Wylie—The only thing Australia can do is to ensure that any imported product has been screened for the infectious agents for which we deem screening necessary, and this would be controlled by the regulator, the Therapeutic Goods Administration; and that, when products are registered with the Therapeutic Goods Administration—and product X comes from Baxter or some other company—it meets a stringent list of criteria required for registration. That would be based on knowledge available at the time of the screening and inactivation processes in their plasma processing. That is all Australia can do as a country. I re-emphasise that that is possible for known agents and known problems in blood supplies throughout the world at the moment.

CHAIR—But not for future disease development?

Dr Wylie—It is a difficulty. The fractionators, the private companies, will argue that the inactivation procedures are very good and that they are likely to be effective for new agents entering the blood supply. But in making that statement you need to have confidence about what the nature of any future infectious agent may be.

CHAIR—This is my final question—the one I have been leading up to: in assessing the health risk factors associated with imported blood, what is the technology used here? Are we talking about taking random samples from a total batch in order to calculate the probability of that batch's safety or otherwise, or can you run the lot through some sort of process—like you might run a pail of milk through a process—and have it all tested so we know the lot is okay?

Dr Wylie—There are two things that are done. First of all—this is done in Australia and they do it as well—when the donated plasma comes in bags it is tested either in a small pool for each infectious agent and then subsequently put into a much larger pool, which may have as much as 10,000 kilos of plasma or more in it. Secondly, the inactivation procedures that all companies use—and CSL uses these in Australia—are validated with certain model viruses so that they can state with confidence that, provided their system works according to plan and there are no problems, a certain percentage of removal of any infectious agent will occur as part of that process. For example, you may be able to reduce the risk of HIV by a number of infectious particles, by a log factor of five or six. So there is the combination of testing small pools, and sometimes individual donations, plus the use of processes which are validated to inactivate certain log removals of each of the viruses that we are in interested in. They do that using model viruses.

CHAIR—Do you do it by sampling or by checking the lot?

Dr Wylie—Every plasma donation going into, ultimately, a large pool is tested either individually or—much more commonly—as part of a pool of a small number of donations. So you might open, say, 20 or 30 bags of plasma from each individual donation, put them into a single aliquot or pool and then test that pool for the virus—for HIV, hepatitis B or hepatitis C.

CHAIR—I have one final question, and this is the absolute final question. I scared the hell out of myself one time by reading a novel about viruses—exotic viruses such as Ebola and that kind of thing. It was the scariest thing I ever read because it dramatised how vulnerable we might be. I have no basis for knowing the scientific probability of all of this, but certainly it painted a frightening scenario. This leads me to ask: in terms of blood and the way in which infections develop for blood—that is, infections that we do not now know but which become known and then are treated and dealt with—what are we looking at here? Are we looking at something that is a rare event but which nonetheless we have to be on guard against or do new infections become reasonably regularly available or manifest themselves in some way? Can you give us laypeople an idea of how serious and how threatening the possibility is of the evolution of new infections in the blood supply?

Dr Wylie—I think the best answer I can give to that question is to say that since 1982 there have been two infectious agents that have come from nowhere and have had a devastating impact in the health system, but in our area more than others. The first was the arrival of HIV in the early 1980s. That came from nowhere, and a lot of damage was done before systems could be put in place to counter it and test for it. The second we have touched on already—that is, Creutzfeldt-Jakob disease, which is the human form of mad cow disease. Again, this epidemic came from nowhere in the United Kingdom—basically from cows eating cow products—and caused a tremendous amount of panic and concern, similar to that book you read. It has led to, as I say, the UK burning 500,000 kilograms of plasma a year to protect itself from the risk of that—even though it is not yet proven to be transmitted through plasma products. So on that average we are talking about one of these diseases per decade. We are dealing with a small number of viruses and infectious agents, but, as any reasonable person would agree, they have had a devastating impact on the parts of the world they have infected.

Senator BRANDIS—I think you have said this, but I just want to make it clear in my own mind. You are not saying, are you, Dr Wylie, that your organisation is concerned that an effect of

the FTA might be to attack the basis of the existing Australian system whereby the Red Cross operates on a volunteer basis with volunteer blood and plasma donors? You are not concerned about that, are you?

Dr Wylie—We are not concerned that it would change, as we understand it, our volunteer system in Australia. Our concern is that, if the market is completely open—and it is not at the moment—product X may be cheaper and, unless other factors are taken into account, product X may be used instead of a product generated from our volunteer donors. That would wind us back from a position of self-sufficiency, which would be very difficult to recover from, and we would need to understand the risks, such as they may be, with the use of that product.

Senator BRANDIS—I am obviously not understanding you properly. How can product X be cheaper than something that comes from a donor? Is it because the processing of that product can be undertaken at a lower cost than the processing of your donor product?

Dr Wylie—Depending on the source of the product. Labour costs will vary; sizes of scale will vary. Whilst I think we pride ourselves on collecting a lot of plasma in Australia, we have only one per cent of the plasma collection worldwide, and some of these companies have an economy of scale which Australia would find great difficulty in competing with.

Senator BRANDIS—But if an acquirer of your product chooses to acquire product sourced overseas, then, subject to issues of the Australian health authorities being satisfied about quality control and standards, what is wrong with that—just because they are not taking their product from product derived initially from donors by the Australian Red Cross? If as a result of that it lowers the cost of health care and, subject to that, a very important qualification I made about product safety, what is wrong with that?

Dr Wylie—My answer to that would be that, if at the end of the day the Australian system could not be cost competitive, a certain differential in cost may override some of these other factors that I have talked about. But the other factors are real. In comparing costs between our products made from Australian donors and any of these overseas products, one would need to be absolutely sure that you are actually comparing an apple with an apple when you look at the cost. That is not necessarily straightforward, because a number of these companies are focusing only on one product, whereas we are supplying a range of products, which we regard as services—all the fresh products such as platelets, red cells, plasma—to Australian hospitals as well. To be fair, at the end of the day if the cost differential is colossal, then that needs to be taken into account, but so do the other factors of our community, our culture, source, contingency factors, trade imbalance et cetera.

Senator BRANDIS—Can you tell us what you mean by the expression ‘contingency factors’?

Dr Wylie—As I explained earlier to Senator Cook, if we are self-sufficient and something happens to our plasma supply—such as an infectious agent; it could happen here—then we could go offshore, because 99 per cent of the world market is out there to assist in our difficulties. But if we have wound back from self-sufficiency and something happens to the international plasma market, bearing in mind that 60 per cent of the world’s plasma supply comes just from the US, where is our contingency?

Senator BRANDIS—My understanding of what you are saying is that at the moment an acquirer of product supplied by the Australian Red Cross pays the Australian Red Cross a price which does not have a component for, if I can put it crudely, the raw material, because that is donated. It does take into account the cost to the Red Cross of processing, packaging and delivering the product to the acquirer but does not have a profit component either, so it is what I have called loosely the processing cost. Is that basically it?

Dr Wylie—That is correct. In addition to that, a fee is paid to CSL for fractionating the plasma, under the Plasma Fractionation Agreement between the Commonwealth and CSL Ltd.

Senator BRANDIS—Your concern is that, as a result of the FTA, some American medical entrepreneur could, with the benefit of economies of scale, deliver a product to those who currently acquire it from you within Australia at less than the price you currently charge the same acquirer for the same product, notwithstanding that you do not have a raw material cost or a profit component. Is that the point?

Dr Wylie—That is possible. The other point I would highlight is that it may be easier not to invest in further developing the Australian system when product is readily available from international resources. Obviously, relevant to this committee, we are talking particularly about the United States of America. One of our concerns is that this lack of investment, whilst it may be expedient and easy in the short term, could have significant long-term consequences for the supply, safety and surety of the best products that we can make available to the Australian community.

Senator BRANDIS—I have enormous respect for the Red Cross—in fact, your national president, Mr Vickery, is a good friend of mine—but it is a humanitarian organisation and it was established to serve a humanitarian need. If that humanitarian need can be met from elsewhere, at a lower cost to the patient—taking that bald proposition alone—that is not a bad thing, is it?

Dr Wylie—If cost were the only thing that mattered then I would have to answer the question in the affirmative. But we submit, before this committee, that cost is not the only thing that matters and, in addition, it has not yet been determined that continued investment in the Australian system will not produce products that are cost competitive with international supplies. But there are other intangible things—some more intangible than others—which we submit the Australian community is very interested in and about which they would have significant concerns if they were not taken into context.

Senator BRANDIS—I understand the point. One last thing: does the American Red Cross operate on broadly the same basis as the Australian Red Cross, or is it a completely different operation but with the same name?

Dr Wylie—It is completely different. In the United States, whole blood or the fresh products that I have alluded to are collected on a volunteer system. What we are really talking about with these plasma products is what we call the fractionation industry, the pharmaceutical companies, of which Baxter is an example, and they almost exclusively use paid donors as their source of plasma. But health is so different in the US.

Senator BRANDIS—So there is no comparison.

Dr Wylie—No.

CHAIR—Dr Wylie, thank you for your evidence and your submission.

[3.15 p.m.]

KILBY, Mr James Pitt, (Private capacity)

Evidence was taken via teleconference—

CHAIR—Welcome. Thank you for your submission. I invite you to make some opening remarks before we proceed to questions.

Mr Kilby—This is a private submission. I am an electronic engineer and I am concerned about environmental issues, not to mention social justice. I have worked overseas for extended periods in Germany and the USA. It is interesting that, in choosing to return to Australia, I found that there are fewer work opportunities here with the same intellectual challenge. I think that is an ongoing concern in Australia.

Overall, apart from the issues of free trade, my concerns are that there are many other aspects of this particular FTA document that do not just address free trade, and which especially impose on the sovereignty of our nation state. Many people have had concerns about the PBS where the changes appear small with the introduction of an industry review panel but we note, as was tabled with the Liberty Victoria submission yesterday, that in the 108th Congress of the United States there is an act that commits the United States to reducing price normalisation strategies such as the PBS. Even though there appear to be small changes, there is a congressional act to indicate the power and influence of the pharmaceutical companies that are essentially committed to dismantling the PBS. I think that is of real concern.

With respect to access to services, in the same way as the GATS and the NAFTA, the definition of services is larger. With privatisation or part privatisation of some services from hospitals through to aged care, roads and water or water supply, all these services come under NAFTA in its liberal interpretations. I believe that the privatisation of these actually results in reduced services and that when and if we, as a country, recognise that and return to a state of providing these services on a public basis, this may be severely challenged by the free trade agreement.

With respect to intellectual property, the increased time limits obviously work against Australia. This is not really a subject for the FTA and should be considered on its own merits. I also note from working in both Germany and America that the European or, at least, the German laws are more biased toward the individual with subsequent agreements between company and individual whereas the United States laws are more corporate based. I do not believe that we should be having this change imposed on us through a free trade agreement. In industry, studies have shown that, where trade liberalisation proceeds with a well-developed manufacturing sector, an upturn in local manufacturing has failed to materialise. So all these promises of industry benefits in trade seem to be hollow promises, given the possibility that our industry will not be able to be supported or thrive within the more open environment. The vehicle manufacturing industry may be an exception and Holden certainly seem to have a very good cross-sourcing, but with Ford there is less of that so maybe decades of nurturing the industry will fall through the FTA.

I will address further the concerns I have in terms of the ability to support new industry or provide industry initiatives. It is all that sort of sovereignty imposition that I find is a real problem with the overall free trade agreement. In terms of the environment, a lot of that is about expropriation and compensation provisions. We note that the environment and labour chapters in the free trade agreement were imposed by congress, but they seem to be pretty thin. There are lots of 'strive to' and 'good intentions' but there is no compulsion to ensure environmental and labour outcomes. For example, the US is not a signatory to the Convention on Biological Diversity 1992 and neither country is a Kyoto signatory. If that changes, there is essentially a drag to the least common denominator in terms of environmental protection not to mention labour protection.

Again with quarantine regulations this has been a key part of the Australian industry and the quarantine regulations should not be compromised by virtue of a free trade agreement. These should remain sacred and free trade issues are secondary to maintaining and providing security for our flora and fauna. The particular reason I asked to address your inquiry is that it seemed there had not been a great deal of attention placed on paragraph 6(a) of article 22.3 where we note:

6.(a) Article 11.7 (Expropriation and Compensation) shall apply to taxation measures.

When we consider the liberal interpretations that have come out of NAFTA and where we see essentially the conflation of nationalisation and changes of circumstance and restriction of provision—I think this is detailed also in the Environmental Defender's Offices submission—the position under Australian law has been much clearer about acquisition of property, which is the nationalisation, whereas compensation for restriction changes has been a separate issue and there is not normally a right to compensation for that. So right now company tax is at a low level of some 20 per cent. This is relatively recent and there are suggestions that this should be raised to 30 per cent. The wording would imply that any increase—obviously they would be only too happy to see a decrease—in company tax from the current 20 per cent would be subject to compensation as a restriction on profit. Even given the litigous nature of issues arising out of NAFTA, government may be disinclined from any increases because of the possibility of litigation. Also in these changing times we have the possibility of carbon tax, environment levies or even other levies—the Ansett levy, for instance.

Looking at carbon tax, certainly in Victoria the power generating companies where that would most probably be applied are generally majority overseas owned. The possibility of government intervention to ensure sustainability and to take up the issues of sustainable development may be impeded by the free trade agreement in terms of article 22.3. My concern in that regard is also that given there is no governmental debate and approval of the free trade agreement as a whole, there is no legislation required not to change company tax. Therefore, these measures will not come under the jurisdiction of the Senate. In that sense, it concerns me that, if the free trade agreement as a whole is put through, although the enabling legislation in the Senate needs to be blocked as a part of the rejection of this particular free trade agreement, it is not a rejection of the notion necessarily of free trade but of the restriction, imposition and abrogation of the sovereignty of our nation state which is entailed in this agreement.

For instance, changes to water allocation would come under that. We have quite a few overseas agribusinesses, especially in cotton and in rice, where at present there is no right to

compensation. There is a balance of duty of care, so to speak, by the government that water will not be taken away without some due compensation—a to-and-fro situation where there is democratic power and governmental responsibility. But there is no absolute right; nor is there a right to compensation in perpetuity, which generally we have seen to be the substance of many of the NAFTA cases. It is amazing that those conditions in 11.7 and, particularly, in 22.3 paragraph 6 are included in the free trade agreement. As such, I believe the whole free trade agreement is a net loss to Australia and is questionable. The Senate should reject any such enabling legislation, especially on the PBS, intellectual property and industry changes.

On industry changes, I did not mention the fair agreements—and I think 11.9 details the restrictions under performance requirements. Any such support—for instance, for the Mitsubishi plant—would be regarded as possibly in contravention to the free trade agreement. So we could not support individual industries and areas, such as the biotech areas, where they are developing. Ten years ago, there was a suggestion of an Intel plant in Victoria, which would have required an arrangement with government. Such an exclusive arrangement would be excluded by this free trade agreement. That is the nub of my concerns with the free trade agreement: it is a challenge to our sovereignty. I find it amazing that that challenge is allowed and we are not rejecting it.

CHAIR—Thank you. On the cover sheet to your submission, we have you down as representing an organisation called Microtailors.

Mr Kilby—Is that in there? I think that has come from my card.

CHAIR—I understood you to say in your introductory remarks that you are representing yourself.

Mr Kilby—Yes.

CHAIR—Do I take it, therefore, that you are not speaking on behalf of this entity?

Mr Kilby—No. I trade as Microtailors. I am sorry that is on there. I think that came from my business card which I provided for numbers.

CHAIR—In your summary you indicated that you support AFTINET, the Greens, the ACTU and Liberty Victoria. Being aware of these submissions, I want to go to the matter that you raised about the taxation and expropriation provisions of the free trade agreement. As I read that—and I may stand corrected—that looks like a reasonably standard provision which we in fact may be signed up to through the WTO in any case.

Senator BRANDIS—Which one?

CHAIR—Article 11.7. It is a standard provision that applies more often between developed countries and developing countries where the fear of expropriation by the exercise of a tax system may apply. It may well be one of those provisions that we are bound to anyway, which is nonetheless set out in this agreement. Aren't the operative parts of this that, if the competent authority—in this case, presuming it is the government of Australia—is using the tax system for the purpose of expropriation, there is a right of appeal and a process by which that matter, if objected to, can be dealt with by the other party? It does not decide what the outcome might be.

Mr Kilby—That is true, although I note that even though the investor-state provisions of NAFTA are not immediately included within this free trade agreement and it is under change of circumstances, there is an automatic clause that under change of circumstances these would be included. This was also raised within the ambit of the Singapore-Australia free trade agreement. The potential tribunal—which would seem to be more a matter of when rather than if—is an undemocratic body that is not necessarily responsible to the Australian government. That is the first thing. Secondly, I note that, within the provisions for resolving disputes, after 60 days it reverts to a panel. It is hard to figure out from the long and short of the agreement what that is, but it seems to be a list of trade negotiators, representatives or others. Again, given that in 60 days my own council does not seem to be able to do a planning permit, I think that it would very easily fall to the tribunal which is no longer directly responsible to government. The difference in the clauses at present in the investor-state provisions would appear to be likely to change.

On the position of compensation, in the cases that have been undertaken under NAFTA—the Metalclad case in California, for example—there have been various cases where changes due to restrictions for environmental reasons have been challenged successfully, with quite large payouts. As you would be aware, there are also quite a few cases under NAFTA where huge payouts are still pending—Sun Belt Water Inc., for instance. I do not know whether they are under WTO at present, but certainly we see those cases being litigated under NAFTA. This FTA is based on NAFTA. Existing Australian law takes quite a different attitude, as I said, to property acquisition. Excluding, obviously, the developing and undeveloped countries et cetera, providing compensation where new restrictions are imposed is the issue which substantially changes Australian precedent and seems to open us up to litigation at the drop of a hat for changes in environmental restriction. So if we have further national parks we will have Hancock demanding compensation in perpetuity, or if we have changes in water rights—because we know we have overallocation of water, especially in New South Wales—it will change from a negotiated settlement to a right to compensation. That is unseemly and untimely given the desire to change the way we operate our nation, country and landscape.

CHAIR—Thank you. I think I understand the way you read that clause.

Senator BRANDIS—Mr Kilby, you appear to be familiar with the operation of a number of international treaties like NAFTA. I wonder if you would give us a slightly fuller account of your credentials as a commentator on international trade law. Are you a practitioner in that field? Are you a lawyer?

Mr Kilby—No, I am not a lawyer; I am an engineer, as I said. I have no great credentials. However, the records are there to be read. For instance, in reading the submission from the Environmental Defender's Offices, which is a set of lawyers concerned with environmental matters, I note that they point out the same concerns that I have read elsewhere. The cases that have been settled—United Mexican States v. Metalclad Corp. or Sun Belt v. Canada are on the record.

Senator BRANDIS—If they have been settled, I guess it depends on what terms they were settled on, doesn't it?

Mr Kilby—Yes. They were settled under a NAFTA tribunal.

Senator BRANDIS—I will come to the sovereignty issue in a minute. You may or may not be aware, Mr Kilby, that Senator Cook is a former distinguished trade minister of this country and one of the foundation members of the Cairns Group. I certainly defer to his practical experience in relation to international trade. When he points out to you that clause 11.7, which has excited your concern, is a pretty standard form of clause in international trade treaties, that is persuasive to me. You do not dispute that, do you, having been told that by Senator Cook?

Mr Kilby—I defer to his knowledge, but—

Senator BRANDIS—So do I, you see.

Mr Kilby—the real point there is I also note that article 11.7 or its equivalent in NAFTA has caused very large litigation cases.

Senator BRANDIS—Of course it has. That is not surprising, is it? Whenever you have a large and complex agreement—whether it is a treaty between states or an agreement between joint venture partners within one economy; whenever there is a large commercial agreement of any shape—there are going to be disputes because inevitably in the way of human nature there will be. Therefore, there is going to be a dispute resolution process. That is not exactly rocket science, Mr Kilby.

Mr Kilby—As was discussed in the hearings on the Singapore-Australia free trade agreement, the tribunal which is mooted as a possibility in this and is a part of SAFTA is an investor-state tribunal—it allows corporations to sue the state. That has not been the case in Australia. Where it has come in, it has seemed to have had adverse consequences. I have read the reasons in these cases—one of them was in regard to carcinogenic or environmentally deleterious additives in a product being banned—and they sued in those cases. It is one thing to say these may be standard. This has not been standard for Australia. It was not standard before NAFTA for that area, because otherwise it would have been litigated under some other tribunal or basis.

Senator BRANDIS—Maybe it would, maybe it wouldn't. But it is not unknown either in international trade treaties, whether they be bilateral or multilateral, for sovereign states to be brought as a disputant party before a dispute resolution process. That is certainly the case under the WTO, which I guess is the most important of the multilateral trade treaties. Australia has initiated proceedings under the WTO against other countries, including I think the United States. I do not personally know this, but I would be surprised if we had not been a respondent to proceedings initiated by others. Senator Cook nods vigorously in agreement. So this idea that there is something novel or shocking about a sovereign state which is a party to an international trade treaty being either a plaintiff or a defendant, if you like, before the dispute resolution tribunals created by the treaty is incorrect—it is not a novel proposition at all.

Mr Kilby—It is not a novel proposition but, given that within the free trade agreement we see that essentially corporate concerns are sacred whereas—

Senator BRANDIS—No, they are not sacred. They are given rights because they have commercial interests which the treaty, to a defined extent, respects, recognises and protects including, as you have pointed out, a right of protection against expropriation.

Mr Kilby—The protections for environmental and labour and ILO conventions, for instance, are not the same as those for the protection of essentially access to resources within the country.

Senator BRANDIS—They are different—I give you that—but they are different because they are dealing with different concepts. What protections against expropriation are dealing with are essentially property rights. What labour and environmental standards are dealing with are different. They are of course important concepts but they are different concepts that do not involve property rights. Don't you accept that there is a conceptual distinction there?

Mr Kilby—The conceptual distinction is indicated by the environmental defender's office, which—again speaking of people who have qualifications—has clearly indicated the conceptual distinction between land as property, where it is acquisition, say, and access to resources and the restriction of those by virtue of new environmental legislation or changes in the approach of managing our country. That is the conflation which appears true of NAFTA and of this agreement, which is not true in Australian domestic law as it stands, or certainly by precedent. That is an enormous change which should not simply happen by virtue of a free trade agreement. If we want to say that a company should have unimpeded access to the country without regard to new environmental initiatives, we need to debate that. It should not come about by virtue of slipping it in. There is also article 22.3 paragraph 6, which I have spoken of. Is it a part of normal WTO agreements that compensation shall apply to taxation measures? We cannot impose a carbon tax on power companies.

Senator BRANDIS—Except that one provision you have not drawn our attention to is annexure 11-A and annexure 11-B(1) of article 11, the effect of each of which is to affirm that the scheme provided by chapter 11.7 is to be understood as amounting to nothing more than a restatement of rights already existing under customary international law.

Mr Kilby—I have not seen that.

Senator BRANDIS—Let me read it to you. Annexure 11-A, which appears as a part of chapter 11 of the agreement, says:

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 11.5 and Annex 11-B results from a general and consistent practice of States that they follow from a sense of legal obligation.

It goes on to deal in particular with article 11.5, and then 11-B says:

1. The Parties confirm their shared understanding that Article 11.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

Unlike Senator Cook, I am not a distinguished former trade minister but I did once teach international law and I can tell you there is a body of customary international law about expropriation. What this agreement says is that we are codifying customary international law and nothing more than that. Perhaps you might care to reflect on the point having regard to those additional considerations.

Mr Kilby—It is also part of recent history that arising out of NAFTA there have been many—of various sizes including very large—litigious processes undertaken on the grounds of changes in regulations which compromise a company's ability to do business.

Senator BRANDIS—Let me try to help you here. I am just being the devil's advocate; I am by no means against what you are saying. Let me put a counterfactual proposition to you and ask you to comment on it. Let us say that a major American company owned land in Tasmania, for argument's sake. Let us say that land fell within an area of environmental significance. Let us say that a Tasmanian state government which was moved by environmental concerns decided, under state legislation, to compulsorily acquire that land, including the land owned by the American corporation, and they did so on just terms, but nevertheless they decided to compulsorily acquire that land for inclusion in a national park. Is it your point that in a case like that the American corporation could sue in the dispute resolution tribunal established by this agreement and have rights of compensation beyond the domestic rights of compensation which it would have under Australian law?

Mr Kilby—That is the indication, yes.

Senator BRANDIS—I understand that point.

Mr Kilby—The same would go for water et cetera. It is not direct acquisition of land but change of access to it.

Senator BRANDIS—No doubt we will seek some guidance from the Attorney-General's Department or DFAT on that issue. Thank you for drawing it to our attention.

Mr Kilby—On the specific of taxation measures, that is another issue which has been specifically and unequivocally mentioned within 22.3 paragraph 6. To me that is saying that a taxation measure will be viewed as essentially—

Senator BRANDIS—Potentially it is expropriatory—is that the point?

Mr Kilby—Yes, it is expropriatory. A specific which is easily identifiable—something which we should be doing, I believe—is a carbon tax and if that is changing the bottom line of a power company then they would be suing.

Senator BRANDIS—I think it is the case that in Britain in the mid-1960s when the Wilson Labour government was elected there were some rates of capital and estate taxes of which the top marginal rate was in excess of 90 per cent. Is it your point that, if you had a socialist government in Australia one day that wanted to charge rates of taxation at that level, that might constitute constructive appropriation and that would be susceptible to attack if it affected an American taxpayer under the free trade agreement?

Mr Kilby—More specifically, it is only in recent decades that our corporate tax rate has changed from 30-odd per cent to 20-odd per cent and that is under neoliberal economics. If that paradigm changes, we might wish to see a higher rate of increase even to 25 per cent—no 90 per cent and no socialist idealism or whatever, just an increase—and that would appear to be clearly under 22.3 paragraph 6.

Senator BRANDIS—It is not to be forgotten that after Lloyd George introduced the budget of 1909, the famous people's budget, conservatives claimed that an increase in the top tax rate to 25 per cent was expropriation.

Mr Kilby—The point is a matter of sovereignty. This ought to be a matter for the Australian government in agreement with its people or in agreement with its democratic processes and promises to raise or lower accordingly and not excluded by virtue of a free trade agreement to some degree imposed by a larger power.

Senator BRANDIS—I think this argument about sovereignty loses a lot, with respect, when one accepts that if there are going to be commercial treaties between states—which is not exactly a new idea—and corporate and proprietary interests are given some rights under those treaties, then the notion that a state which is a party to the treaty and which acts adversely to rights vouched safe by the treaty to corporate interests in another state can be sued under a dispute resolution mechanism by the treaty. As I said before, any treaty or any contract between private parties, depending on its complexity, is likely to generate disputes. The idea of a dispute resolution mechanism is no more a threat to sovereignty. That is just a rather elaborate way of saying that when you enter into a contract which confers rights and duties, to the extent to which you assume duties you constrain your future freedom of action. That is an elementary proposition of what a contract, including a treaty, amounts to.

Mr Kilby—There are obviously disagreements, and given the strength of environmental and labour safeguards et cetera there will be, and in changing times when we are looking at how we provide an economy that is sustainable within our resources this would appear to inhibit at least, if not prohibit, those changes.

Senator BRANDIS—That is not the evidence from other experts with long experience of looking at these treaties—like Mr Gallagher, from whom we heard yesterday. I accept that that is your view, Mr Kilby.

Mr Kilby—It is certainly supported by the cases under NAFTA that have been successfully litigated.

Senator BRANDIS—I do not think we could know that unless we were to read those cases for ourselves and see what the facts, the issues and the outcomes were.

CHAIR—With due respect, I think there is something materially different here. This agreement has a dispute settling mechanism in it which is government to government. While it opens the door to considering a process by which an investor-state clause might be introduced, no such clause applies. The investor-state clause was introduced into the Australia-Singapore free trade agreement, much to my surprise because I do not think you can call Singapore a developing country, but it has not migrated into this agreement. I think what you are referring to in NAFTA is litigation under the investor-state provision in that agreement. The other thing I should mention is that, since I am held in exultant reverence, apparently, by my record as a former trade minister—

Senator BRANDIS—I would not go so far as to say 'reverence'; certainly appropriate respect.

CHAIR—Thank you. I did have the caveat that I could be corrected. It does look to me like a standard clause. From the environmental point of view, the thing that strikes me as odd is that the international environmental movement is very keen to bring environmental questions into the WTO. The reason they are keen is that, because there is a dispute settlement mechanism, if you get international environmental standards inside the WTO you then have, uniquely among international organisations, a means of enforcement, which is the dispute settling mechanism. Having a dispute settling mechanism built into an agreement obviously, at any level, cedes some degree of sovereignty.

Mr Kilby—In that sense, I view it a bit like a country in the EU. To knowingly sign onto a collective agreement which would, for instance, set corporate tax levels, currency rates or whatever is one thing; here we are talking about an agreement with a country which has shown a selective willingness to sign onto international agreements, such as the Kyoto protocol or the Convention on Biological Diversity, not to mention a number of others that are to do with the UN. Bring on the regulations that uphold the environment above corporate or resource access issues, but at this stage we do not have those. As I said, environment and labour are held as a lesser ideal and, as such, there is a concern with this free trade agreement.

Senator FERRIS—I just want to draw your attention to two sections in your submission: 3.10 and 3.11. In 3.10, the quarantine section, I am somewhat puzzled as to why you make the statement:

> It is beyond me to comprehend the negligence that is entailed in reducing our quarantine laws and restrictions. Perhaps our government has more faith in the herbicidal etc. products of agri-giants ...

You go on to talk about a couple of other things. Can you point me to where, in chapter 7 of the agreement, you came to that conclusion?

Mr Kilby—That is, I must admit, a bit of editorial comment. It does relate, however, to the changes and the issues raised on the products noted: Florida citrus and the north-west California stone fruit. These have specific pathogens which are long-enduring. The trend has been within trade agreements to put such quarantine restraints secondary to open trade. We have seen that between America and Europe, and between Australia and New Zealand. It seems to be within that quarantine chapter that it would entail a diminution of respect for—

Senator FERRIS—But where in it does it say that? I am looking at the text now and I simply cannot see where there is a suggestion that in any way either country is going to reduce its sanitary and phytosanitary measures as the basis for its biosecurity. I am quite curious as to why you would simply make the statement that we have done so. I am wondering where you reference it from. I notice the comments on citrus, stone fruit and bulk maize, but for the life of me I cannot see it in the text. Likewise, in 3.11, on the PBS, again you make the statement that the price of drugs is going to rise significantly. I just do not know where you get that from. I am asking you to point out to me, in annex 2-C of the draft, exactly where you find that conclusion.

Mr Kilby—I have taken it from other submissions. Also, the Productivity Commission report recognised:

Changes to Australia's patent protection regulations could severely limit competition from cheaper generic drug producers ...

It has been estimated—I think there is a billion dollar figure somewhere—

Senator FERRIS—I would suggest to you that that was estimated by somebody who was a previous witness—Dr Thomas Faunce—whose evidence has been quite comprehensively, shall we say, analysed and commented upon from a position that denies that that is actually a characteristic of this agreement. In fact, annex 2-C simply makes the comment that it establishes a committee to discuss drugs but nowhere does it suggest that either country is going to give away its right to determine the price of its pharmaceuticals. Even if it did, can you imagine the noise that would be made if any government attempted to raise the price of the PBS? This government has had sitting in the Senate for three years now a proposal to raise the co-contribution cost by $1 but it was rejected three budgets back. How could it possibly be that a government that is already spending $5 billion on the PBS would want to put it up without any prospect of a co-contribution increase? For the life of me, I cannot see where you get that statement from and I cannot see the logic of it.

Mr Kilby—Firstly, there is the additional industry based appellate group. Secondly, as much as my concern is raised by the—

Senator FERRIS—Are you talking about the medicines working group in point 3 of annex 2-C? Is the establishment of a medicines working group 'to promote discussion and mutual understanding of issues relating to this Annex' the one you are referring to?

Mr Kilby—I do not know the point, but there is an industry body which is set up to review appeals from the PBAC.

Senator FERRIS—But nowhere, that I have been able to find, does this letter or this text suggest in any way that that will interfere with the PBAC's independent recommendations to government on the cost of pharmaceuticals.

Mr Kilby—That is one of the concerns.

Senator FERRIS—I just suggest to you, with great respect, that you might like to review the evidence that was given this morning by one of the witnesses who commented at some length on these two matters. His name is Mr Stoler. You may get another perspective on some of these issues that may have led you to these conclusions.

Mr Kilby—If there is an appellant body to the price determinations, that will necessarily change the balance within that. I also refer to an act that was tabled—although I think you had already departed to catch a plane when that occurred. In the 108th Congress of the United States of America there was an act titled 'Amendments to Social Security Act'. In relation to that act there was the statement:

In addition, the United States Trade Representative, the Secretary of Commerce, and the Secretary of Health and Human Services shall analyze whether bilateral or multilateral trade or other negotiations present an opportunity to address these price controls—

referring to price controls with respect to pharmaceutical trade—

and other such practices and shall develop a strategy to address such issues in appropriate negotiations. In so doing, these agencies shall bear in mind the negotiating objective set forth ... to achieve the elimination of government measures such as price controls and reference pricing which deny full market access for United States products.

Senator FERRIS—Where does it say anywhere in what you have just read out that that has the capacity to overrule PBAC?

Mr Kilby—It does not. But I think the inference is there that, apart from patents issues, there will be a change in the balance which shall, first of all, increase the time it takes for generic drugs and also give influence—possibly undue influence—to pharmaceutical companies.

Senator FERRIS—Can I suggest that you have a look at Mr Stoler's evidence? I have to disagree with you. It is the half-empty half-full argument.

CHAIR—Thank you, Mr Kilby. We will adjourn to a date and time to be fixed next week, possibly Tuesday night or Wednesday night.

Mr Kilby—I thank you for this opportunity.

Subcommittee adjourned at 4.06 p.m.