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SENATE

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

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, 18 May 2004

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

Senators in attendance: Senators Brandis, Conroy, Cook, Ferris and O'Brien

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 environment policies, including, but not limited to, agriculture, health, education and the media.

WITNESSES

Committee met at 9.13 a.m.

CHESTER, Mr Doug, Deputy Secretary, Department of Foreign Affairs and Trade

GOSPER, Mr Bruce, First Assistant Secretary, Office of Trade Negotiations, Department of Foreign Affairs and Trade

GREVILLE, Ms Virginia, Special International Agricultural Adviser, Department of Agriculture, Fisheries and Forestry

MARTIN, Mr Andrew, Negotiator, Agriculture, Department of Foreign Affairs and Trade

SPARKES, Mr Philip, Deputy Chief Negotiator, Australia-United States Free Trade Agreement, Department of Foreign Affairs and Trade

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 the committee commences its fifth public hearing and the second with the FTA negotiating team and DFAT officials. Today's hearing is open to the public. This could 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. We will begin today's hearings with topics related to agricultural matters and then move to investment services and intellectual property issues as the day progresses. I welcome the witnesses. Do you wish to begin with an opening statement, Mr Chester?

Mr Chester—I pass on Mr Deady's apologies. He is in Washington to witness the signing of the agreement on Tuesday, Washington time. We have with us his deputy, Phil Sparkes, and other lead negotiators who were involved in the FTA negotiations.

CHAIR—We acknowledge that it is fit and proper that Mr Deady be at the signing, since he was the lead negotiator. If there are no further comments we will go straight to questions.

Senator FERRIS—The first thing I would like to raise is in relation to some evidence the committee received yesterday afternoon from the Pork Council. I am not sure whether we can get a copy of that submission to you or whether anyone at the table has a copy of it, but it did raise some extremely important issues that I gave an undertaking to the Pork Council I would clarify with you this morning. Australian Pork Ltd has raised a number of concerns about the agreement and these are the three major ones that I would like to discuss with you this morning:

• An implied link made by US trade representatives between the FTA and changes to Australia's quarantine standards favourable to US exporters, including specifically pig meat.

• Indications the Final Import Risk Assessment for Pig Meat released by Biosecurity Australia—

last week—

was potentially influenced by negotiations with the USA about quarantine outcomes in the context of the Free Trade Agreement and in particular the timing of the release of the Final IRA Report.

- The potential for de-facto dispute resolution via the SPS Technical and Working Group.

The submission goes on to give slightly less concerning points, which state:

- The potential for de-facto dispute resolution via the SPS Technical and Working Group.

- The inclusion of trade representation on the proposed SPS Committee and related technical sub-committees.

Mr Chester, those comments seem to me to be extremely serious and in need of clarification. I shall start with the first one, which is the implied link made by US trade representatives between the FTA and changes to Australia's quarantine standards favourable to US exporters. Can you begin by commenting on that point, please?

Mr Chester—I will ask Ms Greville to respond to those questions.

Ms Greville—I agree with you that this is a set of complex and serious allegations, and I will try to recall them in the order that you raised them. It is true that a number of American agricultural interests and some American trade officials have made a link between this FTA and its negotiations and concerns they have with Australia's SPS processes. However, it is absolutely true to say that the FTA negotiations were not at any stage concerned with individual technical market access requests. Neither the Australian government nor the United States government would have contemplated confusing the negotiation of a cooperative consultative arrangement, which is what is in the text, with technical discussions on specific commodities, and neither would either jurisdiction trade off quarantine standards for a free trade agreement.

As I said, there have been comments made by some US agriculture interests about the place in an FTA negotiation of technical market access requests, and certainly agriculture interests in the US made demands on their government officials about resolution of them in this context. Those groups were not well informed about either Australia's quarantine processes or, to be frank, their own, nor the SPS agreement. Some of those interests choose not to understand that import conditions for the same product will legitimately vary between countries on the basis of the pest and disease status of the importing country or its appropriate level of protection. So they may feel aggrieved if they cannot obtain access to Australia for their products. That sometimes leads them to make specious claims about our system and to foster the belief among their members that Australia uses its quarantine standards as a trade barrier. And they continue to use SPS as a reason to oppose the FTA when in many cases they fear competition from Australian producers. None of that was relevant in the negotiations, and the fact remains that the US government, which does understand the SPS agreement, did not try to pressure us during the FTA negotiations to fast-track or alter any import risk analysis or to change our conservative approach to quarantine.

Senator FERRIS—Are there any documents that you could supply to the committee that would reinforce the comments that you have just made?

Ms Greville—The best evidence is the text that has been negotiated. It explicitly preserves and protects the quarantine processes of each jurisdiction. Our import risk analysis process is well documented and, as you know, transparent and challengeable at a variety of points along the way. That has been explicitly preserved, as has the US's system, and all that the text deals with is enhanced technical cooperation and exchange during that process. If I could just address your earlier question regarding why people in the US have suggested, after the event, that there was some link, I think that is harder to explain in the sense that there is no doubt that the political connection has been made in the US between the negotiations and SPS outcomes, even though that political connection does not exist. We have not made it. At no point have we changed the outcome, sped up or fast-tracked any IRA process, but I guess we cannot prevent people on the other side making those connections. The fact is that there have been over the last two or three years a number of IRA processes that have come to their logical conclusion—in some cases, after a very long process.

Senator FERRIS—This particular process involving an IRA for pork was a process that took eight years. The Pork Council admitted that that was an extremely long time. Nevertheless, this is the first time that I can recall there having been a witness before us—or even the other committee, for that matter—who has made a link between Biosecurity Australia, as distinct from SPS, and the work that Biosecurity Australia do, which both countries have agreed has always been and will continue to be science based, and some pressure related to these negotiations. I am extremely concerned to lay out these concerns and make sure that they are answered point by point. Unfortunately we do not have the *Hansard* to make available to you, since there was a very late witness yesterday. Might I just say that, if it transpires, when you read the *Hansard*, that further comment needs to be made to clarify the matter, I am sure the committee would be pleased to receive it. Let us go on to the second point that they have made:

- Indications that the Final Import Risk Assessment for Pig Meat released by Biosecurity Australia was potentially influenced by negotiations with the USA about quarantine outcomes in the context of the Free Trade Agreement and in particular the timing of the release of the Final IRA Report**.**

That report, you may or may not know, was released on Monday of last week, which was the final day of the timing for the appeal mechanism to have that report released. Can you take the committee through the staffing arrangements? Are any members of staff who have been working on the free trade agreement associated with biosecurity? Is there any way that Australian Pork Ltd could have drawn this conclusion? I appreciate your comment about the proof that it is not a problem being in the wording, but these people have drawn from the wording these concerns. I think we have to conclude from that that the wording alone is not sufficient to satisfy the concerns of Australian Pork Ltd and potentially other witnesses in the agricultural sector.

Ms Greville—I think there are a couple of things that I can usefully say, Senator, although I am not sure that I—no, let me get to that later. I think it is important to understand that all of our trading partners, or at least a very great number of them, pressure us regularly to finalise IRAs at some time or another.

Senator FERRIS—As we pressure those countries that we want to export to.

Ms Greville—That is right. The US and most of the other prospective exporters of pig meat have expressed concern since 1998 about the length of time that that IRA has taken to reach its

conclusion. My absolute understanding—and I am not an officer of Biosecurity Australia—is that the pig meat IRA has followed the IRA process faithfully, with the addition of at least one extra step to increase transparency, which was the release of a methodology paper that explained how the scientific assessment was being done, to reach a point last week at which the determination could be made. So, notwithstanding the pressure from the US, the EU and others, there is no relationship between the FTA and the fact that this IRA has been finalised. I heard the evidence that APL gave to the committee yesterday afternoon via the Internet. As Ms Plowman acknowledged, there have been many discussions between APL and officers of the Department of Foreign Affairs and Trade, officers of Agriculture, Fisheries and Forestry and Biosecurity Australia, all of whom have been assuring her and her organisation that there is no connection between the two. They are parallel processes that happened to finish in the same year.

Senator FERRIS—In those discussions with APL, yourself and other officers, did you feel at any time that you had given sufficient reassurance and that you were surprised by Australian Pork Ltd's submission and comments yesterday?

Ms Greville—Certainly, I think that what we have given them—and I think that she more or less acknowledged this—was every assurance possible. It is also important for me to say, though, that our quarantine system allows us to base decisions only on science, as you know, Senator, in the light of our appropriate level of protection. That decision-making process is challengeable, but it can only be challengeable on the basis of science. There are on both sides of the Pacific—and, no doubt, in every jurisdiction—people who have very significant interests in the decision going one way or the other. If the decision does not go the way they want or looks as though it is not going the way they want, the only avenue available to them is to criticise the underpinning science or to claim that it has somehow been manipulated. I am not making any accusations about anybody, but I think it is quite common for people who are not comfortable with the outcome of a quarantine decision to call the process into question. So, in that sense, I guess it is fair to say that I was not surprised.

Senator FERRIS—The pork witnesses are not the only people who have made these allegations. We had some evidence last week from two witnesses in Sydney that suggested the same thing. They suggested that there would be some institutionalised pressure—I think they were the words that were used—to suggest that in some way the process would be compromised as a result of the decision to offer the opportunity for another committee of review to discuss some of these issues. What comment would you make about the principle of the establishment of that committee?

Ms Greville—I think I will refer back, Senator, to something that you said a little while ago, to acknowledge that exporting countries can and do query the basis of the quarantine decisions taken by importing countries. We certainly take issue with countries that import our agricultural products if we believe that the measures that they are imposing or thinking of imposing are not justified. So I guess it is fair to say that if the United States considers that an Australian decision is inappropriate, that the process is flawed or that delays are unwarranted, the US can and does raise that issue with us very vigorously.

We are absolutely committed to and more than capable of defending our standards, but we are also willing—as WTO members and upholders of the SPS agreement—to consider alternative approaches which achieve the same level of protection. What this agreement does—rather than

characterising it as institutionalising pressure on us—is to provide a regular forum for ongoing dialogue on matters of bilateral interest. This does not mean that the parties will always agree with each other's decisions, but it will hopefully prevent a situation where the United States or Australia is presented with a quarantine decision at the end of a process for which it does not understand the basis.

I would also like to pick up a point that you made in passing. I think that you were referring to evidence that you have heard before about committee of review or de facto dispute resolution. I would like to make the point that it is very clear in the text that the bodies established in this chapter are neither review bodies nor decision-making bodies nor dispute resolution bodies. What the technical working group and the SPS committee provide is a forum for discussion on matters of technical and scientific interest. If consensus is not possible—and it acknowledges explicitly that consensus may not be possible—then consensus will not be achieved. There is no decision making and there is no capacity for that body to impose its will or its views on the quarantine decision-making processes in either country.

Senator FERRIS—The evidence that we received last week from Professor Weiss suggested:

… that we—the witnesses—have a perspective on the history of trade negotiations. It is well understood and documented that, while agreements are fine in writing, the United States does have a very strong reputation for being able to apply insistent pressure to work the various bodies and vehicles that have been set up to achieve outcomes that have been there all along in between the lines.

She then goes on to say:

We would be extremely naive to assume that somehow, because these words are written on the page and they do not actually say, "We aim to remove Australia's quarantine system," this was not the purpose of the body ...

She was referring to the committee dealing with sanitary and phytosanitary matters. Given that the United States has a history of applying pressure and has a strong reputation for doing that, are you aware of that history or that reputation?

Ms Greville—This is something that some of my DFAT colleagues may want to comment on. I do not think there is any secret that the US applies pressure where it sees fit.

Senator FERRIS—As Australia does.

Ms Greville—And it is also no secret that the US has applied pressure on us on quarantine matters over a great number of years. The important point from my perspective is that, over the last two years at least, when we have been engaged in closer consultation with the Americans on technical matters to do with quarantine, our relationship on those issues has improved. I guess the point I am making is that pressure applied without understanding of the processes and without comprehension of the nature of the scientific issue is very unproductive. By increasing the level of understanding of each other's processes and exchange on technical matters, the relationship works better and the systems work better. But that should not be understood in any way as being a compromise on either the process or the standards.

Senator FERRIS—For the benefit of the DFAT officials, I will complete this little section of Professor Weiss's evidence because I think it is important to clarify it. She says:

The difference with this particular agreement is that it will provide a regular standing committee or a forum—the Trojan Horse—for US trade negotiators to put relentless pressure on our quarantine standards. If we look at that broader historical trend—that comparative perspective that allows us to see who gets what in these trade deals—then I ask you: are you not a little concerned about this measure ...

The measure she was referring to was the existence of that committee. Did the negotiating team receive advice from other departments or agencies on the effect of the creation of these committees? Did the negotiating team in fact expect that people—like Australian Pork Ltd, other agricultural bodies, and academics like Professor Weiss—would draw the conclusion that they have drawn about this committee's establishment? If they were concerned, was the wording in any way changed in your view to make that clearer?

Ms Greville—It is certainly fair to say that, in the case of the United States, there is not a widespread understanding amongst agricultural interests and other commentators about the way that the US SPS quarantine process works. I think Australians, as a general rule—and this is a personal opinion—are better informed about our quarantine processes than their American counterparts. But I do think that there is perhaps a slight disconnect and perhaps they do not understand as well as we might have thought both the way the SPS agreement works and the obligations that are on countries which have signed up to the SPS agreement, and also the extent to which our existing quarantine process is consultative, transparent and challengeable. As I have said before and, as I know you are aware, these arrangements in the FTA text are in no way 'instead of' our current arrangements; they are entirely 'as well as', if you understand that slightly odd sentence. So they are an adjunct to them, to provide additional technical consultation to make the process smoother.

It has not been well understood here, clearly, and we can understand that by the level of concern that has been expressed to you and to the Joint Standing Committee on Treaties. For my department, the Department of Agriculture, Fisheries and Forestry, and its agency, Biosecurity Australia, that has thrown up a fact that we are very interested in and we will go out of our way now to explain it better. The inclusion of trade officials, for example, is something that people have picked up on a number of occasions. I cannot comment on whether everybody was surprised by that. I have to say that, personally, I was a little surprised at the level of concern that people have expressed at that. But it clearly indicates that they do not, or have not in the past, understood the relationship or the fact that quarantine is essentially about trade, if you understand my point, and the fact that there are trade officials who have significant SPS responsibilities. So to me it would be stranger to have an SPS committee in a free trade agreement that did not have trade officials on it than to have one that does.

Senator FERRIS—On the perception of the Trojan Horse principle—let us call it that for the sake of shortening the explanation each time I ask you a question: you have said it was something that surprised you. Does that mean that you had consulted with other government departments and taken advice from them that may or may not have alerted you to this likely element of concern that is being so widely expressed now?

Mr Gosper—Firstly, from a trade negotiation perspective, we are quite comfortable with the outcome that has been achieved in this area. It is true of course, as Ms Greville has said, that sanitary and phytosanitary issues are an area of keen interest for both Australia and the US looking for access into each other's markets. They have been for a number of years and I anticipate that that will continue to be the case. So there is a two-way interest, I think, in access to each other's markets and a dialogue has occurred at many levels that addresses these sorts of issues. One of the things that we constantly deal with in the trade negotiation area is a certain presumption about the nature of our quarantine regime, which is operated on a very conservative basis. We find that opportunities to actually elaborate on the way in which we conduct our quarantine regime—its science basis, the way we operate it fully in accordance with the SPS agreement—are always useful, particularly when we are dealing with major trading partners like the United States and others.

In the context of this particular negotiation on the FTA agreement, the most important thing to say, of course, is that all the rights and obligations and disciplines provided by the SPS agreement under the WTO are confirmed by both sides. Both sides confirmed that that is the framework in which we each make our quarantine decisions. As Ms Greville has said, the consultative mechanism that has been set up merely provides a forum for information exchange. It does not influence directly or indirectly that decision-making capacity. So we are quite comfortable with this mechanism. We think it is a positive thing. It allows for a better explanation of our system and the way it works. It does not interfere or run across any of our SPS rights and obligations and we think it is quite a useful outcome.

Senator FERRIS—The example that Professor Weiss used to give legs to the Trojan Horse principle was the importation of Californian table grapes and the fact that after years of pressure we finally allowed those grapes in, notwithstanding that they have to be treated with a range of measures before they are allowed to be sold in Australia. That was given to us as an example of how the United States wears down—to use their words—a country to eventually win access for a product. Are you aware of any other areas or even a bilateral agreement that American has struck with another country where that sort of pressure has resulted in access? That is where Australian pork is coming from: they believe that the Americans have worn down the process to the extent that they have now got access to Australia. It is probably a regrettable coincidence that the decision was announced in the middle of these negotiations or within the context of them.

Mr Gosper—I do not quite understand the thinking behind that. In our context and in the case of the US, we each have our SPS rights and obligations, which provide basically that we can have a sovereign right to an appropriate level of protection but, in setting that level of protection and applying it, not do so in a way that is used for merely trade protectionist reasons. The whole objective is to allow countries to achieve the level of protection that they determine as a sovereign right but to do so in a way that does not provide merely a tool for trade protection. So countries logically work through the approach to these sorts of issues. In the cases that you have mentioned—table grapes and pig meat—these are issues that have been worked through over a number of years.

Senator FERRIS—On science.

Mr Gosper—On the basis of science, and in each case Australia has determined a conservative level of protection to be achieved and has put in place measures to achieve that

level of protection. We do the same. We have won access to the US market by applying pressure over a number of years to seek them to implement faithfully their SPS rights and obligations to, again, strike an appropriate level of protection and apply that level of protection in ways that are minimally trade distorting or least trade restrictive. That occurs. That is part of the way the system works, and what we should expect to actually happen. The FTA agreement does not change the rights or obligations or expectations that we each have and, in determining our own appropriate level of protection, will apply in accordance with the rules and obligations of the SPS agreement.

Senator FERRIS—Conversely to the Canadian table grapes, as a South Australian I can tell you that the citrus industry were very excited some years ago when, after many years of negotiation and pressure, Australia won access to the US market for oranges at a time when they were out of season in the United States. So I am aware of access that Australia has got as a result of pressure—but, again, based on the science. I am pursuing these questions not because I have a concern but because I think it is important to lay them to rest.

I have a lot of questions in this area but I am conscious of sharing the time so I will ask one more and then allow some of my colleagues to take over. I wonder whether some of the concerns that have arisen in Australia with some of witnesses that we and the other committee have heard from have come about as a result of allegations—and I have not seen these allegations but they have been reported to this committee—by the US farm lobby along the lines that they can put a dollar value on what the US has achieved through the SPS outcomes in the US trade agreement. They have been talking up potential access for their products into Australia through the establishment of these committees, because they believe that that will enable them to more effectively and rapidly get access than they might have otherwise—in other words, by compromising the science or certainly fast-tracking the science. Firstly, what comments would you make about that but, secondly, do you think that that has had some effect on raising the level of concern by Australian groups?

Ms Greville—As I said before, there is no doubt that the US farm lobby, the farm bureau and other organisations, have been making allegations about Australia's SPS regime for some time. Because they do not understand that they cannot necessarily achieve access on the same basis into Australia as they do into other countries, they interpret that as being a problem with our SPS regime, even though there are quite understandable reasons for the restriction. We have explained that again and again, but there is no doubt that they continue to look on that as the barrier to Australia that faces them. There is no doubt that they were looking to the FTA to assist with that process. As I said, there is no point in pretending that is not the case. The important point to understand, though, is what this text does and does not do. It does provide the capacity for technical exchange, which may make individual IRA processes work more smoothly if that technical exchange contributes to the science. What it will not do is have any impact on our level of protection or our conservative quarantine regime or our standards, no matter what they say.

Senator FERRIS—But do you think that has raised the concerns in Australia?

Ms Greville—Yes, I do. I think there is the fact that they have consistently pointed to SPS as their target. If you look at it from the other perspective, our agriculture industry are reasonably outspoken about what they perceive to be the problems in the US market and they have been very clear about what they want out of this free trade agreement. The US agriculture industry

continue to characterise our SPS regime as a problem and are very clear that they want it dealt with. The fact is that the US administration, the US negotiators, understand much more about our SPS regime and their and our SPS obligations. That was not part of the negotiations. The negotiations were about a consultative mechanism that would allow the process to work more smoothly and, hopefully, in that process educate better the constituencies on both sides about what is and what is not involved in those sorts of negotiations.

CHAIR—I have a couple of general questions. Looking at this agreement overall, I think a way of analysing it is to look at what sections of the agreement encode the status quo and what sections of the agreement are new. As I read the agreement, in agriculture it is article 3.4, Agricultural Safeguard Measures, which expresses what is the status quo. Can you confirm that is the status quo position? Perhaps you would like to take that on notice, check on that and come back to us?

Ms Greville—I am certainly happy to do that. I have not thought about this article in exactly that way. This is the article that allows section C of annex 3-A to operate.

CHAIR—I am not saying necessarily that encoding the status quo is a bad thing or a trivial thing, because it may be that by doing that we are in fact binding it at a new but practical level. In some cases in this agreement we are expressing things in clauses which actually bind it at the level that we have agreed to in the WTO, which everyone else gets. But as far as agriculture is concerned, the status quo appears to be the case in article 3.4. I would like you to confirm that.

Ms Greville—Certainly; I will take that on notice.

CHAIR—I have a copy of the Central American Free Trade Agreement. I do not have a copy of the whole agreement; I have a copy of some parts of the agreement, to be honest. The date of the media release is 17 December 2003. This was before the Australian agreement was concluded. On agriculture, as I read the CAFTA—and I am reading from the fact sheet that the Americans make available on their web site—it says this on pork:

WTO bindings range from 35% to 60%, with applied rates 15% - 47%. Under the agreement, all Central American tariffs will be eliminated by 15 years. Tariffs on bacon and some offal products will be eliminated immediately. TRQs amounting to 9,450 MT will be established and grow from 5% to 15% a year. The United States will be allowed to administer exports under the TRQ through an export trading company in four of the countries, if it chooses to do so.

Is that the same provision as we have for pork? Have the Americans conceded the same to the Central American countries as they have conceded to Australia? Have we got a better deal or a worse deal—how does it rank?

Ms Greville—The arrangements in place before the US FTA with Australia were that they had minimal tariffs on pork and we had minimal tariffs on pork. We had no tariff at all on fresh pig meat and a five per cent tariff on processed pig meat which, under this agreement, will go to zero immediately. The US tariffs on pig meat will also go to zero immediately. There are no TRQs into the US on pork and there are no TRQs into Australia on pork.

CHAIR—In short, ours is a more liberal access arrangement than the Central American one on pork?

Ms Greville—Yes.

CHAIR—On sugar, the Central American deal is 110,000 tonnes. It is too long to read out. In effect, they have a graduated scale for each of the five Central American countries for graduating increased access over 15 years. It looks like it goes up by about two per cent a year in perpetuity. We did not get anything on sugar. Did the Central Americans get a better deal on sugar then we have got?

Ms Greville—They certainly have a different deal on sugar. Without trying to be silly about it, they actually do have some access in their FTA and we do not. So the short answer is, yes, they got a better deal on sugar. It is probably useful to say, though, that it is a different deal on sugar in the sense that, as I understand it, there are provisions in the CAFTA agreement that give them some incremental access between the five of them, as you outlined, but there is a provision in there which actually allows the US to buy that quota back. In essence, if the US choose not to accept Central American sugar in the context of the CAFTA agreement, they can avoid allowing it in by paying the Central American country the equivalent amount in dollars.

CHAIR—That is in contradistinction to the Australian government in their reconstruction plan for the sugar industry, which also involves a bit of compensation: paying out of the Australian taxpayers' pockets to Australian sugar producers. Is the comparison that in Central America the American taxpayer pays if they do not want to take the exports from the Central American economies?

Ms Greville—I would not make that comparison myself, but certainly it is true to say that the CAFTA arrangement does allow the American government to transfer funds to Central American countries without requiring sugar in return.

Senator CONROY—It has the same economic effect as an export subsidy.

Ms Greville—I guess it means that the Central Americans get to keep their sugar but they get the money anyway.

Senator CONROY—And then they can sell it for much less.

CHAIR—To someone else.

Ms Greville—That is true.

Senator CONROY—They do not have to get the market price for it because they have already been paid for it once. They could sell it for anything.

Ms Greville—That certainly could be the effect. To get back to your original question, in my view it is also fair to say that the reaction amongst US agricultural industries, sugar in particular, to that provision in CAFTA hardened the administration's attitude to their capacity to give us anything on sugar in our agreement. So not only did they get some sugar but the impact of that probably contributed to us not being able to secure sugar access in our free trade agreement.

CHAIR—So the Central Americans win and, as a consequence of that, there are protests to Capitol Hill in Washington from American sugar producers and we lose. Is that what you are saying?

Ms Greville—What I am saying is that it was clear to us during the negotiations that their capacity—which is the way that they would describe it—to do anything for us on sugar would be very difficult. That had been clear from the very beginning. They continued to tell us that they were not going to be able to give us access on sugar. As we have said many times, we continued to push as hard as we could, right to the very end of the negotiations. But the atmosphere on sugar in January, after the CAFTA announcement, in our last round of negotiations was even more difficult than the atmosphere had been in the previous round, which was before the CAFTA announcement had been made. I guess the rest of it is my interpretation of how that came about.

CHAIR—Did we do this: did we take the Central American sugar deal, assess its overall value and say, 'While we want a sugar deal, we don't want it expressed in the same way,' but that we wanted equivalent value for Australia as the Central Americans got for themselves in sugar? Did we press the Americans in that way?

Ms Greville—We pressed the Americans for access on sugar. We clearly had very high ambitions on the sort of sugar access that we were looking for, leading to free trade in sugar. At no stage, at any negotiations at which I was present, did the discussion revolve around amounts, because the American response to us was always that sugar was too hard. So I was not party to any negotiations along that line.

Senator CONROY—This is a negative list which takes things off the table by saying, 'This is off the table.' So when we sat down at the very beginning, did they say sugar was not on the table?

Ms Greville—No. Sorry, I am trying to remember exactly how it was characterised. Our attitude all the way through was that this was a comprehensive agreement and that we would need something on sugar. Their attitude all the way through was that sugar was very hard. So sugar was not off the table; sugar was in the category that they described as extremely difficult.

Senator CONROY—When did it move from very hard to too hard?

Ms Greville—I am not quite sure how to answer that question. We pressed, right until the very last day, for sugar and—

Senator CONROY—But it was never on the table, effectively. I am trying to understand this: when did you reach the conclusion that it was never on the table from the beginning?

Ms Greville—Our position was that it was always on the table.

Senator CONROY—But I am asking you about their position.

Ms Greville—Their position was that it was an extremely difficult issue on which they were not in a position to make us an offer. So there was not a sugar offer on the table, if that is your point, but our position, right until the end, was that sugar had to be part of the agreement.

Senator CONROY—To be part of the agreement it had to be on the table to start with, and in the discussions.

Ms Greville—Both sides were saying that this was a comprehensive agreement and that nothing was off the table. That was made very clear and reiterated through the negotiations.

Senator CONROY—Nothing was off the table; when did they start saying, 'Sugar is not on the table'? They did not remove it—perhaps you could postulate that it was never on the table—but there must have been some point when they said, 'Look, sorry, we're just not doing anything on sugar'?

Ms Greville—I was not party to that conversation at any stage, Senator.

Senator CONROY—So are we still trying? Have we worked out that sugar is off the table yet?

Ms Greville—No, I think we have worked out that sugar is off the table now, but the—

Senator CONROY—Were you party to the conversation when you found that out?

Ms Greville—The negotiations continued right until the very last minute and there was continued emphasis by Australia that there had to be some sugar offer.

CHAIR—The point is that we closed these negotiations knowing that the Latin Americans had got a sugar deal and we did not. So why did we close the negotiations at that point? Why didn't we simply insist that if it was good enough for the Latins it was good enough for a loyal ally like Australia?

Ms Greville—The government's assessment at the end of the negotiations was that we had a very worthwhile deal. It was a matter of significant disappointment to us that sugar was not a part of that. But I guess—and, as I said, this was not my decision—that the assessment made in the end was about whether this deal was worth having. And the assessment was: yes, it was, without sugar. Therefore we concluded the negotiations on that basis.

Senator CONROY—When you start off and they say, 'Sugar's on the table,' and then you get to the end of the negotiations and find that sugar is not on the table, is that negotiating in bad faith? I would certainly think so. If it is on the table it is on the table. If you end up with nothing you think, 'I've been led up the garden path.'

Ms Greville—I understand what you are saying. In negotiations you have to go with your gut feelings on these things, but it is my personal opinion that sugar was not off the table perhaps until after the CAFTA agreement. So while we were talking all the way through the negotiations about our need to have sugar on the table and the Americans were acknowledging that sugar was very difficult politically for them, that was not, I do not believe at that stage and certainly we did not interpret it to be, a decision that we would get nothing on sugar. My personal view—and I emphasise that it is a personal view—was that the politics of sugar did not become that difficult until after the CAFTA announcement, which was, as you said, towards the end of December. When our negotiations resumed in January it became clear to us that the position that had been

expressed to us as 'sugar is very difficult' had become 'sugar is impossible'. But I do not believe that that was negotiating in bad faith. It was a change of circumstances on their side of the negotiations that we regretted and pushed hard against right up until the end.

CHAIR—You obviously talked this over a lot with the Americans. How do they explain to Australia that they had given this sugar deal to the Central Americans but they were not giving it to us? What was their explanation?

Ms Greville—I am trying to think whether I was a party to any of those particular conversations. In the negotiations during January, the conversation was generally about how much we needed sugar to be a part of the deal and how difficult it was going to be for them. We made the point to them on a number of occasions that they had given sugar access to others and also that this was a comprehensive agreement and that had been the basis on which we had been negotiating. They continued to reiterate that the politics of sugar were too difficult. They were not clear that they could give us any sugar. That was the sum of the conversations to which I was a party.

CHAIR—It seems that ahead of Christmas the Latins got the sugar and after Christmas we got the shaft. The Latin deal is not just a one-off proposal. It is one that ratchets up by two per cent a year for 15 years. It is ongoing, expanding access. In some other areas of agriculture we got deferred access or improved quota arrangements that check in later down the line. If the politics of sugar, to take the apparent American argument, were difficult why couldn't we have done a deal in which in some years time the Latin American table of two per cent a year in perpetuity applies to Australia—that is, defer it past the next couple of years but check it in later on? Why couldn't we have done a deal like that? It would not have been a good deal in my view but it would at least have been a deal.

Ms Greville—The answer probably is that we were not able to do any deal on sugar. It is not that we asked for immediate access on day one and were told no and stopped asking. We were interested in sugar access, however it was described, and would have been, I am sure, happy to negotiate some alternative arrangement to immediate free trade. But that was not possible.

Senator CONROY—You made the point that you said to them that this was meant to be comprehensive. We were unsuccessful in getting sugar. Where does that leave a comprehensive agreement?

Ms Greville—The government have been very clear that they are disappointed that sugar is not a part of this deal. It is still, though, a very wide ranging and worthwhile free trade agreement. I should also say that there are a number of agricultural groups in the United States who are also concerned that sugar was not part of the deal. They were also putting pressure on the United States government to include sugar as part of the deal, and they were equally unsuccessful.

Senator CONROY—They do not have it in Florida, obviously.

CHAIR—I think that point is right, Ms Greville. A lot of the American commentary after this deal was done criticised the administration saying that this was not a genuine free trade agreement. It was not good enough to meet the standards of free trade that the President had

been espousing. To that extent, it was negative commentary to the US administration. I am sure that Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua are all very fine countries and I do not want to say anything that is in the slightest way critical of them, but why can't we get their deal? Other than simply saying no, wasn't some other explanation provided to us? I do not think any of these countries have troops in Iraq, for example. We have a relationship. Wasn't some other explanation made to us?

Ms Greville—All that I can add in answer to that question is to make the point of which I am sure you are well aware, which is that the agricultural sector generally in the US was not particularly supportive of the notion of a free trade agreement with Australia for a range of reasons, mostly to do with the fact that they did not perceive it as a big win for them. The agricultural sectors in the US do not see Australia as a big market for them now or into the future. That is not the case in their perception of Central American or South American countries, where they do see that there is a big market potential for them. In that sense, they were more supportive of the free trade negotiations with the CAFTA countries. Therefore, the negotiation of an agriculture deal that looked like that, as opposed to the one we negotiated, was easier for the US administration because they got less resistance from the agricultural industries.

CHAIR—Was it that the administration had to be satisfied that the lobby group in agriculture would agree before it would make a concession to us? Was that how the negotiations worked?

Ms Greville—There is no doubt that the US negotiating mandate was informed by their industries' interests, and there is no doubt that when we pushed on particular access issues, as we did repeatedly, the consideration that those requests received was made in the light of the interests of the US agricultural industry. I do not think that is quite what you were saying, but I also think it is fair to say that the United States negotiators had an eye to an agreement that they thought had some potential to get through their congressional processes as well. So they were concerned about an agreement that would engender concerted consistent opposition from the agricultural industries.

CHAIR—We had a long discussion yesterday about intellectual property, and we have had a bit of a discussion this morning about sanitary and phytosanitary claims on Australia from the American side. We had a discussion earlier about pharmaceutical benefits and what the American pharmaceutical lobby wanted. If you take their public statements into consideration, the administration had no difficulty in saying no to them, if you accept the government's explanation for what the clauses in the PBS mean. At any point did we say to the Americans: you cannot have these things; they are off the table unless you agree on sugar? Did we go to that level of hard ball?

Ms Greville—I do not know that I am really qualified to answer that question. My involvement was in the agriculture and SPS negotiations rather than any kind of high level summing up. I do not know whether Mr Sparkes wants to comment.

Mr Sparkes—I am wondering whether there is any particular help that we can give you in what you are looking for with this particular line of questioning or whether, frankly, it is particularly helpful to try and recapture, as you can imagine, the many hours of negotiations and the many arguments that we would have had with the negotiators on the other side of the table. I was not personally involved in many of the agriculture negotiations through the course of last

year, but I am sure you would appreciate that we would run a large number of arguments about what the package is and what the balance is. As Ms Greville said, the United States said all the way through on sugar, 'This is very hard,' and at the end of the day it proved to be impossible.

Only the United States administration can provide a complete answer on the reasons why it was impossible, but obviously it had to do with domestic industry concerns and broader political concerns about getting this package through the Congress—it has to be shepherded through in the coming days. The outcome was, as Ms Greville was saying, that the United States said it was very hard; that is certainly no reason why we stopped pressing. We all say that things are very hard to do because we do not want people to keep pressing, but the reality of negotiations is that people continue to push right to the end because that is when the final deals are done. You can never be certain; if you do not keep pressing you will not get an outcome, but the United States was consistent in saying it was very difficult. In the end the outcome was that it was too hard for them, but that conclusion came, as Ms Greville was saying, right at the conclusion of negotiations.

CHAIR—I understand all that, Mr Sparkes—and thanks for the explanation—but the elephant in the room on this agreement is this great yawning gap where the sugar deal would have been. As a consequence of that, or related to that, the government has authorised a $444.4 million payout to the Australian sugar industry for its restructure. One of the things that we have to consider is how much of that payout from Australian taxpayers would have been unnecessary if we had broken through and got better access to the American sugar market. One of the things that we have to evaluate in the cost-benefit analysis of this package is the extent to which that $444.4 million is a cost to the FTA, or our failure in the FTA.

My question is: how far did we push? This is to get an idea of how serious we were, because I am used to argument from precedent. The precedent here is that the Central American countries got a sugar package before Christmas; after Christmas we missed out. It would seem to me that argument from precedent—they got a package, therefore we are entitled to a package—flows. The elephant in the room gets bigger if there is no explanation about how we actually handled that end of the negotiation. I do not want to press officers that are not appropriate to the line of questioning because that was not what they were involved in. That would be a silly exercise and I have more respect for you than that, and unless my colleagues have any further questions on this, I will move on to the next subject. But it is an explanation that we need to pursue. I am a fiscal conservative, I suppose, but you do not write cheques for $444 million unnecessarily—maybe some governments do in an election year, but you ought not to. The idea of trade liberalisation is to actually enable our industry to compete fairly. Why can the Central Americans have more access but we cannot? That is the big question, I suppose.

Senator O'BRIEN—Yesterday Queensland Sugar Ltd gave evidence, and they indicated they were told consistently throughout the process that it was the negotiators' view that it was going to be extremely difficult to make any progress on sugar. Is that accurate? Did they accurately reflect the advice they were given by DFAT?

Mr Sparkes—As I understand it, yes. As Ms Greville and I just said, the United States made it clear from the beginning that it was going to be very difficult to make concessions to increase Australia's access to the sugar market under the FTA.

Senator O'BRIEN—When did we say to the United States, 'No sugar, no deal'? Did we ever say that?

Ms Greville—I think it is fair to say that we were very clear, from the beginning of the negotiations, that sugar was very important to us. Certainly the implication was there that, if sugar was not going to be part of the deal, it called the whole deal into question. I do not think there is any mistake about that. We were very clear with our consultations with industry—

CHAIR—I am sorry to break in. We agree with that point: if sugar is not there, it calls the whole deal into question.

Ms Greville—Our attitude was that sugar was a fundamental part of the deal. I go back to what I said earlier: at the end of the day, when it finally becomes crystal clear that there is not going to be a deal on sugar, one looks at the rest of the deal to see whether it is a deal worth having.

Senator CONROY—But you did not say to them at any stage, 'No sugar, no deal'?

Ms Greville—I cannot put words in other people's mouths but, at the negotiations I was party to, we certainly made that point. But we made that point about a lot of things. As a part of negotiations, you would say, 'If that's going to be your attitude, this calls the whole deal into question.' That was not just posturing.

Senator CONROY—Did you tell them it would be un-Australian to sign a deal without sugar?

Ms Greville—I do not recall whether we used that expression.

Senator CONROY—The Deputy Prime Minister used that expression here in Australia, but you were probably over there at the time. I was just wondering whether it was communicated to the Americans at any stage.

Ms Greville—The Americans were certainly aware of the level of concern, both amongst the negotiators and domestically, about the prospect of doing a deal without sugar in it.

Senator O'BRIEN—Who made the decision that we could do a deal without sugar in it? When was that decision made?

Mr Sparkes—I guess the final judgment was made right at the conclusion of the negotiations, when the two ministers had put together the best package they thought they could and consultations were held back here with the Prime Minister and senior cabinet ministers.

Senator O'BRIEN—But it was clear as soon as you resumed negotiations, if I understand you correctly, that sugar was not going to be in the deal?

Mr Sparkes—I do not think one can assume that the fact that your opponents on the other side of the table are saying that they are not going to do something on day one, when you have

eight months of negotiations ahead of you, should lead you to the conclusion that it is not going to happen that way.

Senator O'BRIEN—Straight after Christmas, when the Central American deal was clear, the Americans went from saying, 'It's too hard,' to, 'It's impossible.' They might have even been your words, Ms Greville.

Ms Greville—I certainly did say that. Just to pick up from where Mr Sparkes left off, they were saying that and it was clear to us that the attitude was different after December. But I also picked up his point that, if we had accepted no for an answer, the first time we got it on anything, the deal would have been different.

Senator O'BRIEN—That is not what I am suggesting. I am suggesting that, when it became clear straight after Christmas that sugar was not going to be in the deal—once the US was saying, 'We just cannot do a deal on sugar'—what instruction were the negotiators given about the deal? Was it to plough on or to say, 'This is a deal breaker'?

Mr Sparkes—I guess the CAFTA negotiations changed the tenor of our negotiations, but the message that the United States continued to give us was that this was a very difficult thing to do and it was going to be very difficult for them to do anything for us on sugar. The dynamics of all these negotiations is that you take that as read and you plough on and you try to get the best deal that you can. You do not say: 'Fine, that's it. We accept that there won't be any sugar,' but you continue to build a package as well as you can, partly to try to satisfy the United States that there is enough in it for them to change their view about whether sugar is not doable. That is a package that does not typically come together until right at the end of the negotiations.

Senator CONROY—What did we say to the US that we would not move on?

Mr Sparkes—I certainly was not in the room when all the negotiations with the United States happened. I doubt whether many people were. I am not sure that anyone could re-create for you exactly what time anyone said anything in particular to the United States—which arguments were used at which particular time. I am not sure that actually helps us very much, to be perfectly honest.

CHAIR—The deal was closed at ministerial level though?

Mr Sparkes—As you know, Senator, you take the negotiations at whatever level you are at. At officials' level you take it as far as you can; ministers will come in and try to deal with the remaining politically difficult issues. At the end of the day, you have to get on the phone and get back to the decision makers at home and ask whether they are prepared to go with the deal as you have outlined it. That is what happened in this case.

CHAIR—The Central American sugar deal would have been done when our negotiations were still alive on 17 December. Did the Americans make any explanation to us that they were going to do a deal on sugar with the Central American countries but not with us? Did they explain why they had done this deal?

Ms Greville—We have touched on that before. Everybody knew that the CAFTA negotiations were going on at the same time as the Australia-US FTA negotiations. CAFTA had their final round in December, as you said, the outcomes were announced and then there was a political reaction to the CAFTA announcement. As I said to you before, when we came back in January there was a perceptible difference in the attitude on sugar. We had lots of discussions on sugar and lots of argumentation about how important it was to Australia and at various times in those negotiations there were discussions about the fact that the CAFTA deal had been done. I am not sure that it was characterised any more specifically than that.

CHAIR—My question was: did the Americans explain to us why they had closed a sugar deal with the Central American countries but not with us?

Ms Greville—I am not sure how to answer that other than to say that the CAFTA negotiations concluded on schedule. Their last round was in December and it was concluded. It was negotiated at the officials' level by a different set of negotiators than ours. The two were conducted separately.

Senator CONROY—They obviously wore down the US better than we did.

Ms Greville—I have said to you before that there are reasons that the CAFTA deal on agriculture looks different from the Australian deal. I am sure it looks different in other elements as well, although I have paid less attention to the other elements of it than I have to the agriculture bits. They were different negotiations in a different environment in the sense of the expectations that the US had about what the CAFTA deal would do for them. The expectations that the Central American countries had were different from the expectations in our negotiations. As I said, my view is that it was unfortunate that theirs was concluded first because that might have had a slightly different outcome for ours. It was always going to be a different agriculture deal because of the perceptions in the US about what was in it for them.

CHAIR—That does invite this formulation. If they got in first, which meant they muddied the pitch for us and they took what was available and we got nothing, why did not we get in first? Ahead of the US closing with CAFTA, did we have an opportunity to do a sugar deal which would have meant that, unfortunately for the Central American countries, there may have been nothing in it for them? Did we think of that as an alternative?

Mr Sparkes—The reality was that if sugar were going to drop, it would be the last shoe to drop in the whole deal. In December when the CAFTA deal was done, we had not got to the point where the package was at that stage.

CHAIR—I read Geoff Kitney's article in the *Financial Review* about progress at the multilateral level. That is very heartening. The biggest surprise is that the French minister for trade walked into the Australian Embassy and put on the record a general position from France which is music to all our ears and that is cause for celebration. If that does energise the round, of course, whatever is decided in the round overwhelms this agreement, doesn't it?

Mr Sparkes—I might invite my colleague Mr Gosper to comment on that. As a general observation, there are concessions which we have negotiated with the United States in the free

trade agreement which would take a very comprehensive round or a series of rounds to get to the same point. Was that the point of your question?

CHAIR—Yes, but we cannot touch subsidies. We can touch subsidies in the round. It seems to me, from what I understand the pork industry was saying yesterday, that it is the subsidised grain feeding into their production of pork that is the hidden benefit for American competitors in the American market which makes it very competitive for foreign imports. I just want to be clear that there is no doubt that, if what appears at this stage to be a nascent European negotiating position hardens into something real and has a knock-on effect with American subsidies and access entitlements in the United States, then the round deal takes precedence over the bilateral deal.

Mr Gosper—Maybe I can best respond with a question: what precisely do you mean by precedence? If you mean, in effect, that if we have a multilateral outcome as part of the Doha negotiations that provides real disciplines on domestic support and export subsidy arrangements and real improvements to market access and that is reflected in changes to the global trading regime for sugar—

CHAIR—I am not just talking about sugar; I am talking broadly.

Mr Gosper—and on all products, that will have a much wider and more systemic impact on that trading regime then the answer is yes. But is that the intent of your question?

CHAIR—Yes. It is a theme that I will pick up later—about whether the balance of effort should be at a multilateral level or a bilateral level. I know all the theory that you can lever gains at bilateral level into the multilateral round. I do not know that there is much in this agreement that we would want to try to lever into the multilateral round, but let us just go on.

Mr Gosper—I will make one additional observation on the trading regime specifically as it relates to sugar. As you know, sugar was one of the areas that perhaps did not fare as well as, say, beef or grains in the Uruguay Round. Nevertheless, it is true that change to the trading regime for sugar of the sort that would see higher international prices requires changes in the subsidy arrangements and the market access arrangements in a number of important Northern Hemisphere countries. It requires changes by the US. It certainly requires changes by the EU, particularly on its export subsidy arrangements but also on domestic support and market access, and by others such as Japan. There is a very distorted global trading regime for sugar that is, of course, resulting in the sorts of prices our sugar producers are facing.

CHAIR—If we go into a discussion about distorted trade in sugar we will be here all day, because it is a terrible scene. I cannot recall the exact wording and I do not have the transcript in front of me, but the last question I put to the NFF when they appeared before us, and the last question of that day, was formulated along these lines: what if we as a committee were to seek an additional agreement with the United States along the lines that, given the sugar situation, if the US enters with a third party into a more favourable arrangement than they have entered into with Australia then Australia should automatically get the benefits of that more beneficial arrangement? Did we seek any such clause along those lines in these negotiations?

Mr Sparkes—I am not sure whether I have colleagues who are better able to answer this question than I am. But in certain areas there were commitments we both gave to each other which, if we extended the cover of certain commitments to a third bilateral party, the existing two parties in the US-Australia free trade agreement would get those benefits, but I cannot be specific as to exactly where they reside in the agreement.

CHAIR—We know that the United States is following an aggressive—and I mean that in a favourable sense—approach on bilateral free trade agreements. A number of those bilateral free trade agreements it is pursuing are with agricultural countries or countries that have a large agricultural sector. For agriculture, is there a provision in this agreement that says if the United States does a more favourable deal with a third party, Australia will automatically be entitled to the benefits of that deal?

Ms Greville—No, there is no such clause.

Mr Sparkes—Not on agriculture access.

CHAIR—Did we seek one?

Ms Greville—It is true to say that we specifically sought that clause in the negotiations on wine, and the Americans were adamant that they would not provide that clause to us. I do not recall whether we specifically discussed a MFN clause at any length in the agriculture negotiations over all but, if we did not, it was very clear to us—and the Americans went out of their way to be very clear throughout the negotiations—that their approach to the negotiations with us were predicated very finely on our current trading arrangements and the perception amongst their agricultural interests of where they had to fear from our agricultural interests and that the deal that they had done with, for example, Chile on beef was fundamentally different to the deal they had done with Australia on beef. They were very clear about why that was—because their beef industry fears that our beef industry is a very vigorous competitor that they need to be wary of, whereas that is not the case in Chile. As I said, I cannot assure you about a particular conversation, but it was patently clear that the deal on agriculture that they were doing with us was different to past deals and future deals for, from their perspective, very good reason.

Mr Sparkes—While one can see attractions in the proposal you put, it can of course work the other way in that, if the United States says, 'Does that mean we have to give every other free trade agreement partner that we might negotiate a free trade agreement with the same deal that we give to you?', the risk is that you get a smaller deal because they feel that they are going to have to extend that to others later on. That is just an observation.

CHAIR—Yes, but there is a lot of commentary about the United States having a template for bilateral deals and having particular things that it wants in common between its bilateral deals. We are in a position to make a judgment, Mr Sparkes, if it looks like tilting downwards in the way in which you have described, whether it is worth while taking that chance. But, just from this conversation, I want reassurance on this clear understanding: we did not seek such a proposition in agriculture although we did seek it with wine and they declined. So the United States is in a position where it is free to do a better deal with a third country on wine without any obligation to extend that same deal to Australia. That seems to be the summary of this

conversation. You are nodding. Does that mean you understand me or you agree with me, Mr Sparkes?

Mr Sparkes—I was just going to consult with my colleague Ms Greville and make sure that that was indeed her understanding, because she was much closer to those negotiations than I was.

Ms Greville—That is true, Senator, but I would just add that the wine deal that the US did with Australia is extremely similar, except in one particular provision, to the deal that they did with Chile. Chile has a MFN clause on wine in their free trade agreement. So we have the same deal as Chile, and Chile has a MFN clause which certainly implies that—

CHAIR—It means that they get our deal—

Ms Greville—the Chile deal is the benchmark for future wine deals that the US will do.

Senator O'BRIEN—Returning to the issue of quarantine, my understanding—and correct me if I am wrong—is that, when we conduct an import risk assessment, there is an opportunity for the country seeking access to have input at a number of points in the process.

Ms Greville—Yes, that is true.

Senator O'BRIEN—At a number of points?

Ms Greville—Yes, I think that is fair to say. Although, I should tell you that I do not work for Biosecurity Australia, so I am not an expert on the IRA process.

Senator O'BRIEN—We negotiated with the US about input into the issue. Who was the key negotiator on that issue?

Ms Greville—The negotiations were conducted at each of the rounds. For three or four of those rounds, I was the lead negotiator from my department. For the final two rounds, the Executive Manager of Biosecurity Australia was present to help with the development of the text to ensure that, from her perspective, there was no text in the agreement—as we believe there is not—that would in any way impinge on Biosecurity Australia's capacity to fulfil its obligations as outlined in our import risk analysis—

Senator O'BRIEN—So we believe this text has no bearing on the actual conduct of an import risk assessment?

Ms Greville—We are very clear that nothing that we have agreed to in this free trade agreement will impact on the way that our import risk analysis process is currently conducted and our quarantine decision-making process is currently conducted.

Senator O'BRIEN—What are we setting up the panel for?

Ms Greville—We are setting up the panel because there is the capacity between us to deal bilaterally with some technical issues and issues of science in a way that is useful, as I think we

have said several times. What the text actually does is codify in a way the informal arrangements that we have been developing over the last two years in an attempt to manage better the fact that SPS issues are sometimes an irritant between us. They will probably always be issues of irritation between us, because neither one of us will get exactly the access that we might like to the other's jurisdiction. But, if those irritations can be reduced by better consultation on technical and scientific issues, we are very happy to pursue that and that is what this chapter is about.

Senator O'BRIEN—So this is about something that operates separately and distinct from an import risk assessment?

Ms Greville—Yes.

Senator O'BRIEN—It does not have any input into an import risk assessment process?

Ms Greville—I am not sure that I would be comfortable in saying exactly that. There is no doubt that—and it is clear in the text—at any given moment, the competent authority in either Australia or the US may well have on its plate a number of ongoing or new technical market access requests from the other. The purpose of this ongoing consultation is to allow technical exchanges and discussions on matters of science that march in parallel, where appropriate, to that import risk analysis that is going on in each jurisdiction. Clearly, if some new level of understanding, if some new agreement on its importance, if a new development comes to light or if a new piece of research is introduced into that dialogue, that may then be factored into the import risk analysis process in either jurisdiction that is going on, but it will be done in a way that allows that additional information to be made public and to be challenged, subject to all the transparency provisions that currently apply.

Senator O'BRIEN—The trouble I have with that is that I think we have established that, if the US were wishing to introduce a matter of science into an import risk assessment, they would have ample opportunity in the current process to do just that.

Ms Greville—That is true, but it is also true to say that they have not always availed themselves of that opportunity. There have been situations in the past where SPS irritations between us have assumed a level of significance that perhaps they should not have. When people have gone back and looked at what has led to that level of angst, it has become apparent that, even though on either side there has been an opportunity to engage on the technical issues, the competent authorities, for one reason or another, have not done that.

As a result—and it came to head a couple of years ago on a number of issues, including Californian table grapes—it was agreed that we would get together and discuss those sorts of issues and alert each other in a more proactive way to the opportunities that were there for input and discussion and in fact to facilitate that discussion rather than just allowing it to happen under the auspices of the import risk analysis process. That has in fact proved to be very successful. As a result, both sides understand the other side's processes better and are more likely, in my view, to avail themselves of those opportunities even if they are not specifically invited to do so.

Senator O'BRIEN—Are there any similar bodies that we have set up with other countries?

Ms Greville—As you said, under our import risk analysis process, we are always happy to engage with the trading partners if they raise issues with us.

Senator O'BRIEN—But that is not the same thing.

Ms Greville—No. We certainly have had discussions under the auspices of the Australia-Thai free trade agreement about putting some more effort into technical exchanges and consultations on SPS issues generally.

Senator O'BRIEN—Haven't we set up a forum with the Philippines—not in the context of a free trade agreement but separately?

Ms Greville—To be perfectly honest, I do not know what we have done with the Philippines.

Senator O'BRIEN—Mr Sparkes and Mr Gosper, you are aware of that, aren't you?

Mr Gosper—I understand that there is an agricultural working group with the Philippines which discusses a range of issues and which may well discuss these sorts of issues. I think as Ms Greville said, we have something with Thailand. These are probably more elaborated examples of the sorts of technical exchanges we have with many trading partners on our SPS regime which I think occur daily or weekly on a number of issues.

Ms Greville—If I could also add to that—because I forgot to say it before—we also have regular animal and plant health dialogues with quad countries, which includes the US, New Zealand, Canada and Australia. Obviously in the margins of SPS committee meetings, we often have discussions on technical issues with trading partners.

Senator O'BRIEN—So what does this forum add?

Ms Greville—Despite the fact that we have the quad animal and plant health dialogues with the US—and have done for a number of years—we continue to have irritations on SPS issues that sometimes threaten to escalate into more serious disputes. Since the informal arrangements that I have alluded were set up a couple of years ago, that process has worked better and there has been less likelihood of issues spiralling out of control. This arrangement codifies that and articulates it better and more thoroughly in a way that people hopefully understand what it does do and, importantly, what it does not do.

Senator O'BRIEN—I am afraid it sounds like you are categorising the US trade department and the various lobby groups as slow learners. How often have they challenged other countries under WTO protocols with regard to their quarantine arrangements?

Mr Gosper—The United States have been one of the more frequent users of WTO dispute settlement provisions on sanitary and phytosanitary restrictions—for instance, the Japans apples case that has recently been found. They were a complainant against Australia on our salmon restrictions at the same time—

Senator O'BRIEN—As I understand it, they came into that late after the Canadians and New Zealanders had—

Mr Gosper—That is right. They stood more or less to one side while that issue was being addressed. There is a range of other issues, including in key export markets like Japan. They are, of course, the complainant against the EU's regime on hormonal growth promotants, which touches on the SPS regime and a number of other issues.

Senator O'BRIEN—They are certainly not unfamiliar with the processes of the WTO with regard to challenging protocols around the world. Apart from salmon, what have they challenged in Australia's protocol regime?

Mr Gosper—I cannot recall that they have challenged any particular measure. They are a third party on a number of other disputes, including disputes that are currently in contemplation.

Senator O'BRIEN—The general ones?

Mr Gosper—In the European challenge against our quarantine regime the US is a third party. They have a strong interest and it is reflected in the high level of exchange we have with the counterparts of Biosecurity Australia in the US on access to the Australian market. I think that is balanced off by a number of access concerns we have into the US market. One of the values of this process is of course that it is a two-way exchange from our view point. We have a number of live cattle issues that have been addressed over recent years. We have a range of issues on which we are looking for better access to the US market.

Senator O'BRIEN—I am sure there are plenty of opportunities for better access to the US market and we have challenged the US in relation to their protection of their lamb industry.

Mr Gosper—Yes, there was a sanitary and phytosanitary issue. The SPS agreement encourages members to engage in bilateral cooperation, transparency and exchange of information. These are all things that the SPS agreement encourages members to do so that they can better understand their mutual rights and obligations under the SPS agreement.

Senator O'BRIEN—In terms of our relationship with the US, which is not a primary challenger of our SPS system so far, what is the situation with the Californian table grapes issue? My recollection is that initially we excluded the grapes because of serious disease present in California—Pierce's disease. Ultimately, after dialogue, that ban was lifted subject to the treatment of the grapes with methyl bromide, a substance which we are trying to phase out, provided they were treated in the United States. That was subsequently changed to allow the treatment to occur in Australia rather than the United States. Is that the sort of consultation process that is envisaged with the forum that has been established under the free trade agreement?

Ms Greville—In order to answer that I should perhaps go back over your characterisation of that process and add a couple of things. Australia undertook an import risk analysis of Californian table grapes—and the draft risk analysis was published—which would allow Californian table grapes to enter Australia with certain risk mitigation measures. At that time there was a renewed outbreak of Pierce's disease in southern California and a great deal of angst was expressed in California and federal moneys were made available in recognition of the size and enormity of the Pierce's disease outbreak.

Senator O'BRIEN—It is a devastating disease for wine growers.

Ms Greville—At that point, despite the fact that we had been on the point of issuing a determination in favour of trade, we paused the process and said that we needed more information. I do not want to leave you with the impression that the Californian table grape regime came about just as a result of consultation. There was a formal risk analysis process. There was then a subsequent scientific investigation undertaken by the CSIRO at the request of the director of plant and animal quarantine which identified a couple of additional risk factors as a result of the new level of risk in California. Through discussion bilaterally a new mitigation protocol was established that took care of that additional level of risk. As a result of that, a determination was made and trade commenced.

It was agreed at that time that at the end of 12 months trade there would be a review of the mitigation measures to determine whether they could be conducted in a different way which, as you quite accurately characterised, meant that instead of the fumigation being undertaken only offshore the examination of the experience of 12 months trade, including detection of pests et cetera, led Biosecurity Australia to make a determination that fumigation onshore was feasible within the level of risk that we were prepared to accept. That is the long answer. The short answer is that some of those cooperative arrangements that went on in the second half of that process were facilitated by the fact that we were in regular exchange. Before that regular exchange commenced, there was essentially a stand-off, which was not a desirable scenario for our trading relationship and it was not good for our IRA process either.

Senator O'BRIEN—So the process of consultation facilitated the US having better input into the IRA process. Is that what you are saying?

Ms Greville—The IRA process was concluded. That is why Californian table grapes are a different scenario from other examples one might use. The IRA process had been concluded and then the situation changed after that. So in a sense it was a situation that was not comprehended by the existing import risk analysis process as it was articulated at that time. Certainly the consultation allowed an outcome to be achieved, which met our appropriate level of protection and militated against the risks, that was doable from the US side as well.

Senator O'BRIEN—One question arises about all that. I understand that we as a nation are looking to restrict or phase out the use of methyl bromide. How does our agreement to allow treatment onshore under that protocol impact on that? In other words, if we were to say that we do not want to use it any more, that would close off the option of treatment onshore. Is that protocol going to mean that we are effectively prevented from phasing out the use of methyl bromide?

Ms Greville—I will answer that to the best of my ability but I am not entirely sure that I am the appropriate person to do so. It is my understanding that there is an international agreement that will ultimately phase out methyl bromide. It is also my understanding that methyl bromide for quarantine use is exempt from that. But it is probably better if I do not go any further and take the question on notice, because, as I said, it is not my area of expertise and I may have got some part of that wrong.

Senator O'BRIEN—So if the states want to phase out the use of methyl bromide, the international protocol that we have agreed to will prevent them from doing that potentially?

Mr Sparkes—A colleague from the Department of the Environment and Heritage has just alerted me to the fact that it is her department which has responsibility here. We are happy to take the question on notice and get an answer for you from that department.

Senator O'BRIEN—I look forward to that answer. In relation to our agreement with the Philippines for a forum on the sanitary and phytosanitary issues relating to their fruit and vegetable industry exporting product to Australian, is that the sort of forum which is comparable to the forum we are establishing under the free trade agreement with United States?

Mr Gosper—I cannot answer in detail, Senator, and will have to get some more information for you. I understand that it is an agricultural working group so it covers the broad sorts of arrangements. Maybe the most obvious parallel exchange I can think of is the exchange we have with the Europeans, the Agricultural Trade and Marketing Experts Group, which goes through an exchange on the full range of issues relevant to not just agricultural subsidy and market access but also sanitary and phytosanitary and animal health and meat inspection issues.

Senator O'BRIEN—This is a forum that the Prime Minister announced, I believe, after visiting the Philippines when he announced we would establish a dialogue on these issues. Perhaps my recollection is faulty but that is how I recall it. That forum is operating now, I believe. Is that right?

Mr Gosper—I do not know whether it is operating or whether it has met. We will have to get advice for you on that.

Senator O'BRIEN—Is it within DFAT?

Mr Gosper—No, it is something that would be administered by the department of agriculture.

Senator O'BRIEN—So is that forum meeting, to your knowledge, Ms Greville?

Ms Greville—I do not know; I can find out for you though.

Senator O'BRIEN—That is happening—if indeed it is—concurrent with a fairly controversial import risk assessment about the importation of Philippine bananas. You would be aware, I am sure, Ms Greville, that that is one which commenced with a rejection of the right to import the bananas because of disease risk. The latest, since the announcement of the commencement of a dialogue, is that we have seen a complete turnaround with the new import risk assessment permitting the importation of those bananas. Has there been some special dialogue that has facilitated that?

Ms Greville—I am not in a position to comment on that. It is not part of my responsibilities.

Mr Gosper—We should reaffirm that none of these groups impacts on the process that applies to risk assessment, which is described in all the official manuals and operates strictly under the SPS rights and obligations.

Senator O'BRIEN—I can assure you that the industry has perceived the coincidence of the dialogue and a change in position as something of concern. If I may digress for a moment, I want to ask you questions about access for seafood products. Would you be able to answer those, Ms Greville?

Ms Greville—To be perfectly honest, seafood products do not come under the agriculture negotiations. They are considered to be part of goods because of the definition in the WTO. I am probably not the person to answer your specific questions on this matter.

Senator O'BRIEN—Who was dealing with those matters during the negotiations?

Mr Sparkes—They were covered under the non-agriculture market access negotiations, which we were not aware you wanted to cover this morning. I suggest you ask your question, because we might be able to help you anyway.

Senator O'BRIEN—Does anybody here know about it? I do not want to ask a question if nobody knows about it. Can you find out if we can get the people here?

Mr Chester—We do not have our lead goods negotiators here at the moment. You could try with the question and if we cannot answer it we will take it on notice or try to get someone up later in the day.

Senator O'BRIEN—On 12 February Minister Vaile put out a press release saying there is an FTA bonanza for South Australian tuna. He said the South Australian tuna processing facility was set to gain up to $20 million per year under the FTA. He referred to the $650 million US canned tuna market and the removal of the 35 per cent tariff. He talked about the plant boosting its turnover by up to 50 per cent and creating 70 new jobs. My question relates to the fact that, given there is no change in the tariff arrangement on whole tuna as processed, which is a substantial part of the production of the firm—they export to a number of countries and we export nearly 500 tonnes of whole tuna to the United States—the gain would have to have been made in the removal of the tariff on canned tuna. I was wondering where that tuna would come from, given that our total exports of canned tuna—let us take the best-case scenario going back to 2000-01—are worth $2.299 million.

I am looking for an explanation of where the $20 million is going to come from. Is it going to come from a conversion of the product from fresh to canned? Is it going to come from a diversion of tuna from one market to another? Are we proposing to catch more tuna—if so, from where?

Mr Chester—I am sure Mr Sparkes will be able to help you with this question.

Senator O'BRIEN—You smiled when you said that, Mr Chester.

Mr Sparkes—We understand this was raised—

Senator O'BRIEN—Last night.

Mr Sparkes—last night.

Senator O'BRIEN—Your figures were the justification for the Seafood Industry Council putting out their press release.

Mr Sparkes—The advice I have is that the quote that the minister used actually came from a Mr Lindsay Guillot. He is the general manager of a tuna cannery at Port Lincoln. This is the quote that the minister subsequently used. Mr Guillot said:

Our current annual turnover is $35 million, a figure I expect to grow by at least 50 per cent, or $15-20 million, per year with the agreement. Jobs opportunities will also increase. We now employ 250 people, but that number looks set to increase by 70 in the first year and then the skys the limit …

That was the origin of the quote.

Senator O'BRIEN—So what Mr Vaile was saying was based on nothing more than that suggestion. It is not a matter the department has any knowledge about.

Mr Sparkes—No, it was a comment on the FTA that was offered by the general manger of the tuna cannery, as I recall, shortly after the details of the agreement became public back in February.

Senator O'BRIEN—My understanding is that we have a fairly strict regime with regard to wild caught tuna and tuna caught for growing-out purposes. While that might change, it would only change at the margin. The statistics are telling us that the overall market for exported tuna—that is, to every country—was at best worth a bit over $2 million in 2001. We already export whole tuna, fresh or chilled or frozen, to the United States. I understand that is tariff free, so there is no restriction on that plant exporting to the US now. The only benefit was in canned tuna, which appears on the statistics to be a lower value product. Can you on notice tell us whether there is actually a potential, without diversion of product from other markets, to grow the processed tuna market to the extent suggested by Minister Vaile?

Mr Sparkes—As I say, the suggestion was by the general manager of the tuna cannery but we will try to clarify it for you.

Senator O'BRIEN—It has grown to one that the Seafood Industry Council is using to promote the alleged benefits of the FTA, which on the revealed statistics—if we diverted, as a best-case scenario, all of our product into the US—might be worth some hundreds of thousands of dollars, if that. We might take the chair's suggestion to break for 15 minutes.

Proceedings suspended from 11.05 a.m. to 11.21 a.m.

Senator FERRIS—Could you take me through the way in which the committee on sanitary and phytosanitary matters and the standing working group on animal and plant health will actually operate in relation to each other?

Ms Greville—Certainly. The Committee on Sanitary and Phytosanitary Matters is established, as you can see, in article 7.4. It will be a committee which potentially includes amongst its membership all of the agencies in either jurisdiction who have responsibilities for matters to do with those issues covered under the SPS agreement. For example, in our jurisdiction that will

include Biosecurity Australia but it will also include the Department of Foreign Affairs and Trade, which has SPS responsibilities, and quite possibly AQIS, which implements our quarantine policy, and Food Standards Australia New Zealand, which is responsible for human health aspects. The US side will include USDA, the Animal and Plant Health Inspection Service, the Food Safety Inspection Service and quite possibly the Environment Protection Agency. So it is the committee which could potentially have an agenda covering a very wide range of issues.

The mandate articulated in the text is very clear about the sorts of issues that will be discussed at that body. It is no coincidence that the first point is to 'enhance mutual understanding of each Party's ... measures and the regulatory processes that relate to those measures.' I have said before that it has become apparent over the years that we do not necessarily understand each other's processes as well as we might and nor, to be fair, within jurisdictions do people necessarily understand the processes of their fellow regulatory bodies.

The rest of the terms of reference there are quite similar to the terms of reference for the SPS committee that is in the US-Chile agreement. They are about taking a broad-picture approach to issues that come up between the two countries and also coordinating positions in other forums such as Codex or the WTO SPS Committee, where, as my DFAT colleagues will attest, Australia and the United States already quite often cooperate and assist each other to push shared visions and shared agendas. That committee reports to the joint committee established under this free trade agreement that covers the whole gamut of the agreement and that is designed to meet once a year unless the parties agree otherwise.

The technical working group on animal and plant health is hierarchically, if you like, below the SPS committee and will report to the SPS committee. It is the forum for the in-depth technical exchange and discussion on particular scientific matters identified by either party as matters which could usefully benefit from that kind of detailed exchange. So that will have on it scientists who are technicians, whereas the SPS committee is more likely to be peopled by senior officers from the regulatory agencies and the trade agencies.

Senator FERRIS—Given the conversation we had earlier and the points that some of my colleagues on the committee picked up, was this an early request within the negotiations? Were the Australian negotiators resistant to the establishment of these committees, given the likely perception that some groups have commented on in Australia about institutionalised pressure and so on? How willing was the Australian negotiating team to establish these committees?

Ms Greville—Perfectly willing, is the short answer. We see this as a very useful forum and we have been very pleased with the way that its informal predecessor has been operating. I take this opportunity to stress—I perhaps have not done so enough in answer to previous questions—the fact that this is a two-way stream. We have a range of SPS issues and technical matters that we look forward to discussing with the United States as often as possible on which we are—if you want to characterise it this way—pressuring them to keep their process moving and get to an outcome that is appropriate. This is an opportunity for us as well as for them. It was apparent right from the very first round of negotiations that there would be a chapter on SPS and that there would be a SPS committee. The articulation of the technical working group, which is the one that more closely corresponds to the current ad hoc informal arrangement, was something that we worked on in subsequent negotiations. But at no stage were we resistant to the notion of a consultative mechanism. In fact, we welcomed it.

Senator FERRIS—As an example, given that you have just said that you welcomed it, could you tell us what sort of topics you think may be on the agenda for the first meetings of those committees?

Ms Greville—I think it is important to understand that the committee, as it stands at the moment, does not exist—neither the SPS committee, nor the animal and plant health working group—so I really cannot speculate about what might be on its agenda. But in the interests of, I hope, being helpful, we have a current informal arrangement where we get together, usually by teleconference every couple of months, and update each other on our agenda of work of bilateral interest to us. That is generally conducted by headings of commodities where either side has a technical market access request in place with the other. While not wanting to speculate on how that body will organise itself, because that is yet to be determined under the provisions of the agreement, I think it is probably fair to say that, at the technical working group anyway, there will be an update of where we are against the technical market access requests that each side has with the other. For Australia into the US they include, as Mr Gosper mentioned, feeder cattle, honey bees, tropical fruit, avocados and other products that we are waiting for progress on. Hopefully, they may already be resolved by then, in which case it will be our next tranche of technical market access requests; if not, then they will certainly be amongst the things that we will be asking for an update on.

Senator FERRIS—The Federation of Australian Scientific and Technological Societies—FASTS—have made a submission to JSCOT, and I understand that FASTS will provide a similar but expanded submission to this committee later in the week. I want to raise a couple of matters that were raised in the evidence to JSCOT and were referred to yesterday in evidence that we received. I have had a look at the submission which has been made to JSCOT where FASTS focus very narrowly on the language used in the text of the free trade agreement. In their submission they highlight the words 'resolve trade issues, and thereby expand trade opportunities' in the objectives in article 7.1. They also refer in their submission to the words in article 7.4.3 'facilitate trade between the Parties', in relation to the objectives of the committee on sanitary and phytosanitary chapters. And they refer to the words in article 7-A 4(a) 'resolving specific bilateral animal and health matters with a view to facilitating trade' in relation to the standing technical working group on animal and plant measures.

These are the words which give rise to the difficulties that we have been talking about this morning. Why were those words used when it is pretty obvious, on the face of it, they are equivocal? You have told us, and other witnesses at the table this morning have told us, that they are in fact not equivocal. But it must have occurred to people when the words were being scrutinised, and even when the words were being formulated, that they were sufficiently open as to raise these sorts of questions. The evidence that we have received from what is now a number of people, despite the assurances from you and others at the table both today and previously, still gives rise to that likely problem. I am wondering why nobody in the negotiating team thought to make those words absolutely unequivocal so that witnesses like FASTS, Australian Pork Ltd and others, including academics last week, would not be able to draw the conclusions that they are drawing and raise the concerns that they are raising.

Ms Greville—I am not sure how to answer that, other than to say—and I think I have said this before—that there has been a degree of concern expressed by FASTS, APL and others about the fact that 'resolution', 'trade' and 'facilitation' have been used in this language. I have to say,

though, that from our perspective it is entirely appropriate that those sorts of words be used in this context. It gets back to the point that I made before, that perhaps people losing sight from time to time of the fact that the SPS agreement is a trade agreement under the World Trade Organisation and it is about managing concurrently two objectives: one is supporting the right of a country to protect its human, animal or plant life or health and the other is ensuring that the measures in support of that objective are not applied in a manner which is a disguised or unwarranted restriction on international trade. If FASTS—and I am not implying anything here about their motivations—are coming from a position where they understand SPS to be just about zero risk of incursions, their comments should be read in that light. Our SPS regime is conservative, but it is about managing risk and managing trade.

I do not think there is a way of describing an SPS committee in a trade agreement without using words like 'trade facilitation'. The free trade agreement is, if you like, about managing our bilateral trade, and the SPS arrangements within that free trade agreement are based on the WTO SPS agreement and are about managing those two objectives. It makes sense for technical and trade people to talk about those issues, and that is what is articulated in the text. I am not sure whether that has addressed your concern.

Senator FERRIS—My question was about whether or not there was any recognition given by the negotiating team to the likelihood that the words that were used could give rise to a view that they are equivocal.

Ms Greville—Again, my response has to be confined to the fact that some of those words when taken out of context by people who are criticising this agreement might appear to be alarming. But if you read them in the context that they appear in the text, where it says, for example, 'achieve consensus where possible' and 'resolve issues where possible', then, to me, that is a fairly explicit acceptance of the fact that resolution of scientific or technical issues is not always possible. That, combined with the explicit preservation in the text of each party's risk assessment processes and quarantine decision-making processes, means that this text is about a consultative technical exchange. It is not about dispute resolution; it is not about decision making.

Senator O'BRIEN—What is the use of the word 'resolve' there if it is not about dispute resolution?

Ms Greville—If there are technical issues and two parties of scientists and technicians can get together and discuss a scientific or technical issue and resolve it, then resolve is an appropriate word.

Senator O'BRIEN—And step that resolution into the import risk assessment?

Ms Greville—What may be imported into the import risk assessment process in the appropriate way, as we have discussed before, is a development or a new piece of science or a progression in the scientific thinking on a particular issue. If the discussion is about some disease or pest, it is certainly within the bounds of possibility that a trading partner can bring to that discussion better or new or more thorough science—particularly if it is a pest or disease that they have and we do not.

Senator O'BRIEN—Take the resolution to the import risk assessment panel and say, 'This is the resolution.'

Ms Greville—What would be resolved, though, is the technical issue, not the quarantine process. When you are developing a quarantine policy in respect of importation of a particular commodity, there may be—and I do not want to exaggerate—lots of specific technical issues, any one of which may impact on the decision or the risk mitigation processes or the practicalities of the trade. Any one of those technical issues may or may not be resolvable. If it is resolvable via technical exchange between the parties, then the import risk assessment process can be improved by having that technical issue resolved at some point. That is not the same as resolving an issue about whether we do—

Senator CONROY—How many—

Senator FERRIS—Hang on, Senator Conroy: you have had an hour and a half to ask questions and I did not once interrupt you or Senator O'Brien during all of the questions you and Senator O'Brien have asked. I want to continue with my line of questioning on FASTS, and then if you have got more questions I am happy for you to continue asking them.

Senator O'BRIEN—I am sorry; go for it, Senator Ferris.

Mr Gosper—I would like to add a few things to Ms Greville's answer. The first point I would make, from the viewpoint of how industry groups might see this agreement and interpret certain words, is that they need to set that against the basic confirmations of the process by which decisions are made on sanitary and phytosanitary measures—that is, according to the rights and obligations under the SPS agreement. That is explicitly confirmed in the text of the agreement, as is the lack of a direct relationship between this committee and that process. Secondly, as many industry groups know, because they participate in a way in this overall process of discussion and clarification on technical issues and other issues relating to the process by which we set sanitary and phytosanitary standards, that is an ongoing part of the work that Biosecurity Australia takes in setting these sorts of risk assessments and consequent measures. What Biosecurity Australia is doing through this process is providing a more formal context for the sorts of exchanges of information which the SPS agreement encourages members to take in order for them to better apply their rights and obligations under the SPS agreement.

The third thing I would note is that I would imagine a committee of this sort would address a number of issues which do not directly relate to a measure that a party or a participant has put in place under the SPS agreement but technical issues related to how members are implementing that measure—for instance, things like certification, how members are actually arranging their certification of procedures they have in place, equivalence type measures and those sorts of things, which are technical exchanges which do not relate to the particular level of protection or the appropriate measure that has been put in place by a member but to how each party is administering its rights and obligations under the SPS agreement. That overall context is how readers of the text should interpret these provisions.

Senator FERRIS—I wonder whether the negotiating team had any legal advice on the likely implications and the equivocation in the text that other committees and organisations have drawn from it. Did the negotiating team have some legal advice on that aspect of the text?

Mr Gosper—I do not think there was explicit legal advice. In looking at the negotiations and drafting text, we ensure that that is viewed through the perspective of our legal rights and obligations under the WTO agreement and those legal rights and obligations we would be taking up as part of this bilateral FTA. Within the department we are certainly confident that we fully understand those rights and obligations that we are taking up under this text and the relationship that they have on our rights and obligations under the WTO SPS agreement.

Senator BRANDIS—The whole text was legally reviewed though, wasn't it?

Mr Gosper—It is a legal text.

Senator BRANDIS—Of course it is, but after the final draft was generated the whole text was legally reviewed, wasn't it?

Mr Gosper—Of course.

Senator FERRIS—My question was whether or not there was legal advice on the likely, as it now appears, misinterpretation by a number of groups on this particular aspect of it. For example, FASTS claims that there is an intrinsic conflict in the objectives of both of the committees we have been discussing this morning. I have no doubt that if I put that to you as a question the answer would be that you do not believe there is. But how is it that these organisations are able to come up with that observation, that accusation, that claim?

Mr Gosper—I cannot answer for their perceptions, and I have not directly discussed it with them.

Senator FERRIS—I realise you cannot, but I am wondering why they are able to draw them, hence my question about whether somebody in the team looked at the likely ability of organisations like these to be able to draw them before the text was signed. That is my question.

Mr Gosper—We certainly looked at whether the text reflected our interests. Given that we were looking at facilitating dialogue and discussion with the US, our interests in this area were to ensure that that did not impinge in any way on our WTO SPS agreement rights and obligations. We are very confident that that has been achieved. As Ms Greville and I have set out, we also think that that should be apparent to industry groups. Certainly that has been the way we have dealt with inquiries like this and described the agreement to these sorts of groups. If there is more of that that can be done then we are happy to do that, of course.

Senator FERRIS—I have some other general questions and questions related to horticulture, rules of origin and so on, but I am conscious that there are a number of officials here to answer questions on wider issues in relation to PBS and so on. I would be happy to put those questions on notice so that we could move on to the other groups.

CHAIR—If that is your wish. We are doing agriculture, quarantine and the environment up until lunchtime and then services, investment and intellectual property.

Senator FERRIS—It was my advice from the secretary of the committee that we were going to squeeze up agriculture because Senator Boswell was not here and that it was our intention to move on to other areas before lunch. That is what I am trying to facilitate.

Senator O'BRIEN—I had thought that there might not be enough questions to keep them here but it is apparent that there are.

Senator CONROY—You have generated more questions with your incisive questioning, Senator Ferris.

CHAIR—We have until one o'clock, which is the lunch break, to complete agriculture, quarantine and the environment. It would be desirable that we complete that and not have to invite these officers back. If members of the committee have questions, they should ask them. Have you got questions on the subject, Senator Conroy?

Senator CONROY—I have some general questions following up on Senator Ferris and I think Senator O'Brien has. I also have some questions on beef and dairy and some on safeguards and the Cattle Council's submission.

CHAIR—What about you, Senator O'Brien?

Senator O'BRIEN—I have questions in the same vein—certainly on beef and safeguards.

CHAIR—Senator Brandis, do you have any questions?

Senator BRANDIS—No, I do not.

CHAIR—Senator Ferris, you have some more questions?

Senator FERRIS—I do have some more questions.

CHAIR—Why don't you proceed with your questions.

Senator FERRIS—Okay. How do you think Australia would be perceived by our Asian neighbours if we were to reject the opportunities offered in this agreement, particularly for access for agriculture?

Senator CONROY—Feel free to waste the time!

Senator FERRIS—Senator Conroy, I do not think we need your patronising remarks. You have had a long time to ask questions this morning in silence. I could have made plenty of comments on them—

Senator CONROY—If you want to invite the officers to give a political opinion—

Senator FERRIS—Why don't you just be quiet and—

Senator CONROY—feel free to waste the committee's time.

Senator FERRIS—The questions were not directed to you; they were directed to the witnesses.

Senator CONROY—Who look excited about not wanting to give a political answer for you.

CHAIR—Order! Let us proceed. If Mr Sparkes or Mr Chester is in a position to answer—

Senator FERRIS—Witnesses can answer the questions if they wish. If they choose not to, fine.

Mr Sparkes—Sorry, Senator, but could I perhaps ask you to repeat the question.

Senator FERRIS—I am sorry for the interruptions. Given the number of countries in South-East Asia that have expressed an interest in negotiating trade agreements—and of course Singapore has already done so—I am interested to know how you think Australia would be perceived if we were to walk away from the opportunities offered, particularly to agriculture, in this free trade agreement.

Mr Sparkes—To the extent that I cannot speak on behalf of other governments, the fact is that many of the other governments in the region are certainly pursuing free trade agreements among themselves and with the United States. Obviously one of the objectives of those agreements is to secure for them better market access. So they perceive that as being an objective that is worth pursuing. I guess, extrapolating that to a view about another country that manages to secure such access, they would obviously find it to that country's advantage if it negotiated that access and to its disadvantage if it failed to do so.

Senator FERRIS—There has been quite a lot of discussion in this committee and also in JSCOT about multilateralism versus bilateralism and the fact that this agreement does not address protectionism in the United States, which in a number of commodities is regarded as very high. If this agreement were not to be signed and were to fail, would you see it as being a win for multilateralism or for protectionism?

Mr Gosper—I think if any trade liberalising agreement breaks down with failure to liberalise access, that is not a good thing for trade liberalisation generally. You put your question partly in the context of multilateral versus bilateral, which is not the approach of the Australian government or the approach of many who see these things as mutually supporting when implemented in a way that is consistent with the principles and objectives of the WTO and the GATT. If this agreement were to break down in some way, obviously that would be because governments have not been able to reach some sort of accommodation or agreement which is intended to liberalise trade. That would not be a good signal for trade liberalisation generally, particularly between two major developed economies. I think that signal and its effect would be something that one could only speculate on.

Senator FERRIS—I asked those two questions because Senator Conroy has made comments on a number of occasions to journalists suggesting that Australia is going to be laughed at for what we achieved in this free trade agreement. I obviously do not hold the same view. But, given

the comment that you made about other countries trying to negotiate agreements and the comments you just made in relation to multilateralism and bilateralism, I would have thought that a number of countries would be quite envious of what we have been able to achieve in this free trade agreement. What would you say to people who say that we achieved so little that we should be laughed at?

Mr Gosper—It is no secret of course that we would have liked to have achieved greater liberalisation in some particular areas—and those areas have been commented on this morning. It is also true that we are not the only country that is seeking to negotiate better access to the US market, including for agricultural products. Looking at the current state of play in the multilateral negotiations and also what they face in bilateral negotiations of one sort or another, I think many countries understand that achieving big outcomes on agricultural trade liberalisation is very difficult. It is not a very conducive international environment for big shifts in agricultural protection, and that environment is one that plays into all these sorts of negotiations at this time.

Senator FERRIS—I will ask a couple of questions on horticulture. How extensive are the safeguard measures that apply to horticultural goods under the agreement?

Ms Greville—The horticultural safeguard applies only to a pre-agreed list of 33 sensitive products. These are products that are identified as sensitive under the US trade promotion authority legislation, not necessarily products that are sensitive in terms of our bilateral trade. Given that those products are identified in the TPA legislation as sensitive, the US is required to provide a safeguard for those products. So, to characterise it, it is a price based safeguard that applies on a shipment-by-shipment basis such that, if a shipment of one of these products arrives and the FOB price is less than the trigger price, then the duty applied is on a sliding scale depending on how far below the trigger the landed price is. As I said, it is shipment by shipment, so it does not apply for any length of time. If the next shipment does not fall below the trigger price, then the safeguard does not apply to the next shipment.

The horticultural industry representatives who were with us in Washington during the negotiations were, of course, not happy—and we were not happy either about the existence of a safeguard because, in principle, we do not support the notion of these kinds of safeguards—but they were not concerned by the way that it was constructed. They were involved in the negotiation of the trigger prices, and they do not believe that it will be an impediment to our bilateral trade.

Senator FERRIS—What impact do you think that will have on our horticultural industry?

Ms Greville—The safeguard?

Senator FERRIS—The trigger measures—I am wondering how long it might take for a shipment from Australia to get to, for example, the ports on the west coast. What would happen if the safeguard was imposed after the goods left Australia—so the growers expected a certain price, the trigger came in and, by the time they got to sell them, there was another price?

Ms Greville—The trigger price is known up front—it is listed in the agreement. So, until those trigger prices are changed—if they ever are—those are the prices that apply. To answer

your question, as long as the price of the Australian exported product is not below the trigger price, there is no capacity for the safeguard to apply.

Senator FERRIS—And that would be known before the goods left Australia?

Ms Greville—Yes.

Senator FERRIS—And would not change en route?

Ms Greville—No.

Senator FERRIS—In relation to the issue of rules of origin, there was some disagreement in our hearings last week with regard to the impact of the rules of origin under the free trade agreement and how that would affect our local manufacturers. Could you talk us through the significance of that impact and whether Australia's manufacturing industry was consulted in relation to those rules of origin during the negotiations?

Mr Sparkes—So this is not a question relating to rules of origin for agriculture, which are covered differently?

Senator FERRIS—No.

Mr Sparkes—I am certainly not the rules of origin expert, but my understanding is that a lot of time was spent by our lead negotiator in rules of origin discussing with industry just what the US model involved. Following those consultations, I think the conclusion was that, while initially the US approach appeared more elaborate than the existing pattern and model that Australia uses—for example, in the closer economic relationship we have with New Zealand—when it was explained to industry how it will operate they were comfortable that, in practice, the rules of origin model that the United States was proposing for the FTA would be easier for them to meet. So I think the short answer to your question is: yes, there was substantial consultation with industry and they accepted the fact that, once they understood what the rule of origin proposal was, they were comfortable with it.

The one sector, of course, where that does not apply is textiles, where the United States uses a protectionist approach on yarn forward and fabric forward. Because of the way Australian textile manufacturers source their raw material, effectively that excludes the possibility of taking advantage of market access negotiations outcomes in the United States, which is why the textile sector was given particular treatment—that is, a slower transition period to free trade than other industrial sectors.

Senator FERRIS—In those consultations, were concerns raised which were subsequently addressed in the final text?

Mr Sparkes—Again, I was not involved in those consultations, but I am sure that the initial reaction would have been one of concern that what appeared to be a known and shorter approach to rules of origin—in other words, the number of pages that are involved in, say, the New Zealand exercise—was multiplied many times by the time you saw the list of rules of origin providing for or applying to United States tariff lines. But, once people understood what that

actually meant for them in terms of bookkeeping effectively, keeping records and attributing costs and input costs to the cost of production and therefore the rule of origin, industry relatively quickly came around to understand that this was not an impediment to trade. In fact, once they had done the arithmetic required the first time around, it was a simpler process after that.

Senator FERRIS—I just have one final point. I am sorry to return to this, Ms Greville, but I think it is significant and quite a serious issue. We just need to lay to rest the concerns that have been raised by previous witnesses. Professor Weiss, in the evidence that I referred to in my first round of questions this morning, was making the point a number of times that there were concerns that the institutionalised pressure on our quarantine would mean that the standards would move from being science based. I just want to put to you one final quote that she made in her evidence so that you can respond finally to it. She said, on behalf of herself and Dr Elizabeth Thurbon:

We are making the point that the science of risk assessment is going to be increasingly politicised under this agreement.

She goes on to say:

We have provided in our submission empirical evidence based on the analysis of primary documents relating to US policy. Firstly, we have provided evidence that the bodies that are being created under the agreement are there at the behest of US agriculture. That is point No. 1. Secondly, we have provided evidence that the new bodies are intended as vehicles to pursue the elimination of our quarantine standards as they impinge on US agriculture. Thirdly, we have provided evidence that they have already placed a dollar value on the exports that are anticipated under this agreement as a result of the elimination of these quarantine standards.

She then says:

... we have also provided evidence of relentless pressure over the past 10 years from grape producers in California which has been effective and has eventually brought Californian grapes onto our tables.

I am happy to provide you with the quotes if you need them, but I would like you to respond to those issues.

Ms Greville—Certainly, Senator. First of all, in relation to the overall claim about the politicisation of the process, I can provide you with my assurance. The Minister for Trade, the Minister for Agriculture, Fisheries and Forestry, and the Prime Minister have all at various stages reaffirmed the fact that our quarantine standards and process are not negotiable and were not ever going to be negotiable in the context of this FTA. It was not and has not been and arrangements under the FTA do not politicise the process. That is not to say—and I have already made this point—that there is not from time to time in either direction political pressure applied in relation to SPS disagreements. That has been a fact of life and no doubt will continue to be a fact of life. But it is not the purpose of this agreement and those bodies are not the vehicle whereby that is likely to occur.

In terms of whether they were there at the behest of the US, I think that it is fair to say that there are those—especially organisations in Australia who are interested in pursuing better technical market access requests to the US—who will see the establishment of those bodies and the formalisation of our consultative process as a positive. As we have each alluded to, there is a

list of issues that are outstanding in terms of our exports to the US that we are very keen for them to focus their attention on more quickly and more firmly and we will be attempting through these bodies, once they are established, to engage on the technical issues to make sure that it is not a technical misunderstanding or a lack of technical discussion that is holding up those issues. So it was not at the behest of the US in that sense; both sides were very happy to see these bodies established.

I think the next point was about elimination of Australia's quarantine standards, that that was the purpose of these new bodies. I think we have probably covered that a number of times in questioning this morning. That is not their purpose. That is not what is articulated. More importantly, I guess, it is very clear in the text if you read it carefully that they have no capacity to do that even if it were the intention of either side, which I submit it was not, that that is what they would be for. It very clearly stipulates that the decision making on quarantine rests in the respective jurisdictions, that these consultative bodies are for technical exchanges and cannot come to decisions themselves on matters of quarantine, and that the sovereignty, if you like, the decision making, remains with the competent authority.

In terms of Professor Weiss's point about American interests placing a dollar value, I guess that gets back also to a point that I made earlier. We cannot control the sorts of comments that American agricultural interests make about either our SPS regime or the impact of this agreement on that SPS regime. All we can do is continue to provide our assurance that it is not within the bounds of possibility from this agreement that our standards will be influenced against our will and provide that assurance to them as well. If they continue to characterise it as some kind of victory then that is their prerogative but that does not make it right or true.

Senator FERRIS—So you are saying, as one of the members of the Australian negotiating team, that Professor Weiss's concerns, and I guess those of Australian Pork Ltd and several other people who have raised them, are without foundation.

Ms Greville—Yes, that is what I am saying.

Mr Sparkes—In addressing the question as to where the pressure for this particular approach to the SPS chapter came from, I just remind the committee that in the objectives the Australian government set out back in March 2003 we listed four under quarantine, sanitary and phytosanitary measures and they included to:

Seek to strengthen cooperation between Australian and US quarantine authorities.

I think that all of the four objectives that we nominated for this area are reflected in the outcome of the negotiations.

Senator O'BRIEN—Ms Greville, you talked about the process of dealing with a disputed matter and resolving it within the processes established under the FTA. I want to understand how the resolution under that process intersects with an import risk assessment under the protocols which apply to all countries under our quarantine arrangements at the moment. How does that resolution feed into the import risk assessment process?

Ms Greville—As I attempted to explain—perhaps not very well—the sorts of issues that are likely to be discussed in the technical working group on animal and plant health established under this agreement are technical or scientific issues. It is always dangerous when you start to come up with a kind of hypothetical situation, but if there is an ongoing technical discussion between us and a trading partner—the US or any other trading partner—about a particular disease, a particular vector for a disease or a particular mitigation for a disease, those are technical level discussions. It is quite conceivable, as I said before, in the context of those discussions that scientists and technicians from either side can explore all of the available science, discuss it and come to an agreement about a technical issue—about whether that disease is or is not something; whether it is or is not transmitted in a certain way; whether a vector for a disease is or is not in the quarantine pathway; whether a mitigation measure will or will not take care of the risk; whether, as a matter of practice, doing something at the border or something offshore is actually going to mitigate that risk in an appropriate way and whether it is feasible and the least trade restrictive mechanism, for example.

Senator O'BRIEN—They are all roles of the import risk assessment panel, aren't they?

Ms Greville—There can be agreement between—

Senator O'BRIEN—That is what they come to do.

Ms Greville—They come to discuss those issues and if, in the course of those discussions, they can come to a resolution of part or all of that issue then that is a useful process. In parallel, as I have explained, our import risk assessment process is presumably going on for whatever a commodity is that this technical issue is related to. In the course of that import risk analysis, there will be a technical issues paper, consultations, a draft import risk analysis, more consultations and a final import risk analysis. At some stage there may be some independent peer review sought and various other things.

If, in the course of the technical exchange, some thorny issue has been sorted out then that can be taken account of during the import risk analysis process, but only in the sense that it would then be reflected in the technical issues paper or as part of the results of the consultation after the technical issues paper. At various stages—and I am going backwards now in the IRA process—there is a discussion about the scope and an identification of the pests and diseases. It may be that the consultation we have had in this technical working group has established that a particular pest or disease is not present in the United States; therefore it can be crossed off the list of the pests and diseases that needs to be incorporated in the import risk analysis. The two processes may not necessarily be conducted in lockstep, but there is the capacity for some useful piece of technical agreement—if it is possible and if it occurs—to then be introduced into the IRA.

Senator O'BRIEN—Are you saying that the IRA panel could say, 'We hear what you say about resolving this issue, but we don't accept your view that this vector is not present or that this particular means of processing, packaging, treating or whatever the substance will mitigate the risks sufficiently, so we are going to exclude it.' If the issue is resolved at this panel level at the same time we have import risk assessment being conducted, there is a different panel—there would have to be a different panel—operating, making its scientific assessment under our

processes. If the import risk assessment panel disagrees with the US-Australia FTA panel on the resolution matter, where does that leave us?

Ms Greville—It leaves the import risk analysis panel where it has always been. The import risk analysis panel has the responsibility for producing the best possible IRA. In the course of that process it takes advice from a lot of people. It weighs it up, considers it and comes out with a plan at the end of it. I should also make the point, though—

Senator O'BRIEN—So they could be different. They could have a different view?

Ms Greville—The point I was about to make was that, for an import risk analysis for a normal commodity, import risk analysis panels are conducted by Biosecurity Australia. They can and often do involve outside expertise, but, essentially, the general modus operandi is for Biosecurity Australia to convene the import risk analysis panel. Biosecurity Australia is the competent authority which is represented in the consultative arrangements with the United States. It facilitates the capacity for that technical exchange to be introduced into the import risk analysis panel's thinking. But the import risk analysis panel retains the autonomy and the sovereignty over what it—

Senator O'BRIEN—Okay. So Biosecurity Australia cannot say, 'That's been resolved at the US-Australia level; you, the import risk assessment panel, will accept that resolution'?

Ms Greville—No. The import risk analysis panel is responsible for its import risk analysis. It is quite likely that, even though Biosecurity Australia will be represented on both, it will be by different individuals.

Senator O'BRIEN—You can see the inconsistency there, can't you? Australia and the US meet. The US believe that they have resolved an issue, but our import risk assessment panel, being independent, say, 'We don't accept that resolution. We find something different.' Does that not mean that the US would take us through the appeals processes and produce the agreement reached at the US-Australia level as evidence of the incompetence of our import risk assessment finding?

Ms Greville—I think we are getting a little far into the realms of the hypothetical here.

Senator O'BRIEN—We are trying to understand how the agreement will work.

Senator CONROY—No, we are not at all.

Ms Greville—I understand the point that you are making—

Senator CONROY—You have negotiated this, and we are trying to understand what the processes are.

Ms Greville—Sure. What I am saying is that, to the extent that the Australian competent authority and the US competent authority can have a technical discussion on a point of science or a practical, technical issue and come to an agreement, then that will be introduced as a useful adjunct to the import risk analysis panel's thinking. I have to say that, on the face of it, if those

two competent authorities have come to some agreement about what a technical issue is or is not, it is unlikely that that would not be taken on board by the import risk analysis panel as a very useful contribution. What I cannot tell you is that it will be binding on the import risk analysis panel, because I do not believe that that will be the case.

Senator CONROY—You 'do not believe'? You negotiated it. We want you to tell us that it will not be.

Ms Greville—As far as I am aware, it will not be, but I should—

Senator CONROY—It is legally unable to be enforced.

Ms Greville—It is legally unable to be enforced. I can assure you of that. The point that I was trying to address was whether it was likely that Biosecurity Australia would reach agreement with APHIS on a technical issue that would not then be taken by the import risk analysis panel as being one less problem to solve.

Senator O'BRIEN—Can I just follow that up? I think it is important to understand that the import risk assessment process leads to scientific disagreement as well as agreement. There is disagreement about methodology; there is disagreement about how particular organisms or diseases will find their way in. It is an area in which there are a great many disagreements. You often find that one group of experts will have a different view from another. So is it not quite possible that the experts consulting between Australia and the US will have different views on matters, as compared to the experts who have been appointed to an import risk assessment panel? In my experience, that is the nature of a lot of the discussion that occurs in relation to import risk assessments. It is an argument about the science.

Ms Greville—There are often arguments about science, and in an import risk analysis process, as far as I understand it—and I am not involved in it personally—there are often arguments about science. In the end it is the responsibility of the import risk analysis panel to bring forward a draft IRA that takes account of the knowns and the unknowns, and the extent to which there is scientific uncertainty is reflected, respected and accommodated in the IRA. But, getting back to the point of your question, it is also very likely that the Australian competent authority and the US competent authority may not be able to resolve a particular issue of science either. So, if those two bodies cannot come to a resolution on a particular scientific matter, they will not be presenting it to an import risk analysis panel as a helpful step forward in the formulation of the import risk analysis report.

Senator O'BRIEN—With respect, that is the easy answer. We are dealing with a provision that allows for a matter to be resolved at the Australia-US level. Clearly what I am trying to understand is what that means in the context of the processes that we establish to assess import risks, which are supposed to be independent of trade and bilateral considerations. It appears to me that what is being suggested is that the solution found by that panel will need to be given some weight by the import risk assessment panel. The alternative is that this is a window-dressing body that has no meaning in our import risk assessment process. It has to be one or the other.

Ms Greville—I agree with you, Senator, that if the meeting of the minds of the competent authorities resolves to their mutual satisfaction a scientific issue that they have been discussing, that will be received by the import risk analysis panel as a positive step forward. I think that is true and I think that is the purpose of these arrangements. The import risk analysis panels, as far as I understand it—and I again caveat my remarks by saying that I am not responsible for import risk analysis or import risk analysis panels—are looking for a way to resolve the technical issues that are of concern in their consideration of a quarantine matter—that is, what are the pests and diseases, how do you deal with them, can trade occur safely, and if so under what conditions, or can it not. So, if a technical issue that is germane to that conversation appears to have a solution that has been agreed to by the exporting and the importing competent authorities, I would have thought that it would be in the best interests of the import risk analysis panel to give that due weight. I am only cavilling at going one step further by saying that it would be binding on them, because I do not believe that is the case. If the import risk analysis panel is a separate body of individuals who have the authority and the responsibility for developing an entire IRA and they do not believe that this particular technical issue, even though it may have been resolved, will impact on their deliberations, then they will not let it impact on their deliberations. I do not know how to answer the question any more clearly than that.

Senator O'BRIEN—I think the way in which I couched my question was either that their finding would have some weight or that it would have none. I am still trying to understand it. It would have some weight.

Ms Greville—Yes, it would have some weight. I think it would probably have quite a lot of weight, but that is not the same as saying that that technical resolution process has replaced the thinking of the IRA panel.

Senator O'BRIEN—Let me take you back to the debate we were having earlier. The current import risk assessment process means that everyone has input at all stages of the process—that is, Australian industry and the industry of the country seeking access would have specific access to the process and to the debates about the science. But the Australia-US body does not give that access, does it? It is a government to government body.

Ms Greville—Yes. It is a government-to-government dialogue between the competent authorities on matters of technical and scientific interest. As I said, if something they have done is factored into the IRA process then it is challengeable, transparent and all of those things. I want to reassure you, to the extent that you are prepared to accept my reassurance, that there is nothing at all sinister or unusual about those competent authorities having discussions on technical and scientific issues. They do it now and they will continue to do it. This is an articulation of a more formal and thorough process but it should not be perceived—and I know from hearing evidence given yesterday that perhaps it is—as some kind of sinister process from which industry is being excluded. It is just part of the consultation.

Senator O'BRIEN—It is clearly an established mechanism which, on your evidence, we should understand to create the prospect of a finding on sanitary and phytosanitary matters which will have bearing on our import risk assessment process. I think that is how industry understands it and I think you have confirmed that. How you sort out the question of how much influence it will have is very much a matter of experience rather than something that we can predict. That is a fair proposition, isn't it?

Ms Greville—Yes, it is, but I should add that, in the IRA process as it currently exists—and I am sure that you know this—as well as consultation there are opportunities for other stakeholders to bring forward scientific information and challenge scientific information and they do so. In that context any issues can arguably be resolved through that process, and if they are resolved through that process that is a useful step forward in the IRA.

Senator O'BRIEN—I understand that about the IRA process. On the horticulture issue—

Senator CONROY—Before you go on, I want to go back a step to recap. How many scientists will be on this new committee?

Ms Greville—That is not stipulated in the text; it is yet to be agreed. That answer applies to both of them, but I am not sure whether you are talking about—

Senator CONROY—Both of what?

Ms Greville—Both the bodies that are established under this text. There is an SPS committee and then there is a technical working group on animal and plant health. I assume you are talking about the latter, which is the forum for the kind of sleeves rolled up—

Senator CONROY—Technical stuff.

Ms Greville—technical exchange. There has been no discussion of, and it is not stipulated in the text, how many will be—

Senator CONROY—Do you know how long that will take?

Ms Greville—How long what will take?

Senator CONROY—Before we know the composition of that.

Ms Greville—The text provides for 45 days, I think. I have to look it up.

Senator CONROY—After the signing, or after the passage?

Ms Greville—After entering into force.

Senator CONROY—So we are not going to know the composition of this panel until after we have voted for it?

Ms Greville—It says:

The Working Group shall establish operating procedures within 45 days of the date of entry into force ...

Senator CONROY—So the Senate will vote for it without knowing what it is.

Ms Greville—The Senate will vote for it on the basis of the articulation of what it will do and how it will operate, which is explicit in the text.

Senator CONROY—You do not think it is relevant for us to know?

Ms Greville—The operating procedures are the nuts and bolts—who will call meetings, how will the agenda be set—

Senator CONROY—No, the composition is not a nuts and bolts issue; I am sorry.

Ms Greville—The parameters of the composition are outlined in the text. It talks about members of the relevant competent authorities with responsibility and expertise to consider the particular technical issues, or some such words. The text does not stipulate who they are or how many there are, but—

Senator CONROY—I presume you are not waiting until the text is passed before you have discussions about the likely composition—or are you?

Ms Greville—To be honest, we are, in the sense that we already have, as I have said before, an informal arrangement which looks very similar to this where we reasonably regularly talk to our United States counterparts on these kinds of issues. There is no limit currently on who, within the relevant authorities, participates in those. It is generally decided on who knows what is going on. So we have not devoted any time that I know of, since the text was finalised, to discussing the operating procedures for the technical working group. I certainly have not been involved in any.

Senator CONROY—So I guess the answer to that is that we, the parliament, will not know about the composition of these committees before we vote on the bill.

Ms Greville—You will know to the extent that the composition is dealt with in the text.

Senator CONROY—We could know before, though.

Ms Greville—I do not know quite how to answer that. There is no requirement on the parties to formulate that until 45 days after the date of entry into force. That is not to say—

Senator CONROY—There is no requirement that you could not do the work earlier, though.

Ms Greville—There is no reason why we could not. It is just a question of whether it is useful to do that or whether we get to it in the overall scheme of things.

Senator CONROY—It would certainly be useful from the parliament's perspective if we knew what we were voting for before we voted for it, if that is a hint at all.

Ms Greville—Thank you, I appreciate that hint, but I do make the point, which I know I have made before, that the text does outline in general the composition. What it does not do is deal with the nuts and bolts of how that will work, and it does not stipulate people or numbers—how many or who they are—but it does talk about the organisations from which they will be drawn

and the basis on which they will be chosen. To the extent that that offers comfort, that is explicit in the text.

Senator CONROY—Like Senator O'Brien, I am still a bit perplexed about the interaction of the two committees. I was keeping notes as you were answering Senator O'Brien's question, and I thought I would run through some of the many descriptions you used on how it would interact: 'a decision would be introduced to the other', 'it will be taken account of', 'a useful adjunct', 'a helpful step forward', 'due weight would be given', 'a positive step forward', 'some weight would be given' and 'quite a lot of weight would be given'. That was just the running list as you were going. That might help to explain to Senator Ferris why there is so much confusion out there about what the role is going to be. Like Senator O'Brien, I am very concerned about what will happen. If this working group says, 'We have resolved this scientific issue,' to the panel, is it bound to accept that scientific deliberation? Can it go and conduct its own scientific deliberation and say, 'No, we don't accept your scientific deliberation'?

Ms Greville—The import risk analysis panel has the responsibility to produce the import risk analysis report. It takes into account scientific opinion that is provided to it from a range of places, and it is bound to consider those and apply due weight to those.

Senator CONROY—Let us say in the worst case scenario that the committee says, 'We have resolved this scientifically.' The panel says, 'We don't agree with your scientific finding.' The ultimate arbiter of this is actually the dispute settling panel, under the terms of the free trade agreement. Is that correct?

Ms Greville—I am sorry. I was momentarily distracted.

Senator CONROY—If the committee says, 'Here, we have resolved this scientifically'—

Ms Greville—That is the Technical Working Group on Animal and Plant Health Measures—

Senator CONROY—I will call it the group. If the group says, 'We've resolved this scientifically,' and the panel says, 'Actually, we've had a look at that and we think it's flawed. We don't agree, and we reject your finding,' is it then possible for the importer to take it to the dispute resolution mechanism under the FTA? That is what I am trying to understand.

Ms Greville—No.

Senator CONROY—I know that you can appeal under the GATS mechanism a quarantine result, but can you appeal a quarantine result—

Ms Greville—There is no recourse to the FTA dispute resolution mechanism through anything that happens under the SPS chapter of this agreement. That is because the only rights and obligations in terms of SPS in this agreement are the ones that we already share under the SPS agreement.

Senator CONROY—That is what I am absolutely trying to get pinned down.

Ms Greville—So that is the answer. I guess the other point I would like to make is to re-emphasise that the standing technical working group, or whatever it is called, can hopefully achieve a resolution of a scientific issue—but that is not a decision; it is a position that they have achieved mutually on a scientific issue. I will go back to what I said to Senator O'Brien before: I cannot think of a reason why an import risk analysis panel would want to reject that given that it is a scientific issue that has been looked at by the competent authorities.

Senator CONROY—The panel is currently rejecting its own findings on bananas, so I am not as confident as you that the panel will just absolutely accept the recommendation from a panel that is not itself. It is currently tearing itself apart and rejecting its own decisions.

Ms Greville—The panel will certainly take account of the fact that Biosecurity Australia and APHIS believe that there is a resolution possible on this particular technical issue. If they have evidence from elsewhere that disputes that then they will have to weigh that up in the same way that they weigh up conflicting opinions as a matter of course.

Senator CONROY—I hesitate to go into my next question because I know you have consistently made the point that you are not an expert on the panel and its processes, but Biosecurity Australia could walk into the panel process and say, 'The committee over there, the working group, has resolved an issue.' It could walk into the panel process and say, 'Look, it has already been resolved. We don't have to look at that because it's been resolved over there.' What happens then?

Ms Greville—At the risk of being boring, I will reiterate that I am not an expert on this. I make the point that in the plethora of science in various states of development around the world there are different amounts of weight that you can reasonably apply to scientific opinion depending on where it has come from, the level of rigour applied and the nature of the process that has led to it. Every import risk analysis does not necessarily go back to basics on every single scientific issue. If there is rigorously produced, conclusive and responsible opinion then that is factored in with an appropriate weight to their consideration. It is then viewed, of course, through the prism of our ecological and environmental conditions, our appropriate level of protection and all of those other things.

Senator CONROY—The issue is that the two, three, four or five scientists sitting on the panel are told that this has been resolved scientifically. Are they still able to go through a scientific process when Biosecurity Australia has said, 'No, this has been scientifically dealt with and resolved'?

Ms Greville—I do not know how to answer that because you could make that same point about any piece of science. If you outsource a particular piece of experimentation or a particular issue in the course of an import risk analysis—

Senator CONROY—But they have not. The scientists who sit on the panel have not approved the scientific rigour of the working group. They may not be happy with it.

Ms Greville—Biosecurity Australia is the convener of the import risk analysis panel and is responsible for bringing it together. Biosecurity Australia is also the competent authority having the technical set discussions with APHIS. While it may not necessarily be the same individuals,

it will certainly be conducted at the same level of technical excellence. That will be considered when the conclusion that has been reached by the technical working group—if in fact one is reached—is passed across to the import risk analysis panel as a useful contribution to the process.

Senator CONROY—In your view, from the way you have described it, Biosecurity Australia are going to walk into the panel with a scientifically resolved position. They are the convener, they are not the panel themselves, but they are going to say, 'This has been scientifically resolved. We can move on.' I appreciate that you are not in charge of the process—and I began by saying that I hesitated to ask you these questions.

CHAIR—I point out that we are wanting to finish on agriculture by one o'clock, and that is in 25 minutes time.

Senator CONROY—I will defer to Kerry. As I say, ultimately Ms Greville is not in charge of this area, so there is not much point in torturing each other over it.

Senator O'BRIEN—Thank you for that. Have you compared our outcome on horticulture with the Central American free trade agreement?

Ms Greville—I certainly have not sat down and gone through it, no.

Senator O'BRIEN—Was that known when we were concluding the negotiations? Was it a precedent that we tried to use?

Ms Greville—We were pushing for immediate tariff elimination, in particular on all lines that had been identified to us by our horticulture industry as of importance to them. That was the guide by which the negotiations were conducted.

Senator O'BRIEN—So we did not have regard to the precedents of what the US had agreed to in other areas?

Ms Greville—The fact that the US has negotiated on a number of fronts was obviously alluded to in the negotiations but, as I said to you before, their approach to these negotiations, and ours, was very much about the bilateral trade that went on between us and trying to maximise our industries' interests in that context.

Senator O'BRIEN—It seems that the US have sought to import into our agreement the types of matters that they have been able to include in other agreements. Did we have regard to that strategy used by the US? Perhaps that is a question for DFAT.

Mr Sparkes—Sorry, I did not quite understand the point of the question.

Senator O'BRIEN—It seems, for example, that in the general provision about sanitary and phytosanitary matters the US have had regard to provisions they have included in previous agreements. I am sure that if we look at other agreements and make comparisons we will see similarities. In our discussions with the United States, what regard did the Australian

government have to that strategy and the principles of what had been agreed elsewhere—any or none?

Mr Sparkes—Perhaps I can make a couple of general comments. One is that certainly the United States does operate on a template, and that template is derived from the authority which the administration secures from the Congress to enable it to carry out the negotiations. That is part of the constitutional set-up in the United States. The fact that they have to check the box before they re-present the outcome to the Congress sets up the template, and that provides precedents, looking both backwards and forwards. They take account of precedents that they negotiate with you when they are looking ahead at others and when looking backwards. I guess Australia does not have that extent of experience in negotiating FTAs. We do not have a template which is derived from a legislative authority.

As a number of colleagues have alluded to, we have tended to consult with industry to determine what their priorities are and combine that with the long experience that we have had bilaterally and through the WTO negotiations with the United States or any other trade partner that we are negotiating with, to work out what we perceive to be our national interest in these things, including, in particular, market access objectives. So I guess we do have a rather different approach to the negotiation of free trade agreements, at least up to this point.

Senator O'BRIEN—So, in the process of seeking concessions for Australia in the Australia-US free trade agreement negotiations, did we or did we not refer to areas where the United States had given concessions to other countries?

Mr Sparkes—I guess there is a background knowledge of these things, but I think the reality—when you are refining your objectives and then you actually get into the process of negotiating with the United States—is that you are negotiating what is a possible outcome, given your ambitions and the limits of what the United States is able to do. I think that that background knowledge and understanding of what the United States may have negotiated with others, frankly, gets further into the background as you get heavily engaged in the detailed negotiations.

Senator O'BRIEN—So we did not say to them, 'You have given this sugar access under CAFTA. Why won't you give it to us?' for example? Do I understand you to be saying that?

Mr Sparkes—No. It may well have been, as I was trying to say earlier in the discussions this morning, that we may have made that point to the United States at any stage in the eight months that we took to negotiate the agreement.

Senator O'BRIEN—You could have before December when you made the agreement.

Mr Sparkes—It is not a formal process where we recorded that at this point in time we said this and the United States' reaction was this.

Senator O'BRIEN—Certainly you could not have done anything of the sort in relation to CAFTA until the agreement was made, which was the point of my question. It would have been a fairly recent part of the negotiations. You might have done it. You do not recall it happening. Do you have knowledge of it happening?

Mr Sparkes—No, I do not. But then I was not in the room when the agriculture negotiations were taking place.

Senator O'BRIEN—I would invite the department to respond to that question on notice. Similarly, I would invite the department to advise whether in any respect in terms of horticulture there was reference to other free trade agreements and concessions the United States had made in the context of seeking a better outcome.

In terms of the agreement with regard to beef and safeguards, can you advise how that safeguard provision was developed? Was that something the US put on the table or was it something over which there was negotiation and toing-and-froing about the level of safeguards?

Ms Greville—The transitional safeguard and the post-transitional safeguard were introduced to the negotiations by the United States, obviously, and we opposed them vigorously on every occasion.

Senator O'BRIEN—Okay.

Ms Greville—The parameters of the safeguards were subject to change during the negotiation period. We continued to make it clear right until the very end of the negotiations that we were not happy to have a safeguard at all but it was also in our best interests to try and alter the parameters of the safeguards such that they would impact less on our trade.

Senator O'BRIEN—So how did we achieve that?

Ms Greville—The safeguards as you see them now, especially the post-transitional safeguard—the content of that in terms of what the trigger mechanism is and the trigger price and the amount of safeguard duty—were all vigorously discussed.

Senator O'BRIEN—Did they change?

Ms Greville—This is the outcome that you see.

Senator O'BRIEN—What you are telling us is that the issue of safeguards and actual safeguard proposals were on the table for some time and they were discussed vigorously. I guess the question I am asking is: how did we fare? Did they get better or did they get worse?

Ms Greville—They got better but the fact that they are there at all is a disappointment to us, as I am sure you are aware.

Senator O'BRIEN—So how will they impact? Obviously, there is some thought being given to the price levels at which the safeguard will cut in.

Ms Greville—Sorry, was that a question?

Senator O'BRIEN—Yes. How will they impact? You have obviously considered how they might impact under the circumstances of the US market and where those safeguard levels might or might not have an effect. I want to get an understanding of what your thinking was.

Ms Greville—Are we talking about the post-transitional safeguard?

Senator O'BRIEN—We are talking about the transitional safeguards to start with.

Ms Greville—The transitional safeguard, as you know, is volume based and it comes in as the quota amount grows. After year nine, when the out of quota tariff starts to come down, there is the potential for a snap back of the tariff if our beef imports at the preferential rate exceed 110 per cent of the quota that we are entitled to in that year. I guess you could characterise that as a protection mechanism of the quota and the quota expansion. The point I would make is that, even though there is a tariff snapback that would apply if our imports exceed that 110 per cent trigger, the snapback does not take us all the way back to the MFN tariff, which, as you know, is coming down incrementally during those nine years.

Senator O'BRIEN—So that I am clear, does it operate in a way similar to the Japanese snapback tariff?

Ms Greville—No, I think there are some pretty fundamental differences between the two in the sense, most importantly, that the snapback is to a proportion of the MFN tariff, not to the MFN tariff, and also that it is based on a growing quota. So it is 110 per cent of the quota each year as it grows. The Japanese snapback, as I am sure you are aware, is based on the differential between one year and the previous year, and it snaps back all the way.

Senator O'BRIEN—What impact, if any, will the US granting access to other beef producers have on our access rights? I understand it is none, but can you confirm that?

Ms Greville—None.

Senator O'BRIEN—Whatever access to the market is given by the US, whatever happens in the multilateral round, we can do no worse than the position that is there?

Ms Greville—That is right. Even if the MFN tariff comes down as a result of multilateral negotiations—and we hope that it does—our preference will still be a preference against whatever the MFN tariff is at that time. So, under any of the scenarios, we will always have a preferential access compared with the MFN tariff, even when either of the safeguards has been triggered, if in fact they are.

Senator O'BRIEN—At the upper quality end of the market, how does the safeguard work?

Ms Greville—During the transitional period, the additional quota applies to manufacturing beef, so the increased quota amount and therefore the trigger, if you like, of the transitional safeguard is based on manufacturing beef. At all times we still continue to have 378,214 tonnes, which becomes tariff free as soon as the agreement comes into force. There are no restrictions on the nature of that beef—it covers all of the beef tariff lines—and that will continue to be tariff-free from the date of entry into force in perpetuity.

Senator O'BRIEN—Remind me of the 378,000—that is not specific to a particular quality of beef?

Ms Greville—No, that covers all of our—

Senator O'BRIEN—So we could have 370,000 tonnes—

Ms Greville—Of high quality grain-fed beef, if we wanted to.

Senator O'BRIEN—of rib roll or something like that.

Ms Greville—Yes, that is right.

Senator O'BRIEN—And the growth could be all grinding beef?

Ms Greville—Yes.

Senator O'BRIEN—In other words, you transfer your grinding beef from—

Ms Greville—That is right. At the moment, I think something like 93 per cent of our trade is grinding beef, anyway, so it is unlikely that we would, in the short term, use up the 378,214 tonnes on anything other than manufacturing. But you are correct when you say that the quota amount, which grows to 70 and, after that, at 0.6 per cent per year, is limited to a subset of beef, namely manufacturing beef.

Senator O'BRIEN—In terms of the beef price for manufacturing beef, how does that impact on the quota?

Ms Greville—In the transition, price has no relevance.

Senator O'BRIEN—Post transition, which is a long way off?

Ms Greville—The trigger for the post-transitional safeguard is an indicator price based on a particular kind of beef, namely 'wholesale box select 1 to 3'. Manufacturing beef covers a range of different kinds of beef, and there is not a price for manufacturing beef, so it was necessary to choose, as a trigger price, one of a range of indicator prices that was possible. In fact, at the time, we discussed this particular, chosen indicator with the beef industry representatives who were in Washington with us, and they were comfortable that it was a less volatile indicator than perhaps another indicator—which also covers elements of the manufacturing beef category—might have been.

Senator O'BRIEN—Is the price of that indicator something that is specific to Australian imports or would it be affected by production in imports, generally?

Ms Greville—No. It is the domestic price that is published daily by the United States Department of Agriculture—so, in fact, it is the domestic price of that particular grade of beef. I guess that could be influenced by imports, but it will also be influenced by whatever other influences are in play on the domestic price of beef on the day. If that price falls more than 6.5 per cent below the average of the previous 24-monthly average prices in two months of a quarter, then it can trigger the safeguard in the following quarter.

Senator O'BRIEN—So that final safeguard will be affected by the size of the US herd, the number of countries that are able to increase their ability to access the market, and the type of product we export to the United States.

Ms Greville—That indicator price will be influenced by a range of factors—certainly including the place in the cycle that the US domestic herd is—but, as I said, essentially it is a domestic price of a particular cut of beef.

Senator O'BRIEN—Do we need to increase the size of our beef herd to take advantage of the increased market access arrangement that is proposed in the agreement?

Ms Greville—That is probably a question that is better directed to the beef industry representatives. I am not sure that I am the appropriate person to answer that.

Senator O'BRIEN—I am just trying to get an idea of what the challenges are for us, if any, in taking advantage of the proposed increased market access at zero TRQ.

Ms Greville—That is probably a question better answered by the beef industry. However, in an attempt to be helpful, I would just offer in response that the beef industry has certainly told the department of agriculture and, I think, the department of foreign affairs that, in the short term, particularly because of the situation in respect of US beef exports into Japan, our current capacity to put any more into the US market than we are currently doing is doubtful. Obviously that will change over time, both by virtue of any changed arrangements into the Japanese market and changed arrangements for US beef, but also by our own herd-building activities, drought and all those other things that impact on our capacity.

Senator O'BRIEN—And whether we process northern cattle rather than sending them live, and the like.

Ms Greville—That is right. There is no doubt that the beef industry would have liked a faster and larger increase in the quota—so I certainly do not think they are saying it is out of the question that we can fill the quota—but, in the short term anyway, I do not think the quota amounts are a significant constraint on our industry.

Senator O'BRIEN—In the short term it is fair to say, is it not, that we probably will not use much extra quota and may struggle to fill quota that we currently have?

Ms Greville—Yes, I think it is fair to say that.

Senator O'BRIEN—So, in terms of beef, the short term benefit from the agreement is not there, but it may be in the longer term.

Ms Greville—There is still some benefit for beef immediately because of the reduction in tariff.

Senator O'BRIEN—Because of the 4.4 cents a kilo.

Ms Greville—As you know, Senator, the increase in quota in the first couple of years is small, but we are unlikely to hit the quota, for those reasons.

Senator O'BRIEN—How do we know that the removal of the 4.4 cents per kilo tariff for in-quota shipments will be captured by Australia and not by an American importer?

Ms Greville—We do not know that, necessarily, but it is certainly seen by our beef industry as an advantage, in terms of the deals that they are doing in the US market, to not have that additional 4.4 cents per kilo impost on their product. The real answer is: it depends on the deal done between the exporter and the importer. It is certainly seen by our beef industry as a positive.

Senator O'BRIEN—Is it the industry's view that has driven the government's positive view about that measure? There is no separate research that you have relied on?

Ms Greville—No. The industry have been clear from the very beginning that increased quota was their highest priority, but reduction of the in-quota tariffs was a very significant benefit from their perspective.

Senator CONROY—Who controls the 70,000 extra tonne quota—Australia or the US?

Ms Greville—Australia.

Senator CONROY—What are the implications for Australia in having the rights to control the quota?

Ms Greville—I am very loath to get into a discussion of quota rents, because it is not something that I am particularly comfortable with, but the ability to control the quota is important to us and to our industry, for reasons of quota rent but also for reasons of quota administration. We argued very vigorously for that and we are very pleased that that was one of the outcomes.

Senator CONROY—So we control who gets to be the exporter?

Ms Greville—Yes. The quota will be allocated. We currently allocate our existing quota, the WTO quota, on the basis of criteria agreed between the industry and the government—

Senator O'BRIEN—Let's not debate that here!

Senator CONROY—Bill Heffernan runs it, but let's not go there!

Ms Greville—and we will administer the additional quota.

Senator CONROY—We got an increased quota for Australian dairy products. The quota increase varies depending on the product. How will that FTA quota for dairy be allocated to Australian dairy producers—who decides that allocation?

Ms Greville—It will be administered by Australia, which is not the case for our existing dairy quota in most instances; as a general rule so far that has been administered by the US. The additional FTA quota will be administered by Australia. The basis for that is currently being discussed among industry. The authority to allocate the quota rests with the Commonwealth government, but they will—

Senator CONROY—Have you called Bill Heffernan in yet?

Ms Greville—I do not know who has been involved in the discussions, but the industry is currently engaged—that is, the processing industry as well as the producers—in trying to agree on a basis for the allocation of that quota, and that will be taken into account by the Commonwealth in determining that process.

Senator CONROY—I want to return to quarantine. For the moment, we are going in the other direction—avocados and stone fruit. Have we reached any understanding yet with the US on the importation of and quarantine issues around stone fruit?

Ms Greville—We have a range of technical market access requests with the United States at any time, as we do currently. Avocados are certainly on that list; tropical fruit is on that list—

Senator CONROY—There is plenty of stone fruit.

Ms Greville—Stone fruit is actually a big issue coming the other way. I cannot off the top of my head remember whether we have a technical market access request for stone fruit in general; we may have one for cherries or a particular stone fruit. Those technical market access requests are going through the US processes, and we will be discussing them in our informal working group arrangement.

Senator CONROY—So have we got any extra agreement for anything to go in yet—any extra avocados, cherries?

Ms Greville—Since the FTA was negotiated?

Senator CONROY—As a result of the FTA.

Ms Greville—There was no discussion of technical market access in either direction as part of the FTA. As I have already mentioned, the issues in the FTA negotiations were about processes and consultation, not about specific technical market access. They did not try to put pressure on us and neither did we on them, because that was not appropriate in that context.

Senator CONROY—We have been trying to get avocados and cherries into the US. We have been having some difficulties, some would suggest.

Ms Greville—The US has an SPS regime which is not the same as ours but has some similarities, in the sense that they have a science based, transparent decision making process. Theirs is complicated by the US rule making which goes on as part of that and which always adds a lot of time to it. I do not think it is fair to say that we have any disagreement with them about avocados, cherries or whatever. It is merely that we are very keen that they give it a high

priority in their overall suite of technical market access deliberations and that we get access as soon as we can—and we will continue to advocate that. I do not think there is a problem with avocados, for example; it is just that they have not got through the process yet.

Senator CONROY—Thanks.

CHAIR—I say by way of an observation—and I do not make this observation for any reason other than for the purpose of trying to smooth the course of this whole proceeding—that there are obviously some questions on quarantine that are outstanding and have to completed in the negotiation. It would be of considerable value if it were possible to have those completed when the bills are considered in the Senate, so that the Senate can see the full implications of all of these things. If that were possible, it would probably be of an advantage.

Proceedings suspended from 1.00 p.m. to 1.35 p.m.

KENNEDY, Dr Steven, Acting General Manager, Foreign Investment Economy Division, Department of the Treasury

LEGG, Mr Chris, General Manager, Foreign Investment Policy Division, Department of the Treasury

BROWN, Mr Nick, Assistant Secretary, Trade and Economic Analysis Branch, Department of Foreign Affairs and Trade

CHESTER, Mr Doug, Deputy Secretary, Department of Foreign Affairs and Trade

CHURCHE, Dr Milton, Lead Negotiator, Services and Investment, Department of Foreign Affairs and Trade

SPARKES, Mr Philip, Deputy Chief Negotiator, Australia-United States Free Trade Agreement, Department of Foreign Affairs and Trade

CAMERON, Mr James, Chief General Manager, Broadcasting, Department of Communications, Information Technology and the Arts

YOUNG, Mr Peter, General Manager, Film and Digital Content Branch, Department of Communications, Information Technology and the Arts

BOUWHUIS, Mr Stephen, Principal Legal Officer, Office of International Law, Attorney-General's Department

CHAIR—We will now proceed with the next section of our hearing: services and investment. I welcome officers from DFAT for that purpose. Do any of you wish to make a statement first?

Mr Chester—No.

Senator CONROY—My questions will be directed to DFAT initially. In assessing the gains for Australia arising from the FTA, the CIE report says the following in its summary on page ix:

Investment liberalisation makes the biggest contribution to overall economic growth and welfare.

On page 11 of Mr Vaile's submission to this inquiry it says:

… Australia's commitments under the Agreement with regard to screening of foreign investment are unlikely to have a major impact on US investment in Australia given the very few rejections of investment applications outside residential real estate.

Could someone explain the inconsistency between the minister's view and the modellers' view?

Mr Brown—The impact statement to which you were referring was written before the submission of the CIE report. I do not necessarily see that as being an inconsistency. The second

part of the paragraph does refer—from memory; I do not have the text in front of me—to the substantial gains that are on offer from investment liberalisation. The passage from which you have quoted said:

… Australia's commitments under the Agreement with regard to screening of foreign investment are unlikely to have a major impact on US investment in Australia given the very few rejections of investment applications outside residential real estate.

It then goes on to say:

However, these commitments will significantly reduce the number of US investment proposals that will be screened and this reduced screening burden is expected to reduce compliance costs for a significant number of US investors and therefore increase the attractiveness of Australia as a destination for US investment.

Senator CONROY—Sure. I have no argument about the compliance issue. By definition, if you do not have to file a form, you do not have to generate the compliance costs that go with it. But the issue is that CIE make the statement that 'investment liberalisation makes the biggest contribution to overall economic growth and welfare' and then they go on to create some groundbreaking economic analysis that I am sure someday someone else will agree with! I will not bore you in a debate about that—that is for people with pointier heads than you and me, Mr Brown.

Senator BRANDIS—Don't flatter yourself, Senator Conroy.

Senator CONROY—Sorry? I said 'pointier heads' than the two of us—not balder, okay, so settle down. The CIE attributes more than half of the gains to Australia from the increase in the FIRB threshold to $800 million based on an estimate of a five-basis-point risk premium. Treasury may want to come in here. Mr Vaile's submission to the inquiry clearly rejects those assessments. Does the government disagree that there is a five-basis-point risk premium due to the FIRB?

Mr Legg—Perhaps the way to set the scene for that discussion is to put on the record our perspective of the way we have approached foreign investment policy and thought about these issues at the time. I think we have always accepted that there has to be a cost to foreign investment restrictions of some type. You have said you acknowledge that we recognise compliance costs. We know there also has to be an impact on the risk premium but we have not got a very good feel for just what that was prior to this. We knew there had to be something. We had tried to implement and administer policy, which had been progressively liberalised over time in a way, to try and get the balance right between keeping costs down and allowing governments to be able to deal with genuine community concerns about the national interest.

We certainly were surprised by the size of the CIE outcome but not in a way that we would say, 'We dismiss this.' We would say, 'This is an interesting piece of information which was done by respectable economists with a respectable model.' The assumptions they made are not completely unreasonable; they are reasonable in terms of the time they had to work through these issues. It says to us that there is a case for saying that there would be a materially significant benefit from these higher thresholds even if you debate the particular assumptions and the particular number that churns out at the end of the model. We do not have a view on

whether five basis points is the number, but the model says to us, 'Even if it was less than that, they are still going to get a materially significant benefit from these liberalisations and that makes us more comfortable.'

Senator CONROY—Even if it was less than that you would still get a material benefit—even if it was 0.0005?

Mr Legg—The sensitivity analysis says even if it was two or one basis points. The assumptions they have made to get the five basis points are quite conservative in some ways.

Senator CONROY—That is a matter of opinion.

Mr Legg—But even if they were more conservative, there does seem to be a significant material benefit from doing this, which we have always felt would be from investment liberalisation so long as you were able to preserve the ability to deal with genuine national interest concerns that the government of the day may have.

Senator CONROY—How much foreign investment is there into Australia on an annual basis?

Mr Legg—I do not have that figure off the top of my head. I would prefer to get it exactly right rather than take it on notice. The US stock of investment in Australia is currently about $65 billion. Our foreign direct investment in the US is worth $65 billion as of the last reporting period from the ABS. From memory, the US represents about a third of the total. That may vary from year to year, but it is roughly a third.

Senator CONROY—Let us just stick with his assumptions for the moment rather than Treasury's. Would the five basis points apply to every investment coming into Australia? Would everybody who wants to invest here factor in five basis points? Do you think that was his assumption? It wasn't just five basis points for the Americans, 10 basis points for the UK, 20 basis points for Japan. Do you think it was a consistent figure?

Mr Legg—My colleague is more of a modeller than I am, but my understanding is that they start with a respectable independent study of what the overall difference between the return and equities to the return of long bonds is and the long-term margin, which that study shows is about 120 basis points. They say, 'Maybe some portion of that is to do with investment restrictions—let's say half.' They then say, 'But this agreement is only applying to US investments and within that the increased thresholds are only applying to the non-sensitive sectors.' I think we recognise that these are rough judgments but not unreasonable ones. That gets them to 10 basis points. They then halve that again just to be conservative. It gets them to five basis points—

Senator CONROY—Subtract their mother's age.

Mr Legg—They are saying that this is a measure that applies generally and then they have adjusted it for the proportions of US investment and the total that may end up being proportionately related to the benefit for Australia as a whole in terms of the total average risk premium—it is an average risk premium as all these things are.

Senator CONROY—I will take that as a Treasury yes.

Mr Legg—You asked me about the choice; I could say yes to both.

Senator CONROY—It seems incredibly attractive that you are not proposing we abolish all restrictions, because there must be billions of dollars in it. I mean if there is $7 billion from the US, there has got to be $50 billion or $100 billion if we get rid of the lot—to be internally consistent.

Mr Legg—It is not for me to comment on what advice I might be giving the government about future policy.

Senator CONROY—It just seems that there is an attractive couple of per cent of GDP sitting there staring at us, and billions of dollars of benefits.

CHAIR—From that answer, Mr Legg, are we to assume that you have given advice on the subject?

Mr Legg—We have certainly given advice to the Treasurer and the government about the terms of the US free trade agreement, and the implementation of that raises its own issues which the government needs to consider going forward.

Senator CONROY—But my point is: logically, if five basis points holds as an average, then there are billions of dollars there staring at us waiting for a reformist government to say, 'We can put a couple of points on GDP, just like that.'

Mr Legg—That is your conclusion, and I respect it.

Senator CONROY—Is it an unreasonable conclusion, if you accept the conservative assumptions?

Mr Legg—It is an honourable conclusion that you could make from that particular assumption using that particular model, but you could vary the assumption. My point earlier was that even if you varied the assumption and you decided to be even more conservative and cautious again, in terms of the benefit of this particular decision in the context of this agreement, it suggests to us that we are getting positive benefits for the Australian economy and doing so in a way that protects legitimate rights to worry about community concerns about foreign investment. As the person responsible for administering and advising on foreign investment policy, I do give weight to that second set of issues. Community concerns are genuine, they need to be taken account of—I am not so pointy-headed that I dismiss them.

Senator CONROY—I have never accused you of being pointy-headed, Mr Legg.

Dr Kennedy—We also need to keep in mind that the gains come out of the model and the model is just one representation of the real world. Investment in particular is a very difficult activity to model, so the modellers have come up with something that is logically consistent and fits with what we call mainstream theory, but we also need to keep in mind that this is giving us an indication.

Senator CONROY—I certainly would not want to sign up for it either if I were you, Dr Kennedy. But to be logically consistent, the point you are making—if we extrapolated this into a decision right across the board—is that there are billions of dollars in this. There is $7 billion just from the US; it is the largest, but not 50 per cent of our total investment.

Mr Legg—We are not taking the model as the only piece of information that you want to take to make a decision on these issues, and it was never intended to be by my DFAT colleagues either. They never said that this model is somehow the only piece of information relevant to whether or not the US free trade agreement should or should not go ahead. It is a useful effort to put a number on it and, in getting that number—if we do not get fixated on the number we get but think a bit more about the assumptions and the linkages that work through in this—it then contributes to debate and the understanding of how the agreement may work. But as colleagues have said in other Senate committees in the past, there is a danger in modelling to fixate on a particular number outcome.

Senator CONROY—I would not want to accuse you of fixating, but I thought Treasury would have been excited by this development. There has been such an impediment to the Australian economy with a risk premium of this magnitude, I thought you would have been rushed into doing all sorts of modelling of your own to test it. Have you done any modelling, or considered it yet? Have you run it through the Treasury model yet?

Mr Legg—I am not a modeller, I am afraid.

Senator CONROY—Dr Kennedy, have you run it through the model yet?

Dr Kennedy—No.

Senator CONROY—Are you planning to? Surely we want to test this; there are dynamic benefit gains to be had everywhere.

Mr Legg—Dr Kennedy can elaborate on this in a minute, but my understanding is that there is not a Treasury model; there are several models. Most of the models we have are not the sorts of models that would be used for this purpose, so they are not really useful to test this idea. One model we do have is this model; we have the licence to use this model and if we ran the same assumptions through this model, then we would get exactly the same answer so I am not certain that it adds any value to this process.

Senator CONROY—Have we critiqued the model or the assumption yet?

Dr Kennedy—Do you mean this particular assumption?

Senator CONROY—I would like to critique the entire model. To be able to make some assessment of whether you think it is a credible figure, you must have looked at the assumptions and the model structure—you did not have to get the source code out.

Dr Kennedy—To some extent. G-cubed is quite a complex model, and to some extent we have to rely on the support and the research of our academic colleagues. To build a model like this you have to have substantial expertise. Frankly, we would not be able to build from scratch a

model like this; hence we take the option of using the model but gaining support from outside. We would use the model to do thought experiments and to think about how these things might translate into economic activity. Mr Legg is right in that, if we took the same assumption and put it through the model—as you are saying—we would get the same answer. As to what is coming out of this, it is basically coming from a condition on how you equate the marginal return to capital to the marginal cost to capital. That is the way most economists would think about that type of equilibrium condition. I think the CIE has a thought experiment which shows how that logically flows. Going back to my earlier comments, we all appreciate that this is a model—it is just an abstract or a representation of the economy—so we treat it in that light.

Senator CONROY—I love that Treasury insight: 'a thought experiment'. I will remember that for the future. Mr Brown, did you say that the submission we received was written before the CIE report?

Mr Brown—I understand that the impact statement was written before the report—the first draft.

Senator CONROY—Mr Vaile's submission to us makes specific reference to the CIE report. I am wondering how it could do that if it was written before the CIE report.

Mr Brown—I understand there were some minor changes after the CIE report was submitted. For example, the section to which you are referring also referred to the fact that the agreement would not affect Australia's ability to screen US investments.

Senator CONROY—So after seeing the CIE report you changed that bit but you did not change the bit that said that investment is already so liberal it is not really going to make a difference.

Mr Brown—No.

Senator CONROY—And the CIE is dotted throughout the submission. I am still confused about how CIE can be referred to so regularly in the submission when you are saying that it was written before. I appreciate that you have now made the point that you received it from CIE and made a few minor changes, but references to CIE are dotted through the submission.

Mr Brown—I will have to take that on notice.

Senator CONROY—Sure. I will come back to the thought experiment for a minute. You did mention academic economists and the debate. One noted academic economist referred to the laugh test. Are you familiar with the laugh test? Is that a thought experiment?

Mr Legg—I am familiar with the quote that you are referring to.

Senator CONROY—Did this pass the laugh test from your perspective?

Mr Legg—I did not apply a laugh test to it, because I am not the modeller. I guess there are many laugh tests that Treasury might apply to all sorts of things. Something that certainly does not pass the laugh test for us is a view that investment liberalisation is not a good thing. We

certainly felt that, and we were comforted that here were some respectable economists with a model that we did not necessarily have a position to question—as models go, it is a good model—saying that here were some sizeable gains. If we applied quite conservative sensitivity analysis to that we were then comforted that we were on the right path. I do not really want to comment any further on that, because we were not in the business of unbundling this much further than that. In fact, quite frankly—

Senator CONROY—I would have thought that this would have stimulated the Treasury juices and that you would have been hopping into this model to find out whether it was a credible one.

Mr Legg—Not everyone in Treasury; actually a relatively small number of people in Treasury are very passionate modellers—

Senator CONROY—I think you are being modest, Mr Legg.

Mr Legg—My area has been passionately involved in drafting legislative instructions and the like to actually give effect to the free trade agreement in the investment area while continuing to do our core business, which is screening foreign investment, so we have not had a lot of time, quite frankly, to take this model apart. It is not an issue for us; if it tells us there is a positive benefit, we know we are on the right track. That is what we in Treasury are focused on, so we are just trying to go ahead and implement it.

Senator CONROY—I am shocked to find that Treasury is so uninterested. I appreciate though that you are very busy and that that could be the major factor holding back that enthusiasm. Has Treasury previously considered whether or not there is an equity risk premium? Is that something you have done any work on?

Dr Kennedy—We have in the context of other modelling. The equity risk premium that is being talked about in this is the difference between the US equity risk premium and the Australian equity risk premium, which is the 120 basis points that Mr Legg talked about before. It is true in history in data that there has been a difference between the two equity risk premiums. I think the CIE study draws in fact on an estimate taken over 102 years, but even estimates that have been taken over more recent periods would find in general an equity risk premium difference. It is a difficult area to understand. It is called the 'equity risk premium puzzle' because it is a puzzle.

Senator CONROY—Have any eminent experts in Treasury done any papers on this that might be available to the committee for us to draw an assessment from?

Dr Kennedy—Not that I am aware of.

Senator CONROY—Could you refer me to any academic work on the equity risk puzzle, as you describe it?

Dr Kennedy—We could.

Senator CONROY—I am interested in doing a little bit of puzzling myself.

Dr Kennedy—There is a reference from the CIE study—

Senator CONROY—Yes, but preferably one that he has not quoted.

Dr Kennedy—and there is other work. We would be happy to do that.

Senator CONROY—Yes, take that on notice and let us know if there is anybody in the known universe who can help us out. So you have never tried to quantify such a measure?

Dr Kennedy—In our own modelling in TRYM, the Treasury macro model which is a model of just the Australian economy, that model needs to deal with differences or equity risk premiums.

Senator CONROY—What is your equity risk premium?

Dr Kennedy—My understanding is around 100 basis points, because it reflects the history over which it was calculated, as opposed to the 102-year period over which the other number was calculated from.

Senator CONROY—So he is basing it on 120?

Dr Kennedy—It is 102.

Mr Legg—It is 102 years and 120 basis points.

Senator CONROY—Please help me if you can. What assumptions does he make to work from 120 to get to five basis points?

Mr Legg—From memory, and Dr Kennedy can tell me if I get things wrong, there is an arbitrary judgment that not all of that is going to be about foreign investment restrictions. There are a number of other factors that could be worked in, so he said, 'What if half of it is foreign investment?' That is purely an arbitrary judgment. There is no quantitative basis for that but there is a qualitative basis, which is that they draw on recent OECD work which tries to rank countries by the relative restrictiveness of their investment regimes. That OECD work does suggest that, over time, whilst we have been liberalising, other countries in the OECD have liberalised faster than us, certainly in the last 10 years or so, so we have actually in relative terms looked more restrictive. In fact, we are ranked as the fifth most restrictive country on foreign investment in the OECD group by this study.

That study has obviously made its own assumptions in making that judgment, but it is a real factor for us because it affects perceptions and those perceptions are a big part of feeding into investor risk premiums and issues of uncertainty. So the authors of the report take that into account in saying, 'Let's say half of this figure of 120 basis points is the starting point for what is driven by foreign investment restrictions per se,' and then they make adjustments relating to the proportion of US investment in total and then the proportion of sensitive versus non-sensitive sectors. Those two adjustments arithmetically, from memory, get you down to something close to 10 basis points and they say, 'Let's just halve that because even that might be very high. Let's halve it again and see what happens.'

CHAIR—That is a very interesting answer.

Senator CONROY—Dr Stoeckel actually did a model before the release of the free trade agreement. I am wondering why he did not discover the equity risk premium when he did the first one. Have you asked for your money back on the first one?

Senator BRANDIS—Mr Chairman, a point of order. I am struggling to see how it can be fair either to any of these witnesses or indeed to Dr Stoeckel, who is not here to defend himself, for them to be asked what they think might have been in his mind as to why he did something. There is an overriding principle of fairness, not only two witnesses at the table but also to people who are not here to defend themselves.

Senator CONROY—I think you have verballed me but I will let Senator Cook rule.

Mr Brown—In the prior study there was a different methodology used. The effects of investment were encapsulated in the treatment of services. There is a table on page 10 of the summary which summarises the treatment before and after the agreement. As I understand it, the new methodology reflects development in the modelling technology that has occurred since that last modelling exercise three years ago.

Senator CONROY—So the $4 billion figure that was touted was a three-year-old figure?

Mr Brown—That was a figure that was worked out using different baselines and different methodologies in 2001.

Senator CONROY—So the $4 billion figure was a 2001 figure.

Mr Brown—It was a figure that came out of an exercise at that time.

Mr Legg—Senator, I make one observation. Obviously what the CIE did not do in their first study was make any allowance for changes in foreign investment restrictions. They did have investment benefits that were linked to the benefits from services liberalisation, but they did not try to quantify any changes in investment restrictions.

Senator CONROY—I was wondering why—that is my point.

Mr Legg—I think they just took a judgment that they had no idea what might come out of this process. While they could make some assumptions about cutting tariffs to zero or whatever over whatever period of time, they obviously took a judgment that they were not going to make an arbitrary judgment about what would happen on the foreign investment side, so there was nothing there for them to model until they knew the outcome of the agreement.

Senator CONROY—I think you are probably being a bit have been generous to Dr Stoeckel, Mr Legg. Unfortunately, I have to leave, so Senator Cook will take up the debate with you.

CHAIR—I will ask some questions. Has Treasury done any estimates on the expected impact on US investment in Australia arising from the change in the FIRB threshold?

Mr Legg—No, we have not. We are, as I say, comforted by this external work that shows we are on the right track and that there are positive benefits here, but we have not tried to quantify that ourselves.

CHAIR—The CIE report says that in the past five years the government has only rejected four out of 2,285 proposals for investment from all countries.

Mr Legg—That is other than urban land and real estate.

CHAIR—Yes, that is the caveat: other than urban land and real estate. In Senate estimates in February, a Treasury official said:

I do not think there have been many, if any, cases where US investors have been rejected. There may have been one or two.

Mr Legg—I think that was me. It sounds familiar.

CHAIR—So the FIRB does not seem to be a deterrent, turning away US investment; yet the CIE's model says the increase in the threshold to $800 million will lead to a significant inflow of US investment—billions and billions of dollars.

Mr Legg—I tried to set this in context earlier because I think that earlier perspective is very much the way we have thought about it in implementing it: we do not turn away very much, therefore the material impact is probably relatively small. But what the CIE study has usefully asked us to do is to think about the uncertainties created by the fact that we may turn people away, and the uncertainties in their mind because if they invest in Australia they may in future not be able to sell it to a foreigner if at that point we turn somebody away.

This was actually an issue that came up in the negotiations to some extent. I make this point very strongly: the US side were very keen on addressing this issue because, to them, they saw our foreign investment strictures as being a real barrier that they wanted to tackle that their business sector had raised concerns with them about—not just about how we implement it now but uncertainties about how future governments might implement it. The CIE study is saying, 'Whilst you may not turn very much away, the very fact that you screen and you raise uncertainties in investors' minds—and you may deter investors that never apply because they are worried they may not get past the screening—contributes to the overall risk premium.' Then they make some assumptions about what that contribution is and they say, 'Even if it is very small, the benefits can be significant.' That is not an unreasonable way of thinking about the issue, and we are open to seeing that as a relevant set of considerations.

CHAIR—Yes, but it is a question of what weight you attach to them. I might say that, in my experience, investors tend to spot the investment first and then decide whether or not the mechanisms to screen foreign investment in any way deter them. So they have a project in mind that they wish to invest in. They have done their sums, as a rule; they have worked out what the return on this investment might be. A secondary consideration then becomes: 'Are there any screening mechanisms to allow that investment to come into the country?' With the greatest of respect to anyone who holds this view—and I am not sure you are putting this proposition, so I am not challenging you—it is naive to assume that investors just look at the apparatus, the FIRB.

They look at the track record. The first question they tend to ask their accountants or their financial advisors is: 'How difficult is it?' And the track record is pretty clear here, isn't it? So while the point you are putting has some standing, the question is what weight you give it. It would seem to me from a practical point of view from my experience in dealing with investors in Australia that it is a very minor point. Isn't that a fair conclusion?

Mr Legg—It is an honourable conclusion from your experience, and I think that is fine. But it is also valid to say that there has to be some uncertainty created. You are right that they probably look for the commercial opportunity first rather than being driven purely by our regulatory framework. There would be a raft of other things they would be worrying about too, or would be thinking about, in comparing potential investments, not just investment screening arrangements. Nonetheless, we deal with a lot of proposals where there are funds managers who want to buy out companies here, manage them for a few years and then sell them to others if they can improve the performance and add some value to the economy that way but also some value to their own shareholders. There are an awful lot of those sorts of transactions which come through our door. Those people clearly would have to say, 'What will happen in a few years time if for some reason you've still got these thresholds in place, you've still got the national interest test and at that point the political culture is less friendly to investment than it is now or has been in the recent past?' I am sure Australia is not the only place that has such investment vehicles for them, and when comparing like with like that will be a significant consideration in where they choose to go. Even the sort of money, whilst it is investing in firm, productive activities, is pretty fickle and fairly fleet of foot when it needs to be in terms of where it can go.

CHAIR—I accept the argument about how nimble it might be. But that then raises another question. If you are an American investor you probably have a global view. Which other competitor countries that are on a par with Australia in terms of the type of return you would expect from an Australian investment—which may be not as high yield as some Asian investments but may be more secure and more solid over the longer term—have more onerous screening provisions than we do?

Mr Legg—I am not in a position to categorise countries by the type of return they might have—I do not have that set of boxes in front of me in thinking of comparing different benchmarks—but I refer again to the OECD study, which actually has us as, relatively, a very restrictive country by OECD standards. Presumably there is a bit of a range across the OECD in terms of security and likely return and the robustness of institutions and all of those other things you were referring to. Nonetheless it is more of a like group than other countries you might want to compare them with. That study is like any other study in that you could debate the finer points of it and where we end up in that ranking, but we are ranked the fifth most restrictive country in the OECD. With respect to countries that are less restrictive, countries like Poland are less restrictive than us in this ranking. We are down there with Turkey. Canada is—

CHAIR—Is Poland in the OECD now?

Mr Legg—I remember Poland being mentioned, so I will confirm that for you, in case I have it wrong.

CHAIR—Turkey is not in the OECD, is it?

Mr Legg—Turkey is certainly mentioned in this group as a country which has—

CHAIR—But it is not an OECD member, is it?

Mr Legg—It is, I think. I am being told it is.

CHAIR—I accept the advice. The last time I looked we were debating over Mexico and South Korea, but go on.

Mr Legg—They are certainly at the table. Canada is down there as well, I have to say, because they have a similar screening arrangement to us. The US is in the middle of this field and the UK is listed as being the least restrictive. So it is not a study you can ignore and say, 'We're not interested in this study.' The OECD is clearly a respectable organisation in thinking about these issues, so we have to take that seriously and, whilst we have liberalised over time, we cannot ignore the assumption and the conclusions being made in that study that perhaps others have liberalised more quickly recently.

CHAIR—I heard that point, which is why I said earlier that you gave a very interesting answer. That is just for a political debate later: who is more effectively liberalising—this government or the previous one. But I am not going to canvass that now.

Mr Legg—I think it is actually more what other countries have done rather than what we have done, but I take the point.

CHAIR—It is, but it is a question of maintaining your position in the global framework. If we stand still and others overtake us, we have lost our position. My point is that there is no static position here. I guess I am arguing the converse of exactly that view now, and I note the fact that you have referred to this OECD study and said it is something to take into consideration but, by inference, of itself it is not decisive and does not clinch the argument, because in order to clinch the argument you would need to look at the behaviour of investment, wouldn't you, and see whether or not there are any grounds for believing that serious investment is deterred by our regulatory framework and not the other issues that people actually invest for—the return on their money and so forth?

Mr Legg—I certainly would not say that the OECD study or any single study is the decisive piece of information that you take into account. We have been approaching this from a different point of view: we have been saying that all the evidence we have says that liberalising foreign investment, if you can do it whilst preserving the ability to protect the national interest in a way that the government and the community generally feel comfortable with, is a good thing to do. There is no study I have seen that says we should not be doing that, and the studies I have seen suggest that maybe if we do it, whilst you can argue about the assumptions and the ultimate dollar value, it will give a positive benefit. I guess we have taken comfort from that and seen that these are good things to do. Whether there is a US FTA or not, these are good things to do and the US FTA has been a vehicle by which we have been able to have a discussion about this and weigh up the costs and benefits and take this decision.

CHAIR—That leads me to what could be another very long diversion and we will not take it, but I just mark the spot for general consideration. There is a silent lobby group here that never

speaks out, and that is the national interest lobby group. The purpose of having the FIRB is to actually make an assessment in the national interest. It is true that there are always people pushing for less regulation and, let me say straight up, that there is an advantage in fewer and less onerous regulations. But we are not talking about one view takes all; we are talking about a balance between what is the right way of filtering foreign investment in Australia in order to attract as much of it as we can while safeguarding our national interest.

Mr Legg—Absolutely.

CHAIR—The weight of pressure is always for less regulation. There is little weight of pressure for protecting national interest, it seems to me. That is something for the government to have a view about, but it is also something for the legislature to have a view about. If we are having this debate about what the marginal benefit of removing these things is, one has to weigh that marginal benefit. That is just me expressing a policy perspective on this.

Mr Legg—I absolutely agree with you; as the officer responsible for advice for the Treasurer I take that national interest issue very seriously. One observation I make in terms of these outcomes and the increase in thresholds for the non-sensitive sectors—and this is the analysis we did in thinking about our position in these negotiations—is that we looked back and asked: what have governments actually determined to be national interest concerns in the past and, if these were the thresholds to apply in the future, does that mean that governments in the future cannot do things they have done in the past? In terms of the current arrangements, the $50 million threshold, our judgment is that there is no case where a government has chosen to act, certainly in terms of restricting and more or less in terms of imposing conditions, which could not still be done with an $800 million threshold, other than for the sensitive sectors, because almost all of the places where we have acted have been much larger than $800 million—which is natural because there will be a correlation to some extent between national interest and size most of the time, other than in the sensitive sectors, where we have tried to reflect that: media, defence related issues, uranium, transport, telecommunications and urban land, including accommodation facilities and the like.

Looking back, say, at the term of this government I think there have been 11 cases which it has rejected or sought to reject for whatever reason, and all of those cases could still be done with an $800 million threshold and the arrangements suggested as a result of the US FTA. That gives me comfort that we are not limiting the government's ability to protect national interest, as it is revealed to be, in terms of the correlation between size and sectors and national interest considerations.

CHAIR—I have just looked at the questions that Senator Conroy has given me to ask, and I am actually off on a frolic of my own, though it is still germane to the point. I will move on. If this liberalisation were to have significant impact, it would need to be factored into your economic forecasts, wouldn't it? Has there been any change to forecasting assumptions as a result of the FTA deal?

Mr Legg—This is something I will leave to Dr Kennedy in terms of detail. But I will say that I think there is a false premise there, which has been discussed before in Senate estimates and also with JSCOT last week, and that is that our forecasts are built from the bottom up of this initiative and that initiative and how they feed into the overall performance of the economy. Our

forecasts are put together on a much more aggregated level and probably would never try to capture the impact of a particular decision like this.

CHAIR—But there is a bulge coming through here of a so-called $6 billion or an investment of something like four.

Dr Kennedy—What Mr Legg said was right. In this type of modelling, in modelling the FTA, there are two projections, if you like, going on. There is the baseline and then there is the forecast of what happens with the introduction of the FTA. In doing forecasting, we are not doing that; we are basically taking the world as it is and forecasting from that point. It is very difficult to disentangle all the bits and pieces. That is how our forecasting modelling exercise differs quite substantially from this type of exercise. Basically, you are looking at the differences between two worlds—one that you think is the baseline or the projected world and then one where you make a change. That is not how we do forecasting. We just take where the world is and we take partial information and we use our models to forecast for, say, the next two years and projections thereafter.

CHAIR—You take the world as it is, where it is, and project therefrom. But here you have a dynamic change that affects investment and that the CIE's modelling assigns a considerably high value to. So you would not just project on, would you? You would take that into consideration in some form—if not the change in the arrangements with the FIRB then at least the outcome of the CIE model.

Dr Kennedy—Not directly. We cannot disentangle that from observing or modelling investment or any other aspect of the Australian economy as we see it. We do not have a world that is net of this effect which we are able to add on top. As I said, we have it as it is and from that point we make a forecast. It would be largely impossible to disentangle all these types of effects.

CHAIR—We would say it is having an effect on the balance of payments, on the exchange rate and maybe on inflation, wouldn't we?

Dr Kennedy—The other aspect of this modelling is that it is abstracting from all the short-run movements. The outcomes of this modelling exercise are essentially long run or they come through over a long period and reflect a new equilibrium, a different point. What we see in real time is an economy that is affected by shocks, by droughts and by other international circumstances. In the short run, those effects are going to be generally much larger than, for example, this type of effect.

Mr Legg—The Treasury never forecasts the exchange rate. That is the first point. It is impossible to do—

CHAIR—I am glad you picked me up on that, Mr Legg.

Mr Legg—and most evidence suggests that you are better off not to try.

CHAIR—Some companies do, of course. They hedge against it.

Mr Legg—That is right, but that is their commercial judgment. Broad macro-forecasters do not try to make those judgments.

Senator BRANDIS—Does that mean that any model that Treasury develops bears no assumption about forward movements in the exchange rate?

Mr Legg—There is usually an assumption that the exchange rate is what it is today or what it has been over some average period. Statistically, that usually produces as good a result as, or better than, any effort to make a judgment where it might move.

Senator BRANDIS—So there is an extrapolation, but it is based on an averaging of past movements.

Mr Legg—Yes. It is a working assumption; it is not a forecast.

CHAIR—An averaging of past movements or where it is today?

Mr Legg—It is over a period. It is an average, isn't it?

Dr Kennedy—You can check; the assumption is listed in the budget. From memory, it is the last 30 days, but I am not certain. You would have to check the budget documentation.

CHAIR—It tends to move in trends. We can draw trends around it. So if you took the last 30 days and you had the wrong side of the trend you could end up with a misleading outcome, couldn't you?

Mr Legg—It is a matter of managing the risks here: whether that risk is greater than the risk of trying to make some discrete judgment. Statistically, I think most of the analysis of models suggests that the risk is greater if you try to make a guess about it going forward rather than to just say, 'Let's assume it stays roughly where it is.' The other point I want to make—and I make this as a non-modeller and not much of a quantitative type either—is that what you are talking about with the CIE report is something that says, 'You might get 0.7 per cent of GDP 10 years from now, against a baseline which holds a number of things constant.' Forecasts are 18 months to two years out, then you have a couple of years of projections. Those forecasts are never going to pick up that 0.7 per cent because it is too far out. By the time we get close to it, there will be a lot of other factors at work that mean you would never be able to identify whether that 0.7 was 0.6 or 0.8 as a result of that particular factor.

CHAIR—What is the Department of the Treasury's bottom line here? Do you agree with the CIE estimate that after 10 years we will get a $6.1 billion boost?

Dr Kennedy—We think that the CIE has done a good study. It is a good modelling study in the sense that the assumptions around which the results are arrived at are clearly laid out. They use a sensible set of models. We do not tend to go to the single number, as we said before. We look at the whole exercise and evaluate the whole exercise. To us it looks like a sensible exercise which has promoted sensible debate about how to try to capture these effects. They also give a full range of estimates, which is another useful way to approach this exercise, to illustrate the difficulty in trying to pinpoint a single number. As Mr Legg said earlier, it also accords with our

thinking about liberalising foreign investment and those types of things, so it certainly fits comfortably with what we would expect to see.

Mr Legg—I think that is right. We are not in the business of saying, 'We'll take that number and this is the number we're going to attach our reputation to.' Even if on some aspects of it, such as investment, you may feel that they could be more conservative than they have been, it also tells us that we know there are things that they cannot model. We know traditionally that forecasting ex ante the benefits of reform generally understates them, because of the difficulties of getting all the dynamic relationships and changes that occur in behaviour as a result of those reforms. They have made an attempt here to factor in dynamic benefits. That is probably an improvement on the earlier analysis that they did.

It is by nature an arbitrary number, but it is one that is as well based as anything else. We know that there are aspects of this agreement that they cannot model and they have said that. We assume there will be positive benefits from those and they will probably offset some of the areas where there may be some negative benefits. So, overall, what we take from this is not to say, 'We feel confident we've got $6 billion in gains, or 0.7 per cent of GDP,' but, 'We feel confident that the liberalisations that are being undertaken as part of the US FTA are positives for the Australian economy.'

CHAIR—Okay. Is that the same answer to the findings that, over the first 20 years of the agreement, the present value of the benefit to the Australian economy exceeds $57 billion and the agreement will create 40,000 jobs and real wages will rise?

Mr Legg—Any of those quantitative assessments—we are not latching onto particular numbers as government forecasts.

CHAIR—What about the conclusion that there is a 95 per cent chance that the extra welfare of Australians will lie between $1.1 billion and $7.4 billion per annum in 20 years time?

Mr Legg—I think it is the same answer. We think they are reasonable judgments to be making. The model is interesting and useful in elaborating some of those issues and we feel that it reassures us that liberalisations being done in the context of the US FTA are positive things to do.

CHAIR—Have you done any modelling on the possible overall impacts of the FTA on the Australian economy?

Dr Kennedy—No.

CHAIR—Were you consulted at all in the preparation of the government's regulation impact statement on the FTA?

Mr Legg—Yes, we were. I saw a draft. I think that was circulated around the relevant areas of the department.

CHAIR—Am I right in taking that answer to assume that the regulation impact statement is a reflection of a whole-of-government view on the FTA?

Mr Legg—It is certainly meant to be.

CHAIR—Does it incorporate the Treasury view?

Mr Legg—We were happy with the draft we saw. Going back to the issue raised by Senator Conroy earlier about the apparent disconnect between saying on the one hand that, because we had a light touch in screening, we do not expect significant huge increases in investment because of this and on the other hand the juxtaposition with the CIE report. It is very much in the context, as Mr Brown pointed out, that the first reflected our preconceptions before we had seen the CIE study. We had an arrangement whereby we had made it clear to the committee that we would write this before we had the CIE study but we would put the CIE study results in there and add them once we had them. Out of respect for the protocols involved, we did not go back and madly redraft the RIS. But we take that extra piece of information seriously, at least in terms of strengthening our perception that liberalisation in these areas is good.

CHAIR—Do I assume that you therefore support the conclusions of the regulation impact statement?

Mr Legg—I have no reason not to.

CHAIR—I will change gear at this point and will farm out the call to one of my colleagues. There are two questions here that I have not asked that I need to. I can ask one now straight off, which is to DFAT. The other one is to Treasury and it is about CIE, but I need to find my papers. With regard to the question to DFAT, on the 11th of this month in the *Australian* on page 4 under the heading 'US trade deal won't have "big effect" on investment', the correspondent Christine Wallace says:

Claims that looser investment rules will lead to big gains for Australia from the US free trade agreement have been undermined in a report by the Department of Foreign Affairs and Trade.

Can you provide to the committee a copy of that report?

Mr Chester—This reference goes to the same point you were making earlier about the statement where Mr Vaile is quoted as saying certain things. It comes back to this paragraph of the impact statement. That is the report that is referred to in that newspaper article.

CHAIR—Could you just identify the document that you are referring to again? I did not catch it.

Mr Sparkes—It is the regulation impact statement. That was the basis for Senator Conroy's question.

CHAIR—I missed that part of the proceedings; my apologies. Senator Brandis, did you want to come in at this point?

Senator BRANDIS—I just had one rather general question that I might direct to you, Mr Legg, which draws all the threads together. You said earlier in your evidence, if I understood you correctly—if I did not please correct me—that the suggestion that we should not liberalise

investment rules does not pass the laugh test. Having regard to the various critiques that opposition senators have put to you in their questions, what is your overall conclusion—I do not want you to quantify this; we have enough discussion about the modelling—in relation to the benefits of the FTA from the point of view of liberalising investment to the Australian economy? In addressing that question, could you please tell us with what, if any, other bilateral or multilateral Australian agreements to which Australia is a party it bears comparison.

Mr Legg—You did accurately capture what I said earlier, except I hope I said that it does not pass the laugh test to say we should not liberalise—so long as we can liberalise in a way that still protects the government's ability to address national interest considerations. If you are comfortable that you still have sufficient cover for that and the community is comfortable with that then whatever you can do to reduce compliance costs and to reduce the risk premium within that is a good thing. That is absolutely my position. I should make it clear that the US were very keen that we do not apply the national interest test to US investors in Australia or, if we do, that we only apply it to a very small number of sectors. We were very determined that we would not do that. In that context, having protected the overall framework of the screening arrangements, I feel very comfortable that the increased thresholds on the non-sensitive sectors is a very positive thing for attracting investment and for reducing compliance costs for investors. So I have no ambiguity in my mind about that at all.

In terms of comparisons with other agreements, I am not quite certain what you were getting at, but we have some other bilateral agreements. With Singapore we bound our current arrangements as at this current time we did not make progress in liberalising them. This is a quasi political economic judgment on my part, so in that sense it is a personal opinion, but it was always going to be a deal with the world's largest economy and largest single investor in Australia that was going to concentrate our minds on whether or not we had scope to raise thresholds and do this sort of liberalisation.

We knew going into these negotiations that investment would be a big issue for the US. It was. We argued, as we have done in the past, that they were misunderstanding how friendly we were to investment and all those sorts of things, but for them it was very important. That presumably reflects a genuine view on their part that there was a restriction here that mattered, or that their investors were telling them mattered, and I think the outcome is a much larger deal on investment than we would have done in the context of any other bilateral deal prior to this.

Senator BRANDIS—Plainly the order of magnitude of this deal is a quantum leap beyond any other trade deal Australia has ever had. I forget who it was, but one of the witnesses we have had who is an economist said to us, 'If this works significantly to Australia's benefit, it is going to be in the services and investment area, rather than in the merchandise trade area.' Do you go along with that view?

Mr Legg—I think that is right. My instincts are in line with that. Those benefits are very hard to measure but, given that services are about 80 per cent of our economy and I suspect are about the same percentage in the US, then even things which on the face of it might not be very sexy, like legal certainty and the nuts and bolts of the services chapter and the investment chapter—putting aside the issues of foreign investment screening—have the potential to be very significant over time, simply because service is the dynamic growth sector of the economy. It is the thing that defines us as a developed economy. Investment is interrelated with that, because

obviously investment is a key way in which you may wish to choose to deliver services. So I think that is right.

The market access issues are important to those sectors of the economy which gain market access. I will also say that from a Treasury point of view the increased market access to our economy is important to improving disciplines and competitive pressures on the Australian economy. As we have argued consistently that cutting tariffs and protection is generally a good thing, opening up the Australian economy is generally a good thing. In many ways, that is where we will capture a lot of the benefits, quite apart from the access of this or that sector to the American economy. Much, if not all, of the dynamic benefit will come from what we do to ourselves. I certainly feel that it is a lot of those intangibles in the services and investment area where, over time, the integration with the world's largest economy is going to be most important for us.

Senator BRANDIS—You have no hesitation in saying that, from the point of view of the desideratum of liberalising investment, this agreement is significantly beneficial to Australia, regardless of what quantitative quibbles there might be about the figure produced by the modelling?

Mr Legg—Yes. I think the outcome is a positive outcome for Australia.

Senator BRANDIS—Dr Churche, you were the lead negotiator in this area. Are you satisfied that, in this area, the deal that Australia did with the United States was the best deal it would have been possible for Australia to do?

Dr Churche—I certainly think that is a rather hard question, a bit of a hypothetical question. Who knows if we had been doing this 10 years ago, 10 years in the future or under a different scenario—

Senator BRANDIS—That is not what I mean. My question is really narrower. Perhaps I put it badly. I think people are looking for reassurance that, when the negotiating process came to its completion, what Australia signed off on, at least so far as the area of your responsibility was concerned, was the best deal we could have done with the Americans in the circumstances, given our bottom line and their bottom line.

Dr Churche—It is very important to emphasise that, when you look at the services and investment outcome we got here, you see we got everything which every other bilateral FTA partner with the United States has got and we got more. So what we have here on the service and investment front is the most any country has ever got from the United States in an FTA negotiation. That was very important from our perspective when we went into the negotiations. We obviously looked at NAFTA and the FTA negotiations that the US have done with Singapore and Chile. Everything which the United States gave to those countries in their FTA negotiations on service and investment we have in our FTA. There is nothing that we did not achieve in our FTA which those countries achieved. We also have a range of things in our FTA which those countries did not achieve. Certainly, looking at it from that perspective, it is very hard to see how we could have achieved a better outcome on the services and investment front.

Senator BRANDIS—Let me get this very clear. As the lead negotiator for the services and investment sector, your evidence is that this is the best FTA in terms of the benefits to the other party that the United States has ever entered into. Is that what you are saying?

Dr Churche—When you look at the actual commitments in the services and investment chapters and when you look at the degree of reservation which the United States has taken, it has certainly given us as liberal an outcome as has been given with any other FTA. There are a range of areas, particularly professional services and financial services, where we have achieved outcomes which go beyond what the United States has done in other FTAs.

Senator BRANDIS—And you were the lead negotiator? Congratulations, Dr Churche.

Dr Churche—It is very much a team effort, I can assure you of that, not just of our department but very many other agencies.

CHAIR—To borrow a phrase from Ronald Reagan, you would have been in 'deep doo-doo' if you had come here and said we have got a worse deal than we could have got. Of course we expect you to get the best deal you could have got. But there are some wider questions about whether this deal is the best deal we could have got had we not had the deadline to close the deal in the highly charged political atmosphere of an election campaign kicking off in the United States where there is less wiggle room for a US President to be bolder on things than his rhetoric would have led us to believe he would want to be when the political agenda starts crashing in around him. But that is a matter for us to give some thought to at our level. I have a question for you, Mr Legg. Do you agree with the Centre for International Economics assumption that our concessions on foreign investment screening represent a reduction in the equity risk premium for Australia?

Mr Legg—I agree with the basic premise that increasing thresholds and reducing compliance costs and reducing the level of uncertainty for investors will have some impact on reducing the equity risk premium or should have some impact. The theoretical issue I have no difficulties with. As for the assumption about what size that is, I think their assumptions are not unreasonable. You might come up with a slightly different set of assumptions.

CHAIR—Perhaps you can explain to me why it is that investment review represents an equity risk. Surely it is more likely to be a transaction cost, isn't it?

Mr Legg—I think it was the point that I made earlier. It is not just a review, it is the fact that we could choose to say that you cannot invest or the government of the day could choose to say that they could only invest with conditions that the investor would not want to accept. So our arrangements basically imply a level of uncertainty including the uncertainty of getting their money out when they want to sell in the future, because they may be limited in whom they can sell to. They may want to sell to another foreigner and that might be the best deal for them and we may then be stopping the next foreign interest from coming in and buying their investment. That must have some impact on the risk premium.

CHAIR—Some impact perhaps, yes. How does the CIE report correlate with the National Impact Analysis which says:

Australia's commitments under the agreement with regard to screening of foreign investment are unlikely to have a major impact on US investment in Australia given the very few rejections of investment applications outside real estate.

Mr Legg—It is exactly the same issue as with the RIS that was raised earlier and the Christine Wallace article. My answer would be exactly the same.

CHAIR—In article 11.1.16 the door is left open for investor state dispute settlement. What change in circumstances would trigger further consultations?

Mr Legg—I will leave this to others to answer but, as a general principle, we are very happy that we do not have investor state dispute settlement—that was a big issue for the government and a big issue for our negotiating position. We saw that as a significant plus in the overall package at the end of the day.

CHAIR—I think some of us saw it as an overall plus as well, but the door is left open so how big a plus is it? Is it a plus that can evaporate into a minus?

Dr Churche—With regard to that particular paragraph in the investment chapter, it is very important to emphasise we went into the negotiations very firm in our position that we did not think there was a need for investor state dispute settlement in this agreement. The United States wanted an investor state dispute provision to suit its sort of mechanism. However, the United States was very frank. It did not do this because it saw any particular problems with Australia or in our legal regime, but rather as an issue of precedent from its perspective.

CHAIR—We are not a developing country for a start, so you would not think we would need an investor state provision.

Dr Churche—That is exactly right. There was no debate between the United States and us. The prime reason why this has been included is that in the past these sorts of agreements have been done with developing countries and there has been concern about the lack of integrity of their legal regimes, at least on the part of investors, as well as concerns about corruption or political influence on the judicial processes. At the end of the day we included this provision as a safeguard in case there was to be some sort of change in circumstances. Frankly, the sorts of changes in circumstances would include situations in which either of our countries had corrupt judiciaries or judiciaries which were subject to political influence—scenarios which we certainly are not envisaging in this country.

CHAIR—We are a robust democracy, for God's sake; a corrupt judiciary in Australia is a bit of a stretch.

Dr Churche—That is why, in our view, it is quite clear this provision will never be invoked. That is why it is important to understand where the United States was coming from with its concern about precedent, that there might be circumstances in the future where it wants to say to all countries it is negotiating with that this is where they all need to sit down and have a look at this and say, 'Yes, should we have an investor state mechanism.'

CHAIR—This is a sensitive point. I want to be able to peer into the negotiations at this point and try and read the United States' hand. Let me put the question to you directly: would a

political change in Australia be suffice for triggering consultations on investor state relations or not?

Dr Churche—Absolutely not; based on all the discussions we have had with the United States during the negotiations, I feel very confident in saying absolutely not. It is important for you to understand the negotiating history; we had very long discussions about the scenarios in which investor state disputes might be relevant. A situation where there is just a change in government would be absolutely irrelevant to this sort of thing; it really would be a case where the integrity of your judicial system is affected—that is what we are talking about. The alternative to this is that investors go through the domestic legal process.

CHAIR—So it is the integrity of our judiciary. People can engage in corrupt behaviour and you do not know because you cannot establish that it is corrupt behaviour. For a second country like the United States to come to an opinion, for example, that our judiciary was corrupt, or part of it was corrupt, one would assume there is a set of behaviours that occur in Australia in which we too identify that problem. If it were to arise, perhaps there is an assumption that we cannot deal with it or remedy it, therefore triggering the investor state clause. Is that the type of thing you are talking about—when it is beyond our power to remedy something that we would regard as abhorrent in our judiciary, only then does it come in? Or is it—and this is quite an important distinction—when the Americans divine there is something wrong and then can unilaterally trigger it?

Dr Churche—When you look at the actual article in the investment chapter, it is important to emphasise that there are a number of processes. The thing would only be triggered if there was a change in circumstances. Clearly, if the United States or ourselves—this is something that either of us can trigger—felt that there was a change in circumstances and our investors had concerns about their ability to get justice or due process in the other country, then either country can unilaterally ask for consultations. All the provision provides is that the other country has to be prepared to sit down. The two countries then have to look at the issue and say: 'Has there been some change in circumstances? Is there some merit in establishing some sort of investor state dispute settlement?' There is nothing in here which in any way automatically says there should be or there will be an investor state. All there can be in terms of that trigger mechanism is the right for one country to say, 'I want to have consultation with you,' and for the other country to be prepared to sit down and talk about that.

CHAIR—There is an assumption that people are not going to recklessly or frivolously action this clause. One presumes—and this is the understanding of the negotiators—that they would action it if there were some substantive, objective reason that could be pointed to as justification for so doing. Is that right?

Dr Churche—If, for example, Australia were at some point to say, 'Our investors are raising serious concerns about the judicial process in some US states,' the determiner would be what both countries were hearing from their investors. If their investors were saying that they had real concerns—real perceptions—that they were not getting proper treatment in the legal system of the other country, that is the kind of circumstance in which this might be triggered by either party.

CHAIR—So we could trigger it on the United States, for example.

Dr Churche—Yes.

CHAIR—Is that why we agreed to this clause being included?

Dr Churche—Frankly, we did not see a need for this. Not only do we have confidence in our processes; we also have confidence in the United States' processes. We have heard nothing from our investors to suggest otherwise, so we certainly did not see a need for it. We recognised that the United States had certain concerns for their own investors, particularly the investment community in United States, because they see this as a very important provision. In the other FTAs—the other bilateral agreements the United States is doing—they were concerned about the precedent of having an FTA without such a mechanism. We saw this as something we were prepared to agree to—again, with the very important safeguards that are in that paragraph which say that there is no automaticity to the establishment of a dispute settlement process.

CHAIR—This was a late-breaking development, wasn't it? It came towards the end.

Dr Churche—I would have to say that, right up to the end, the Americans pressed for investor state and we resisted that right to the end. It was done very much at the end of this process.

CHAIR—We are on the record here so, before I put this question to you, let me tell you that it is a loaded question. Can you rule out that this clause will create a future option for an investor state clause to be inserted in the agreement?

Dr Churche—In answering that question, the important thing is that, even if there were not such a provision here—even if the agreement in no way mentioned investor state clearly—this is a bilateral agreement. If at any time in the future the two parties think there is something that they should talk about, they will be able to talk about it. There is no automaticity. All this does is create an opportunity for the two parties to talk if they feel there is something worth talking about. Again, I think it is important to emphasise that there is nothing prescriptive here, even about the content. It does not say whether this should be ad hoc. If it were decided to extend—to have such a thing—and there was agreement between the two parties, there is nothing about whether that mechanism should be permanent, temporary, ad hoc for a particular case, or whatever. None of those issues are addressed here. There is nothing prescriptive. Again, in the event that there is such a discussion—and in our view it is very unlikely—they are all issues that would have to be discussed and agreed to by both parties before anything could happen.

CHAIR—Here is a bit of folklore from the Senate. We have a scrutiny of bills process, in which a committee scrutinises each bill that comes before the Senate. The committee looks for a couple of things. Firstly, we look for the retrospective operation of a piece of legislation. I put my hand up to say I am in favour of retrospective legislation on tax bills to wipe out ill-gotten gains by tax avoiders, but I am in a minority in the Senate on that. By and large, we hold that the retrospective operation of legislation is a bad thing.

Another thing we regard as bad is delegated legislation, where the parliament delegates to some other authority the right to make decisions that commit the country to legislation. As I read this, if this were to be carried by the Senate it would be a classic piece of delegated legislation. That is to say, the parliament delegates to the executive the right to make a decision to impose an investor state clause on Australia. The executive does not have to come back to the parliament in

order to get approval to do so. Am I reading this clause correctly? Is there no requirement to come back to the parliament if an investor state clause is to be inserted?

Dr Churche—If this was ever to be invoked and the two parties said, 'We are going to amend this treaty to incorporate the investor state clause,' and if doing so actually created some treaty rights in that agreement for investors, that would have to be done through the treaty amendment process. That would have to go through our approval procedures, which include going to JSCOT.

CHAIR—So a regulation has to change?

Dr Churche—In terms of the actual content, clearly one would actually have to look at what that mechanism was going to be. I think there are two separate processes here. The first is that, if it were to be incorporated into the treaty at some point in the future, it would have to go through treaty amendment processes as any amendment does. It is the same process. The second is that, even if we were to have such a mechanism, we are already party to a whole range of treaties that provide for such a mechanism and we would obviously have to look at what the outcomes of those discussions were and what sort of mechanism we are talking about.

CHAIR—I understand your reference to JSCOT. But the Senate, for reasons that I do not think it has actually articulated on the record, nonetheless appointed this select committee to have a look at the same thing that JSCOT is having a look at. It obviously did that for the reason that it wants its own chamber to examine this for itself. If there is a regulation that would arise as a consequence of an approval to insert an investor state clause then the parliament has a role—it can allow or disallow that regulation. If it is an amendment to a piece of legislation then the parliament has a role—it can vote for or against it or seek to amend it further. It can do those things that a parliament does.

JSCOT is an advisory body, not a decisive body. It enables the issue to be ventilated in the parliament but not decided by the parliament. The executive still decides as an outcome of the JSCOT process. If you are saying to me that that is the case then it is delegated legislation, I would believe. If there is a regulation that has to be changed then it is not delegated. Can you tell me one way or another? We do not have the legislation yet. For some of the questions we have in mind, we are better off waiting to see the legislation because some of them may be answered when we see the black letter of the bill. But is there a role here in any form on this issue—which is, as you have said, a sensitive one—for the parliament?

Mr Sparkes—You are touching on issues to do with legal questions broader than this particular FTA. Can I invite Mr Stephen Bouwhuis from the Attorney-General's Department to give you an advice on that?

CHAIR—That is fair enough. The Attorney-General's Department should be heard.

Mr Bouwhuis—There would be no legislation or regulation required for an investor state procedure if situations were to change, as Dr Churche has outlined. If such a procedure was seen as desirable by both governments it would require an amendment to the treaty, so it would be required to go back through the treaties process. But, in any event, the decision to establish an arbitration procedure is one for the executive and it would not go before the parliament.

CHAIR—You see my point, don't you? I have respect for the JSCOT process, as I am bound to have, but it is an advisory process to the executive from the parliament; it is not a decision making process. This committee is an advisory process to the Senate, which is a decision making chamber. If we were to carry this in whatever form and it fetches up on our shore as a bill then we are delegating legislation. That is the only point I want to make at this point.

Mr Bouwhuis—There would be no bill for the investor state clause. It would be through the power of the executive. The executive could set up an arbitration procedure tomorrow without going through the parliament.

Dr Churche—On that point, we certainly see nothing here. In relation to any sort of power being created which, in a sense, is not already there, Australia, as Mr Bouwhuis has mentioned, can enter into and create such a thing. We certainly do not read this as creating any sort of delegated power. All we have here is an obligation on each party to be prepared to talk to the other party. I think that is the point to emphasise here. It is not creating any investor state mechanism. This is about an obligation to consult at the request of the other party, if they demonstrate there is some change in circumstances which warrant the consideration.

CHAIR—I understand exactly your point. If we were to go further, we would begin to debate it. I agree with what I think Mr Legg said up-front: moving to an investor state clause is quite a serious move. We are not a developing country. There is no reason to assume that the characteristics of an investor state clause would apply to Australia now or in the future. We do not want one, and that is common ground. But we have a process built into this agreement which could conceivably and reasonably lead to one, if the circumstances to which you have referred were to apply. We have to weigh up, in the overall balance of this agreement, whether or not this type of delegated legislation is an acceptable cost, given how well its hedged and phrased. That is just a question of judgment at the end of the day for the Senate to make. As there are no further questions, thank you all very much for appearing before this committee today. After the break we will move on to intellectual property.

Proceedings suspended from 3.01 p.m. to 3.17 p.m.

CHESTER, Mr Doug, Deputy Secretary, Department of Foreign Affairs and Trade

CHURCHE, Dr Milton, Lead Negotiator, Services and Investment, Department of Foreign Affairs and Trade

SPARKES, Mr Philip, Deputy Chief Negotiator, Australia-United States Free trade Agreement, Department of Foreign Affairs and Trade

CAMERON, Mr James, Chief General Manager, Broadcasting, Department of Communications, Information Technology and the Arts

YOUNG, Mr Peter, General Manager, Film and Digital Content Branch, Department of Communications, Information Technology and the Arts

CHAIR—There are some questions on services. I must apologise because I did not realise that all of you who were here for the session on investment were here as well for questions on services. I thought we were allowing you to get back to your offices earlier, but that was a mistake on my part. The scope of chapter 10, 'Cross-border trade in services', is to exclude:

services supplied in the exercise of governmental authority within the territory of each respective Party.

The definition of 'services' in the FTA is identical to that contained in the GATS; that is:

A service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

Are you happy with that definition of 'services'? Does it adequately reflect services supplied by Australian governments which are excluded from the deal?

Dr Churche—Yes. I think the point to emphasise is this is the same definition that is used in the WTO General Agreement on Trade in Services. That has been around since the early 1990s, so it is a concept that we have a lot of experience with. There have been no problems experienced with that in the WTO. It is certainly something that we think is a very useful term. There is obviously a lot of misunderstanding and a lot of debate about this term, and we are very sensitive to that. I think one of the points to emphasise is that there is nothing in either this chapter or any of the other chapters which in any way stops governments from continuing to provide public services.

We also have a reservation in this agreement to the chapters on cross-border trade in services and investment which also quite specifically reserves the right of governments to provide a range of public services. So we have no reason to doubt the use of this term or to think there will be any problems experienced because of that particular carve-out. It is very important to emphasise that there is actually nothing in the substantive obligations in this chapter which in any way creates problems for public services.

CHAIR—From that answer there is a number of questions that follow. Does the definition adequately protect Australia Post, for example, which provides many services on a commercial basis in competition with others—for example, express post, package delivery type services?

Dr Churche—In relation to Australia Post, I think it is important to emphasise that we actually have a different structure in this agreement from what is in the WTO General Agreement on Trade in Services. Many of the issues that are dealt with in the WTO services agreement are in the investment chapter, not in the cross-border trade in services chapter. In fact when you look at national treatment, cross-border trade in services are things which are done, for example, for a service provided from the United States. A thing like a postal service is very unlikely to be done on a cross-border basis. So your key national treatment obligation in that area would be in the investment chapter, and there is really nothing in that chapter or in the cross-border trade in services chapter which in any way would adversely affect or stop us from continuing to use Australia Post to provide certain monopoly services.

There is also a quite explicit reference in the cross-border trade in services chapter, in article 10.12, where we have some specific commitments on express delivery services. We have a footnote there quite explicitly saying that those express delivery services, for which we have a number of commitments, do not include services reserved for exclusive supply by Australia Post. So there is nothing in any of these chapters which in any way would affect the operations of Australia Post.

CHAIR—So that is an elegant yes?

Dr Churche—Yes—I hope so.

CHAIR—What about public hospitals, which also provide services on a commercial basis in competition with other service suppliers? How are hospitals captured by the definition?

Dr Churche—Again, I emphasise the fact that we do not just rely on that particular definition of a service provided in the exercise of government authority. I would certainly see hospitals as falling within that, but in addition we do have this general reservation. Annex 2 to the cross-border trade in services and the investment chapters talks specifically about a range of public services, including health services. So we have that double protection there in relation to health—and also for a number of other things, such as public education, for example.

CHAIR—So that is another yes.

Dr Churche—Indeed.

CHAIR—Is the fact that they may not be adequately captured by that definition—I think you have given that part of the answer—the reason why health services are excluded from the FTA under annex 2 of the agreement? I think you have answered that question.

Dr Churche—It is a case of both—it is not because we actually see that there is a problem with that definition. But I think that is why it is important to emphasise that we have a different structure here. We also have the investment chapter, and this reservation is to the investment chapter as well as to the cross-border trade in services chapter.

CHAIR—If a service is not listed under the FTA as excluded from the agreement via the annex, and a future Australian government decides the private sector is not delivering that service to an adequate level, can we ever draw that service back into the public domain?

Dr Churche—This is again something which is very important to emphasise—the way in which the GATS operate and the way in which the term 'services supplied in the exercise of governmental authority' is excluded from the cross-border trade in services chapter. We know there is a very vigorous public debate that would like to see us give more meat to that definition. One of the reasons why it is a very generic definition is because those 'services supplied in the exercise of governmental authority' are really going to differ from country to country. We do not need to reach agreement as to what services we are excluding, and they can change over time. What they might be in 10 years time—those services which are provided in the exercise of governmental authority—might be different from what they are today. There might be more services covered by that in 10 years in Australia; there might be fewer. That will depend on decisions made by Australian governments.

CHAIR—So the answer is that it depends on future governments.

Dr Churche—And that remains up to the sovereignty of Australia in terms of our decisions as to what services should be provided by government or in the exercise of government authority and what should not. This agreement in no way prejudges that decision by Australia.

CHAIR—Is there any precedent for it occurring?

Dr Churche—For?

CHAIR—Drawing back.

Dr Churche—In terms of governments, whether in Australia or in other countries, that is something which happens, and there is nothing in this agreement which should in any way prevent those changes.

CHAIR—What you are saying is that it is not precluded?

Dr Churche—Yes, that is right.

CHAIR—I think that dispenses with my obligations to Senator Conroy under that heading. There are no further questions. Thank you again, and I am sorry to have delayed you.

[3.25 p.m.]

CHESTER, Mr Doug, Deputy Secretary, Department of Foreign Affairs and Trade

HARMER, Ms Toni, Lead Negotiator, Intellectual Property, Department of Foreign Affairs and Trade

SPARKES, Mr Philip, Deputy Chief Negotiator, Australia-United States Free trade Agreement, Department of Foreign Affairs and Trade

CORDINA, Mr Simon, Acting General Manager, Intellectual Property Branch, Department of Communications, Information Technology and the Arts

CRESWELL, Mr Chris, Consultant, Copyright Law Branch, Attorney-General's Department

TUCKER, Dr Peter, General Manager, Business Development and Strategy Group, IP Australia

ARBLASTER, Mr Michael, Acting Registrar, Trade Marks, IP Australia

CHAIR—It has been a long day and we are on the home straight so we might get up a bit of a gallop in this section on intellectual property. However, before I turn to intellectual property—this is for you, Mr Chester—this morning we had agriculture and environment and I do not think we put any questions to you on the environment, but in a story from the Environment News Service on 7 May there was a remark attributed to the Australian Conservation Foundation calling upon us to reject the FTA. There are a number of propositions that the Australian Conservation Foundation puts about the FTA, and they are in part related to investment, because the story talks about investment constraints on the environment. I do not want to go through them now, but I just want to indicate that they are here and they are likely to arise in any future Senate debate on the enabling bills. I would like to give you some questions on notice and perhaps you can reply to them.

Mr Chester—Yes, that is fine.

CHAIR—Yesterday we had quite a long session with many of the protagonists of various points of view on intellectual property before us. I am not sure that we came through that necessarily dramatically enlightened, but certainly better informed. If I can go through a couple of questions, I would appreciate your comments. Article 17.4.7 of the agreement commits both parties to introducing or maintaining a number of measures in relation to the circumvention of 'any effective technological measure'. It would seem that the greatest burden of legislative change arising from this section rests with Australia rather than the United States. Is that true; do you agree with that proposition?

Ms Harmer—Yes.

CHAIR—Would I be correct in assuming that the US were the driving force behind the inclusion of this clause, along with most of that chapter of the agreement—they pushed it, we did not?

Ms Harmer—I think it is fair to say that the US had quite significant ambitions for intellectual property in the negotiations, yes.

CHAIR—In the old language, they were the demander, not us?

Ms Harmer—I think it is fair to characterise it in that way.

CHAIR—The committee heard yesterday from a number of witnesses who were keen to see the introduction in Australia of something akin to the fair use provisions established under US law. I was surprised to learn, as I am sure many were, that an act such as recording a television program for later viewing is protected under the US fair use provisions but is not afforded the same protection in Australia. Is that right?

Mr Creswell—Video recording a prerecorded television program for private use, such as for viewing at a later or more convenient time—what we call 'time shift recording'—is technically an infringement of copyright of the prerecorded material, such as a TV program, film or whatever, and of the underlying script—for instance, the script read by a newsreader in a live newscast. However, in the case of a live transmission of, say, a sporting program, which is quite a common thing, there is a provision in the act which exempts the private copying of a live TV program from infringing the broadcast copyright.

CHAIR—So, being of the Australian Rules football religion, I can record a West Coast Eagles match and I am fine. I can come back and view it later.

Mr Creswell—Yes, if it is live.

CHAIR—Sometimes in Perth you get them on delayed telecast.

Mr Creswell—As soon as there is any recording, even if it is a half-hour deferment or, of course, if advertisements are slotted in, you are into the arena of prerecorded material. An action replay is a prerecorded bit of program material.

CHAIR—So if an action replay is embedded in a live recording you are still caught?

Mr Creswell—It is not embedded. I suppose it is interposed in a live recording. So if you see that mark again or something like that you are into the arena of prerecorded material.

CHAIR—And then you are in breach?

Mr Creswell—Technically, yes.

CHAIR—You are, or you are not.

Mr Creswell—I suppose the reason I am saying 'technically' is that we are not aware that television or the owners of copyright in the underlying works that are broadcast on television have taken action against people for private time shift copying, although they are entitled to.

CHAIR—It is one thing to be in breach, but if no action is taken against you and no penalty is imposed on you—

Mr Creswell—It is not a criminal infringement. The more serious acts of infringement under the Copyright Act have parallel criminal offence provisions. Private copying for noncommercial use is a civil infringement, not a criminal infringement.

CHAIR—Here I am in public life and I will no longer have a stainless record; but I have to own up. The Friday night football games played at the MCG according to their timeslot are shown in Perth—which is two hours behind Melbourne—two hours or maybe three hours later in a Western Australian timeslot. So if I am out on Friday night or my plane does not get in from Canberra until about 9.15 p.m. and I want to see the first couple of quarters, and I record that match and then watch it—I want to be clear on this—I am in breach?

Mr Creswell—You are in breach of copyright in whatever recorded material you see.

CHAIR—If the owners wanted to take action, they could succeed—they would succeed—in finding I was in breach.

Mr Creswell—Yes. I suspect that the damages would be so small that it would be quite uneconomic for them to contemplate taking action against you.

CHAIR—You have now given me a huge guilt burden. I am in breach, I am a serial offender, and I am only let off by virtue of the fact that the damages are infinitesimal and it is probably not worth the owner of the copyright pursuing me.

Mr Creswell—Yes.

Senator BRANDIS—And you have confessed on the public record.

CHAIR—I have just confessed on the public record. I am an honest man. What else can you do?

Mr Creswell—I do not want to be too pernickety but you are not an offender, because, as I say, it is not a criminal infringement.

CHAIR—If I were to record a live telecast of a match, and a replay of the mark of the day or the goal of the day were inserted in it, I would be all right if I could bleep out that replay, but if I could not I would be in breach?

Mr Creswell—There are also qualifications with regard to substantiality by making an unauthorised copy. It might be regarded as an insubstantial copy, if it ever got to court, which, as I have suggested, is extremely unlikely.

CHAIR—Let me plead guilty again on the public record. There was a top political murder journalistic thriller not so long ago on the ABC called *State of Play* . It ran over three Sunday nights. I fly to Canberra on a Sunday night and cannot watch it—I saw the first two instalments and was hanging by my fingernails wanting to know what the denouement was—so my son recorded it for me in his house and gave me a copy of the recording. I played it when I had spare time after I got home the following weekend. Am I in breach?

Mr Creswell—Not by just simply viewing a copy that somebody else has made.

CHAIR—Is my son in breach?

Mr Creswell—Technically, yes.

CHAIR—If I were an American in America, I would not be in breach though, would I?

Mr Creswell—First of all, I disqualify myself from any authoritative knowledge of US law, but from my reading I understand that it follows from the decision in Universal Studios and Sony that went to the US Supreme Court in the 1980s where they instanced time shift recording as likely to be a fair use. I am not actually aware that there has been a determination on that issue—again, I infer, for the reason that it would seem unlikely that a broadcaster or the owner of copyright on an underlying work would take action against private copying. Of course where somebody, as has become more common now, is downloading material from the Internet for sharing or distribution then that gets copyright owners concerned.

CHAIR—But my understanding is that the Americans have this fair use provision in their law so that, if I were in the United States and wanting to do exactly the things I have just described which I have already done in Australia—I think I have dobbed my stepson in, but that is another matter—I would have the protection of the fair use provisions, wouldn't I?

Mr Creswell—As I say, I understand that is an inference to be drawn. I do not pretend to have begun to undertake a comprehensive study of US law, because it depends on case law and there is nothing specific, as I understand it, in a provision in the US act on fair use which says time shift recording is not infringing. It is not as straightforward as that, as I understand it.

CHAIR—So if someone were wanting to take me to court, I would help define the jurisprudence of the fair use provision by that set of circumstances being decided?

Mr Creswell—That is my understanding. Yes, you would.

CHAIR—The Americans have been the demander on this. We have accepted, after negotiation, a set of provisions as a consequence, but the impact on Australia is different from the impact on American citizens. That raises the question about whether this is a fair deal, I suppose, but that is a matter for some further consideration. In our roundtable yesterday, while you were with us, Mr Creswell, one of the comments made was that the fair use criteria in the United States were bound in by court decisions, which meant that in practical terms the jurisprudence narrowed the entitlement beyond, whereas the provisions that apply in Australia have actually kept a wider entitlement. Are you in a position to tell us whether that is right or wrong?

Mr Creswell—I cannot tell you as to my understanding of the width or the scope of US fair use. My understanding is that they just have this provision which has got a number of criteria for guiding the courts in determining what is fair use but that it is open ended. The possibilities, I understand, could be infinite—you cannot put a limit on where the court might find fair use; whereas in Australia fair dealing is not an exception at large—fair dealing is confined to some specific sets of circumstances, including research or study, which is probably the most well-known one, criticism or view, reporting of news and also the furnishing of legal advice.

CHAIR—The difference, as I understand it—and I am not a lawyer, so you might have to help me over some of these definitions—is that our provision of fair use is defined in black-letter law, so we know what fair use is by those provisions—is that right?

Mr Creswell—We know this much—that fair dealing, as it is in Australian law, has to be for a specified purpose.

CHAIR—And those purposes are defined in law?

Mr Creswell—They are set out, yes. Research and study is not really defined to any extent; in fact, it is still a fairly open question for instance as to whether research is private research for an individual undertaking or whether it could be more commercial or institutional research. There is still some jurisprudence one way or the other on that.

CHAIR—So if, for example with regard to this TV program, *State of Play*, which involved politics and so forth, I could get off a charge of infringement by saying, 'I am a politician and this was a dramatisation of a political event and that was a bit of research on my part,' and I might be able to squeak out of it—is that right?

Mr Creswell—Yes. Of course, there are other things. The amount you copy is also not limitless once the purpose is established. For instance, for criticism and review, it might be in order to quote an entire poem which is a short poem in order to offer a critique of it; whereas it might not necessarily be a fair dealing for criticism or review of a substantial book to quote great slabs of it and just have a comment of a few lines in between. That might look more like making an unauthorised copy.

CHAIR—And if I were a music critic, downloading an entire symphony for the purpose of criticism may be a bit dicey.

Mr Creswell—Do you mean in the aural form or in the written form?

CHAIR—Does it matter? If it is in the aural form and it is the Sydney Symphony Orchestra—

Mr Creswell—And if you are doing a voice critique of it on radio, for instance?

CHAIR—Yes.

Mr Creswell—It would depend.

Mr Cordina—May I jump in here. I think the key in looking at these fair dealing cases is that in Australia we do have the law and it does specify particular purposes under which something is a fair dealing, but each case is looked at on a case-by-case basis and the court would have regard to the extent copied, the purpose of the copying. It is primarily designed to cover non-commercial types of use.

Senator BRANDIS—I would like to go back a couple of answers because something you said rather surprised me. Do you say that if the work is a short work—the example you gave was a short poem—it would not be an infringement of the fair use doctrine to copy the whole of it but if the work is a longer work it might be an infringement of the fair use doctrine to copy substantial parts of it which fall short of the whole? I understand the second part of that, but why should the size of the work be a material fact?

Mr Creswell—It might come about this way: if you have a sonnet of 14 lines, I think it may be impractical to discuss it without reproducing all of it.

Senator BRANDIS—So the test is not—and like Senator Cook, I am not an intellectual property lawyer either—

CHAIR—I am not a lawyer!

Senator BRANDIS—I am not an intellectual property lawyer so I do not know anything more about this area of the law than you do, Senator Cook. The test then is not the magnitude or the proportionality but the necessitous use for fair treatment?

Mr Creswell—The operative word is 'fair'. Even though you have fair dealing for the purposes Mr Cordina recalled, 'fair' is the operative word and certainly that together with the quantum of the work taken and also the nature of the work taken would all factor into the court's determination of whether in the circumstances what was taken was fair.

Senator BRANDIS—I will use Senator Cook's example, I think it was, of a symphony. I think the distinguished retired Deputy Prime Minister Tim Fischer wrote his master of music thesis on Beethoven's Fifth Symphony. If you were treating of a symphonic work with the detail of a master's thesis, you could not treat fairly of it at that level of analytical scrutiny without copying the whole thing for the purpose of the analysis. That would not be an infringement of the fair use doctrine. So the test is the kind of treatment you are subjecting the work to—is that your point?

Mr Creswell—That is certainly a factor of fairness, yes.

Mr Cordina—The element of the amount taken in comparison with the whole is specifically pointed out as one of the factors which the court should have regard to in determining whether or not a fair dealing for research or study is in fact fair. Also under research and study to assist users and assist libraries there is actually a reasonable portion test specified in the legislation which says that if you copy 10 per cent of a work for the purposes of research or study that will be taken to be a fair dealing.

Senator BRANDIS—But that is a kind of a per se standard. You could copy more but then it would be a judgment to be made on a case by case basis.

Mr Cordina—That is exactly right.

CHAIR—I could not copy the whole of the *History of the Decline and Fall of the Roman Empire*, for example. In order to criticise it, I would have to—

Mr Cordina—It would be hard for you to put forward an argument that that was a fair use, I think.

Senator BRANDIS—But your point is that it all depends on what you are doing it for. If it was to prepare a concordance, for example, so that you needed to analyse every single word, it conceivably could be.

Mr Cordina—It is dependent on the facts and it is looked at on a case by case basis.

CHAIR—It is an interesting discussion and perhaps—

Senator BRANDIS—It is a delightful discussion.

CHAIR—It is, and what more could you do to entertain yourselves with it on a Tuesday afternoon? Yesterday I asked a number of specific questions about the agreement and how they affected particular events. I got some sort of answers but I would like to go back over those questions again. They all start with the same phrase, 'If the agreement was implemented,' so I will skip that. If the agreement was implemented would it be illegal to modify a DVD player to allow it to play disks from any region?

Mr Cordina—It would depend on the circumstances of the case. If that modification also allows a primary purpose—perhaps the playing of pirated DVDs—then it would potentially be an illegal activity. I think there was a similar set of circumstances in the case of Sony v. Stevens which involved the modification of a PlayStation console to play PlayStation games. It was put that, in addition to playing PlayStation games which came from regions outside the region in which the PlayStation console was meant to operate games or interact games with, it was able to play pirated games. By virtue of that, that modification was found to be providing a service for a circumvention device that actually is in contradiction to our law, which prohibits the manufacture of and dealing in circumvention devices. So it depends on the actual facts of the case and the circumstances in which that modification takes place.

CHAIR—The actual fact that it turns on is whether I am wanting to do that for the purposes of playing pirated material.

Mr Cordina—That was a factor that was important in the court's consideration in the PlayStation case of Sony v. Stevens. In terms of regional coding itself, if a person is playing a legitimate, non-pirated product, the government's intention would not be for that to fall foul of the laws in relation to technological protection measures. This issue of regional coding is one of the issues that the government will be looking at in terms of the implementation of our

obligations under the free trade agreement whereby we can introduce exceptions to the protections we are providing to technological protection measures.

CHAIR—I will give you an example. As the world stands now, I am travelling, I buy a DVD recorder in Europe and I come back here. I cannot play my DVDs on that recorder but I can go down to the shop and buy exactly the same recorder which is regionally coded for Australia and on which I can play my DVDs. What do I do with the European recorder? Can I go off and modify it and, as long as I am not playing pirated material, be legal?

Mr Cordina—I cannot say what would happen if you were in Europe or how the law in Europe would operate.

CHAIR—But I would just buy one in Europe. I am Australian and I live in Australia but I travel and I buy one in Europe. It will not play my recordings in Australia because it is coded for Europe. The same product is available off the shelf in Australia and is coded for Australia, but I do not want to buy another one. I have already got a DVD recorder. I want to modify it and I do so. Am I acting legally?

Mr Cordina—I do not think I can give you a yes or no answer on that. It would depend on the facts of the case. There was quite a lot of litigation on a similar set of circumstances in Sony v. Stevens to determine whether or not that was in fact illegal. It would very much depend on the circumstances of the case.

CHAIR—There is an economic consideration here. It may well be that the manufacturer of this DVD recorder has divided the world up into regional codes in order to jack up the price in some areas, and I live in one of those areas where the price is being jacked up. So I am paying more for my DVD recorder. Have we sorted that out here?

Mr Cordina—Setting aside the issue of modification, as far as regional coding is concerned the viewing of non-infringing material from other countries is regarded as a legitimate activity whereas the obligations on the FTA are targeting piracy.

CHAIR—How do you explain 17.4.7(a)(i), which is the circumvention measure that controls access? It does not go to making any determination about the intent on piracy.

Ms Harmer—I will perhaps try to provide some clarity in terms of the anticircumvention provisions in the agreement. The anticircumvention provisions include those prohibitions. They also include a list of specific exceptions that we can take advantage of and a mechanism for us to make further exceptions that we consider to be appropriate for the Australian circumstances. The other thing I would add about the anticircumvention provisions is that we very specifically negotiated a two-year transitional period for us to phase in our obligations so that we can take account of those concerns that are very specific to Australia. A broad point—and perhaps it is one that I should have made earlier with respect to the FTA in general and the copyright provisions—is that it is correct to characterise it as having strength in copyright in the FTA but we have also been very careful to ensure that we maintain the ability to put in place exceptions where we regard those to be appropriate to the Australian circumstances.

The other comment I would make with respect to your example, which goes to situations where a copyright holder may divide up regions for the purposes of some sort of price advantage, is that the provisions in the FTA relating to copyright certainly do not ask about the application of domestic competition laws in relation to those activities either. If the copyright owner were considered to be acting in some way that was considered to be anticompetitive they would still be subject to the provisions of the Trade Practices Act.

CHAIR—I was chasing up my own reference. I apologise for this but I must ask you to go to the nub of that explanation again because I did not catch all of it.

Ms Harmer—We have the capacity under the technological protection measure provisions of the agreement, and more generally in relation to the copyright provisions of the agreement, to make exceptions where we regard those exceptions to be necessary and appropriate to the Australian circumstances. Rather than putting in place the US exceptions and the way that the US do things, which I think some stakeholders have suggested might be a good idea, the preferable approach, and the one that we have negotiated in the chapter, is to put in place a list of objective standards that we meet when putting in place exceptions so that we can craft those exceptions to be appropriate to Australia. As you said earlier, what may be appropriate in the US market may not be appropriate in the Australian market and we may need to have different exceptions to balance the interests of our consumers and users.

CHAIR—How do I overcome this point that I have referred to?

Ms Harmer—To the extent that there may be a concern that the provisions in the FTA catch regional coding—as I said, we have two years to put in place these obligations, so I am not definitively saying that the provisions would capture regional coding—we have the capacity to make exceptions where we think that those are necessary. I think it is fair to say it is not the government's intention to prevent people from viewing legitimate copyright material.

CHAIR—If you have to take this on notice, that is fine. Can you direct me to where in the agreement there is the power to make those exceptions?

Ms Harmer—Do you mean the exceptions relating to technological protection measures? I apologise, there is a list of specified exceptions in article 17.4.7(e). It is a little bit difficult to follow. The provision that allows us to make further exceptions, that provides a review mechanism, is in article 17.4.7(e)(viii).

CHAIR—I think that I am aware of those.

Ms Harmer—More generally, the provision in the agreement that relates to the ability to make exceptions to copyright is 17.4.

CHAIR—I have to recall the argument about those. As far as regional coding is concerned, we have the ability to say, 'You can modify your DVD recorder to overcome the regional coding as long as you're not doing it for piracy purposes.' We have the ability to do that—are we doing it?

Ms Harmer—As I said, we have two years to implement the obligations relating to technological protection measures. The way this provision works is that it requires us to put in place a review mechanism so that we can call for public submissions from the community to ask what exceptions the community thinks are appropriate over and above those that are already contained in the agreement. That will be something that we will be doing in the next two years in order to ensure that we have in place appropriate exceptions for Australia. I have no doubt that regional coding will be something which comes up in that context.

CHAIR—Are the Americans required to agree with us?

Ms Harmer—No. The article requires us to have a domestic process. It does not require us to get the agreement of the US to the particular exceptions we choose to put in place.

CHAIR—So it is up to us to manage?

Ms Harmer—Yes.

CHAIR—If we were to adopt this agreement, you would then go off for two years to work out this process. We give you the power to resolve it, but we do not know what the resolution will be.

Ms Harmer—I am not sure that I am in a position to be able to pre-empt the outcome of that review. I think that would be inappropriate.

CHAIR—I am not asking you to do anything that is inappropriate.

Ms Harmer—The important thing for us to emphasise is that that will be a public review and we will allow the community to come forward with the kinds of exceptions that they think are appropriate to Australia.

CHAIR—You may have been in the room earlier when I referred to what, in the Senate, is a general sense of anathema to delegated legislation.

Mr Cordina—They will be considered as part of this two-year implementation process. I think the FTA specifies that the review of the exceptions will be conducted once every four years. It refers to a legislative or administrative process. If these exceptions are implemented through a legislative process then, yes, they would have to go through a bill process, which would obviously be subject to parliamentary scrutiny.

CHAIR—Yes. To go back to my original question, would it require legislation to make it legal to modify a DVD player to overcome regional coding? You might have to take the question on notice. I am not doing this to embarrass you; I am doing this to find out. What I am interested in is the accuracy of the answer. If you have to take the question on notice, please do. But if you can answer it will help me.

Mr Cordina—As part of our implementation of our obligations I think we will be looking at a range of exceptions and whether they are appropriate for introduction, and regional coding would be one of the issues to which the government would need to turn its mind and consider

how an exception would apply if needed. But at this stage it really is a matter for implementation and part of this two-year process in which we will be looking at how we implement the obligation.

Ms Harmer—I would like to add for clarity, and I apologise that I did not point this out before, that article 17.4.7 (e) (viii) provides that that review should operate in the context of a legislative or an administrative review. So I suppose it is possible that that could actually happen through a legislative process that would go to parliament.

CHAIR—Yes. If the agreement were implemented, would it be illegal to sell a DVD player that played disks from any region?

Mr Cordina—I think that multizone players are currently available on the market. I cannot pre-empt how we will implement our obligations, but I would suggest that making such a player illegal would be an unlikely outcome.

CHAIR—Would it be illegal to modify or remove the rights management information contained in a digital media file?

Mr Cordina—It would be illegal under our current law if the removal of that rights management information were done to facilitate copyright infringement. Currently under Australian copyright law we have protection against the alteration or removal of that information.

CHAIR—What if it were not done for that purpose?

Mr Cordina—If it were not done for that purpose, I would have to look at the act to give you a response to that question.

CHAIR—If we get to a point where we are in the committee stage of a bill in the Senate you will actually be asked these questions. It probably would not be asked by me but by someone else. If it were implemented would it be illegal to bypass some of the copyright protection measures applied to music CDs, which are designed to prevent them from being played on a computer?

Mr Cordina—Again, I think this is an implementation issue and related to how the definition of technological protection measures is implemented in our legislation. It is something we will need to look at as part of our implementation process over the two-year period. As Ms Harmer has indicated, that period is an opportunity for various interests to provide their views to government. So we will be balancing a wide range of interests in determining how we implement that legislation.

Ms Harmer—In terms of the implementation, there is probably a two-step process: firstly, whether it would actually be caught by the prohibition; and, secondly, whether we would need to have an exception. But the point that I would make in relation to all of these issues is that the provisions are designed to assist copyright owners to enforce their copyright and target piracy, not to stop people from doing legitimate things with legitimate copyright material.

CHAIR—A general comment I would make is that, knowing my colleagues in the Senate, they do not like to pass legislation which contains too many loose ends and they do not know where all these loose ends are going to lead. If some of their constituents at some future time have a go at them for doing something which they thought they were doing in good faith but which turns out to be wrong, that is an understandable reaction.

One of the problems I am beginning to apprehend from this is that there are still a lot of things unsettled, and you cannot give definitive answers until they are settled. That then raises the question as to whether the Senate would be of a mind to put itself in a position where it did not know the implications of what it was doing and take it on good faith. I do not know how we would resolve that, but I mention it because—

Ms Harmer—I would also add in relation to the changes that we would need to make to our anticircumvention provisions that, in all likelihood, the exceptions would both need to be put in legislation and will both go before the Senate. So at the time we are putting in place the prohibitions on anticircumvention, we would envisage that we will have gone through the first review process to ascertain the exceptions that we would need to put in place. It is difficult to say definitively that the exception will be done through legislation, but I would say that, in all likelihood, that is the way it will happen. I think the way that we had envisaged doing this would have been that that would go through as a package—that is, the additional provisions on anticircumvention and the exceptions.

CHAIR—I accept that some of the questions I am asking cannot be answered until we see the actual bills that are going to implement the proposals; but, nonetheless, they are questions that I think will be put to you at some point and questions on which we will have to make a decision when we frame our recommendations. On the FTA itself, I came to the conclusion yesterday that, under the Copyright Act as it stands, the use of circumvention measures is not illegal but the manufacture, distribution or sale of circumvention devices is. Is that correct?

Mr Cordina—Under the current law?

CHAIR—Yes.

Mr Cordina—Yes, that is right. The prohibition applies to the manufacture and dealing and not the actual use.

CHAIR—We also heard yesterday that the FTA will change this and bind us to a position whereby the manufacture, distribution, sale or use of such devices is illegal. Is that correct?

Ms Harmer—Yes, that is correct. Use will be prohibited except where there is an exception.

CHAIR—Article 17.4.7(e) provides a list of exemptions to the prohibitions on the use of circumvention devices—I think that is the section you referred us to earlier, Ms Harmer—and includes a mechanism for adding new exceptions for non-infringing use under 17.4.7(e)(viii). I ask whether this is the mechanism referred to in the users guide to the agreement when it says:

The Agreement also provides for a review mechanism. The review mechanism will allow the Government to make or introduce new exceptions in addition to those specifically provided for in the Article.

Ms Harmer—That is correct.

CHAIR—One of the witnesses at yesterday's roundtable, Ms Kimberlee Weatherall, who I think was a law lecturer from a Victorian university—I forget which one it was; it is in the *Hansard*—made the following comment in relation to 17.4.7(e)(viii):

> No. 8 is only allowed to be an exception to the act of circumvention and not to the distribution of devices, it seems to me, on my reading of that text—and I am perfectly willing to be corrected if I am wrong.

That was based on her reading of the application of the exemptions in 17.4.7(f). Do you agree with her about that point? I can read the full quote, if you like.

Mr Cordina—It really is a matter of implementation as to the form in which we implement those exceptions. The nature of the scope of exceptions will be something that will be considered as part of the implementation process.

CHAIR—Something that will be considered as part of the implementation process: can you give us a bit more comfort than that? That is still out there in the ether; can you give us an assurance that her complaint will not be, in fact, the order of the day?

Ms Harmer—I am sorry, I have not seen the transcript from the meeting yesterday.

CHAIR—I will ask the secretary to bring it around; it will make it a bit easier for us all. I have got the *Hansard* here somewhere. It seemed to me one of the more important comments that came out of our roundtable yesterday, albeit that it came right at the end. It is on page 39 of the transcript for Monday, 17 May.

Mr Cordina—That leads me back to my earlier statement in that the nature and scope of the exceptions is something which the government will need to consider in that two-year interim period where it looks at how the actual obligations in relation to technological protection measures are implemented.

CHAIR—Okay, I hear your answer and we have been across this a couple of times—that is your answer and I will not dispute it. Thank you for that. But following on from that question, what if a future government wishes to take up the views of Graeme Samuel, from the ACCC? His views were:

> The ACCC believes region coding is detrimental to consumers as it severely limits their choice and, in some cases, access to competitively priced goods …

That is a quote in the *Australian Financial Review* from August last year. If a future government wants to take that up and wants to legislate to specifically allow the use and sale of region free DVD players, then it would seem that they are unable to do this under the agreement. They are allowed to legalise the use of such devices, but not their manufacture or sale. Is that correct?

Mr Cordina—I think it goes back to the nature of the scope of the exception which is, as I indicated, something which would be considered as part of the implementation. The IP chapter

does not alter competition law in Australia, and any competition law can be used to address anticompetitive conduct.

CHAIR—So we would turn Mr Samuel loose on you anyway—or he would turn himself loose?

Mr Cordina—In terms of the application of competition law, that is correct.

CHAIR—Another way that copyright holders are already attempting to restrict the ways in which consumers use purchased media is through the use of rights management and information embedded within their media files. The agreement under 17.4.8 requires that criminal sanctions must attach to any attempt to modify or remove this rights management information. There are specific exceptions listed for limited purposes but no review mechanism, as in article 17.4.7. Is there any way Australia could legislate to allow people to modify this type of information?

Ms Harmer—No, there is no review mechanism that applies in relation to 17.4.8.

Mr Cordina—The rights management obligations are in relation to the removal or alteration to induce or conceal or facilitate copyright infringement. So, in terms of implementing our obligation, we would look at the extent to which we currently meet our obligations under the copyright law as it stands which already provides similar protection against rights management information and, in doing so, we could consider whether or not there would be any need to introduce exceptions to that protection.

CHAIR—Does the FTA then restrict the Australian government from introducing legislation or regulation governing the use of rights management information?

Mr Cordina—To the extent that we manage to remain compliant with our obligations in relation to rights management information under the FTA, I would not imagine that it would. I might also add that the issue of rights management information, in terms of the Australian experience, is one of those areas which has proven to be the least controversial in terms of copyright issues. The protection of rights management information under our current law against the removal or alteration of rights management information or the further distribution of rights management information is not something which, in our Australian experience, has been one of the issues that has been a focus of attention. It is the scope of the technological protection measures that has proven to be more of a controversial area of the copyright law.

CHAIR—I understand that, but the operative point of your answer seems to be that it would restrict the Australian government from legislating in that area.

Mr Cordina—I would really have to look at the terms of the FTA.

CHAIR—Would you please do that. I am not here trying to embarrass you; I am trying to get to the actual meaning of this. I must say I have had a bit of trouble because this is a very difficult section to get across intellectually.

Ms Harmer—Going back to the technological protection measures for which we sought a two-year transitional phase-in, that was because we understand these are quite difficult technical

issues and ones that the community wanted to have input into. It may be worth us offering to provide you with some written advice about our obligations in terms of implementation, if you think that would be of assistance.

CHAIR—That would be useful. One of the things that strikes me in reading all of this is that the Australian law is a bit unsettled itself, so when you bring this type of agreement in it creates a whole range of other new questions. Maybe everyone would feel more comfortable if the law was settled, and if you can shed some light on that, that would be appreciated.

Ms Harmer—Yes, but certainly the desire for us to have a two-year transitional phase was to allow us to have proper time to implement changes. Many people in the community had the kinds of concerns that you are raising, so they were certainly very much in our minds when we were in the negotiations. We will provide some further written advice for you.

CHAIR—Is the government able to legislate against the introduction of rights management information on TV broadcasts?

Mr Cordina—Television broadcasts are the subject matter of copyright, and the application of rights management information under the treaty is in relation to works, performances or phonograms.

Ms Harmer—In the interests of time, we would be willing to respond to these questions if you want to give them to us in writing as questions on notice, if that would be helpful.

CHAIR—Yes, that would be helpful. We can give them to you in writing and, when you peruse the *Hansard* after this session, you might want to enlarge on or provide better and more specific particulars about some of your answers. We would appreciate that too, because this is a hard section and I am trying to get to the bottom of it and make some serious judgments.

Ms Harmer—I understand that. Also, it may be helpful, once we have had the benefit of the transcript from the IP roundtable yesterday, to understand the context of some of the questions. I will just point out, in relation to 17.4(8), that that prohibition is very much in the context of attempts to induce, facilitate or conceal infringements of copyright, so that provision does sit very much in that sort of context of piracy.

CHAIR—Yes. Just going back to this question about taking things on notice and providing written answers, I should warn you fairly, Ms Harmer, that sometimes written answers provide us with even more questions. We do want to get to the bottom of it. There is an art to providing written answers, but this is a serious inquiry; it is not about gamesmanship. I know that you know that.

Ms Harmer—No, I understand that. I think everyone is concerned to make sure that we get to the bottom of it, so I think that that is probably the best way of doing it.

CHAIR—In which case, there are four other questions on this matter that perhaps I will provide you with. If we get a bit of time, I might come back to them. I want to go on to patent issues for the moment, but do you have any questions, Senator Ferris?

Senator FERRIS—I do have some questions on intellectual property. I think it is fair to say that the committee has received some quite substantially conflicting evidence on the effect of the extension of the copyright term from 50 to 70 years after death. What benefits will extending and aligning our copyright term more closely with that of the United States and a number of major partners, including the EU, provide to Australia? We heard yesterday from a panel of people about both advantages and disadvantages. Some people claimed that there were substantial advantages and others claimed substantial disadvantages. Could you outline for us the benefits of harmonisation and what you believe to be the overall net economic impact of the extension of the copyright term for Australia?

Ms Harmer—I think that the key benefit of copyright term extension is in the benefit that that will provide to Australian artists and musicians for the protection of their works, in terms of an extended term of copyright protection and therefore royalties for a further 20 years.

Mr Creswell—Clearly, you cannot characterise term extension as directly beneficial to users. It is indirectly beneficial, insofar as it may encourage creators to greater creativity, and users will have a greater array of works to enjoy.

Senator FERRIS—I suppose I am intrigued by the fact that the views on both sides of this debate seem to be so strongly held.

Mr Creswell—Yes. The American experience—and indeed, I think, before that, the European experience—has probably thrown up these divisions that you refer to. As you have probably heard in the course of the hearings, in the US the legislation was contested all the way to the Supreme Court of the United States on constitutional grounds, which would not apply here, so I understand. Yes, it is divisive.

Ms Harmer—But I would say that copyright term extension is certainly one area of the IP chapter that is of direct benefit to our copyright owners. In terms of the net economic impact, I think you would be familiar with the CIE report, which states that that is actually quite difficult to quantify in the absence of robust economic data about the average economic life of works and the fact that some works are less likely to have strong economic value in the extended term—things like software, for example. Probably not many of us are using 50-year-old software or hope to be doing so in the future, so—

Senator FERRIS—Or even five years old!

Ms Harmer—For that particular class of works, it is unlikely to have a strong economic impact, so I think that is difficult to quantify. Throughout the negotiations for the FTA, we heard various arguments from both industry and users about the potential impact of copyright term extension. One of the ways that I think we have sought to balance those concerns that I would point out is that we have not agreed to claw back information which has entered the public domain. That is something that I think was done in the United States and Europe, but it is something we are not envisaging doing. If things are in the public domain, we are not proposing to bring those back into copyright. Also, I would add that the sorts of exceptions we have within our system, or exceptions that we may put in place in the future—for example, with respect to educational use—will continue to apply throughout that extended copyright term.

Senator FERRIS—Likewise, yesterday, with respect to the Allen Consulting Group's 2003 report, people felt very strongly on both sides of the debate. Do you have any comment to make on their argument that the extension would encourage foreign investment and produce cost savings in managing intellectual property rights through consistency with foreign laws? Again, people sitting along that table yesterday took very strong positions on both sides of that debate. It was quite intriguing.

Ms Harmer—Generally, in relation to copyright and intellectual property laws, we would see an advantage to industry to the extent that similarity of laws creates a more familiar legal environment and certainty about the ability not only to protect rights but to enforce them. To the extent that it creates confidence in the Australian system about the similarity of those laws to those in the US, it could be said to encourage investment in Australia.

Mr Creswell—I presume that one can infer there was a perception of an advantage from harmonisation in the European experience. They were the first to do this. As I understand it—and one needs to have a lot of knowledge to speak authoritatively about European constitutional issues—the constitutional basis for the EC to develop directives on copyright is harmonisation for the purposes of trade within the common market area. Clearly, it seems that the initiative to have harmonisation of the term of protection was driven by the perceived economic advantages of having a harmonised term of protection.

Senator FERRIS—There was some discussion during the roundtable yesterday regarding the provisions of chapter 17 that relate to anticircumvention. Can you briefly outline the indications of this area of the free trade agreement, and have you sought any legal advice on the implications of the anticircumvention provisions?

Ms Harmer—That is article 17.4.7, the provision we were talking about earlier, for which we have a two-year transition period to implement those obligations. I think a number of those issues will be addressed in the questions on notice that Senator Cook has asked. In relation to those provisions, I think it is important to emphasise that the reason we provide prohibition from anticircumvention provisions is that they are seen to assist copyright owners to enforce their rights. Our purpose in providing those provisions is not to allow copyright owners, for example, to do other things that are related to that. In that sense, I guess I am referring back to our comments about the continued application of competition law, which is an area that I know is sometimes raised as a concern: if you strengthen these rights do you therefore allow for abuses? I would argue that the competition laws will still apply.

Senator FERRIS—Kimberlee Weatherall, of the ANU, said in her submission that the negotiation of the IP chapter was a 'failure of sound and transparent policy making' and that it is 'far too detailed and will seriously hinder future IP policy making'. Would you like to respond to that accusation? I imagine you would disagree with that, but would you like to make a comment on it?

Ms Harmer—We certainly would disagree with that and we would argue that, whilst there are criticisms of the IP chapter, intellectual property is a very important sector of our economy, particularly in developing value added exports. I do not see somehow strengthening our IP protection at the same time as providing the ability to make exceptions where they are appropriate in the national interest as a bad policy outcome for Australia at all.

Senator FERRIS—How widely did you consult with the Australian community and business groups on the impact of these changes?

Ms Harmer—We conducted very broad consultations across the community and industry in relation to the intellectual property chapter, as we did across the FTA. I think in the regulation impact statement there is a list of bodies that were consulted, which you could refer to for specifics about whom we did consult with and are continuing to consult with through the implementation phase of the agreement.

Senator FERRIS—Broadly, what has been the response from those consultations?

Ms Harmer—It is fair to say that the response has been unsurprising in the sense that you can see continuing divergent views on some aspects of intellectual property. We have been at pains to explain to those music interests that are concerned that, whilst we have strengthened copyright in some areas, we have retained the ability to make exceptions and that, whilst we have agreed to adopt elements of US law, we have not agreed to implement US law word for word. Therefore, continued consultations with industry about the most appropriate way to do that in the context of our regulatory and legal environment are important.

Senator FERRIS—Am I correct in understanding that the agreement does not compel Australia to change its law in relation to what can and what cannot be copyrighted, that it only pertains to term extension?

Ms Harmer—The agreement goes beyond term extension in what can and cannot be copyrighted. I will ask Mr Creswell to respond to that question.

Mr Creswell—I do not think there is anything in the FTA that alters the sense of a work or other subject matter, but particularly works, having to be original or having to be in a material form or having to have the connection of an author with the jurisdiction. In fact, we do have a different standard of originality. I think I might have heard one of the witnesses yesterday raise this issue of a divergence in standards originality. There is nothing that I am aware of in the FTA to cause us to change that.

Senator FERRIS—There was also some concern expressed yesterday that the language of chapter 17 is very similar to the US Digital Millennium Copyright Act. The implication was drawn that Australia would effectively be adopting America's copyright laws, including their anticircumvention laws.

Ms Harmer—I think, as I said in response to a previous question, the IP chapter does contain elements of the US Digital Millennium Copyright Act. It also contains flexibility for us to implement that in a way that is appropriate for us. So I believe it is an incorrect reading of the IP chapter to think that it requires us to implement US law word for word in our system. Whilst we have treaty level obligations, we will be implementing those within our own legal context.

Senator FERRIS—Yesterday, Mr Cochrane, one of the witnesses from the Australian Libraries Copyright Committee, and who was also from the Australian Digital Alliance, gave evidence during the roundtable discussion. I would like to quote to you what he said and to hear your response. He said:

What we would see with the FTA and the possible changes to Australian law that might be embraced if one followed the chapter 17 provisions, I think, would be an environment in which litigation and action around a number of issues would develop rapidly.

Would you comment on that assertion.

Ms Harmer—I am not sure what the basis for that assertion is, so I cannot see that our implementing the FTA obligations is going to lead to increased litigation at all. I am not sure of the entire context in which Mr Cochrane made those comments.

Senator FERRIS—He only referred to the provisions of chapter 17 at the point at which he made that comment, so I am not able to assist you by clarifying what particular sections of chapter 17 he was referring to.

Ms Harmer—He may have had concerns but I do not think we have any reason to think that our implementation of chapter 17 is going to lead to increased litigation.

Senator FERRIS—So you do not believe that Australia's commitments under the FTA in relation to copyright will create an environment of increased litigation?

Ms Harmer—No.

Senator FERRIS—One of the examples of the impact of term extension, provided yesterday in Dr Matt Rimmer's submission to the committee, was that Winnie the Pooh would have fallen into the public domain in 2006 and that the books are now subject to copyright fees until 2026. Surely this is just an example of how the effects of term extension or copyright users will be fairly narrow. That is, it only applies to a situation where an author has died no more than 50 years ago but less than 70 years ago.

Ms Harmer—I am not actually familiar with when copyright expires on Winnie the Pooh. Certainly to the extent that—

Senator FERRIS—Neither am I. It is not something that I carry around in my head. Accepting Dr Rimmer's claim, that it goes from 2006 to 2026, our discussion centred yesterday around the fact that this term extension on copyright uses was quite narrowly applied.

Ms Harmer—Term extension will apply to copyright works in general. It is not sector specific in terms of the copyright works that it will apply to. I think this gets back to the point that I made earlier and, to some extent, the point that comes out in the CIE report, which is that the impact of copyright term extension will probably vary depending on the kinds of works we are talking about. For example, we would not expect it to have much of an impact on software. But there may be some types of works, even within categories of works, for which there may be some increased costs. Even within a category of works, such as children's books, that would still relate only to those books which continue to be popular after the life of the author plus 50-plus years.

Senator FERRIS—You can argue about the principles of access and affordability—for example, in relation to children's books, because there was some suggestion that children would

pay more for their storybooks. Surely the fact that you could go to a library and borrow Winnie the Pooh books—or Enid Blyton or anybody else of that ilk—or buy those books in a bookshop at a reasonable price puts to rest the access and affordability argument in relation to children's literature.

Ms Harmer—Yes, I think that is correct. In relation to other works, as I said, exceptions to copyright that apply will continue to apply—for example, for libraries and educational institutions.

Senator FERRIS—Some of the submissions from copyright users argue that an extra 20 years means copyright works will be kept out of the public domain and become generally unavailable for reuse, research, study and review by authors, researchers and educators without permission and higher fees being charged. They argue it will inhibit the free flow of ideas and stifle innovation in Australia.

Ms Harmer—To the extent that the uses that people wish to make of that material, as I said previously, relate to exceptions for research and education, that will be no different. Certainly in relation to works that do not fall within those exceptions there may be some increased cost involved in seeking permission to use those works. That is not something that we were to know.

Mr Creswell—Just echoing what I think we might have already said or implied a moment ago, the extension of term does not prevent access in the sense of reading a book. It is not a use of the rights of the copyright owners to read a book or to borrow it from a library. Another thing, perhaps, can be said: a stronger factor or a more decisive factor in access may be the fact that it is out of print rather than whether or not it is in copyright. True it is that if somebody wants to reprint a work in the public domain they will not have to pay the right holder, but it is still a commercial decision in the end whether there will be enough demand to warrant going into print.

Senator FERRIS—Another argument that was mentioned in submissions from copyright users was that Australia is a net importer of copyright and, therefore, the benefits of term extension will flow to big American corporations. Does the fact that, for example, the Disney corporation owns copyright to Winnie the Pooh mean that Australians will necessarily be worse off?

Ms Harmer—As I said earlier, term extension applies to all copyright works, so it will apply also and equally to Australian authors, artists and musicians as it will to Disney corporation and their copyright works. I think that is an important issue to remember. I think our copyright industry is a growing industry. It remains a fact that currently we are a net importer of copyright material, but that may change in the future. Certainly, it is something which our copyright industry strongly supported through the negotiations. Term extension was something that they saw as being beneficial to them.

Senator FERRIS—The CIE report said that the average cost of textbooks would not increase due to the extension of the copyright term, because their economic life usually falls well within the existing copyright term of the life of the author plus 50 years. Would you agree with that?

Ms Harmer—I think that is correct and I think that is probably in a similar category to that of software. I would expect that most textbooks would be well and truly obsolete before they got to 50—let alone 70—years from the death of the author.

Senator FERRIS—We have received a submission from the Council of Australian University Librarians. I would like to put to you a comment that they made in their submission and see whether you would like to respond to it. They said:

> Moral rights provisions, which are recognised in Australian and European intellectual property law, are not recognised in the USA. Although not signalled in the documentation … it appears likely that those provisions will be vulnerable to challenge under the dispute provisions of the FTA. This will again jeopardise the interests of Australian creators in favour of corporate media interests.

How do you respond to that?

Ms Harmer—I have heard that comment and I have to say that I find it quite perplexing. Moral rights are not specifically addressed in the IP chapter, so I have a lot of difficulty seeing how those rights could be somehow subject to dispute resolution under the FTA, which is what I understand that comment to be saying.

Senator FERRIS—Yes. That is the assertion.

Ms Harmer—I have to say that I do not see any foundation for that concern at all.

Mr Creswell—I had not heard that. There was some discussion at the negotiation stage about the reference to moral rights in chapter 17, but I understood that the ultimate outcome was that there was no reference to moral rights in chapter 17.

Senator FERRIS—When you have had the opportunity to have a look at the submission from the Council of Australian University Librarians, if there is any further comment that you want to make I am sure that we would be glad to receive it on that particular assertion. Likewise, we heard evidence from open source software developers yesterday. They argued that the free trade agreement will require Australia to extend our patent laws to a small extent—that is, to all fields of technology—and that this will effectively stifle the open source software industry.

Ms Harmer—I am glad that you raise that question, because it is of concern to us that there is that concern out there. The free trade agreement does not change in any way the scope of what we currently consider to be patentable or what would be patented in Australia. We currently allow patents for software, and there will be no change to that. We are not being required to take a US approach in relation to that type of patent, so I do not think that that concern is well founded. It will be business as usual for IP Australia in terms of granting patents.

Senator FERRIS—The Business Software Association also had a representative at the roundtable yesterday, and they argued that the agreement will introduce measures that will assist in the fight against copyright piracy as well as Internet piracy through the provisions that cover ISP liability. Alternatively, on the other side of the debate, the committee has received evidence that the agreement would compel Australia to significantly extend criminal sanctions into the realm of intellectual property, and that this would significantly impact on a wide range of

innovative activities and that would put very large compliance burdens on ISPs. Do you have any comment to make on those two assertions?

Ms Harmer—In relation to the issue of Internet service provider liability, what the agreement does is put in place a set of rules, if I can call it that, so that Internet service providers, copyright owners and users are clear about their rights and obligations. It puts in place a take-down and notice regime and provides Internet service providers with certain safe harbours. If they comply with those safe harbours then that assists them to limit their potential liability for copyright infringements. I think we would see that very much as being of benefit to ISPs in providing certainty and of benefit to copyright owners in providing the ability for a take-down and notice regime. It would also assist users to have that certainty about how the system works. I would see the ISP provisions as being something that would certainly assist copyright owners to enforce their copyright at the same time as introducing appropriate safeguards for users and ISPs.

In relation to the criminal penalty and procedure provisions in the agreement, we have agreed to extend those provisions. In particular they relate to copyright piracy on a commercial scale, and commercial scale is taken to include significant wilful infringements and infringements for commercial advantage or financial gain. So they very much have the character of a commercial element in terms of those criminal penalties and procedures, and we see that as appropriate in protecting copyright interests.

Senator FERRIS—When the panel have had a chance to look at the *Hansard* from yesterday's roundtable, if there are any other areas of conflicting opinion that you would like to comment on we as a committee I am sure would be pleased to receive them.

CHAIR—I have some concluding questions on patents, and we now move into the deal bracket territory, the PBS and the impacts on drugs and so forth. The Generic Medicines Industry Association, GMIA, raised a question about paragraph 17.10.5 and said that it would enable pharmaceutical patent holders to delay the introduction of generic equivalents. We have had a bit of evidence—we have not sought this evidence but it has come to us—about how the costs reduce dramatically in hospitals when you can move to generics rather than patented drugs. That evidence was related to the emergency clinics at major hospitals. Coming back to this paragraph, it requires that marketing of a generic equivalent 'must be prevented where the product use is claimed'—and the word 'claimed' here is the operative word—'in a patent'. The GMIA argue that this could lead to the appearance of a practice common in Canada known as 'evergreening', whereby drug companies delay the introduction of generic drugs by filing 'new-use patents near the expiry of the original patent'. We did not do very much on evergreening in the roundtable but it is of considerable interest to me. In Canadian law this triggers automatic injunctions on the sale of generics.

The GMIA is concerned that the effects of these provisions may be similar in that they may prevent the sale of generics where a patent is claimed even if the patent has not been tested in court. Paragraph 17.10.5(b) also requires that patent holders be notified if someone applies for marketing approval for a product or if use is claimed in a patent that the patent holder be notified. This would appear to put pharmaceutical patent holders in a position to prevent the granting of market approval to generic drugs. What criteria would the marketing authority use to judge whether a product is claimed in a patent?

Mr Sparkes—I am sorry but we were not prepared for you going back into the PBS issues. Unfortunately, the people who can answer these questions are in that health area. I am afraid we are going to have to take your questions on notice and consult with them.

CHAIR—At least it is in the *Hansard* now. We covered IP in the roundtable yesterday. I always took the interpretation of IP to be pretty broad and to include trademarks, patents and things of that nature. I have put my question and it is a fairly clear question. This word 'claimed' in the agreement seems to open the way to introduce evergreening into Australia, and that is the concern. My other question, were someone here to answer it, would be: how would a generic manufacturer go about getting marketing approval in a circumstance in which the product or use is claimed in a patent but in which they feel the patent is invalid? That is the other side of the same question. We have agreed that we are having an iterative discussion about some of these things and that you will take these questions on notice and reply to us.

Mr Sparkes—Yes.

CHAIR—Thank you all. We will be hearing from you a bit more as we delve into the depths of IP.

Committee adjourned at 4.51 p.m.