LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PUBLIC ACCOUNTS

(Reference: General Agreement on Trade in Services (GATS) with special reference to the ACT)

Members:

MR B SMYTH (The Chair)
MS K MacDONALD (The Deputy Chair)
MS K TUCKER

TRANSCRIPT OF EVIDENCE

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Secretary to the committee:
Ms S Mikac (Ph: 6205 0136)

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents relevant to this inquiry which have been authorised for publication by the committee may be obtained from the committee office of the Legislative Assembly (Ph: 6205 0127)

The committee met at 11.19 am.

PATRICIA RANALD was called.

THE CHAIR: You should understand that these hearings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege. That gives you certain protections, but also certain responsibilities. It means that you are protected from certain legal actions, such as being sued for defamation, for what you say at this public hearing. It also means that you have a responsibility to tell the committee the truth. Giving false or misleading evidence will be treated by the Assembly as a very serious matter.

This morning's proceedings are being recorded by Hansard. I ask that you introduce yourself by giving your full name and the capacity in which you appear. The committee thanks you for coming down and appearing here this morning.

Dr Ranald: Thank you. My name is Patricia Ranald. I am the principal policy officer of the Public Interest Advocacy Centre and I also convene a network of about 75 community, union and other organisations which is known as the Australian Fair Trade and Investment Network. I am appearing today on behalf of the Australian Fair Trade and Investment Network. Do you want me to make a brief opening statement?

THE CHAIR: If you want.

Dr Ranald: I do not want to repeat a lot of the material that you have heard from other witnesses, but I will briefly outline our concerns about the trade in services negotiations. I will also flag some issues which may apply particularly to the ACT, because it has a unique position in terms of in some ways being a mixture of state and local government functions. You have a copy of our written submission which was given to the Senate inquiry, but I also have a paper here done for the Public Interest Advocacy Centre about the impact of GATS on local government. I table that for you. It may be useful.

I thought I would briefly talk about some of the same issues which arise from the US Free Trade Agreement negotiations. I think it is worth particularly state and local government being informed about these because they are more urgent in time and they do have some more serious implications even than the GATS for state and local government.

As you know, the WTO trade in services agreement treats services as traded commodities and it is not designed to pay regard to their social impacts. It is what is known as a positive list agreement, like most WTO agreements, and that is that it has some limitations in that it does only fully cover those sectors and services which are listed in the agreement by each government, but it does commit governments to increasing the range of services listed over time. The current negotiations are about that.

GATS is supposed to exclude public services but, as you know, the definition of public services is ambiguous because it refers to services which are not supplied on a commercial basis or in competition with other service providers and, as you would be

aware, quite a few public services are now supplied in competition or on a commercial basis. There is ambiguity in the exclusion of public services.

Like all WTO agreements, the services covered in GATS are subject to a dispute settlement mechanism. What that means is that governments can complain about the regulation of other governments on the ground that they are a barrier to trade. That is heard by a panel of trade law experts and, if the complaint is successful, governments can be asked to change the regulation and they can face trade penalties up to the value of what the panel estimates in terms of trade loss. In other words, the winner can ban or tax the products of the loser.

In the current negotiations we have a number of concerns. First of all, there is a concern about the process of the negotiations. All WTO negotiations are conducted in secret and it is only because of community campaigning in which AFTINET played a prominent role that the government agreed to release on 1 April this year its initial offers in the GATS negotiations. We will not know the full story about the GATS negotiations until after the negotiations are completed and the whole thing becomes public, but it is a positive step that the community pressured the government to make its initial offer in the GATS negotiations public. That is a positive step in process. We are also demanding that they make all future offers in the negotiations public. The negotiations will go on for the next couple of years at least.

The other positive thing about this offer is that it did not include any new offers from the Australian government to include in GATS health, education, water services for human use, postal services, media or telecommunications. They were all key areas which we were concerned about. However, there is no guarantee that that offer will not change. As I said, we are campaigning to try to get the government to make public any new offers. The government still has not made public the requests that it has made to other governments. So we do not know, for example, if it has requested, say, developing countries to include those sorts of areas.

The second concern about the current negotiations is that there is pressure on governments to expand the areas that they have listed under the agreement. For instance, the European Union made requests to Australia about water services and postal services. The US has made requests about media services and health services. Again, we know about those only because some of those other governments have released their offers, but not all governments have made their requests or offers public.

The second area of concern is about the regulation of services in general, particularly those kinds of essential services I have talked about. Until now there has been some recognition in GATS that services are different and that governments do have some rights to regulate particularly essential services, such as health, education and water. There is a move in the current negotiations to reduce that right to regulate by applying what is called a least trade restrictive test or a necessity test to regulation. We strongly oppose that. The Australian government has, in fact, supported this idea. We strongly oppose it because it would make it easier for governments to challenge regulations around areas such as water services or health services on the ground that they are a barrier to trade.

Thirdly, we are concerned about an issue which has not yet been fully discussed in the negotiation, but it has been flagged in terms of the rules that apply under GATS and definitions that apply under GATS and that is the definition of subsidies. There has been some discussion about defining government funding of public services as a subsidy.

Once something is defined as a subsidy, under WTO rules it has to have applied to it the notion of national treatment; that is, that subsidies should not be just applied to government services or to national providers, but must be also available to transnational investors or service providers. If that were the case, we would end up with a situation of compulsory competitive tendering and hence privatisation of public services. As I said, this proposal was flagged very early on. It has not been discussed in great detail in the GATS subcommittee which is dealing with definitions, but we think that that should be monitored very carefully.

In terms of the impact on the ACT, one of the key things about all WTO agreements is that they do bind all levels of government—state, Commonwealth and local government. Since the ACT covers the functions of state and local government, you should be aware that not only services such as health, education and water could be affected, but also things such as local government planning laws, environmental services, waste disposal, community services, libraries, recreational services. All of those things could potentially be affected, so you would want to ensure that all of those things were not included in any GATS offers and that public services were not included.

I want to move on now to talk about the US Free Trade Agreement, because it actually covers all the areas that I have just discussed in relation to GATS. It is a bilateral agreement that is being negotiated, but it would have a worse impact on services and investment than GATS because, while GATS is a positive list agreement, the USFTA is what is called a negative list agreement; that is, that all services and investment regulation will be included unless it is specifically excluded. It is like the multilateral agreement on investment, it is the same structure, or the North American Free Trade Agreement.

That is very serious for state and local government because it means that state and local government will have to list every service that they want to be excluded from this agreement. It will also apply to government procurement. I am not sure whether the ACT government, as a government, in its purchasing policies has arrangements with local suppliers or uses local services in order to foster local development, but that could also be affected because it has that procurement chapter.

This negative list means that all regulation is effectively frozen at current levels. There are two types of exceptions. There are exceptions which will be exceptions at the current level of regulation. So you can continue to have that regulation, say, for water services or any area, but you cannot increase that level of regulation. That is called the stand still list. There is a second set of exceptions which do permit you to have new regulations.

I will give you one example of where this is being discussed in the USFTA. It is not a state government example. It is in relation to Australian content in audiovisual services. What the US is proposing at the moment is that Australia be allowed to retain its current local content rules for film, television and music, but that for any new media there be no

restrictions. That would mean that we would have a stand still clause for current levels of media, but a future government could not increase the local media content in the current technology, say, of film, television and music, but for digital technology, for instance, there would be no local content rules or there would be less restrictive local content rules. You can see that this structure is very restrictive on the ability of governments to regulate. The US Free Trade Agreement proposes to use the same ambiguous definition of public services as GATS, so all of those problems are still there.

The fourth thing which is worse is that there is a proposal to have an investor-state complaints process as well as the government to government complaints process. The investor-state complaints process is only meant to apply to investments, but it is very draconian because it means that investors can challenge laws and sue governments for damages if they believe that the investment is being harmed by a particular type of government regulation.

The US is using the NAFTA model, the North American Free Trade Agreement model, of investor-state complaints process. Under that process, US corporations have challenged environmental laws. They challenged a Mexican local government planning law which disallowed a proposal for a waste disposal plant and they got damages of $15.6 million from the Mexican local government, which would not have that money. It had to get it from the federal government.

MS TUCKER: That clarifies the question yesterday.

Dr Ranald: The Ethyl Corporation challenged a Canadian government ban on an additive to petrol called MMT and it succeeded in getting the ban lifted and also got damages of $13 million. There is a current case, which has not been concluded, where UPS, which is the giant courier service, is challenging Canada Post on the ground that its subsidised public postal services constitute an unfair competitive advantage and a barrier to trade. Since Australia Post has a similar structure to Canada Post—we have the standard letter delivery service which makes postage affordable for country people—we could be vulnerable to that sort of challenge as well.

I just want to alert you to the fact that with the investor-state complaints process, again, the complaints are heard by a panel of trade experts. It is outside the Australian court system. They look at the issues in relation to—

MS TUCKER: That is different from GATS or the WTO because they do not have that capacity.

Dr Ranald: That is right. In GATS or WTO it is government only. In the US Free Trade Agreement the US government could make complaints about other issues besides investment, but investors would have the right.

MS TUCKER: That is something America and Australia are talking about now.

Dr Ranald: Yes.

MS TUCKER: And they are favouring it.

Dr Ranald: The Americans definitely want it. Australia was willing to agree to some form of it. We have been campaigning hard on it, just like we have campaigned on other issues, such as the pharmaceutical benefits scheme, media content and the regulation of genetically modified organisms. The last one, the regulation of genetically modified crops, is also an area which particularly affects state government because the state governments have the jurisdiction there. Perhaps I should stop now. I just wanted to indicate that all of those issues are worse than the GATS issues and they are planning to finish the negotiations by mid-January, they are saying now, rather than by the end of the year.

I think that you ought to be aware of what kind of consultation is taking place between the federal government and the state governments on these issues. With the Singapore-Australia Free Trade Agreement they completed the agreement without doing the full consultation with states about the exceptions and they have left another year to list all the state government exceptions. I do not know whether you are engaged in that consultation process at the moment, but there should be a consultation process going on to list all the exceptions that state and local government want for the Singapore Free Trade Agreement.

MS TUCKER: That is so interesting. We will just ask our government to tell us exactly what consultation has occurred and what it has said.

Dr Ranald: The same process will have to happen for the US Free Trade Agreement.

MS TUCKER: At least on the exemptions. That should come to the Assembly. Surely we should be involved in the discussion on the exemptions. It is really outrageous!

THE CHAIR: Thank you for that, Pat; it was very interesting. Has UPS sued US Mail?

Dr Ranald: No.

THE CHAIR: Why not? I would assume that US Mail operates a subsidised scheme for a standard letter.

Dr Ranald: I am not sure that they do. I do not know why they haven't, but they certainly have sued Canada Post on the ground of the monopoly on the standard letter, which is essentially a cross-subsidy to rural users.

THE CHAIR: I have to say that I do not know, but I assume that US Mail has a standard letter rate round the country.

Dr Ranald: You may not be able to assume that. I do not know whether it does or not. The US population is more evenly dispersed than the Canadian situation.

THE CHAIR: The GATS proposal would allow a US company, not to sue its own government, but to sue everybody else's government because it is an international trade agreement.

Dr Ranald: Yes, that is true. If UPS had an issue with the US government, it would use the US court system. But the problem with these tribunals from our point of view is that they set up another layer of legal rights for corporations to go to a different forum which mainly looks at trade; it does not look at social or other impacts.

THE CHAIR: You may end up with an American corporation having more rights in Australia than it would have in America.

Dr Ranald: Yes, that is one of the problems with these tribunals, and more rights than Australian corporations would have in Australia, too. An Australian corporation could complain, theoretically, about a US company. We regard these tribunals as an unnecessary addition to corporate rights over governments. Our view is that governments should have the right to regulate and if the regulation is unfair it can be challenged under domestic law.

THE CHAIR: Under existing law rather than having independent tribunals that are not responsible to anyone.

Dr Ranald: That is right, which not only can change laws but also can sue governments for damages. That has a very discouraging or freezing effect on the ability of governments to regulate. If governments are thinking about some form of social regulation and they then get an inkling that they may be sued about it, it will obviously make them more cautious about social regulation.

MS TUCKER: It is very scary for democracy.

Dr Ranald: Yes. It really limits the ability of governments to make laws in the public interest. In that sense it limits democratic rights.

THE CHAIR: The submission from Mr Vaile says that it is probably not true.

Dr Ranald: His submission was only about GATS.

THE CHAIR: Certainly about GATS, where they say that GATS will still allow us to make domestic laws. We will still be able to legislate. We could still override this.

Dr Ranald: That is true; you can still make domestic laws and regulate, but the thing about GATS is that, if you have a law or regulation which another government perceives to be restricting trade, it could be challenged. At the moment, that is not happening, partly because GATS also says that governments do have the right to regulate services and recognises that there is some difference between services and goods in that respect. But, as I said, our worry about the negotiations in GATS is that there are proposals to restrict the right of governments to regulate by applying a harsher test to government regulation, so that this least trade restrictive and necessity test means that it will be easier for other governments to challenge regulation.

The area that is considered reasonable to regulate in under the WTO GATS rules will be less. That is why they are seeking to change the definition or tighten it. That has not happened yet and we are trying to prevent it. The Australian government did say when it

released its initial offer that it would not agree to anything which reduced the right to regulate, but that is a very general statement and we believe that the negotiations have to be monitored very carefully because they did write an earlier paper which supported the application of a least trade restrictive test to government regulation. It was published on their website.

THE CHAIR: Does the document that you are going to provide to the committee contain any reference specifically to the ACT or is it particularly to local government?

Dr Ranald: No, it is looking at local government in New South Wales, but it deals with issues like zoning regulations, libraries, waste disposal and so on. Although it does not apply particularly to the ACT, I think that there may be some services that the ACT government supplies which may be relevant.

THE CHAIR: A lot of this comes back to the definition of what are public services. Have you prepared a definition that you would like to see?

Dr Ranald: It should be services supplied by government. We do not think that it should have those ambiguous clauses which say, "Not in competition with other service providers or on a commercial basis." Again, the WTO and the government keep saying to us that they are not worried about that ambiguity, that they think that it is clear, for instance, that health services provided by government are not covered or education services are not covered, but if you look at the progress of commercialisation and competition in areas like education, particularly in areas like TAFE, but increasingly in other areas of education, like other areas of tertiary education, for example, we believe that that ambiguity should be put to rest.

The danger is that in a situation in which you can have regulatory challenges you may get governments that want to invest in those areas, who want on behalf of their corporations to argue that some areas should not be considered to be public services. That has not happened yet. We are saying that we would like that ambiguity cleared up. In the case of the USFTA it is a much worse situation because, unless you clearly exempt all of those areas that you want to be exempted, they are covered by the agreement.

THE CHAIR: How do future areas that do not even exist at this stage—you mentioned entertainment mediums that we are not even aware of—get included in such an agreement?

Dr Ranald: In the USFTA there is going to be a chapter on what is called e-commerce and the US negotiators, pushed by their industries, are very keen to have no restrictions on e-commerce. E-commerce will cover all these developments like digital technology and so on and it would make a nonsense of local content rules if they did not apply in those areas because in five years most television will be digital.

MS TUCKER: You were talking earlier about the dispute settlement process and the tribunals. I asked the federal public servant about that process and whether it takes into account social and environmental concerns and it is correct to say that basically the decisions will be made based on commercial criteria by people who are qualified in that area. I cannot misrepresent what she said, but my general understanding of what she said

was that the actual process allows the parties to the dispute to choose their advocates, if you like, in a way that ensures that all parties are happy that it is neutral and representative of the concerns.

Dr Ranald: Do you mean advocates or the people hearing the dispute, the panel?

MS TUCKER: What was she saying? No, it was the people hearing the dispute. She said that there are different panels; there is not just one panel. Sorry, I was wrong in saying "advocates". She was saying that they would have a situation in which all parties were happy that the panel would be neutral and able to address the issues of concern. What is your comment on that?

Dr Ranald: It is true that there is a range of people who are eligible to be on panels and the parties to a dispute have some say on who is in the panels, but the pool of people from which the panels are chosen have, above all, qualifications in trade. That is their expertise. So their expertise is not in the environment or social policy. They are not experts in the environment or social policy or other areas. That is just the nature of the WTO. It is a series of trade agreements, so the tribunals that it establishes are staffed by people who are experts in trade law.

We would argue that if you look at the record of their decisions, they pay the most weight to trade and commercial issues, because that is what they are trained to do and that is what the WTO framework does. So it is not just a fault in the individual panellists; it is the whole framework. Our concern is that in some cases what we would regard as social or environmental laws are being judged in a purely trade and commercial context. It is true that WTO rules say that governments can have laws which regulate things like health and the environment, but the way those things are defined is often quite narrow and, again, it is in relation to those commercial and trade rights which are the main concern of the WTO.

MS TUCKER: With the investor-state tribunals or government tribunals—

Dr Ranald: They are not government tribunals.

MS TUCKER: Sorry, with the investor-state complaints process for the free trade agreements, is it going to be a similar disputes process to NAFTA? Is it exactly the same kind of arrangement?

Dr Ranald: It is a similar arrangement, but there are two possible sources of arbitration under those disputes. One is run by the World Bank and the other is run by an agency of the United Nations, but, because they are dealing with trade disputes, the panellists from whom the arbitrators are selected are, again, people with qualifications in trade law. If you look at the decisions that have been made under NAFTA, if you look at the decisions I quoted before—the Mexican decision about local government planning and waste disposal and the other one was the banning of a petrol additive which the Canadian government considered to be dangerous on health grounds—it is very clear that the main concern of the panel was whether the legislation or planning regulation affected the investment rather than whether it was justified on health or environmental grounds.

MS TUCKER: In terms of the consultation processes, we asked question about that of the federal public servant and she explained that the initial offer had been made public and that was an indication of the open processes of the federal government. I did ask her whether, if there were any further offers, they would be made public and what the process would be. My general impression of her answer—once again, I do not want to misrepresent her—was that it would be the same, which would be inclusive and open. I would like your comment on that. Also, I asked why it is that there isn't a much more open process and her response, as I understood it, was that it would reduce their bargaining power and that it is not a useful thing to do. I would like your comment on that.

Dr Ranald: On the first thing, we are urging the government to make public any subsequent offers, but we would like them to consult with people about the offers before they actually make them and to have some knowledge of what is proposed to be in the offer so that we can comment on it. In the case of the first round of offers, the government did consult with a range of organisations, although it tends to have much more structured consultation with industry than it does with community-based organisations or unions. We have asked for consultations and they have consulted with us about various issues, but we tend to have to be the proactive ones.

MS TUCKER: She said that, if people ask.

Dr Ranald: Whereas with industry they tend to have more ongoing structured consultations. We would like a situation in which there was a round of consultation, the government prepared an offer and then it actually discussed it with people or made it public before it made the offer so that people could comment on it.

MS TUCKER: If they have made the offer, can they go back?

THE CHAIR: It is a negotiation, so you can. You can until it is signed.

Dr Ranald: Yes, in a negotiation nothing is finalised until it is actually signed up to. We do not think that the kind of secrecy that has so far pertained is justified. The other justification they use sometimes apart from the negotiating advantage is that it is all commercial-in-confidence because it affects the commercial interests of Australian companies, et cetera. I really do not think that that argument holds up, because the offers do not deal with the situation of individual companies. They normally do not get down to that level of detail. It seems to me that, if governments are negotiating about issues like essential services which affect the regulatory powers and which affect the way in which those services might be delivered to the community, that process should be much more open and accountable, both to parliaments and to the public.

MS TUCKER: Part of the conversation in this committee has been about what happens if, at a later stage, a government takes a strong position contrary to the one which has been agreed and the possibility of getting out of such an agreement. For example, the government in the ACT has changed its policy fairly significantly in terms of outsourcing and the purchaser/provider model. That is an interesting example. Another was given of a tram system collapsing in Victoria and the government took it back for

the public. Would that be possible if an agreement had been signed and what would be the potential for us to be sued in some way?

Dr Ranald: Under GATS, that sort of process would only be affected if that area was actually listed in the agreement as one of the areas covered by GATS.

MS TUCKER: Assume that it was.

Dr Ranald: Under GATS, even if you list an area, you can say that the area will be covered except for this situation or that situation. If there were no restrictions listed and it was fully covered and if a new regulation were introduced or a new form of service provision which other governments perceived as a restriction on their right to invest or trade in services, such regulation possibly could be challenged. But that danger is much greater under the US Free Trade Agreement because all existing regulation is automatically covered unless it is listed as an exception. If your existing regulation at the time of signing was to have compulsive competitive tendering for all government services and a new government was elected which said that it was not going to tender out any more and it is going to bring it all back in-house, that could possibly be challenged on the ground that it is introducing new regulation which is more restrictive.

MS TUCKER: And the investors could sue.

Dr Ranald: Yes, if a particular investor wanted to complain about that, they could not only complain about the law but also sue for damages. It would depend a bit on the exact terms of the agreement, but that is theoretically possible.

THE CHAIR: What is the federal government saying to all your concerns?

Dr Ranald: On the investor-state complaints mechanism they are trying to say that they are going to have a more restrictive form of complaints mechanism, so these sorts of things would be more difficult, but we then say back to them, "Why have it at all? If you are saying that it would not be possible for them to challenge laws in the way that it has happened under NAFTA, why have a complaints mechanism at all? Why not just say that you have access to the normal judicial system in Australia if you think that you are being unfairly treated?"

The US wants a complaints mechanism because they perceive that it has advantages for their investors, although it should be said that there has been concern from some parts of business and certainly from civil society organisations in the US about some complaints that have now been made against the US from Canada, for example, although there are a few of those. It is a very controversial area. They have also said to us that they do not really consider that such a mechanism is necessary between two industrialised countries.

The original thinking behind these investor-state complaints processes was that they were meant to apply in situations or countries where governments did not have an adequate domestic legal system and an investor faced a risk situation of investing, say, in a developing country with a less developed legal system where they may have less legal rights. So the idea was that there would be this international tribunal to protect their legal rights. That is also a dubious justification, but if you accept that justification it can then

be argued that, given that both the US and Australia have very robust judicial systems in terms of international comparisons, it would be entirely unnecessary.

The government indicated to us that they were willing to entertain that argument, but I do not think that they have been successful in winning that argument with the US, because apparently the US is still putting forward a proposal for an investor-state complaints mechanism and they are saying that it would be more restricted than the NAFTA one. Our response to that is: why do you need it at all?

THE CHAIR: Back onto local issues, something like planning. The ACT currently has a moratorium on retail development. We have Civic and five town centres and there is a moratorium on the town centres having any further retail development. If you were the owner of a chain of malls and you were an American, you could see that as a restriction on your trade and come in and go to some sort of tribunal to have the existing policy overturned.

Dr Ranald: That is an area that could be challenged if they could argue that it was a de facto discrimination against new investment and foreign investment. I am not saying that it would happen, but theoretically it could. If there was an investor-state complaints mechanism, an investor could do that.

THE CHAIR: If the policy was not on the exclusion list.

Dr Ranald: Sorry?

MS TUCKER: If you had not excluded planning.

Dr Ranald: Yes.

THE CHAIR: So you have to get your exclusions right.

MS TUCKER: We have not had any discussion about that for the Singapore one, as far as I am aware, and the US one is to be by January. It is terrifying.

THE CHAIR: Thank you, Pat. Is there anything you want to say in conclusion?

Dr Ranald: I do not think so.

THE CHAIR: What should the committee be recommending?

Dr Ranald: We have made a series of recommendations in our submission on both GATS and the USFTA to the Senate. In terms of the urgency of the USFTA, I would certainly urge you to explore what consultation processes are going on and how these exceptions might be listed. The negotiations are not an absolute certainty. You have probably seen all the reports in the media about them. If they do go ahead, all of the exceptions for state and local government will have to be listed in a very short period.

MS TUCKER: What period?

Dr Ranald: I would think in the first couple of months of next year, if not between now and mid-January, unless there is some arrangement like the Singapore one where they say, "We will give you an extra year to include all the state and local government exceptions."

MS TUCKER: What was that?

Dr Ranald: For the Singapore Free Trade Agreement they did not have the time to consult with the states and local government, so they have given them a year from last July.

MS TUCKER: And for the US Free Trade Agreement.

Dr Ranald: I do not know what the arrangement will be there. If the agreement is absolutely finalised by mid-January, as they are discussing, the danger is that there is a very short timeframe.

MS TUCKER: I guess that it is something to be pushing for a reasonable time line if they do it, which they probably will.

THE CHAIR: I thank you for your attendance. I close the public part of the meeting at this time.

The committee adjourned at 12.04 pm.