

Australia–US Free Trade Agreement: Overview of Potential Legal Issues

Australia and the United States may conclude negotiations for a Free Trade Agreement (AUSFTA) this month. While much of the AUSFTA negotiations involve 'market access' issues—direct and explicit trade barriers such as tariffs and quotas—domestic laws that discriminate against the other party's goods and services or are otherwise considered unfavourable to the other party's producers are also on the negotiating agenda. This Research Note provides a brief overview of some potential areas of Australian law that may be affected.

Regulation of Services

Both parties aim to achieve comprehensive bilateral liberalisation of services markets. This is a particularly complicated area of trade liberalisation because the most significant trade barriers to services normally involve regulation. In some circumstances, laws may have a discriminatory effect even though they are intended to meet some other public policy goal. For example, rules governing medical qualifications are intended to ensure quality but may, in effect, discriminate against doctors with foreign qualifications. Liberalisation of services therefore involves a balancing act between retaining the flexibility to make laws governing services and promoting free trade.

Negative List Approach

The AUSFTA will adopt a 'negative list' approach which means that service and investment sectors will be subject to liberalising rules unless they are specifically

excluded. There is likely to be three levels of exception:

- a general 'carve out' for all government subsidies to services (e.g. to universities or hospitals)
- a standstill list which will name those sectors where parties will promise not to make current laws any more discriminatory than they are at present, and
- a reservations list which will name sectors that the parties wish to keep open to discriminatory laws.

The 'negative list' approach has been criticised for 'binding the future' by failing to make provision for regulatory flexibility when it comes to new sectors and emerging technologies. Government cannot know if it will want to enact a discriminatory regulatory scheme for a sector that does not yet exist. However, this argument applies in reverse to the alternative 'positive list' approach—the parties also cannot know if they are prepared to tolerate discrimination in future sectors. The argument is one over the preferred default position—liberal trade or regulatory flexibility. There is likely to be some mechanism to add new sectors to the list as they emerge.

Local Content Requirements

One area of services that has attracted particular attention in negotiations and the media has been Australia's local content requirements for audiovisual media (e.g. television). The Government has indicated that it will ensure that Australia's cultural support laws will not be 'watered down'.¹

Speculation has centred around whether the Government might agree to make local content laws a 'standstill' exception—that is guaranteeing no extension of local content requirements, for example to new media.² In the recent Singapore–Australia FTA (SAFTA), cultural protection was given a complete exemption.

Electronic commerce provisions of the AUSTFA may also affect regulation of certain new audiovisual media. The US–Singapore agreement included commitments to provide national treatment (i.e. non-discrimination) to all digital products other than scheduled programming. Depending on how exclusions are worded, this could prevent any future local content regulation of pay-per-view audiovisual content.

Regulation of Investment

The US Trade Representative (USTR) has outlined its objectives on investment as:

- removal of investment screening (i.e. through the Foreign Investment Review Board) for US investors
- national treatment for US investors in Australia, and
- comparable rights for US investors as would apply to those investors under US law.

The first of these objectives goes significantly beyond the investment provisions agreed by Australia in SAFTA.

As with services, non-discrimination in investment can involve a complicated balance between liberalising and maintaining regulatory flexibility.

Also, the investment chapter is likely to go further than non-discrimination, requiring some agreed minimum rights for investors.

Investor–State Dispute Settlement (ISDS)

The US has requested inclusion of an ISDS process. In short, an ISDS process would allow private investors to apply to arbitrators for compensation from the Australian or US Government for breaches of the investment provisions of the agreement. Such provisions are relatively innovative in international law in that they create rights that can be exercised by private parties against states.

A recent Senate report suggested that an ISDS process would not be required in the AUSTFA as both countries have well-developed domestic legal systems through which private parties can pursue their rights.³ ISDS processes have also been criticised for allowing arbitrators, rather than governments, to determine the correct balance between liberalising and regulatory objectives.

That said, ISDS processes have been included in several previous trade and investment agreements concluded by Australia, including SAFTA.

In terms of what an ISDS might look like, the US Congress' trade negotiation rules indicate that the US will demand a process that is:

- transparent—with requests for arbitration, hearings and decisions all publicly accessible
- open—allowing non-party NGOs, unions and businesses to present *amicus curae* briefs, and
- subject to appeal.

In these respects, the ISDS process would differ from that under the controversial Chapter 11 of the North American FTA.

Intellectual Property (IP)

The USTR seeks a strengthened IP regime in Australia. In particular, the US wants Australia to ratify two

World Intellectual Property Organisation Conventions, adopt tougher penalties and remedies for breaches of IP law and build upon its obligations under the WTO's IP agreement. Based on the US–Chile and US–Singapore FTAs recently concluded, the US is likely to be asking for:

- an increase to the period of copyright protection from 50 to 70 years
- a binding commitment to a five year period (or longer) of 'data exclusivity' for pharmaceutical patents, that is the period in which other drug makers are prohibited from applying for approval of a drug on the basis of safety and efficacy data provided to drug regulators by the patent-holder. Australian law already provides a five year period of data exclusivity
- a requirement that patent-holders be given identity details of others who apply for approval of a generic drug while the patent is still current. This may help the patent-holder to commence legal action preventing or delaying the release of the generic drug, and
- changes to make it more difficult for generic drug-makers to 'springboard' into the market as soon as a patent expires.

It has been argued that even a small delay in the entry to market for generic products could substantially increase the running costs of the Pharmaceutical Benefits Scheme.⁴

Other Regulatory Issues

Briefly, some other regulatory issues that may be dealt with in the agreement include:

- consumer labelling: the US considers certain labelling requirements to be technical barriers to trade. Some groups are concerned that the US may try to impose an obligation to remove Australian laws requiring the labelling of genetically-modified foods⁵

- quarantine: AUSTFA may require the US and Australia to work together more closely on setting quarantine criteria and performing scientific assessments so that quarantine cannot be used as a de facto protection measure, and
- labour and environmental protections: the USTR wants Australia to 'strive to ensure' that its labour and environmental protections will not be lowered to attract foreign investment or gain a trade advantage.

Endnotes

1. *Senate Hansard*, 27 October 2003, p. 16757 (Senator the Hon. R. Hill).
2. *Voting on Trade*, Report of the Senate Foreign Affairs, Defence and Trade References Committee, Senate, 2003, p. 127–130.
3. *ibid.*, p. 134–135.
4. Lokuge, Faunce, Dennis, *A backdoor to higher medicine prices: Intellectual property and the Australia–US Free Trade Agreement*, Australia Institute, 2003. For more information see forthcoming Research Note by Maurice Rickard of the Parliamentary Library on the PBS Scheme and the AUSFTA.
5. C. Hughes, 'What's Wrong with a Free Trade Agreement: GM food labelling', *Consuming Interest*, vol. 97, 2003, p. 28.

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