

Labour and Environment

Introduction

- 17.1 Under Chapter 18 (Labour) and Chapter 19 (Environment) the Parties agree they will ‘not fail to enforce effectively [their] own environmental and labour laws, through a sustained or recurring course of action, in a manner affecting trade between the Parties’.¹
- 17.2 This is the first trade agreement in which Australia has included labour and environment chapters.² DFAT informed the Committee that, in the case of this Agreement, the provisions were included because

labour and environment are both covered in the US Trade Promotion Authority Act, which provides the administration with a mandate which the Congress gives to it to go away and negotiate free trade agreements. The fact that there are these two chapters there does reflect a political compromise. However, another part of that compromise is that the only discipline is not to fail to enforce whatever laws you happen to have on your books. So there is no implication or requirement to do anything other than to enforce your own

1 DFAT, Fact Sheet, viewed on 16 June 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/19_environment_labour.html

2 Mr Stephen Deady, *Committee Briefing*, 2 April 2004, p. 6.

legislation. In other words, it is not a standards-setting requirement in either labour or environment.³

- 17.3 The Chapters recognise the importance and value of cooperation and consultation on environmental and labour issues.⁴ The Parties retain the right to establish their own domestic environmental and labour standards, and to adapt or modify their own laws.⁵ Neither chapter requires any change to Australian environment or labour law or regulations.⁶
- 17.4 The Committee notes that the majority of evidence received on these chapters support their inclusion in the Agreement. Further, it was stated that these chapters do not go far enough.⁷

Labour

Background

- 17.5 The Chapter aims to ensure that neither Party fails to enforce its labour laws in a manner affecting trade between the Parties.⁸ According to evidence presented to the Committee, its inclusion in the Agreement does not reflect upon Australia's current labour practice.

The provision for a relationship between trade and labour really grew out of the earlier US experience with Mexico, and it was instilled in US legislation as a requirement for all of these agreements. I do not think anybody had it in mind as necessarily applying in the case of Australia. It has to be in there because it is part of the US legislative requirements, but

3 Mr Phillip Sparkes, *Committee Briefing*, 2 April 2004, p. 82.

4 DFAT, Fact Sheet, viewed on 16 June 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/19_environment_labour.html

5 DFAT, Fact Sheet, viewed on 16 June 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/19_environment_labour.html

6 Mr Stephen Deady, *Committee Briefing*, 2 April 2004, p. 7.

7 Ms Liz Turner, *Transcript of Evidence*, 20 April 2004, p. 63.

8 DFAT, *Guide to the Agreement*, p. 107; AUSFTA Article 18.2.1(a).

I do not think Australia was the target country at the time when that was drafted.⁹

Core obligations

- 17.6 Under Article 18.2.1(a), a Party must not ‘fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties.’
- 17.7 This is the only provision of the Chapter subject to dispute settlement under the Agreement. The Committee notes evidence from DFAT that this enforcement refers to domestic laws only, not obligations under international law.¹⁰
- 17.8 The Committee understands that these provisions apply only to governments, not to Australian, American or multinational corporations.
- The mechanisms do not pertain to companies; they pertain to failures of governments to enforce their domestic labour standards. So it would be a matter of a failure on the part of the Australian government to enforce its domestic labour standards.¹¹
- 17.9 The Committee notes statements from witnesses that the obligations of the Chapter do not go far enough.
- The main problem we point out about this is that you can weaken the domestic labour standard, you can reduce it, you can move further away from the ILO standards under the labour chapter of this agreement, and that will not attract any penalty or enforceability. As long as you enforce your weaker, domestic labour standards, you are okay.¹²

Labour standards

- 17.10 Under Chapter 18, the Parties reaffirm their obligations as members of the International Labour Organisation (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)* (ILO Declaration).¹³

9 Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 27.

10 Mr Stephen Bouwhuis, *Committee Briefing*, 2 April 2004, p. 82.

11 Mr Ted Murphy, *Transcript of Evidence*, 20 April 2004, p. 46.

12 Mr Ted Murphy, *Transcript of Evidence*, 20 April 2004, pp. 46-47.

13 AUSFTA, Article 18.1.1.

- 17.11 The Chapter recognises the right of Parties to establish their own labour standards and to adopt or maintain labour laws, and states that Parties shall strive to ensure that these laws are consistent with internationally recognised labour principles and rights.¹⁴ Parties must strive to ensure that their laws are ‘consistent with the goal of maintaining high quality and high productivity workplaces’.¹⁵ Parties retain the right to exercise discretion in their law enforcement.¹⁶

Labour laws

- 17.12 The labour laws to which the Chapter relates are the internationally-recognised rights and principles relating to
- the right of association
 - the right to organise and bargain collectively
 - a prohibition on the use of any form of forced or compulsory labour
 - labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour
 - acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.¹⁷
- 17.13 Labour laws for Australia refer to ‘acts of a parliament of Australia, or regulations promulgated pursuant to such acts, directly related to internationally recognised labour principles and rights’.¹⁸ This covers both Federal and State laws.¹⁹ The Federal Government would be held responsible for a failure to enforce effectively either State or Federal laws. If the US raised a concern regarding the failure of a State government to enforce its laws under Article 18.2.1(a), the Federal Government would consult with the State government in relation to the matter.²⁰

14 AUSFTA, Article 18.1.2.

15 AUSFTA, Article 18.1(2), *Guide to the Agreement*, p. 108.

16 AUSFTA, Article 18.2.1(b).

17 AUSFTA, Article 18.7.1.

18 AUSFTA, Article 18.7.2(b).

19 DFAT, *Guide to the Agreement*, p. 109.

20 DFAT, *Guide to the Agreement*, p. 109.

Dispute settlement and consultations

- 17.14 Dispute settlement provisions are detailed in Article 18.6. These mirror the general dispute settlement provisions of the Agreement contained in Chapter 21. A Party may raise with the other Party any matter arising under the Chapter.²¹ The Parties are encouraged to resolve the matter,²² but where they cannot, the Sub-Committee on Labour Affairs can be convened.²³ The Parties may only use the general dispute settlement provisions of the Agreement where the matter is one arising under Article 18.2.1(a).²⁴
- 17.15 Where a matter goes to the dispute settlement process of the Agreement, panellists chosen to resolve the dispute must have expertise or experience in the relevant matter under dispute.²⁵
- 17.16 Penalties for failure to comply with Article 18.2.1(a) consist of a fine which is to be paid into a fund, to be spent on labour initiatives.²⁶

Procedural guarantees and public awareness

- 17.17 The Guide to the Agreement states that
- in the interests of transparency and procedural fairness, each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to judicial, quasi-judicial, or administrative proceedings for the enforcement of the Party's environmental laws.²⁷
- 17.18 This includes ensuring that its procedures for the enforcement of labour laws are fair, equitable and transparent,²⁸ ensuring that persons with a legally recognised interest in relation to a particular labour matter have access to judicial, quasi-judicial or administrative proceedings,²⁹ providing that parties to such proceedings may seek

21 DFAT, *Guide to the Agreement*, p. 109; AUSFTA, Article 18.6.1.

22 DFAT, *Guide to the Agreement*, p. 109; AUSFTA, Article 18.6.2.

23 DFAT, *Guide to the Agreement*, p. 109; AUSFTA, Article 18.3.

24 AUSFTA, Articles 18.4 and 18.5.

25 DFAT, *Guide to the Agreement*, p. 109.

26 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 21.12.4.

27 DFAT, *Guide to the Agreement*, p. 110.

28 DFAT, *Guide to the Agreement*, p.110; AUSFTA, Article 18.3.2.

29 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.3.1.

remedies to ensure effective enforcement of rights,³⁰ and promoting public awareness of labour laws.³¹

Institutional arrangements

- 17.19 The Joint Committee established to supervise the implementation of the Agreement under Article 21.1.1 may establish a Subcommittee on Labour Affairs to discuss matters related to the operation of the Chapter. The Subcommittee would be comprised of government and agency officials of each Party, and shall normally include a public session.³²
- 17.20 Parties are to designate an office to operate as a contact point with the other Party and members of the public, in order to coordinate on cooperative activities and consider public communications.³³ The Parties may consult with representatives of labour and business organisations on the operation of the Chapter.³⁴ Formal decisions of the Parties regarding the Chapter are to be made public unless otherwise determined by the Subcommittee.³⁵

Labour cooperation

- 17.21 A mechanism for cooperation is established on the basis that the Parties recognise that ‘cooperation provides opportunities to promote respect for workers’ rights and the rights of children consistent with core labour standards of the ILO’. Thus, they agree to ‘cooperate on labour matters of mutual interest and explore ways to further advance labour standards on a bilateral, regional, and multilateral basis’.³⁶
- 17.22 Cooperative activities under the Chapter may include ‘exchanges of information, joint research activities, visits, or conferences, and such other forms of technical exchange as the Parties may agree.’³⁷ Such activities can include work on labour law and practice in the context of the ILO Declaration, and other matters agreed by the Parties.³⁸

30 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.3.3.

31 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.3.4.

32 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.4.1.

33 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.4.2.

34 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.4.3.

35 AUSFTA, Article 18.4.4.

36 AUSFTA, Article 18.5.1.

37 AUSFTA, Article 18.5.3.

38 AUSFTA, Article 18.5.2.

- 17.23 The Committee notes comments from the Australian Services Union that it would welcome a mechanism whereby Australian unions could discuss labour issues with their US counterparts.³⁹

Compliance with the Chapter

- 17.24 The Western Australian Government claimed that current Commonwealth laws are ‘in breach of the spirit and intention of the Labour Chapter’, in reference to collective bargaining.⁴⁰ This allegation relates to the Commonwealth Workplace Relations Act and ILO Convention 98.

- 17.25 Further, it was presented to the Committee that, in the US
- the union officials have strongly condemned this agreement and are fighting against it, but the labour movement in the United States has fought against every trade agreement in recent memory, so this is no exception. But you would probably find it interesting to read this report, because they have all sorts of criticisms of Australian labour law, which they believe will not be affected positively by this agreement. As I think USTR Zoellick puts it, it is maybe going a bit too far to suggest that that is the case.⁴¹

- 17.26 In reference to both the environment and labour chapters, the Committee heard from Alcoa World Alumina Australia that there
- are potential issues that arise for Australia, given our constitutional structure, given that labour and environment laws operate predominantly at the state and territory level. We believe that the FTA will create some challenges of coordination within Australia’s federal system. We acknowledge that the labour and environment provisions are such that it would take a particularly egregious situation, involving a repeated and flagrant abuse of labour or environmental law, before a party would take the matter to an FTA dispute settlement process. But, on a broader front, this is an issue about which we think there needs to be quite careful management at both state and territory level and on the part of business to avoid these particular provisions being

39 Mr Gregory McLean, *Transcript of Evidence*, 6 May 2004, p. 58.

40 WA Government, *Submission 128*, pp. 8-9.

41 Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 26.

able to be used where governments come under pressure from sectional interests which would seek to resort to the provisions.

In particular, it would be an impost on business where business and government need to manage any claims that would be made about a failure to apply environment or labour laws and to apply resources to demonstrate that there was no legitimate basis for the claims. We have seen on the multilateral front how much public campaigns have the potential to damage corporate reputation. This is something that we would not wish to see used through this agreement. It is an additional layer of complexity that will need to be managed sensibly by governments and business.⁴²

Environment

Background

17.27 Among Australia's objectives in entering negotiations was to

seek to ensure that trade and environment policies are mutually supportive by maintaining Australia's ability to protect and conserve its environment and to meet its international environmental obligations.⁴³

17.28 Chapter 19 recognises each Party's right to

establish its own levels of environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies ...⁴⁴

17.29 Under Article 19.1, the Parties undertake to ensure that their laws 'provide for and encourage high levels of environmental protection'. The Chapter contains various provisions aimed at ensuring that Parties do not fail to enforce their respective environmental laws in a way that affects trade between the Parties.⁴⁵ The Parties recognise the importance of multilateral environmental agreements and agree to

42 Ms Meg McDonald, *Transcript of Evidence*, 23 April 2004, p. 41.

43 DFAT, *Guide to the Agreement*, p. 129.

44 AUSFTA, Article 19.1.

45 AUSFTA, 19.2.1(a), DFAT, *Guide to the Agreement*, p. 113.

‘continue to seek means to enhance the mutual supportiveness’ of multilateral agreements to which they are a party.⁴⁶

Core obligations

17.30 The core obligation for each Party under Chapter 19 is that ‘neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties.’⁴⁷ This is the only obligation under the Chapter that is subject to dispute settlement.⁴⁸ The Committee notes evidence from the DFAT that this enforcement refers to domestic laws only, not obligations under international law.⁴⁹

Environmental standards

17.31 Article 19.9 defines environmental laws as

any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through

- the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants
- the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto, or
- the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.⁵⁰

17.32 Under the Chapter, the Federal Government is responsible for a failure to enforce effectively both State and Federal laws. If a concern were raised under Article 19.2.1(a) about failure to enforce a State law, the Federal Government would consult with the State government to which the concern related.⁵¹

46 AUSFTA, 19.8, DFAT, *Guide to the Agreement*, p. 115.

47 AUSFTA, Article 19.2.1(a)

48 DFAT, *Guide to the Agreement*, p. 113.

49 Mr Stephen Bouwhuis, *Committee Briefing*, 2 April 2004, p. 82.

50 AUSFTA, Article 19.9.1.

51 DFAT, *Guide to the Agreement*, p. 114.

- 17.33 Parties retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters'.⁵² They may also continue to 'make decisions regarding the allocation of resources to enforcement of with respect to other environmental matters determined to have higher priorities.'⁵³

Dispute settlement and consultations

- 17.34 Under Article 19.7, a Party may request consultations with the other Party over any matter arising under the Chapter.⁵⁴ If Parties are unable to resolve the matter, they may establish a Subcommittee on Environmental Affairs.⁵⁵ The dispute settlement provisions of the Agreement may only be used if the matter relates to Article 19.2.1(a).⁵⁶
- 17.35 Where a matter goes to the dispute settlement process of the Agreement, panellists chosen to resolve the dispute must have expertise or experience in the relevant matter under dispute.⁵⁷
- 17.36 Penalties for failure to comply with Article 19.2.1(a) are outlined in Article 21.12 of the dispute settlement Chapter. Under that provision, fines for non-compliance are to be paid into a fund to be spent on environmental initiatives in the territory of the Party against whom the complaint was made.⁵⁸

Cooperation

- 17.37 The Parties have agreed to negotiate a Joint Statement on Environmental Cooperation.⁵⁹ They also agree to take into account public comments and recommendations received in relation to their cooperative activities.⁶⁰ Further, the Parties are to share information with each other and the public (where appropriate) on the environmental effects of trade agreements.⁶¹

52 AUSFTA, Article 19.2.1(b).

53 AUSFTA, Article 19.2.1(b).

54 DFAT, *Guide to the Agreement*, p. 115.

55 Article 19.3; DFAT, *Guide to the Agreement*, p. 115.

56 Articles 19.7.4 and 19.7.5; DFAT, *Guide to the Agreement*, p. 115.

57 DFAT, *Guide to the Agreement*, p. 109.

58 DFAT, *Guide to the Agreement*, p. 115.

59 AUSFTA, Article 19.6.1.

60 AUSFTA, Article 19.6.2.

61 AUSFTA, Article 19.6.3.

Procedural guarantees and public awareness

17.38 The Guide to the Agreement states that

in the interests of transparency and procedural fairness, each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to judicial, quasi-judicial, or administrative proceedings for the enforcement of the Party's environmental laws.⁶²

17.39 This includes ensuring that its procedures for the enforcement of environmental laws are fair, equitable and transparent,⁶³ ensuring that persons with a legally recognised interest in relation to a particular matter have access to judicial, quasi-judicial or administrative proceedings,⁶⁴ providing that parties to such proceedings may seek remedies to ensure effective enforcement of rights,⁶⁵ and promoting public awareness of environmental laws.⁶⁶

Measures to enhance environmental performance

17.40 Under Article 19.4, the Parties agree to encourage the development of 'flexible, voluntary, and market-based mechanisms' that 'encourage the protection of natural resources and the environment.'

17.41 Friends of the Earth Melbourne appeared before the Committee, raising concerns with this provision.

Article 19.4 encourages US and Australian governments to engage in voluntary approaches and market based mechanisms for environmental protection. We have a concern about voluntary mechanisms for environmental protection. We believe, based on global practice and the practice of the Australian government and also practices of corporations, that voluntary and market based mechanisms for environmental protection are flawed. One good example of how such voluntary mechanisms are flawed is that we do not believe that they provide protection for the environment.⁶⁷

62 DFAT, *Guide to the Agreement*, p. 116.

63 DFAT, *Guide to the Agreement*, p. 116; AUSFTA, Article 19.3.1.

64 DFAT, *Guide to the Agreement*, p. 116; AUSFTA, Article 19.3.2.

65 DFAT, *Guide to the Agreement*, p. 116; AUSFTA, Article 19.3.3.

66 DFAT, *Guide to the Agreement*, p. 116; AUSFTA, Article 19.3.4.

67 Ms Liz Turner, *Transcript of Evidence*, 20 April 2004, p. 63.

Institutional arrangements

- 17.42 A Joint Committee to supervise the implementation of the Chapter is established under Article 21.1.1. The Agreement establishes institutional arrangements for the Joint Committee under Article 19.5.1.⁶⁸ Parties are to provide an opportunity for public comment on the implementation of the Chapter.⁶⁹ Formal decisions concerning the operation of the Chapter will be made public unless the Joint Committee decides otherwise.⁷⁰
- 17.43 At its first meeting, the Joint Committee will consider reviews by each Party of the environmental effects of the Agreement.⁷¹ The public will have an opportunity to comment on those effects.⁷²

Environmental impact of the FTA

- 17.44 In addition to comments on the Chapter itself, the Committee heard evidence relating to both consequences of specific provisions for environmental regulation, and the environmental impact of the Agreement as a whole. Environmental matters relating to the AUSFTA Chapters 7 (Sanitary and Phytosanitary Measures), 8 (Technical Barriers to Trade), 10 (Cross Border Trade in Services) and 11 (Investment) are discussed in the chapters of this Report pertaining to those Chapters of the Agreement.
- 17.45 Professor David Shearman of Doctors for the Environment Australia spoke to the Committee about the indirect impacts of trade on the environment.

There are dozens of externalities that the negotiators have not considered. The externality we are particularly interested in is the use of oil in products—in transport, fertilisers and all those things. That can be accounted for. In terms of greenhouse emissions, when we are accounting for externalities like that, we should perhaps be putting a cost to future generations on them of perhaps five times the present cost of oil. If you are transporting stuff across the Atlantic, that is the calculation you should be putting on it.⁷³

68 DFAT, *Guide to the Agreement*, p. 116.

69 Article 19.5.3; DFAT, *Guide to the Agreement*, p. 116.

70 Article 19.5.2; DFAT, *Guide to the Agreement*, p. 116.

71 DFAT, *Guide to the Agreement*, p. 117.

72 DFAT, *Guide to the Agreement*, p. 117; AUSFTA, Article 21.1.7.

73 Prof David Shearman, *Transcript of Evidence*, 22 April 2004, p. 33.

17.46 It was stated that, in the context of the expected environmental effects of increased trade, that Chapter 19 is ‘inadequate’⁷⁴ and that ‘many of the provisions are aspirational and platitudinous’.⁷⁵

17.47 Concerns were also raised with the Committee that no environmental impact assessment of the Agreement has been undertaken. The Australian Conservation Foundation stated that

The Australian Government is remarkably under-prepared to ensure that trade agreements such as the AUSFTA do not have a negative impact on the Australian environment. For example, unlike under US law, there is no Australian legislation in place that requires the Australian Government to undertake a review of the environmental impacts of free trade agreements. Furthermore, unlike under US law, there is no Australian law that sets out Australian environmental objectives for free trade agreements.⁷⁶

17.48 It was further stated that, without an environmental impact assessment, Australia is unable to fully assess the potential environmental impacts arising from the AUSFTA, which may include

- the impact the AUSFTA will have on Australia’s environmental laws and social policy measures...
- the environmental impacts arising from the predicted increase in Australian agricultural output, which will intensify the impacts of a sector that already accounts for a significant proportion of Australia’s current environmental problems. Increases in agricultural production will probably lead to more tree clearing, more salinity, less water for our rivers, more species on the extinction list and a huge repair bill for the Australian public, unless adequate environment measures are in place.
- the transboundary environmental impacts of ‘two-way traffic’ across the Pacific that will increase under the AUSFTA, and
- the increase in greenhouse gas emissions that will arise as a consequence of the concession made to allow US made ‘petrol-guzzling’ motor vehicles into Australia duty free.⁷⁷

74 Australian Conservation Foundation, *Submission 127*, p. 9.

75 Environmental Defenders Office, *Submission 102*, p. 4.

76 Australian Conservation Foundation, *Submission 127*, p. 11.

77 Australian Conservation Foundation, *Submission 127*, p. 11.

- 17.49 Despite the *Guide to the Agreement* stating that the Australian Government will be preparing an environmental assessment of the Agreement in the context of an overall analysis of the Agreement this assessment has not been forwarded to the Committee for consideration during the course of its review of this treaty.⁷⁸
- 17.50 The Committee notes that the CIE Report undertakes some analysis in relation to the environmental impact of the Agreement, finding that the impact on land and greenhouse gas emissions is difficult to quantify, but that the sectoral results projected do not ‘rely on or imply additional land use or clearing; and that ‘a “best guess” would say that Australia experiences a marginal increase in CO2 emission but without the global context’.⁷⁹

Recommendation 22

The Committee recommends that the Government undertake a review of the environmental impact of the Agreement and that legislation be introduced which will ensure that all future free trade agreements contain results of an environmental impact assessment prior to final agreement.

Concluding observations

- 17.51 Regarding the labour and environment chapters, DFAT has stated
- in the FTA, Australia and the US recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental and labour laws. Under AUSFTA Australia retains the right to establish its own domestic environmental and labour standards, and to adapt or modify them.
- Furthermore, in the agreement Australia and the US have agreed to explore ways to support ongoing bilateral, regional

⁷⁸ DFAT, *Guide to the Agreement*, p. 117.

⁷⁹ RIS, p. 19.

and multilateral activities, in particular in the negotiations in the WTO regarding the environment.⁸⁰

- 17.52 The Committee notes that the labour and environment chapters will not prevent Australia from maintaining and adopting labour and environment laws.

⁸⁰ DFAT, AUSFTA – Frequently Asked Questions, viewed on 15 June 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/faqs.html.