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## US Free Trade Agreement Implementation (Customs Tariff) Bill 2004

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The following acronyms are used throughout this Bills Digest.

APEC	Asia-Pacific Economic Community
APVMA	Australian Pesticides and Veterinary Medicines Authority
AUSFTA	Australia–US Free Trade Agreement
CER	Australia/New Zealand Closer Economic Relations Trade Agreement
CIE	Centre for International Economics
DFAT	Department of Foreign Affairs and Trade
FIRB	Foreign Investment Review Board
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GI	Geographical indication
JSCOT	Joint Standing Committee on Treaties
MFN	Most Favoured Nation
PBS	Pharmaceutical Benefits Scheme
SAFTA	Singapore–Australia Free Trade Agreement
STE	State trading enterprise
TCF	Textiles, clothing and footwear (industry)
TGA	Therapeutic Goods Administration
TRQ	Tariff rate quota
USITC	United States International Trade Commission
USTR	United States Trade Representative
WTO	World Trade Organization





# US Free Trade Agreement Implementation Bill 2004

## US Free Trade Agreement Implementation (Customs Tariff) Bill 2004

**Date Introduced:** 23 June 2004

**House:** House of Representatives

**Portfolio:** Foreign Affairs and Trade

**Commencement:** Schedules 1, 2 (Parts 1 and 2), 3, 4, 5, 7 commence on either the 1 January 2005 or the day AUSFTA comes into force, whichever is the latter. Schedule 2 (Part 3) commences after Parts 1 and 2 and the commencement of the *Agricultural and Veterinary Chemicals Legislation Amendment (Name Change) Act 2004*. Schedules 6 and 8 commence on Royal Assent. Items in Schedule 9 commence on different dates, as outlined in items 9–20 of the table in clause 3 of the Bill.

### Purpose

The purpose of these Bills is to make the necessary legislative changes to implement the Australia—United States Free Trade Agreement (AUSFTA).

### Background

#### The Agreement

#### Existing situation and rationale

The United States (US) is Australia's largest trading partner, and has been for a number of years. Trade disputes between the two nations have been relatively frequent and have included some of the disputes most widely publicised in Australia.<sup>1</sup> On a number of occasions in the past, a free trade agreement between the two nations has been mooted, usually at the behest of the US. In late 2000, during the US presidential election and subsequent disputes over the result, the Australian Cabinet reached an in-principle

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decision that Australia would try to secure a free trade agreement with the US if George W. Bush was elected.<sup>2</sup> The logic seems to have been based on the assumptions that Bush and his likely trade appointees would be open to the idea, that the 1999 Seattle Ministerial<sup>3</sup> had demonstrated difficulties with the World Trade Organisation (WTO) process,<sup>4</sup> and that there were significant barriers to bilateral trade that could be reduced to the long-run benefit of the Australian community.

#### Existing trade

Two-way trade between the US and Australia in 2002-03 was A\$44.1 billion, or some 14.1 per cent of Australia's total trade.<sup>5</sup> The US was a more important source of imports (A\$28.6 billion) than a destination for exports (A\$15.6 billion). Japan actually remains Australia's largest merchandise trading partner and export destination, but stronger bilateral services trade makes the US Australia's single largest trading partner overall, services trade partner and source of imports. Merchandise trade with the US has been growing slowly over the past two decades and the relative importance of the US as a trade partner has been declining. However, in services trade the US' importance as a trade partner has been increasing.<sup>6</sup>

Australia is not a highly important partner for the US, with only 1.1 per cent of total US trade, or US\$ 27.9 billion, in 2003, although Australia is the destination for 1.8 per cent of US exports.<sup>7</sup> The US has its largest bilateral surplus with Australia, or second highest depending on how *entrepôt* trade through the Netherlands is treated. Overall, the US, like Australia, runs a large trade deficit.

The US is a more important partner for investment for Australia than for trade.<sup>8</sup> At the end of 2003, the stock of US investment in Australia was some A\$297.3 billion, or 30 per cent of the total, while Australian investment in the US was some A\$211.0 billion, or 42 per cent of Australian investment abroad. It is interesting to note the US was the source of 50 per cent of flows of investment into Australia in 2003 and the destination of 52 per cent of Australian investment abroad.<sup>9</sup>

#### Existing barriers

The WTO's 2002 Trade Policy Review of Australia<sup>10</sup> found that 45 per cent of Australia's tariff lines were duty free, and more than 80 per cent faced duties of 5 per cent or less. While the proportion of trade with the US that is duty free could differ, it is unlikely to be substantially different. None of the econometric studies of AUSFTA examined this (although the 2001 CIE study cites earlier WTO Trade Policy Reviews). Australia applies only one tariff rate quota (TRQ) which is for cheese.<sup>11</sup> The highest tariffs are applied to automobiles and parts, and textiles, clothing and footwear.

In the WTO's 2004 Trade Policy Review of the United States, the US Government estimated that in 2003, 66 per cent of all US imports entered duty free (including those

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under various preferential programs).<sup>12</sup> However, given that Australia is not currently eligible for any preferences, the WTO's estimate that only 31 per cent of all tariff items enter the US duty free is likely to be more applicable to Australia. While the average tariff in the US is low, some tariffs are very high—in the range of 50 to 350 per cent—principally on tobacco, peanuts, dairy products, sugar and footwear. Additionally non-*ad valorem* tariffs (tariffs not expressed as a percentage of the price) tend to be high, TRQs apply to 1.9 per cent of all tariff lines and complicated contingency measures (anti-dumping and countervailing duties) are increasingly applied, often on a long-term basis.

Those sectors of merchandise trade that already face no 'standard' tariff barriers (technically known as Most Favoured Nation tariff barriers) (likely to be some 30–40 per cent of goods) and those services sectors where no improvement on the two nations' *General Agreement on Trade in Services* (GATS) commitments have been made do not stand to gain directly from AUSFTA. This is in addition to those sectors where no reduction in trade barriers was achieved (such as sugar). On the other hand, the increased protections and inter-governmental communications offered by the agreement, and investment that may be stimulated by it, could benefit all sectors.

#### History of negotiations

In 1938, Sir Earle Page made a statement to the House of Representatives that the possibility of a trade agreement between Australia and the US was being studied by both Governments.<sup>13</sup> This was the first of a number of occasions—more often at US initiative<sup>14</sup>—on which the possibility of a free trade agreement was raised, but for various reasons was not implemented. The Government's 1997 White Paper on Foreign and Trade Policy, *In the National Interest*,<sup>15</sup> foreshadowed a shift to increased emphasis on bilateral relations, including in trade. In late 2000, the Cabinet made a decision to propose a bilateral free trade agreement,<sup>16</sup> and this was signified by a speech by Ambassador Thawley in New York in December 2000. Given the chequered history of trade negotiations, incoming United States Trade Representative (USTR) Bob Zoellick required bipartisan support in Australia to consider the matter.

In May 2001, President Bush announced that he was making approval for Trade Promotion Authority (TPA, also known as 'fast-track') from Congress his priority in trade policy. TPA allows the President to negotiate trade agreements with other states, subject to Congressionally-imposed conditions and Congressional oversight, with agreement from the Congress that it will not seek to amend any agreements achieved but simply vote them up or down. A bill giving this authority to the President came into effect in August 2002. In November 2002—almost two years into his four-year term—the President notified Congress of his intention to enter into negotiations with Australia on a free trade agreement. The first round of talks was held in Canberra in March 2003 and agreement between USTR Zoellick and Trade Minister Vaile was achieved on 8 February 2004.<sup>17</sup> The draft text of the agreement was made public on 4 March 2004, and was soon referred to the Joint Standing Committee on Treaties (JSCOT). In May 2004, the Senate set up the

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Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (Senate Select Committee). The Agreement was signed in Washington on 18 May 2004 and the [final text](#) of the agreement was released. JSCOT recommended binding treaty action on 23 June 2004 and these Bills, implementing AUSFTA, passed the House of Representatives the following day. In July 2004, President Bush sent legislation to the Congress, and it was passed in both chambers by large margins. President Bush signed the agreement in Washington on 3 August 2004.<sup>18</sup>

## Economic Studies

### Productivity Commission

The Productivity Commission is the Australian Government's principal review and advisory body on microeconomic policy and regulation. It conducts public inquiries and research into a broad range of economic and social issues affecting the welfare of Australians, including: competition policy, productivity, the environment, economic infrastructure, labour markets, [trade and assistance](#), structural adjustment and microeconomic reform. Although there is a large amount of expertise in the Commission regarding trade issues, no reference to the Commission regarding AUSFTA was made by the Government, despite calls from a number of trade experts.<sup>19</sup> The recommendations of both JSCOT and the Senate Select Committee envisage an enhanced role for the Productivity Commission in trade negotiations.

### Centre for International Economics (CIE)

The Centre for International Economics was commissioned by the Government in 2001 to evaluate the economic impacts of a possible AUSFTA, and Trade Minister Vaile released the results in June 2001. The report found that:

Australian GDP could be 0.33 per cent higher by 2006. This gap would then continue to widen, levelling off by 2010 at 0.4 per cent of GDP – an annual increase in that year of nearly US\$2 billion.

The report is available from the DFAT website.<sup>20</sup> It should be noted that the modelling assumed full implementation of the agreement by 2006 and that all agricultural trade would be liberalised, two important outcomes that were not achieved in negotiations.

### ACIL Consulting

ACIL Consulting prepared a report on the possible FTA for the Rural Industries Research and Development Corporation.<sup>21</sup> The report found far fewer potential benefits from a possible agreement than the CIE study.

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Our assessment is that the economic benefits of the FTA to Australia as a whole are, at best, very finely balanced. The impact on Australian farmers is likely to be negative, especially if domestic political considerations in the US prevent genuinely free trade in the most sensitive industries — sugar, dairy and meat. Given this, the case for the FTA must rest on broader strategic arguments, the articulation of which has not been clear to date.

Trade diversion effects, the diversion of government resources away from other trade initiatives, and the disaffection of countries that on the whole are more important trading partners, all threaten the worth to Australia of a special trade agreement with the US. Note “special”: it is unlikely to be genuinely “free”.<sup>22</sup>

While a number of assumptions differed between the studies, one that seems critical is whether trade liberalisation in and of itself induces productivity improvements in the sectors involved. DFAT went further in criticising the ACIL Consulting study, claiming that its methodology would imply that unilateral trade liberalisation would be harmful to the Australian economy, something contrary to recent experience and theoretical foundation.

CIE (2004)

Once the details of the agreement were known in February 2004, the Government commissioned a new study based on the specific outcomes rather than the general idea of an FTA.<sup>23</sup> Again this was awarded to the Canberra-based CIE. Although many of the earlier assumptions had not been realised—notably, full and rapid agricultural liberalisation—the new report, released at the end of April 2004, found that the actual agreement was likely to lead to greater economic benefits than the earlier study.

The most probable effect on macroeconomic welfare after a decade, as represented by real gross national product (GNP), is an increase of \$5.6 billion per year above what it might otherwise be.

Merchandise and services trade liberalisation contributes an extra \$1 billion per year to both welfare and real GDP above what it might otherwise be a decade out. The size of this effect reflects several things. First, both Australia and the US are already relatively open economies, with average tariffs of 4.5 per cent and 3.6 per cent respectively. Second, when tariffs are removed preferentially, there is some trade diversion and that offsets some of the gain. Third, the services markets in both countries are also relatively open.

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

Indeed, the investment and productivity impacts of the agreement in the CIE’s model were the cause of the bulk of the expected economic gain. This was criticised by some as overstating the case.<sup>24</sup>

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## Dee Report

The Senate Select Committee commissioned its own econometric evaluation of the likely impact of AUSFTA, by Dr Philippa Dee.<sup>25</sup> The first section (and associated appendices) of the Dee report gives a very clear accounting of the trade liberalisation achieved in AUSFTA in various sectors, compared to the two nations' existing commitments under other agreements such as GATS. The conclusion of the report is that:

Based on the alternative assessment, the annual gains to Australia from AUSFTA are a mere \$53 million. This is a tiny harvest from a major political and bureaucratic endeavour. And the figure does not reflect further unquantifiable costs, such as associated with safeguards on manufactured goods and the additional tightening of intellectual property rights.<sup>26</sup>

## USITC

The US government is required to commission the US International Trade Commission (USITC) to produce a report on the economic effects of each free trade agreement negotiated with Congressional TPA. In May 2004 the USITC published its findings regarding AUSFTA.<sup>27</sup> It found a relatively small net gain to the US economy, in the order of US\$ 500 million per year when fully implemented.

## Others

A number of other studies have examined AUSFTA, either in full or in part. A major study commissioned by DFAT looked at the broader non-quantifiable effects of a potential FTA with the US, and was enthusiastically in favour of the agreement.<sup>28</sup> The Australian Manufacturing Workers Union commissioned a study by Dr Peter Brain, released in June 2004, and this found potential costs of A\$ 46.9 billion, mainly from restrictions on the ability to pursue an active industrial policy.<sup>29</sup> An International Monetary Fund study of the impacts of various US FTAs found that AUSFTA was likely to have a small negative effect on Australia, and a similar effect for the global economy.<sup>30</sup> This was caused by trade diversion from Japan, Asia and the EU.

## Timing

The schedule of the negotiations of AUSFTA is extensively covered in a paper by Ann Rann.<sup>31</sup> What is most apparent about the timing is that there was a major delay from the announcement of an intention to seek negotiations (August 2001) and the actual beginning of negotiations (November 2002). A reduction in this delay would have meant substantive negotiations were less affected by the logic of US Presidential (and Congressional) elections in November 2004.<sup>32</sup> In part, this delay was caused by the time taken to grant TPA to President Bush.

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## Position of significant groups

The Coalition parties have made clear their support, for the FTA, despite some apparent reservations before the close of negotiations at the beginning of 2004 related to the non-inclusion of all agricultural sectors in AUSFTA.<sup>33</sup> The Democrats, Greens and One Nation have all expressed opposition to the agreement, focussing on issues such as the Pharmaceutical Benefit Scheme, investment, intellectual property, culture and other issues. The ALP has been reserved about the agreement from the start of negotiations, committing to awaiting the findings of the Senate Select Committee before determining its policy. It has recently announced it will support AUSFTA, subject to two provisos and with a commitment to enact further legislative change if it wins governments (see Concluding Comments, below).

A number of groups have expressed concerns about the potential inability to develop local content restrictions in new media as they evolve under AUSFTA and the “one-way ratchet” (quotas can only go down), although it is possible that these concerns are overstated, or reflect a protectionist motivation. A number of community groups have expressed concern that the increased mechanisms for bilateral consultation regarding quarantine issues may actually lead to a downgrading of existing protections. Some agricultural groups have expressed concern that, although for now single desk arrangements<sup>34</sup> have been preserved, Australia has agreed to cooperate with the US in the WTO on the issue.

## Relative Merits of the FTA as agreed

### JSCOT

JSCOT issued its report on AUSFTA in June 2004, and made 23 recommendations – including recommending binding treaty action to implement AUSFTA.<sup>35</sup> A dissenting report was issued by the ALP members of the Committee (requesting more time for consideration). Some of the most important committee recommendations were:

- the Productivity Commission review the operation of AUSFTA every five years after it comes into operation
- consultation with state and territory governments be improved in future negotiations
- a number of principles must be taken into account in implementation of AUSFTA to ensure the integrity of PBS
- active measures be taken to promote increased market access for sugar, and to improve recognition of qualifications and movement of business people
- local content levels for broadcasting be protected by legislation

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- legislate to protect academic and research access to copyright material, and take other measures to ensure the consistency of proposed changes with other (more lenient) aspects of the US intellectual property system, and
- the Government review the environmental impact of AUSFTA and legislate for this to happen for all future FTAs.

#### Senate Select Committee

The Senate Select Committee released a summary of its findings on 2 August 2004.<sup>36</sup> The ALP members of the Committee raised 43 qualifying recommendations about the agreement as it stands (see endnote 55), while nonetheless recommending the Senate support the agreement (which meant that, with coalition support, the majority of committee members supported the agreement). Among the many concerns the ALP members of the Committee expressed were a number related to intellectual property issues, the PBS and generic drugs, manufacturing protection and local media content.

Thus, both Parliamentary Committees found that a number of aspects of AUSFTA could be improved, even given the finalisation of negotiations. At the same time, both found that on balance AUSFTA was likely to be a net benefit to Australia.

#### Potential Benefits from a Trade Perspective

- As JSCOT argued, AUSFTA is GATS-plus, that is, it goes further than GATS in liberalising services trade by using a *negative list* approach—all sectors are included unless specifically excluded. While this is desirable, there do not appear to be any substantial innovations in AUSFTA in services compared to Australia's other bilateral agreements and there appears to be somewhat less liberalisation from the US perspective than in its recent agreements with Chile and Singapore, particularly regarding mobility of skilled labour.<sup>37</sup>
- The opening up of government procurement markets is desirable from a trade perspective, while safeguards have been included for indigenous Australians, any socially or economically disadvantaged minorities in the US and small business in both countries.
- The inclusion of mechanisms to increase competition policy cooperation is a WTO-plus aspect of the agreement, as JSCOT argued. While this does not go as far as under CER (FTA with New Zealand), this seems appropriate given the different policy structures that currently exist.
- The exclusion of investor-state dispute settlement provisions, such as those that exist in NAFTA, is likely to alleviate concerns many in the community have about trade

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agreements impinging on the ability of governments to legislate on legitimate social issues.<sup>38</sup>

- Increased connection to the largest/most dynamic economy in the world—the US had 20.9 per cent of world GDP in 2003, and 12.4 per cent of world exports (and 4.9 per cent of global population).<sup>39</sup> This increased connection will not only occur through trade, but also through greater two-way investment, greater people-to-people contact (especially at the business level) and greater attention in the media (if only for a limited period) to each other's nation.
- Improve Australian management practices, especially in services and the use of information technology.<sup>40</sup> In particular, US managers have demonstrated a strong preparedness to put new ideas into practice—whether this relates to personnel issues like affirmative action and promotion of women and migrants, and adoption and innovation of new information technologies, or to the generous funding of universities and research.
- Australians have never saved enough to provide for their investment requirements<sup>41</sup> and there is a constant need to find sources of new fixed investment.<sup>42</sup> It has been noted that when the US has signed free trade agreements there has been a tendency for a surge in investment to occur, not just to take advantage of new opportunities opened up by the agreement *per se* (and much attention has been paid in the agreements to investment), but through a 'head-turning' or advertising effect of the discussion and policy process preceding Congressional approval of a deal.<sup>43</sup> Since the relaxation of foreign investment screening need apply only to US firms, existing agreements with New Zealand and Japan may be somewhat compromised and will possibly lead to wider investment deregulation in the long-run. The agreement is also being promoted in the US on the basis that Australian investment in the US will increase.<sup>44</sup>
- Some Australian industries will be given a competitive advantage (with respect to US tariffs/quotas) ahead of their competitors in nations without free trade agreements with the US.<sup>45</sup> For example Australian aluminium producers, with tariff free access from year one, will have an advantage over other exporters from countries without a free trade agreement with the US.<sup>46</sup>
- Contrary to the claims of some critics, AUSFTA may increase Australia's ability to reach trade agreements with important Asian trading partners.<sup>47</sup> This is not only because Australia will have enhanced access to the US market, and will be offering preferential access, say, to US cars over Japanese or Korean cars, but also because Australia has demonstrated that it is now willing to leave sensitive agricultural sectors out of trade liberalisation deals.
- The provision of information to consumers through labelling, for example, of genetically modified ingredients, will be maintained despite US objections.

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- As an FTA partner, DFAT claims Australia will be exempted from US safeguard actions almost automatically.<sup>48</sup> This is a protectionist tool that the US is increasingly invoking. This will be particularly important for those agricultural industries not specifically listed as being subject to safeguard protections.

Potentially negative precedents for WTO and trade policy

One significant problem with AUSFTA from Australia's long term trade perspective relates to the rules regarding free trade agreements in the WTO. Article XXIV of the *General Agreement on Tariffs and Trade* (GATT 1947) requires that free trade agreements (and customs unions) should cover *substantially all trade*. While AUSFTA excludes sugar and a number of services covered under GATS, it would be difficult to argue that it does not meet this criterion. However the *Marrakesh Agreement* (1995) clarified Article XXIV (which had been increasingly ignored by GATT members) and strengthened its discipline.<sup>49</sup> In particular the length of phase-in periods in FTAs (Article XXIV:5(c)) was limited to 10 years *except in exceptional cases*. In cases where parties believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period. It is difficult to see a compelling reason for extended phase-in periods in the case of AUSFTA, especially since both countries are signatories to the (APEC) Bogor declaration committing them to free trade by 2010. Most of the barriers in TCF and automobiles will be phased out over the whole ten years, and of course, a number of agricultural barriers will be in place for at least 18 years.

In its inquiry into the SAFTA, JSCOT praised the agreement for reinforcing Australia's position on free trade in agriculture.

2.18 DFAT acknowledged that neither party actually provides export subsidies to agriculture. Nevertheless, SAFTA reinforces Australia's international stance on comprehensive trade liberalisation and particularly the trade in agricultural goods.<sup>50</sup>

Unfortunately, AUSFTA can be seen as presenting a negative precedent in the sense that Australia has accepted the continuing subsidisation of US agriculture through export credits and the exclusion of sensitive agricultural products from trade agreements. Perhaps coincidentally, exclusion of sensitive products was recently accepted on the Doha agenda. In addition Australia has agreed to 'unprecedented price mechanisms'<sup>51</sup> (safeguards) that will reduce access to the US beef market in the case of quite moderate downward fluctuations for US producers,<sup>52</sup> and there are safeguards for many horticultural products.

Significant concerns have been raised about the value of a bilateral, as opposed to multilateral, approach to trade liberalisation. It has been argued that a piecemeal approach to trade agreements may result in an incoherent system, as a US Congressional Committee advised in relation to the US–Singapore Free Trade Agreement:

A minority believes that, though not a fault of the Agreement, there is a concern that the current melange of global, regional and bilateral international trade agreements

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have different, [in]congruent and conflicting substantive, procedural and enforcement provisions. This creates confusion and uncertainty and encourages global forum shopping and multiple proceedings. Congress should look at this patchwork quilt in its entirety, not only one piece at a time and consider the long term impact these agreements will have on American interests over the long term.<sup>53</sup>

This is similar to the ‘spaghetti bowl’ problem identified with such clarity by Professor Bhagwati: the more FTAs that are signed, the more incompatible standards and rules of origin emerge.<sup>54</sup> This makes ‘free trade’ an administrative mess, and eliminates one of the large efficiency gains possible from moves to free trade. In particular for Australia, sourcing of components from New Zealand suppliers under CER might affect the ability to claim tariff free status for exports. In the TCF case, this effect is expected to preclude 80 per cent of Australian manufacturers making any substantial gains in the US as a result of AUSFTA.

#### Timing problems

It can be argued that Australia might have negotiated a better deal had the negotiations been conducted earlier, with more political distance from the US presidential and congressional elections.<sup>55</sup> At the time of the finalisation of negotiations US beef was facing difficulties due to the outbreak of BSE, and the inclusion of sugar in the US FTA with five Central American countries had raised the lobbying efforts of US sugar producers, who are concentrated in electorally important states.<sup>56</sup>

#### Other concerns

The content of AUSFTA raises several other concerns:

- that Australia has traditionally opposed the inclusion of geographical indications on the trade agenda in the [WTO](#), so it seems somewhat surprising that this has been included in AUSFTA
- Australia’s export monopolies are left in place, although Australia has promised to cooperate with the US in the WTO regarding state-trading enterprises (STEs). Investigation of STEs has been one of the gains the EU could claim in the recent Doha Round negotiations
- while Australia has supported developing countries’ efforts to limit the inclusion of labour and environmental standards in the WTO, as essentially a form of implicit protectionism, these areas have been included, albeit in an attenuated form, in AUSFTA
- generally, the most protected industries—for example, sugar in the US and textiles, clothing and footwear (TCF) in Australia—retain their protected status longer than

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other industries, something that will not encourage the specialisation in areas of comparative advantage that is the basis of gains from trade agreements

- the intellectual property (IP) chapter contains highly prescriptive requirements for Australian IP law. This is especially the case for copyright, where AUSFTA requires the extension of performers' rights, a twenty-year extension to the duration of copyright (longer for photographs), extended criminalisation of infringement and use of circumvention devices and an onerous regime for the policing of internet service providers. This chapter will severely circumscribe Australia's ability to craft IP law that balances the needs of creators and innovators against users and consumers. Given the increasing role that information plays in the economy, this could involve significant costs in the future. Of most concern are those provisions that restrict trade by allowing IP holders to control imports and exports of their products (known as parallel importing). In the area of patents, Australia has agreed to respect patent holders rights to prevent parallel importing. In the area of copyright, Australia may have agreed to a system for protecting 'technological protection measures' that allows copyright owners to effectively prevent parallel importing through 'region-coding' devices.<sup>57</sup>

#### Other Parliamentary Library publications on AUSFTA

For more detail on aspects of the agreement, see these other publications from the Parliamentary Library:

- David Richardson, '[Foreign investment and the Australia–United States Free Trade Agreement](#)', *Current Issues Brief*, No. 7 2003–04, Parliamentary Library, Department of Parliamentary Services, March 2004
- David Richardson, '[Intellectual Property Rights and the Australia–US Free Trade Agreement](#)', *Research Paper*, No. 14 2003–04, Parliamentary Library, Department of Parliamentary Services, May 2004.
- Kate Burton and Jacob Varghese, '[The PBS and the Australia–US Free Trade Agreement](#)', *Research Note*, No. 3 2004–05, Parliamentary Library, Department of Parliamentary Services, July 2004.
- Jacob Varghese, '[Guide to copyright and patent law changes in the US Free Trade Agreement Implementation Bill 2004](#)', *Current Issues Brief*, No. 3 2004–05, Parliamentary Library, Department of Parliamentary Services, August 2004.

#### The Bill

Aside from the merits or demerits of the agreement itself, Parliament also has to consider whether the Bill proposes the best means to implement the agreement. It is important to

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appreciate that the implementation is not merely a technical matter, but also involves policy issues of substance and process.

The provisions of the Bill are analysed in the Main Provisions section below. Observations about those provisions are made in the Concluding Comments section.

## Main Provisions: US Free Trade Agreement Implementation Bill 2004

### Schedule 1—Customs amendments

Schedule 1 of the Bill is comprised of two Parts. Part 1 deals with US originating goods or the rules of origin, implementing Chapter 5 of AUSFTA, and Part 2 deals with the conferring of verification powers in relation to certain trade items (implementing Article 4.3.2 AUSFTA).

#### Part 1—US originating goods

##### Why are the amendments necessary?

Part 1 of the Bill proposes changes to the *Customs Act 1901* in relation to the rules of origin. These amendments reflect the agreements reached under Chapter 5 of AUSFTA, providing comprehensive and descriptive rules to determine the origin of individual products. Under the new scheme, whether a product can qualify as a US originating good would determine whether the product is eligible for preferential customs rates under the *Customs Act 1997*.<sup>58</sup>

##### The proposed amendments

Rule 1. Goods wholly obtained, or produced entirely, in the US (proposed Subdivision B)

**Proposed new section 153YB** stipulates that goods ‘wholly obtained or produced entirely in the US are of US origin’. **Subsection 153YB(2)** provides an exhaustive list of circumstances according to which a good is classified as ‘wholly obtained or produced entirely in the US’.

Rule 2. Goods produced entirely in the US, or in the US and Australia, from ‘originating material’ (proposed Subdivision C)

Goods are considered to be of US origin if they were produced entirely in the US or in the US and Australia, using exclusively originating materials. The term ‘originating material’

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is defined in proposed section 153YA, including, for example, goods which are of US origin and which are used in the production of other goods.

Rule 3. Goods (except clothing and textiles) produced entirely in the US, or in the US and Australia, from non-originating material (proposed Subdivision D)

**Proposed section 153YE** sets out the requirements according to which a good (except clothing and textiles), which was produced entirely in the US, or in the US and Australia, from non-originating material, may qualify as a US originating good. **Proposed subsections 153YE(2), (4) and (7)** stipulate three essential requirements that a US originating good must fulfil, including:

- that the good satisfies the transformation test set out in **subsection 153YE(8)** or, for example, that the non-originating material does not exceed 10 % of the customs value of the goods (**paragraph 153YE(2)(a) and (b)**)
- that the good satisfies the regional value content requirement (**paragraph 153YE(4)**)
- that the good satisfies any other requirement set out in Schedule 1 of the Free Trade Agreement Regulations (**paragraph 153YE(7)**).

Refer to the [Explanatory Memorandum](#) of the Bill for a more detailed discussion of this complex provision and examples.<sup>59</sup>

Rule 4. Goods that are chemicals, plastics or rubber (proposed section 153YF)

Proposed section 153YF provides specific rules for goods that classify as chemicals, plastics and rubber. Similar to Rule 3 above, a good produced entirely in the US, or in the US and Australia, from non-originating material that fulfils all the requirements set out in **proposed subsections 153YF(a) to (f)** will qualify as a US originating good.

Rule 5. Goods that are clothing or textiles, produced entirely in the US or in the US and Australia, from non-originating materials (proposed Subdivision E)

**Proposed section 153YH** sets out the requirements according to which a clothing or textiles good, which was produced entirely in the US or in the US and Australia from non-originating material, may qualify as a US originating good. This provision is similarly structured as Rule 3 above. **Proposed subsections 153YH(2) and (4)** stipulate two requirements a US originating good must fulfil, including:

- that the good satisfies the transformation test set out in **subsection 153YH(7)** or, for example, that the non-originating material does not exceed 7% of the total weight of the goods (**paragraph 153YH(2)(a) and (b)**), and

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- that the good satisfies any other requirement set out in Schedule 1 of the Free Trade Agreement Regulations (**paragraph 153YH(4)**).

Refer to the [Explanatory Memorandum](#) of the Bill for a more detailed discussion of this complex provision and examples.<sup>60</sup>

Rule 6. Goods that are clothing or textiles classified to Chapter 62 of the Harmonized System (proposed section 153YI)

Chapter 62 of the *Harmonised Commodity Description and Coding System* ('Harmonised System') as devised by the World Trade Organisation deals with articles of apparel and clothing accessories, not knitted or crocheted. **Proposed section 153YI** stipulates a specific three tiered test to determine US origin for goods falling within the scope of Chapter 62.

Rule 7. Other US originating goods (proposed Subdivision F)

This rule would apply to standard accessories, spare parts and tools. Proposed section 153YJ sets out the test to be applied to goods comprised of an 'underlying good' and standard accessories, standard spare parts or standard tools ('parts'). The parts would only qualify as US originating goods, if:

- the underlying goods are US qualifying goods
- the parts are not invoiced separately, and
- the parts are of a usual quantity and value in relation to the underlying good (**proposed paragraphs 153YI(1)(a) to (c)**).

Where, however, the underlying good has to be tested for its origin under Rule 3 discussed above, to satisfy the regional value content, the value of the parts must be taken into consideration (**proposed paragraphs 153YI(2)**).

Rule 8. Packaging materials and containers (proposed Subdivision G)

As a general rule, packing material and containers used to package goods for retail are to be disregarded from the operation of the Division, if they are classified with the goods in accordance with Rule 5 of the *General Rules for the Interpretation of the Harmonized System*. Rule 5 specifies, for example, containers and packing material such as camera cases, musical instrument cases, gun cases, drawing instrument cases or necklace cases, which therefore would be disregarded.<sup>61</sup>

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Where, however, the packaged goods have to be tested for their origin under Rule 3 discussed above, to satisfy the regional value content, the value of the packaging material must be taken into consideration (**proposed paragraphs 153YH(2)**).

Rule 9. Consignments (proposed Subdivision H)

Where goods went through any other country than the US or Australia, undergoing there a process of production, **proposed section 153YL** provides that the goods can not be US originating goods within the meaning of the Act.

## Part 2—Verification Powers

Under AUSFTA, Australia and the US are required to create and confer certain verification powers in relation to textile or apparel goods.

### Why are the amendments necessary?

Article 4.3 of AUSFTA requires the parties to

- enforce or assist in the enforcement of measures affecting trade in textile or apparel goods
- ensure the accuracy of claims of origin
- enforce or assisting in the enforcement of measures implementing international agreements affecting trade in textile or apparel goods, and
- prevent circumvention of international agreements affecting trade in textile or apparel goods.

The proposed amendments apply only in relation to the trade with textile or apparel goods, enabling Australia, either upon request by the US or on its own accord, to determine that a claim of origin for the good is accurate (Article 4.3.2 of AUSFTA).

### The proposed amendments

Power to request records or ask questions in relation to the exportation of textile and clothing goods to the US

**Item 6** of the Bill inserts **proposed new Division 4B** dealing with exportation of textile and clothing goods to the US. Central to this Division is **proposed section 126AE** which confers to certain, specifically authorised officers ('verification officers') the power to request records or ask questions from:

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- exporters or producers of goods as defined in proposed subsection 126AE(4) (**proposed paragraph 126AE(1)(a)**) or
- persons involved in the transport of such goods from Australia to the US (**proposed paragraph 126AE(1)(a)**).

The person subject to the request is not obliged to provide the records or answer any questions (**proposed paragraph 126AE(2)**) and the strict liability offences, sections 243SA (failure to answer questions) and 243SB (failure to provide documents or records) of the *Customs Act 1901*, will not apply.

Powers to monitor and audit AUSFTA

**Item 8** proposes to introduce a **new Subdivision JA**—Powers to monitor and audit—Australia–United States Free Trade Agreement. The proposed provisions in this subsection would create several powers for the ‘purpose of verifying information relating to the export, production or transportation of textile and clothing goods that are exported to the US.’ (**proposed section 214BAA**).

The powers created are set out in **proposed subsection 214BAC(1)**, including:

- the power to search a premises (**paragraph 214BAC(1)(a)**)
- to take photos (**paragraph 214BAC(1)(b)**)
- to take and inspect or analyse samples (**paragraph 214BAC(1)(c)**), and
- to test record keeping (**paragraph 214BAC(1)(g)**).

The powers created under this section can only be exercised if it is reasonably necessary for the purpose of ‘verifying information relating to export, production or transportation of textile and clothing goods that are exported to the US.’ (**proposed subsection 214BAE(1)**)

Further, the power to enter premises is subject to the voluntary written consent given by the occupier (**proposed section 214BAE**). The section does not provide for entering the premises on the basis of a warrant. To obtain the requisite consent, the verification officer must follow certain procedural steps set out in this proposed section.

Under **proposed section 214BAF**, a verification officer can be accompanied by a US customs official, subject, however, to the occupier’s voluntary written consent. However, even where an occupier does not consent to a US customs official accompanying a verification officer, any information obtained by a verification officer in the course of exercising the powers under the Act can still be disclosed to a US customs official

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**(proposed section 214BAJ)**. The Bill does not specify that the occupier has to be informed about this.

The verification officer has the power to ask questions and ask for reasonable assistance in performing his duties (**proposed section 214BAH** and **214BAI**).

Also provided are powers:

- to operate equipment, such as computers, containing information relevant to the information verification, and
- to transfer electronically stored information onto disks and to remove those disks from the premises (**proposed subsections 214BAC(2) and (3)**).

It is a prerequisite under **proposed section 214BAK** that the person operating the equipment must hold a reasonable belief that the operation will be safe for the equipment. Where damage to the equipment occurs, **proposed section 214BAL** provides for a compensation regime that, under certain circumstances, provides the owner of the equipment with avenues to obtain compensation. However, the legislation possibly contains a gap which could result in unnecessary complications for the parties. It seems arguable that the preliminary decision to operate the equipment based on the reasonable belief that it is safe is not covered by the compensation provision. This situation should be resolved by amending proposed **subparagraph 214BAK(1)(b)(ii)** to include the situation where the person lacked the reasonable belief required pursuant to **proposed section 214BAK**.

## Schedule 2—Agricultural and Veterinary Chemicals

Agricultural and veterinary chemicals, and labels for those products, require approval or registration with the Australian Pesticides and Veterinary Medicines Authority (APVMA, formerly the National Registration Authority, NRA) before they can be marketed. This process is called marketing approval. The process requires the applicant to provide certain data to APVMA, demonstrating that the chemical is safe and effective.

This schedule proposes a new regime for the protection of that data. This affects the practice of ‘springboarding’ generic products. Generic products are those produced by manufacturers other than the owner of the patent in the product. Springboarding is a process which allows a generic product to get marketing approval on the basis of test data that has already been submitted by the original product’s manufacturer. This allows the generic manufacturer to avoid duplicating much of the costly and time-consuming process of chemical testing, resulting in a faster entry to market and therefore cheaper product prices.

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## Why are these changes necessary?

Article 17.10 establishes certain requirements for the regulation of agricultural chemicals and pharmaceuticals. Pharmaceuticals are discussed below, under Schedule 7.

Article 17.10 requires that generic products not be permitted to springboard in the first ten years after the original product has been given marketing approval—this is known as the *data exclusivity* period. It also requires that the information submitted to the government for the purpose of obtaining marketing approval be protected from ‘unfair commercial use’.

Currently, the *Agricultural and Veterinary Chemicals (Administration) Act 1992* provides an effective data exclusivity period of five years (s 69EY).

## Key changes proposed

### Compliance with AUSFTA

In order to ensure compliance with AUSFTA, the Bill proposes a ten year data exclusivity period where use of the product within ten years would be ‘commercially unfair’ (**item 8, proposed subsection 14B(2)**).

Item 8 proposes to severely circumscribe the remedies available to the original product manufacturer if information is used in breach of this rule. **Proposed subsection 14B(3)** would provide that the use of information in contravention of the rule (for example, within the ten year period) would not affect the validity of any registration that results from that use. **Proposed subsection 14B(4)** would prevent the original applicant from claiming any compensatory remedy against the Commonwealth or its agents in relation to the misuse of information. In other words, except for injunctive relief *before* a second (or subsequent) product has been registered, the Bill would provide no relief to the original product manufacturer in the event that the data exclusivity period is breached. In practice, the Bill’s attempt to remove remedies for breach of the law by APVMA may not be effective if courts hold that a decision to grant registration within the ten years was not properly made.<sup>62</sup>

### Further reforms

Beyond implementing AUSFTA, the Bill proposes several other changes to the way information supplied to APVMA may be used. These are not directly required by AUSFTA, but do deal with the issue of how the data provided to APVMA is protected.

According to the Second Reading Speech, these reforms represent part of a suite of reforms devised by the government with the agreement of ‘key stakeholders including all

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State and Territory Governments'.<sup>63</sup> According to the Trade Minister, a second set of reforms will be proposed in a subsequent Bill.

There does not appear to have been much commentary from stakeholders on the provisions proposed in the Bill. However, the Pastoralist and Graziers Association of Western Australia has indicated opposition to the ten year data exclusivity rule on the basis that it overrides the outcome of earlier stakeholder consultation on data protection and it could increase the costs of chemicals.<sup>64</sup>

The Bill proposes a detailed scheme for the protection of data in different circumstances. This Digest does not examine these provisions in detail.

## Comments

This section:

- may lead to increased costs for agricultural chemical products by extending the data protection period to ten years and delaying the entry of generic products, and
- makes changes that go beyond implementing AUSFTA, but that are, according to the Trade Minister, consistent with outcomes negotiated with key stakeholders.

## Schedule 3—Australian Geographical Indications for Wine

### Why are these changes necessary?

Article 17.2 of AUSFTA provides certain obligations regarding the treatment of trade marks and geographical indications (GIs).

GIs are words or expressions protected for the use of producers from a particular geographical region. Australia has a system for declaring and protecting GIs for wine and spirits under the *Australian Wine and Brandy Corporation Act 1980*.

Article 17.2.7 requires that interested parties have an opportunity to seek refusal or cancellation of a GI. Article 17.2.12(b)(v) requires that GIs be refused on the grounds that they are likely to cause confusion with a pre-existing trade mark or a good faith pending application for a trade mark. The current law does not comply with these requirements.

### Key changes

Schedule 3 proposes amendments to the Australian Wine and Brandy Corporation Act to require the Geographical Indications Committee to take account of pre-existing trademark rights when determining geographical indications (GIs). This would involve the following process:

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- notice of a proposed GI must be published if an application for a GI has been made or if the committee is considering a GI on its own initiative. The notice must set out the GI and invite written objections within one month (**item 11, proposed section 40RA**)
- a person may object to a GI on the following grounds:
  - if he or she owns a registered trade mark that *consists* of a word or expression identical to the proposed GI or of a word or expression with which the GI is likely to cause confusion, or the proposed GI *contains* a word or expression with which the GI is likely to cause confusion and the owner has trade mark rights in the word or expression
  - if he or she has an application pending for registration of a trade mark, any of the above conditions apply, the application was made in good faith and there is a prima facie case for accepting the trade mark, and
  - if he or she has trade mark rights in an unregistered trade mark, any of the conditions of the first ground are met and the trade mark rights were acquired through use in good faith
- objections are made to the Registrar of Trade Marks, who decides whether the objector has a ground. Even if the ground is made out, the Registrar may recommend to the Committee that it is reasonable in the circumstances to determine the proposed GI, although such a recommendation must be made with regard to Australia's international obligations (for example, AUSFTA)
- decisions by the Registrar of Trade Marks on these issues may be appealed to the Federal Court, and
- the Committee may not determine a GI until any trade mark issues have been resolved, including appeals. The Committee may not determine a GI if the Registrar of Trade Marks has decided that the grounds for objection are made out and does not recommended the determination, unless the objector consents.

This process will apply to any GIs that have not been finally determined by the date of commencement. In other words, it may apply to GI's still under consideration by the Committee.

Schedule 3 also proposes a scheme for the cancellation (called 'omission') of GIs by the Committee. This would be possible where a GI is not in use (as defined by **proposed s 40ZAF**) or where a GI is no longer required (according to the process outlined in **proposed s 40ZAI**).

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## Summary and comments

This schedule:

- prevents GIs from being determined where they are likely to be confused with pre-existing or pending trade marks, and
- according to the Trade Minister, enacts existing practice into legislation.<sup>65</sup>

## Schedule 4—Life Insurance

### Why are these changes necessary?

Chapter 13 of AUSFTA makes certain requirements of Australia in relation to financial services, which includes life insurance. The key obligation is *national treatment*—treating US life insurance companies no less favourably than domestic companies in like circumstances.

### Key changes

Currently, the *Life Insurance Act 1995* provides that only companies incorporated in Australia can carry out a life insurance business (through definition of *company* in the dictionary Schedule, among other provisions).

The Bill proposes the creation of a new category of life insurance company, to be known as an *eligible foreign life insurance company* (**items 1 and 25**). Such a company must, among other criteria, be authorised to carry on life insurance business in another country, have an Australian branch or propose to establish one and meet conditions specified in the regulations. These conditions would include, but not be limited to, a list of countries in which eligible foreign life insurance companies may be incorporated. Presumably, the United States would be placed on this list.

The Bill would set certain governance requirements for eligible foreign life insurance companies. These would require the company to nominate a ‘Compliance Committee’, who would have management responsibility for the Australian branch of the company and be responsible for ensuring the company complied with the Life Insurance Act. **Items 11 and 12** would empower courts to grant injunctions against members of the compliance committee in order to enforce the Act.

The other items appear to be consequential and technical.

## Summary and comments

This schedule:

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- allows regulations to prescribe countries from which life insurance companies can be based but still access the Australian market, with conditions, and
- would allow regulations to prescribe more than just the United States as an eligible country.

## Schedule 5—Foreign Acquisitions and Takeovers

This schedule proposes changes to allow regulations to prescribe new asset screening thresholds in relation to certain foreign investors.

### Why are these changes necessary?

In AUSFTA, Australia agreed to relax its requirement for Foreign Investment Review Board (FIRB) review and screening by the Treasurer of proposed US investments in Australia (Annex 1—Australia—2–3). This was done by agreeing to raise the threshold below which most investments do not require review and screening. The threshold is currently A\$50 million and this must be raised to A\$800 million where US investors are involved. Lower thresholds or other conditions still apply in certain 'sensitive' areas such as real estate, banking, aviation, shipping, media and telecommunications.

### Key changes

The Bill proposes to allow regulations to:

- define investors from a specified country as *prescribed foreign investors* which could allow them to be treated as non-foreign investors in certain circumstances (**proposed s 17E**)
- define specified foreign government investors as *prescribed foreign government investors*, again allowing them to be treated as non-foreign investors in certain circumstances (**proposed s 17G**)
- define a business activity as a *prescribed sensitive sector* (**proposed s 17H**)
- determine the screening threshold for proposed acquisition of shares or assets by a *prescribed foreign investor* or a *prescribed foreign government investor*. The regulations would be able to determine different thresholds for a variety of different contexts, including in relation to different countries and different sensitive sectors (**proposed ss 17A, 17B, 17C**), and
- specific rules for the screening of foreign investments in financial sector companies (**proposed s 17D**).

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Regulations would determine the entire scope of all the substantive provisions of proposed Part IA. Presumably the Government will make regulations under these provisions to ensure compliance with AUSFTA. It is possible that regulations under these provisions could extend the benefits of these provisions beyond the United States, to include investors from other countries.

### Summary and comments

This schedule:

- would allow regulations to set different foreign investment screening thresholds for prescribed countries in prescribed sectors, and
- would allow regulations to extend these liberalising benefits beyond United States investors.

### Schedule 6—Commonwealth Authorities and Companies

Schedule 6 contains a proposed amendment to the *Commonwealth Authorities and Companies Act 1997*.

#### Why are these changes necessary?

Chapter 15 of AUSFTA imposes certain obligations regarding government procurement. In general, this involves a commitment not to discriminate against US providers in awarding government contracts, although there are several exceptions to this principle.

#### Key changes

**Item 1** proposes to provide the Finance Minister with the power to issue directions to prescribed Commonwealth authorities and companies on matters relating to procurement, on the condition that such directions are consistent with international agreements concerning government procurement (such as AUSFTA). This change will enable the Finance Minister to ensure that Commonwealth authorities and companies are subject to the *Commonwealth Procurement Guidelines* that apply throughout the public service.

It is understood that other changes to ensure compliance with AUSFTA will be made through amendment to those guidelines.

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## Schedule 7—Therapeutic Goods

### Why are these changes necessary?

As with agricultural and veterinary chemical products (see above), Article 17.10 makes similar requirements for the regulation of pharmaceuticals. It requires:

- data exclusivity period of five years
- that measures be provided in the marketing approval process to prevent generic manufacturers from entering the market during the term of a patent, and
- that, where generics are permitted to request approval to enter the market during the life of a patent, the patent holder must receive notification of any such attempt, including the identity of the applicant.

See the Parliamentary Library's *Research Note* 'The PBS and the Australia—US Free Trade Agreement' for more detailed discussion of these provisions and their implications.<sup>66</sup>

### Current law

Currently, the Therapeutic Goods Administration (TGA) is prevented from allowing generic manufacturers to springboard in the first five years following registration of the patented product (s 25A, *Therapeutic Goods Act 1989*). Aside from this requirement, the TGA is not concerned with any intellectual property issues when considering applications to register a drug.

### Key changes

**Schedule 7** proposes that, in addition to existing requirements, applicants for registration of a new drug must supply a 'section 26B' certificate with their application. This certificate must state either:

- that the applicant is not marketing, and does not propose to market, the drug in a manner that would infringe a patent in relation to that drug, or
- that a patent has been granted in relation to a drug, that the applicant proposes to market the drug before the end of the term of the patent and that they have notified the patentee that they have applied for registration of the drug (**item 6**).

A new offence is proposed for providing false or misleading material information in the certificate, with a maximum penalty of 1,000 penalty units (\$110 000). Read with cl 5.6 of the *Criminal Code*, the wording of this offence would require that it apply even if the

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person did not intentionally provide false or misleading information, as long as they were *reckless* as to this fact.<sup>67</sup>

## Summary and comments

This schedule would introduce a new certification scheme in which generic manufacturers must either certify that they will not infringe a patent or certify that they have notified the patent holder of their intentions. The ALP has been concerned that the notification requirement could lead to spurious infringement claims launched by patent holders to delay the entry of generics. While a civil remedy is currently available against unjustified *threats* of infringement action (ss 128–129, *Patents Act 1990*), there may not be a significant disincentive to actually launching such claims, especially where the patent holder may stand substantially to benefit from such an action. To this end, the Opposition has indicated that it will propose an amendment to introduce a penalty for spurious claims.

## Schedule 8—Patents

The proposed changes to the *Patent Act 1990* are relatively minor. They include expansion of the grounds for opposition to patents and removal of conditions on patents. Despite some earlier concerns, they do not involve any change to the tests for patentability.

See the Parliamentary Library's *Current Issues Brief*, '[Guide to the copyright and patent law changes in the US Free Trade Implementation Bill 2004](#)' for more detail.

## Schedule 9—Copyright

The changes to the *Copyright Act 1968* are the most complex changes proposed by this Bill. See the Parliamentary Library's *Current Issues Brief*, '[Guide to the copyright and patent law changes in the US Free Trade Implementation Bill 2004](#)' for more detail. The following is an extract from the Executive Summary to that guide:

The copyright changes [proposed by the Bill] would introduce a regime that is more protective of copyright and more punitive toward infringement. These changes would: expand performers' rights, including the creation of performers' copyright in sound recordings; extend the duration of copyright protection; introduce a more protective regime for electronic rights management information and broadcast decoding devices; criminalise more infringing and some non-infringing conduct; extend the scope of copyright to include all temporary reproductions; and introduce a new regime for determining the liability of carriage service providers.

In several areas, the proposed implementation either goes further than AUSFTA requires or fails to take advantage of exceptions and limitations that AUSFTA allows. More generally, the Bill introduces no new mechanisms to counter-balance the more protective copyright regime, such as a broad 'fair use' exemption or stronger

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competition laws. The result is that, in several respects, this Bill would give Australia a more protective copyright regime than the United States.

Copyright is a complex area of law and changes can produce unexpected results. As a result Australia has tended to pursue copyright law reform with wide, public consultation with stakeholders and experts. In several areas, changes proposed by this Bill conflict with the recommendations that have arisen through those processes, including those from the very recent review of the 2000 Digital Agenda reforms by law firm Phillips Fox.

It seems that little or no public consultation has been involved in the preparation of this Bill. Given the complexity of the reforms and the substantial issues of policy involved, a special public inquiry into the proposed copyright changes could be warranted.

## Main Provisions: US Free Trade Agreement Implementation (Customs Tariff) Bill 2004

### Items 1 to 32

#### Relevant proposed changes

Central to the amendments are **items 8** and **9** of the Bill, proposing changes to section 16 of the Act. Should these amendments take effect, goods originating in the US<sup>68</sup> will be generally free of customs unless the Act expressly specifies a rate for a particular good (**proposed paragraph 16(k)(i)**).

**Item 14** introduces a regulation making power in relation to matters:

- required or permitted under the Act (**proposed subsection 21A(a)**) or
- necessary or convenient to be prescribed for carrying out, or giving effect to, the Act (**proposed subsection 21A(b)**).

**Items 15** to **34** make amendments to various items in Schedule 4 of the Act, specifying express concessional rates for a range of products.

#### Commencement of the items

**Items 1** to **32** of the Bill will come into effect either

- on 1 January 2005 or

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- on the day the AUSFTA enters into force in Australia, whichever is later.

Should AUSFTA should not enter into force at all, these provisions will not commence (**item 2, table item 2** of the Bill).

**Item 33** will come into effect immediately after both

- the *Customs Tariff Amendment (Textile, Clothing and Footwear Post 2005 Arrangements) Act 2004*<sup>69</sup> and
- the provisions covered by item 2, table item 2 of the Bill

came into effect. Again, commencement is the later date of the above events. However, if neither of the above events would occur, the provision will not commence. (**item 2, table item 3** of the Bill).

Item 34

**Item 34** proposes to incorporate a new **Schedule 5 – US originating goods**.

Items 1 to 133 of **proposed Schedule 5** would provide express custom rates to be imposed upon certain alcohol, tobacco and petroleum products which are in line with excises imposed upon equivalent domestic products. This is in accordance with Article 1.2.4(a) of AUSFTA. These items are not subject to the phasing regime agreed upon under AUSFTA, except for item 121, stipulating a custom rate of 5% applicable to certain carbolic acids.

Items 134 to 951 of **proposed Schedule 5** would provide expressly specified customs rates to be imposed upon a variety of US originating goods. The schedule sets out the relevant heading numbers that are to be amended. The numbers correspond with the Harmonised Commodity Description and Coding System 2002 designed by the World Trade Organisation.<sup>70</sup> The goods subject to the changes set out in items 134 to 951 are subject to phasing rates as stipulated in Annex 2B of the AUSFTA.

**Item 34** will commence at the same time as the **items 1 to 32** referred to above.

Items 35 to 56

**Items 35 to 56** of the Bill make subsequent amendments to the proposed Schedule 5 to account for the changes to the fuel tax structure proposed by the [Customs Tariff Amendment \(Fuels\) Bill 2004](#).<sup>71</sup>

Under item 2, table item 5 of the Bill, these amendments will only come into effect if the [Customs Tariff Amendment \(Fuels\) Bill 2004](#) and the AUSFTA come into effect. The commencement date for the provisions in this Bill will be the later of those two events.

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## Other items

**Items 57** makes consequential amendments to the Act's user guide.

## Concluding Comments

### Implementation of the agreement

Although AUSFTA is an unusually prescriptive and detailed agreement, as with all international agreements, it leaves some room for Australia to determine how it will change its law to ensure compliance. As a result, implementation is not a merely technical issue—it involves substantive issues of policy as well.

### General approach to implementation

In general, the Bill's proposed approach to implementation involves substantial reliance on regulations to implement the details of the legislation, so that many of the Bill's proposals merely involve extension of the Government's regulation making power (for example, Schedules 4, 5, 6). This has the advantage of allowing the Government flexibility to ensure that AUSFTA is adequately implemented and that any concerns of the United States can be more easily accommodated. It has the disadvantage of involving less parliamentary scrutiny of those details. Related to this, the Bill sometimes allows regulation to extend to other countries the benefits that AUSFTA requires to be given to the United States. This has the advantage of allowing the Government to more easily pursue liberalising goals in investment, government procurement and services, either unilaterally or through subsequent agreements. Again, it has the disadvantage of reduced parliamentary scrutiny of such extensions.

### Schedule-by-schedule approach to implementation

Schedules 1 and 3—8 appear to make the only changes necessary to implement AUSFTA or allow regulations to implement AUSFTA.

Schedule 2 implements AUSFTA but also goes further, introducing further rules relating to data protection. Apparently, these are proposed with the concurrence of major stakeholders, including the states and territories. The Trade Minister has foreshadowed a second suite of reforms to agricultural and veterinary chemical regulation in a subsequent Bill.

Schedule 9—relating to copyright—contains many provisions required by AUSFTA. However, in some cases it fails to implement AUSFTA adequately, goes further in protecting copyright than AUSFTA requires or fails to take advantage of exceptions and

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limitations that AUSFTA allows. Where these happen, substantive policy choices are involved. It appears that Schedule 9 would give Australia a more protective and more punitive copyright regime than the United States. See the [Guide to the copyright and patent law changes in the US Free Trade Implementation Bill 2004](#) for details.

What is not in the implementation Bill?

The Government does not appear to have given significant consideration to legislative change that might mitigate some of the potentially negative aspects of AUSFTA. There may be significant scope to make such change while maintaining compliance with the text and spirit of the agreement.

The Opposition has indicated that it will oppose the Bill unless two such changes are made. These relate to introduction of a penalty for spurious patent claims (discussed above) and enactment of local content standards in legislation, rather than allowing them to be changed by the Australian Broadcasting Authority. There seems no reason to believe that these amendments would be inconsistent with AUSFTA.

However, there may be many more options to make these sorts of changes, especially in the area of intellectual property. The failure to consider these may indicate a concern with ensuring the implementation of AUSFTA by 1 January 2005. However, given the complexity of the Bill and the nature of changes to the law it requires (and of course the long-term nature of the agreement itself), it is the type of legislation that could fruitfully be referred to a Senate Legislation Committee for consideration. These issues of process might be considered in future bilateral trade negotiations, possibly modelled on the US Congressional trade promotion authority approach which provides substantially more legislature involvement in all stages of negotiation and implementation.

## Endnotes

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- 1 Bilateral disputes have included problems with lamb, steel and Howe Leather, and these have reached the WTO dispute system. Of course, since January 1995, the WTO Dispute Settlement Understanding has been in place – one of the great advances of the WTO system (see Pru Gordon, “The World Trade Organization”, DPL, *Research Paper* No. 10 1995–96, 23 October 1995) - and all bilateral cases taken to the WTO have been resolved well.
- 2 See Ross Garnaut, “An Australia–United States free trade agreement”, *Australian Journal of International Affairs*, 56(1), 2002, p. 123.
- 3 The topmost decision-making body of the WTO is the Ministerial Conference, which has to meet at least every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements, including the launch of a new round of

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multilateral trade negotiations. The 1999 Ministerial held in Seattle, in the US, had been expected to launch a new round of multilateral trade negotiations, since a number of major agreements were due for substantive review by 2000. Instead the Ministerial ended in acrimony and chaos, in part due to the large anti-globalisation protests outside, but also due to fundamental disagreements between those such as the US and Europe pushing new trade agendas such as “trade and labour” and “trade and the environment” to the complete opposition of most developing nation members. For more information on the Seattle Ministerial see the [WTO website](#).

- 4 This belief, while prevalent, is not necessarily correct. A number of US domestic factors strongly affected the Seattle Ministerial: see Bruce Donald, “[The World Trade Organization \(WTO\) Seattle Ministerial Conference, December 1999: Issues and Prospects](#)”, Department of the Parliamentary Library (DPL), *Current Issues Brief* 12 1999-2000, 30 November 1999. In addition, it is entirely unsurprising that as GATT/WTO has lowered average tariffs and its coverage of topics has increased, it takes longer to achieve agreements that will give additional significant gains. The anti-globalisation movement, prominent in Seattle, is equally likely to be opposed to bilateral trade deals as to multilateral.
- 5 This was a decline from both 2001-02, with bilateral trade of A\$ 45.2 billion, and from 2000-01 with bilateral trade of A\$ 47.0 billion.
- 6 B. Donald, ‘Basic Facts of Australia’s Economic Relationships with the USA’, *Unpublished paper*, Foreign Affairs Defence and Trade Section, Parliamentary Library, Department of Parliamentary Services, Canberra, June 2004.
- 7 Calculated from [Bureau of Economic Analysis](#), US International Transactions Data, Tables 1 and 11, accessed June 2004.
- 8 See [ABS](#), 5352.0, *International Investment Position, Supplementary Country Statistics, 2003*, 20 July 2004.
- 9 However, while the Singapore-Australia Free Trade Agreement came in effect in July 2003, Singaporean investment in Australia actually declined by A\$ 4.9 billion into 2003, and Australian investment in Singapore declined by A\$ 1.4 billion. Thus, there is no guarantee that AUSFTA will ensure the continued strength of this investment partnership.
- 10 World Trade Organization, [Trade Policy Review, Australia](#), Geneva, 2002, WT/TPR/G/104.
- 11 This is unlikely to substantially affect the US.
- 12 WTO, *Trade Policy Review, United States*, Geneva, 2004, WT/TPR/G/126 and WT/TPR/S/126.
- 13 This section is based on A. Rann, ‘Chronology of events leading to the Australia–United States free trade agreement’, *Unpublished memo*, Foreign Affairs Defence and Trade Section, Parliamentary Library, Department of Parliamentary Services, Canberra, 2004.
- 14 For a history of discussion of the issue in recent decades see Ross Garnaut, *op cit.*, while for a longer history see A. Rann, *op cit.*
- 15 Commonwealth of Australia, [In the National Interest: Australia’s Foreign and Trade Policy White Paper](#), Canberra, 1997.

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- 16 See Ross Garnaut, *op cit*.
- 17 This followed intensive negotiations between the two Ministers (as opposed to only officials) from 26 January 2004. The same month WTO Director-General Supachai was warning of the urgent need for US leadership to revive the Doha Round.
- 18 For a press release, see the [White House website](#).
- 19 See for example, Bill Carmichael (chairman of the former Industries Assistance Commission), “Vital to get independent gauge of FTA benefit”, *Australian Financial Review*, 11 March 2004, p. 79. Chris Wallace, “US trade deal gets a laugh”, *The Australian*, 4 May 2004, p. 7, states that Professor Ross Garnaut urged the Government to refer AUSFTA for independent assessment, and that Dr Andy Stoeckel (CIE) conceded there might be merit in such a referral, both testifying to the Senate Select Committee.
- 20 Centre for International Economics, [Economic Impacts of an Australia-US Free Trade Area](#), Canberra, 2001.
- 21 A Melbourne-based economic consultancy, now known as [ACIL Tasman](#).
- 22 ACIL consulting, [A Bridge Too Far? An Australian Agricultural Perspective on the Australia/United States Free Trade Area Idea](#), report for the Rural Industries Research and Development Corporation, February 2003, p. iv.
- 23 Centre for International Economics, [Economic Analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States](#), Canberra, 2004.
- 24 Ross Peake, “FTA study fails the laugh test”, *Canberra Times*, 4 May 2004, p. 3.
- 25 Philippa Dee, *The Australia. US Free Trade Agreement: An Assessment*, Paper prepared for the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004.
- 26 Dee, *op cit.*, 2004, p. 35.
- 27 USITC, [U.S.-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects](#), May 2004, Washington.
- 28 APEC Study Centre, [An Australia-United States Free Trade Agreement - Issues and Implications](#), Melbourne, 2001.
- 29 National Institute of Economic and Industry Research, [An assessment of the direct impact of the Australian-United States Free Trade Agreement on Australian trade, economic activity and the costs of the loss of national sovereignty](#), June 2004.
- 30 Alvin Hilaire and Yongzheng Yang, “[The United States and the New Regionalism/Bilateralism](#)”, *IMF Working Paper*, WP/03/206, October 2003.
- 31 A. Rann, ‘Chronology of events leading to the Australia–United States free trade agreement’, *op. cit.*
- 32 For an analysis of the effect of the forthcoming US elections on the current round of WTO negotiations see Geoff Kitney, “Trade talks rush to beat US election”, *Australian Financial Review*, 28 July 2004, p. 7.

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