

The Senate

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Select Committee on the Free Trade  
Agreement between Australia and the  
United States of America

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Final Report

**August 2004**

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ISBN 0 642 71413 4

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This document is produced by the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Committee Secretariat, and printed by the Senate Printing Unit, Parliament House, Canberra.

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## Abbreviations

ACTPN	Advisory Committee for Trade Policy and Negotiations
ALOP	Appropriate Level of Protection
AQIS	Australian Quarantine Inspection Service
AMA	Australian Medical Association
ANZCERTA	Australia New Zealand Closer Economic Relations Trade Agreement
AUS-US FTA	Australia and the United States Free Trade Agreement
AUSFTA	Australia and the United States Free Trade Agreement
CIE	Centre for International Economics
CLRC	Copyright Law Review Committee
DAFF	Department of Agriculture, Forestry, Fisheries
DCITA	Department of Communications, Information Technology and the Arts
DFAT	Department of Foreign Affairs and Trade
DoHA	Department of Health and Ageing
ETM	Elaborately Transformed Manufactures
FIRB	Foreign Investment Review Board
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IFAC-3	Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters
IP	Intellectual Property
IPCRC	Australian Intellectual Property and Competition Review Committee
IRA	Import Risk Analysis

ISP	Internet Service Provider
IT	information technology
JSCFADT	Joint Standing Committee on Foreign Affairs, Defence
JSCOT	Joint Standing Committee on Treaties
MFN	Most Favoured Nation
NAFTA	North America Free Trade Agreement
NGO	non- government organisation
NIA	National Interest Analysis
NIEIR	National Institute of Economic and Industry Research
PBAC	Pharmaceutical Benefits Advisory Committee
PBPA	Pharmaceutical Benefits Pricing Authority
PBS	Pharmaceutical Benefits Scheme
PC	Productivity Commission
PTA	Preferential Trade Agreements
R&D	Research and Development
RTA	Regional Trade Agreement
SPS	Sanitary and Phytosanitary
TGA	Therapeutic Goods Administration
TRIPs	Trade Related Aspects of Intellectual Property Rights
TPMs	Technological Protection Measures
US	United States (of America)
USTR	United States Trade Representative
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

## Foreword

The final report of the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America consists of the following:

- An introduction and 10 chapters that were adopted by a majority of the committee as a balanced summary of the evidence taken during the inquiry
- Additional comments, points of dissent and recommendations from all parties represented on the committee, and
- A separate volume of additional information containing the independent economic analysis of the Agreement by Dr Philippa Dee, answers to questions on notice provided by the Commonwealth and state governments, a chronology of events leading to the FTA and a table of the items to be reviewed, institutional arrangements and working parties to be established under this agreement.

The 10 chapters of the final report examine in detail some of the key issues considered by the committee. It should be read in conjunction with the committee's interim report, released on 21 June 2004, which set out the breadth of issues raised during the inquiry.

The main body of this report does not contain specific recommendations. Each party's findings and recommendations are found in the additional statements at the end of the report.

At a private meeting on 2 August 2004 the committee voted 6-2 in favour of a motion that the Committee recommend that the Senate agree to the Australia-US Free Trade Agreement Implementation Bill 2004. This recommendation should be read in conjunction with the additional recommendations, comments, and dissenting remarks of all parties contained in this report.

.....  
**Senator the Hon Peter Cook**  
**Chair**



## The inquiry process

### The Senate Select Committee

On 11 February 2004, the Senate established a Select Committee on the Free Trade Agreement between Australia and the United States of America, to report to the Senate within three months of the text of the agreement becoming publicly available, or on such later date as determined by the Committee.<sup>1</sup> The Select Committee agreed to table the final report on or before the 12 August 2004. The Select Committee was asked to:

- determine whether the Agreement as a whole is in Australia's national interest; and
- examine its impact on Australia's economic, trade, investment, social and environment policies.

The government made the draft text of the AUSFTA publicly available on 4 March 2004, under the provision that it still needed to be 'legally scrubbed'. The Senate Select Committee held its first meeting on the 11 March 2004. At this meeting, Senator Peter Cook was elected chair, and Senator George Brandis as deputy chair. The other Committee members are: Senators Conroy, Ferris, O'Brien, Boswell, Ridgeway and Harris.

The Committee wrote to over 200 key stakeholders, organisations and industry bodies inviting submissions, and advertised in the press. The Committee received 548 submissions. A list of submissions is at Appendix 1.

The Committee held 13 public hearings from 4 May to 6 July 2004.<sup>2</sup> The Committee heard from a cross section of witnesses, 178 in all. A list of hearing dates, locations and witnesses is at Appendix 2.

The Committee also held several round table discussions on key aspects of the Agreement. These roundtable discussions brought together leading economists and trade specialists,<sup>3</sup> experts in intellectual property and copyright issues,<sup>4</sup> as well as organisations and specialists with a keen interest in the AUSFTA's possible ramifications for the Pharmaceutical Benefits Scheme.<sup>5</sup>

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1 *Journals of the Senate* no.126, 11 February 2004

2 Although the Committee Chair proposed numerous hearing dates in the month of April while the Senate was not sitting, agreement could not be reached to hold hearings on those days as a number of senators were not available.

3 See *Transcript of Evidence*, 5 May 2004, pp.18 - 67

4 See *Transcript of Evidence*, 17 May 2004, pp. 1-42

5 See *Transcript of Evidence*, 21 June 2004, pp. 1-73

As well, the Committee engaged a private consultant, Dr Philippa Dee, to assist in its assessment of the AUSFTA. The Committee has released Dr Dee's report, which has informed the Committee's judgement on the overall impact of the AUSFTA. Dr Dee's report is contained in the volume of additional material that accompanies this report.

It should be noted that while the Senate was holding its inquiry, the Joint Standing Committee on Treaties was also tasked with assessing the AUSFTA. This Committee's AUSFTA report was tabled on 23 June 2004. The Select Committee tabled an *Interim Report* on the AUSFTA on 21 June 2004.

The Committee would like to thank all those who supported its work by making submissions and giving evidence at public hearings.

## Introduction and summary

The Select Committee has conducted an exhaustive examination of the Australia-US Free Trade Agreement. The evidence gathered covers the full range of both expert opinion and the views of members of the general public. Close consideration has also been given to the various econometric reports that have been produced. The Committee's Report explores that range of views, and has sought to juxtapose the arguments and judgements in such a way that the debate is represented as robustly and comprehensively as possible.

Any trade agreement, especially one as unprecedentedly complex as the AUSFTA, necessarily entails both costs and benefits. One of the most difficult tasks for this Committee has been to try and assess those costs and benefits. Econometric studies can only ever provide a guide to the expected economic benefits, and even then it depends significantly on the assumptions made as to what the outcomes will be. Assumptions are invariably contestable, and the Committee has sought to reflect that fact in its own commentary on the merits of the various studies.

The Agreement has received strong support from those business groups who regard the AUSFTA as providing new and significant opportunities to do business with America, and facilitating access to American technology and commercial know-how. They applaud the greater integration of the Australian economy with what is undeniably the world's most economically powerful country, arguing that the benefits will be dramatically outweigh any downsides. Other business interests see only modest benefits.

For many people, however, the Agreement represents nothing but economic, cultural and employment risks from exposure to powerful United States interests. Some economists have argued that the trade diversion effects of the AUSFTA could work to the overall detriment of the Australian economy. Many have argued strongly that the Agreement will undermine Australia's sovereignty and erode social policy, and that many of the AUSFTA's provisions will severely restrict Australia's future capacity to direct and manage its own affairs.

Final assessments of the Agreement must be made with respect to Australia's national interest. Given that national interest is itself a highly contested notion, it is hardly surprising that the Committee has operated in an environment of claim and counter-claim, amidst the clash of big ideas and passionate and powerful arguments. The adversarial nature of much of the debate on the AUSFTA has not assisted sober analysis.

The main purpose of trade agreements is to remove as far as possible any tariff or other restrictions to the flow of goods and services between the parties involved, and to create an environment which facilitates rather than impedes the capacity of

companies to get on with business. There are several 'headline' areas of the AUSFTA that have drawn the most attention.

Agriculture has traditionally been a fraught area for trade negotiations. The AUSFTA has delivered overall benefits to Australia in this sector, although these are universally acknowledged to be less than what Australian producers and the government had hoped for. Sugar was omitted entirely from the deal. Some improved access to US markets for beef has been achieved, but with long phase-in periods and safeguards. While quotas remain in certain dairy products, there are valuable opportunities for value-added products. The horticultural industries and seafood exporters are also pleased with the opportunities that have opened up for them.

Investment is another area in which a relatively open market has been further liberalised. According to the government's commissioned study, the projected gains from such liberalisation are said to be the major area of economic benefit to Australia. But again, authorities in both Australia and the US have suggested that the AUSFTA will not usher in a flood of new investment. Much has been made of the proclaimed 'dynamic gains' arising out of the Agreement. These are very difficult to measure in practice, and the proof of the pudding will be very much in the eating.

Service industries are a major component of modern economies, and the AUSFTA provides for greater opportunities in cross-border trade in services. Much will depend on Australian firms' capacity to enter the US services market, and the government procurement area in particular. The gates have been opened; hopefully the service providers are at least in the starting blocks. Issues such as mutual recognition of qualifications and easier movement of business people between Australia and the US are still to be resolved.

While the removal of tariff and other barriers enhances Australia's access to the American markets, the opening of Australia's markets to highly competitive and export-oriented US firms will obviously have ramifications for Australian companies and their employees. Many Australian firms have already shown themselves to be good global competitors. But concerns about job losses have been pressed strongly by employee representatives, especially in the manufacturing industries, and the various econometric studies have confirmed that effects will be variable from sector to sector. This is a matter that governments at all levels will have to attend to carefully if they are to ensure their industry policies can proceed optimally.

Health services, and in particular the operation of Australia's Pharmaceuticals Benefits Scheme, has been one of the most hotly contested areas of the Agreement. This is the first time a trade agreement has included measures directly addressing a country's pharmaceutical policies. This Committee has heard heated debates about the possible impact of the FTA commitments on the PBS and on whether the concessions made here could drive up the price of drugs in Australia. The intellectual property provisions relating to generic drugs have been another area of concern. The changes made to Australian law and PBS procedures are complex, and the probable outcomes are contested. Many assurances have been given by ministers and officials, but these

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are important issues with implications for Commonwealth and state governments' health spending as well as for Australian consumers. Chapter 4 of this report considers them in some detail.

Intellectual property emerged as one of the most significant aspects of the Agreement. The issues are significant, because it is a relatively new area for inclusion in trade deals. It is a complex and constantly evolving area in terms of both technology and government regulation, and it lies at the heart of 21<sup>st</sup> century 'knowledge industries'. It has enormous implications for innovation and all the benefits that flow from it.

The IP Chapter of the AUSFTA is the largest chapter in both form and substance and requires the most significant changes to current Australian law. The Committee has heard arguments that the changes to Australian copyright law required by the AUSFTA will upset the careful balance between the rights of owners and the interest of users that currently forms the basis of Australia's IP regime. The result is that, in some areas, Australia will be more protective of copyright than in the US.

While IP creators and owners, particularly large US copyright-owning corporations, stand to benefit from the greater IP protection, the changes may impose additional costs on Australian consumers and researchers. As a net importer of IP, the changes could have a negative impact on the Australian economy as a whole. Further, the changes required by the AUSFTA are essentially trade restrictive measures rather than trade liberalising ones as they strengthen the monopoly of IP owners. In many cases, the changes required by the AUSFTA have gone against the recommendations of IP law reform processes in Australia over the last few years.

In view of the complex and technical nature of the IP law changes, the Committee requested the Parliamentary Library to examine the IP aspects of the AUSFTA implementing legislation, the US Free Trade Agreement Implementation Bill 2004, in some detail. This paper should be read in conjunction with Chapter 3 of the Committee's report.

Some of the early debate about the AUSFTA was agitated by concerns about Australia's capacity to maintain proper regulatory regimes in a range of matters, including quarantine and environmental protection. Although there are various working parties and committees established under the AUSFTA that will provide forums for discussion on such matters, they have no authority or official standing in Australia's regulatory framework. Again, what flows from these various committees is yet to be seen. Even the details of their membership, their structure and operation is largely still not settled.

Perhaps the most notable matter thrown up by the whole AUSFTA experience is the question of proper process in negotiating international agreements. The current process, whereby the government can, without reference to the parliament, set out to strike a binding agreement with another country, is fraught with difficulty and does nothing to facilitate a measured debate about the treaty being pursued. Nor does the current process provide for the public to be brought along with any agreement.

State and territory governments, who are necessarily important players in facilitating the implementation of the AUSFTA, have an insufficient role in the negotiating process. The Treaties Council of ministers did not even meet to address the AUSFTA. This lack of transparency, and in particular the inability of the Commonwealth parliament to consider the AUSFTA until after the deal has been done – indeed not until after it has been officially signed – is clearly unsatisfactory. A proper framework for parliamentary scrutiny of treaty negotiations at all stages must be established as a matter of urgency. The Committee's report explores these process issues in some detail. It is a matter that cries out for resolution.

The Committee urges the government to take seriously all the matters raised by it in this Report. They have been comprehensively canvassed. The advice and commentary of officials, economists, industry and union groups, community bodies and individuals have all been exhaustively heard. This Report encapsulates all sides of the debate, and should provide the resources necessary to enable the parliament and the government to truly serve the national interest.

# Chapter 1

## Outcomes

### What is a free trade agreement?

1.1 A free trade agreement (FTA) is typically a bilateral, preferential<sup>1</sup> agreement between two countries aimed at securing maximum access to each other's domestic markets in order to facilitate trade in goods and services. It commits the parties to policies of non-intervention by the state in trade between their nations. Such an agreement usually entails:

- removing or lowering explicit trade barriers, including import taxes (tariffs) and import quotas.
- softening or eliminating non-tariff or 'hidden' trade barriers – for example, quarantine laws, production and export subsidies, local content requirements, foreign ownership limits, and domestic monopolies.

1.2 Free Trade Agreements necessarily involve an exception to the Most Favoured Nation (MFN) principle, the fundamental rule guiding trade in goods among members of the World Trade Organisation. Under the MFN rule, members of the WTO must give fellow WTO members no less favourable treatment in terms of tariff rates and other trade measures than they afford to any other country. However, WTO rules allow individual countries to afford preferential treatment to partners in an FTA, provided that the FTA conforms to certain strict conditions.

1.3 The rationale for allowing this exception is set out in Article XXIV of the General Agreement on Tariffs and Trade (GATT) of 1947, which recognises the desirability of increasing freedom of trade by the development of closer integration between member countries through agreements establishing free-trade areas. At the same time, strict conditions apply to FTAs to ensure that they serve a liberalising purpose in international trade and do not encourage the establishment of new barriers. Nor should FTAs provide an occasion to introduce new measures discriminating between trading partners.

1.4 The crucial test of an FTA is that it must eliminate all tariffs and other restrictions on substantially all trade in goods between its member countries. Although WTO members have differed over how precisely to define 'substantially all trade', few would disagree that this means, at the very least, that a high proportion of trade between the parties - whether measured by trade volumes or tariff lines - should be covered by the elimination of tariffs and other restrictive trade regulations.

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1 Some economists contend that a 'preferential' agreement is, by its very nature, also 'discriminatory' – that is, discriminatory against all those countries that are not included in the FTA.

1.5 According to DFAT's background paper about negotiations on a proposed FTA with the United States, Australia considered that 'substantially all trade' must be a very high percentage, and that no major sector should be excluded from tariff elimination.<sup>2</sup>

1.6 In addition to trade in goods and services, Free Trade Agreements frequently cover such issues as investment protection and promotion, government procurement and competition policy, which are either not yet encompassed by WTO rules or only partially covered.

1.7 FTAs often also contain practical provisions in areas such as harmonisation or mutual recognition of technical standards, customs cooperation, application of subsidies or anti-dumping policies, electronic commerce, and protection of intellectual property rights.

### **The early stages of AUSFTA**

1.8 The notion of a Free Trade Agreement between Australia and the United States was given its first official airing in a speech to the American Australian Association in New York by Michael Thawley, Australia's Ambassador to the United States, in December 2000.

1.9 Foreign Minister Downer explored the idea further during talks with United States Trade Representative Zoellick in March 2001, and Trade Minister Vaile made it an official proposal in Washington a month later.

1.10 The government's wish to pursue a free trade agreement with the United States came to wider public attention in Australia around the middle of 2001, as Prime Minister Howard was preparing to visit Washington for celebrations surrounding the 50th Anniversary of the ANZUS Treaty.

1.11 In June 2001, Minister Vaile released a study by the Centre for International Economics, claiming that an FTA could increase Australia's real GDP by almost \$US2 billion by 2010.<sup>3</sup> In August 2001, a report by the APEC Study Centre gave further support for an Australia-US FTA, and on 30 August 2001 Prime Minister Howard confirmed the government's intentions in parliament.

There is no way we can find out whether a free trade agreement to the mutual advantage of Australia and the United States is possible unless we begin the process of negotiation... Of course, the Australian government is not going to negotiate away with the United States or, indeed, any other country the vital interests of any Australian industry...

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2 Department of Foreign Affairs and Trade at [http://www.dfat.gov.au/trade/negotiations/us\\_bkg.html](http://www.dfat.gov.au/trade/negotiations/us_bkg.html)

3 Minister for Trade (Hon. M. Vaile, MP), Media Release, 21 June 2001

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We believe that it would be to the advantage of Australia if we could negotiate a free trade agreement with the Americans. Obviously, it has to be on terms and conditions that are acceptable to both. I do not have any delirious expectations, but if we do not try we have no chance of ever succeeding...

There are complementarities between the Australian economy and the United States economy. There are also areas of very significant difficulty. Agriculture is an area of significant difficulty... and of course there are areas of resistance in relation to what many in Australia see as some kind of cultural imperialism by the United States. There is concern amongst the entertainment industry about changes that might possibly disadvantage them. I am aware of all of that. The government are aware of all of that. We do not dismiss those things. We do not pretend that they will be easily resolved or easily negotiated away. But we do contend that we ought to make an attempt to negotiate an understanding with the United States. That will be the proposition that I will put to President Bush when I see him on Monday week in Washington.<sup>4</sup>

1.12 By mid-2002, the necessary Trade Promotion Authority had passed through the United States legislature, and shortly thereafter the Bush administration was given 'fast-track' authority by Congress to negotiate trade agreements. In November 2002, Prime Minister Howard and USTR Zoellick announced that negotiations would start. Public submissions were called for, and in March 2003 Minister Vaile released Australia's formal list of objectives.

The Government will give a high priority to reducing the most significant market access barriers facing Australian exports, particularly in the agricultural sector. We will pursue a range of Australian interests in the United States market covering all areas of the Australian economy – manufacturing, services, investment, government procurement, telecommunications and electronic commerce, intellectual property rights, and movement of people.

We will ensure outcomes from the FTA negotiations do not impair Australia's ability to deliver fundamental objectives in health care, education, consumer protection and supporting Australian culture and identity. The Government remains committed to preserving its ability to regulate in relation to social and cultural objectives, and will ensure the FTA is consistent with that goal.<sup>5</sup>

1.13 The first round of talks was held in Canberra between 17 and 21 March 2003. Australia's Chief Negotiator was Mr Stephen Deady; for the United States, Mr Ralph Ives.

1.14 In May 2003, Prime Minister Howard met with US President Bush at Crawford, Texas, and both leaders confirmed that they wished to pursue a target date

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4 Prime Minister (Hon. J. Howard, MP) *House Hansard*, 30 August 2001, p.30678

5 Minister for Trade (Hon M Vaile MP) Media Release, 3 March 2003

of December 2003 for the conclusion of negotiations. DFAT officials advised the Senate Foreign Affairs, Defence and Trade Committee at the time that negotiations were being conducted assiduously in order to meet the tight deadlines. They also advised that they were in pursuit of a 'very big agreement'.

We are seeking a truly comprehensive and liberalising free trade agreement that is fully consistent with the rules of the WTO, both the rules of the GATT which deal with free trade agreements and the rules under the GATS which talk about the economic integration of economies. We are looking at a very big agreement. The agreement itself will run to probably 23 or 24 different chapters, covering the full range of economic activity.<sup>6</sup>

### **The broader trade context**

1.15 The debate surrounding multilateral and bilateral trade was explored in some detail in the Senate Committee report *Voting on Trade* (November 2003). It is worth setting the global context briefly again here, especially in the light of the 'competitive liberalisation' arguments that stress the use of negotiating bilateral agreements to prompt advances in multilateral trade negotiations.

1.16 The Howard Government has consistently regarded bilateral agreements as an important supplement to its multilateral trading efforts. Following the Seattle WTO ministerial, the government announced that it was:

intending to explore the prospect of bilateral free trade agreements where these would deliver benefits to Australian exporters in a deeper way and in a quicker fashion than perhaps may have been possible through the multilateral negotiations.<sup>7</sup>

1.17 There has been a long-standing debate about the extent to which WTO based multilateral trade negotiations might be undermined by countries entering bilateral agreements that are by their nature preferential. Both the Select Committee and the Senate Foreign Affairs and Trade Committee explored the issue on several occasions by posing the question as to whether burgeoning bilateral agreements had 'sucked the oxygen out of' multilateral efforts.

1.18 A prominent advocate of liberalised global trade, in its multilateral rather than bilateral manifestations, is Professor Ross Garnaut. He has expressed concerns on several occasions about the risks arising from preferential bilateral agreements, and has identified five key risks that are at play in the AUSFTA:

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6 *Transcript of Evidence*, Senate Committee Inquiry *Voting on Trade*, 2 October 2003, p.460 (Deady, DFAT)

7 *Transcript of Evidence*, Senate Committee Inquiry *Voting on Trade*, 2 October 2003, p.481 (Deady, DFAT)

- 
- the negotiation of a bilateral FTA would accelerate the weakening of the multilateral system;
  - there will be resulting trade diversion from Australia's most important export region, East Asia;
  - the rules of origin associated with a US FTA would raise transaction costs in international trade and lower productivity in the process;
  - the exclusion of US agricultural subsidies from the FTA would corrode the position of free trade agricultural exporters in the international system and could negate any benefits from increased market access to the US;
  - the processes of policy making in developing this agreement, relying on commissioning consulting reports with limited terms of reference, have been very damaging to trade policy processes.<sup>8</sup>

1.19 In its submission to the earlier *Voting on Trade* inquiry, the government explained why it believed that there was no conflict arising from the pursuit of both bilateral and multilateral arrangements.

Some commentators have suggested that negotiation of an FTA with the US will undermine the multilateral trading system founded on the WTO, or signal a lessening of Australia's commitment to the WTO and multilateral liberalisation.

This observation appears to ignore the following:

- FTAs are sanctioned by the WTO – good FTAs are accepted as consistent with the WTO if they are comprehensive and trade creating...
- FTAs can help the WTO system to generate momentum by liberalising difficult sectors among a few countries – and help with the adjustments necessary under global liberalisation negotiations
- in circumstances where the pace of the Doha Round is slowing ... and in particular the difficulty of securing commitments from WTO members to significant agriculture reform, governments will wish to take the opportunity to secure WTO-consistent market opening elsewhere;
- suggestions that bilateral FTA negotiations somehow conflict with Australia's efforts in the WTO reflect a flawed understanding of trade negotiations
- there is no conflict between the objectives Australia is pursuing in the WTO and our FTA negotiations.
- we *continue to press the United States* in Geneva on access for sugar, dairy and other products

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8 *Transcript of Evidence* Senate Committee Inquiry *Voting on Trade*, 22 July 2003, pp. 196, 197, 198, 199, 100 (Garnaut)

- the bilateral FTA negotiations give us a further opportunity to secure our Doha Round objectives on agricultural market access more deeply and rapidly than would be possible through the WTO Doha Round.<sup>9</sup>

1.20 The Committee notes that the government's decision to pursue a free trade agreement with America represented a significant turnaround from its previous position, and something of a 'historic departure in Australian trade policy'.<sup>10</sup> Like its Labor predecessors, 'through the 1990s the Howard government... remained deeply wary of proposals for bilateral trade deals'.<sup>11</sup>

1.21 When President Bill Clinton approached Australia about the possibility of a free trade agreement he was rebuffed. Rob O'Donovan was Australian Senior Trade Commissioner in Los Angeles until 1998, and was a contributor to the DFAT *Review of Australian US Trade relations - A Partnership in Transition*. In a February 2002 article for the Brisbane Institute he wrote:

The Howard government ... in 1997... still firmly rejected the overtures from the Clinton Administration for a bilateral free trade agreement as the Hawke government had done so in the late 80's. It did so for much the same reasons - any success we had was achieved multilaterally and we were unlikely to get any joy in those US agricultural markets where we were competitive but our competitors had friends in Congress... The last consideration hasn't changed so it is worth asking what has?<sup>12</sup>

1.22 The Committee is not clear about why the Australian government's views on this matter were modified to the extent of shifting from a consistent rejection of a US free trade agreement to a forthright and energetic pursuit of one. Some commentators have discerned the shift to be purely a political choice.

Although the public debate will be about economics, the real agenda of the FTA is political. Prime Minister Howard has strategic reasons to support the agreement. An FTA would consolidate the emerging US-Australia axis.<sup>13</sup>

1.23 These observations seem consistent with the remarks made by government ministers throughout the AUSFTA process, which consistently highlighted the fact that the AUSFTA would deepen and strengthen Australia's ties with America.

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9 *Submission 54, Senate Committee Inquiry Voting on Trade* p.40 (DFAT)

10 Capling, A 'Trade, the USA and Down Under's Tyranny of Size' *The Sydney Papers* Autumn 2001, p.180

11 Capling, A 'Trade, the USA and Down Under's Tyranny of Size' *The Sydney Papers* Autumn 2001, p.177

12 Available at [http://www.brisinst.org.au/resources/brisbane\\_institute\\_fta.html](http://www.brisinst.org.au/resources/brisbane_institute_fta.html)

13 Hamilton, C 'Free trade deal won't produce the goods' *Australian Chief Executive* (CEDA) April 2003, p.29

1.24 In the Committee's view, Australia's pursuit of a free trade agreement with America has as much, if not more, to do with Australia's broader foreign policy objectives as it does with pure trade and investment goals. Certainly for the United States administration, free trade agreements can only be situated within a particular foreign policy setting. This was made clear in a widely-reported speech (May 2003) to the Institute for International Economics by USTR Zoellick:

U.S. Trade Representative Robert Zoellick late last week said countries that seek free-trade agreements with the United States must pass muster on more than trade and economic criteria in order to be eligible. At a minimum, these countries must cooperate with the United States on its foreign policy and national security goals... The U.S. seeks "cooperation - or better- on foreign policy and security issues," Zoellick said... Given that the U.S. has international interests beyond trade, "why not try to urge people to support our overall policies?" he asked.

Zoellick said that he uses a set of 13 criteria to evaluate potential negotiating partners, but he insisted that there are no formal rules for the selection or any guarantees. "It's not automatic," Zoellick said. Negotiating an FTA with the U.S. "is not something one has a right to. It's a privilege."<sup>14</sup>

1.25 Some observers regard these sorts of remarks as signalling America's desire to cement a network of countries into a pact which will bind them to comply with US foreign policy. Others regard the AUSFTA as an appropriate and important complement to Australia's existing alliance with the United States.

1.26 The government has been unequivocal in this respect. In particular, its views are declared strongly in Australia's latest foreign policy White Paper *Advancing the National Interest*.

Australia's links with the United States are fundamental for our security and prosperity... Australia has a vital interest in supporting long-term US strategic engagement in East Asia, because of its fundamental contribution to regional stability and prosperity. The government's pursuit of a free trade agreement with the United States is a powerful opportunity to put our economic relationship on a parallel footing with our political relationship, which is manifested so clearly in the US alliance.<sup>15</sup>

1.27 The Committee agrees that Australia's relationship with the United States is its most vital strategic and political alliance. However, the linking of trade and investment agreements so closely to issues of security and strategic political interest is not without its tensions. Links between trade and security or other things which are not closely related to trade can distort the kind of agreement that emerges.

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14 Quoted in *Inside US Trade*, 16 May 2003.

15 Australian Foreign and Trade Policy White Paper *Advancing the National Interest* Canberra (2003) p.(xvi)

## **Anticipated results of AUSFTA**

### **CIE 2001 Study**

1.28 When the proposed negotiations for an AUSFTA were announced, it introduced a period of very active speculation on what the agreement might contain.

1.29 An early effort to predict the outcome was made in the June 2001 CIE study *Economic Impacts of an Australia United States Free Trade Area*. That study estimated that, over 20 years, Australia would benefit by US\$ 10.9 billion and the United States by US\$ 16.9 billion.

1.30 Assuming full implementation in five years, the study predicted a welfare gain for Australia of 0.5% by 2020. Other predictions were that exports would increase, Australia's current account balance would improve by 0.9% and trade creation would exceed trade diversion.

1.31 The study also assumed that all major sectors (including sugar), would be liberalised in the agreement.

### **Department of Foreign Affairs and Trade**

1.32 In a background paper on the proposal to negotiate the AUSFTA, DFAT noted that the core requirement for an FTA to be acceptable to the WTO was elimination of '...tariffs and other restrictions on substantially all merchandise trade between the parties.' The Department added that, beyond that basic requirement, the terms negotiated would:

...be guided by the interests, practices and policies of both countries, and determined in the course of negotiations. Both governments have agreed that an agreement should be comprehensive in scope and should aim to complement our respective efforts in the WTO negotiations, and set a high standard for FTA agreements between other countries.<sup>16</sup>

1.33 The DFAT Background paper also commented that, for Australia, an agreement with the United States would offer substantial benefits. It noted that the

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16 Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement*, Background Paper, Annexure to Interim Report by the Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, Chapter 4, Background Paper, p.2

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United States is our second largest trading partner, the largest provider of foreign investment and also the main destination for Australian investment overseas.<sup>17</sup>

1.34 In a paper entitled *AUSFTA - Frequently Asked Questions*, DFAT listed the benefits it saw accruing from the completion of the Agreement:

The Agreement will immediately extend Australia's trade relationship with the world's largest merchandise and services exporter and importer. It will deliver real benefits and opportunities for Australian exporters from the day it comes into force, and the dynamic gains from the Agreement promise to yield enormous long-term benefits to the Australian economy.<sup>18</sup>

1.35 On the question of whether an FTA with the United States would undermine Australia's objectives in the Doha Round, DFAT stated that FTAs are regarded as 'building blocks to multilateral trade liberalisation'. It also suggested that the AUSFTA will add momentum to Australia's WTO objectives and described the Government's strategy as one of:

...competitive liberalisation – maximising our trade opportunities with individual countries, in our wider region, and globally, to ensure our exporters achieve greater access to overseas markets as quickly, as broadly and as deeply as possible.<sup>19</sup>

1.36 DFAT explained that Australia's trade policy sought to stimulate growth and increase employment opportunities in Australia, by creating new and more open markets for exports. These opportunities, the Department said, were pursued at every opportunity, whether at the global level, on a regional basis or through bilateral agreements.<sup>20</sup>

1.37 DFAT said that because the liberalisation process in the WTO is necessarily a slow process: '...FTAs can provide opportunities to achieve ends that may take longer

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17 Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement*, Background Paper, Annexure to Interim Report by the Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, Chapter 4, Background Paper, p.4

18 Department of Foreign Affairs and Trade, *AUSFTA - Frequently Asked Questions*, Annexure to Interim Report by the Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, Chapter 4, FAQ, p.1

19 Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement - Free Trade Agreements and Multilateral Negotiations*, Annexure to Interim Report by the Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, Chapter 4, Free Trade Agreements and Multilateral Negotiations, p.1

20 Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement - Free Trade Agreements and Multilateral Negotiations*, Annexure to Interim Report by the Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, Chapter 4, Free Trade Agreements and Multilateral Negotiations, p.1

through the multilateral system'.<sup>21</sup> (A discussion of the bilateral vs multilateral trade policies was included in the Select Committee's interim report. It is universally accepted that multilateral agreements are far and away the preferred option, although the negotiation of them is inevitably more time-consuming and complex.)

### **Minister Vaile's Objectives**

1.38 In March 2003, the Minister for Trade released a detailed list of Australia's objectives for the negotiations.<sup>22</sup> Those objectives emphasised that the thrust of the Agreement would be to complement Australia's objectives in the WTO Doha Round and in APEC, and for the two countries to work together in those forums.

1.39 For industrial products and agriculture, the aim was to eliminate tariffs and other trade barriers, including tariff quotas and agricultural export subsidies. Non-tariff barriers on maritime vessel exports to the United States, standards and technical regulation, were also areas of concern. Australia also sought an exemption from United States safeguard provisions or, at least, measures to minimise their impact.

1.40 On Quarantine/Sanitary and Phytosanitary (SPS) measures, the aim was to strengthen co-operation with the United States and the commitment to science-based quarantine measures. Elimination of any unjustified SPS measures was a priority.

1.41 Alignment of Customs procedures was an area in which Australia sought greater co-operation with the United States. This included investigation and prevention of illegal practices and involved harmonisation of policies and procedures.

1.42 The objectives emphasised the need to reduce impediments faced by Australian services trade in entering the United States market. Included were issues such as recognition of the qualifications of Australian professionals, licensing requirements and the temporary entry of business people. Protection of Australia's cultural and social policy objectives and the Government's ability to provide social services, were also important objectives.

1.43 For investment, Australia sought an enhanced framework for investment flows, reduction of unnecessary impediments and to ensure that Australia's foreign investment policy is taken into account.

1.44 Intellectual Property Rights is an area which has generated considerable controversy. Australia's stated aims were to: reaffirm the principles of the WTO

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21 Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement, Free Trade Agreements and Multilateral Negotiations*, Annexure to Interim Report by the Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, Chapter 4, Free Trade Agreements and Multilateral Negotiations, p.2

22 Senate Foreign Affairs, Defence and Trade References Committee, *Voting on Trade – The General Agreement on Trade in Services and an Australia-US Free Trade Agreement*, November 2003, Appendix 3, pp. 168-71

TRIPS agreement; ensure the protection of the rights of Australian holders of intellectual property; and to promote co-operation between the two countries and also together in APEC. An important issue was to ensure that Australia remained free to implement an appropriate legal framework, which maintained a balance between the rights of intellectual property holders and those of the users.

1.45 In telecommunications and e-commerce, Australia sought agreed principles for regulation of the sector. Also important were: reduction of constraints on Australian access to the United States market; retaining the current practice of no customs duties on electronic transmissions; fair, non-discriminatory and competitive rates for internet access and co-operation in seeking to expand the sector.

1.46 Access to the United States government procurement process, based on flexible, transparent and fair rules, was an important aim. Other issues highlighted were co-operation and consultation on competition law; State to State disputes; and mutually supportive policies on environmental issues.

1.47 In October 2003 the Premiers and Chief Ministers of the Australian states and territories – while there were 'no formal arrangements made... to discuss the AUSFTA'<sup>23</sup> - issued a statement in support of it and 'urge[d] all sides to bring negotiations to a swift and successful conclusion'.<sup>24</sup>

### **What the AUSFTA actually delivered for Australia**

1.48 The public responses to the outcomes of the AUSFTA negotiations ranged from great enthusiasm to considerable anxiety.

1.49 Broad support has come from business and industry groups who regard the Agreement as providing new and significant opportunities to do business with America. This support was conveyed in the following terms by Mr Alan Oxley, spokesman for a business group very supportive of the AUSFTA.:

You asked, Chair, what would be the downside for Australia if we rejected the agreement. We would probably be regarded as the most bizarre country in the world for having rejected a free trade agreement with the world's biggest economy—an agreement that would actually give us access in agriculture, which is one of the most difficult areas, notwithstanding the fact that it is not perfect—when many other countries are lining up to have an agreement with them. I honestly do not know how any serious Australian government could justify that to the world at large.<sup>25</sup>

1.50 For many others, however, the Agreement represents nothing but economic and employment risks from exposure to powerful United States interests, and the

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23 WA Government, *Answers to Questions on Notice*, 14 July 2004

24 State Premiers and Chief Ministers, Media Release, 21 October 2003

25 *Transcript of Evidence*, 5 May 2004, p.40 (Oxley, AUSTA)

undermining of Australia's sovereignty. The AMWU summarised its criticism as follows:

This agreement must be rejected because it fails the most basic national interest test, which involves answering the following questions in the affirmative. Is it beyond reasonable doubt that the agreement will achieve net benefits for the nation? Will the benefits be achieved in a manner that is consistent with the deeply held values and beliefs of ordinary Australians? And will this be achieved without compromising the political sovereignty of future Australian governments to act in the national interest? That is the national interest test, and this agreement fails that test.<sup>26</sup>

1.51 Such polarised views have been typical of the submissions and oral evidence that have come before the Select Committee. The Committee discusses elsewhere in this report its concerns about the divisive and adversarial nature of the process by which the AUSFTA was brought into being. In the Committee's view, such polarised responses to trade agreements will only be ameliorated by a formal, proper parliamentary involvement at all stages. Such an approach would mean that the public could be adequately consulted and informed about the reasons and purposes for agreements, and could participate in an informed way in the development of them.

1.52 A paper by DFAT outlining the key outcomes of the Agreement indicated that the overall result for Australia was very positive. On agriculture it was described as a 'significant boost', despite the omission of sugar, the long phasing period for key agricultural commodities such as beef and the retention of dairy quotas. For manufacturing it said that 97% of United States tariff lines (exports worth \$6.48 billion) would be duty free on implementation, with the remainder phased out by 2015. For services (particularly financial services), investment and government procurement, the assessment was that these areas would offer substantial benefits for Australia.<sup>27</sup>

1.53 In other sectors, DFAT also assessed the outcomes as positive for Australia. This included such sectors as:

- intellectual property,
- health (the PBS described as "maintained"),
- local content in Australian media ("protected"),
- quarantine (Australia's quarantine system's "integrity preserved"),
- competition,
- telecommunications and e-commerce,

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26 *Transcript of Evidence*, 7 June 2004, (Cameron, AMWU)

27 Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement – Key Outcomes*, Annexure to Interim Report by the Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, Chapter 4, Key Outcomes, pp.1-2

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- technical regulations and standards.<sup>28</sup>

1.54 There are many Chapters in the AUSFTA that include the establishment of various working parties and committees. They range from a Committee on Trade in Goods, to a Medicines Working Group, to a Committee on Sanitary and Phytosanitary Matters, along with many others.

1.55 Details of the membership and operation of all these committees are not given in the Agreement text. The Committee has appended to this Report a list of those areas in which such committees will operate.

1.56 The Committee went to considerable effort during the course of its inquiry to elucidate the roles, responsibilities and authority of these various groups. Very little information was made available. While the Committee appreciates that the AUSFTA is a 'living document', it is imperative that the activities of the many committees and groups are carried out in a transparent fashion.

1.57 To the extent that there is delegated to these groups a responsibility to discuss matters of considerable significance and sensitivity to both parties, accountability is paramount. In the view of the Select Committee the Australian parliament must be fully apprised of the progress of these committees, and the nature of their discussions. To that end, there should be regular reporting to the parliament of the state of play across all committees. This matter of accountability is taken up elsewhere in this report.

### **Revised DFAT/CIE Study 2004**

1.58 In April 2004, a revised DFAT/CIE study was released.<sup>29</sup> This study was based on the draft structure of the Agreement and was able to take into account the differences between that structure and the assumptions on which the earlier paper had been based. It also had available the timing of the phasing process and details of commitments agreed upon for intellectual property, rules of origin and investment.

1.59 The overall assessment of the study was that the Trade Agreement would 'lift economic growth and welfare in Australia'.<sup>30</sup>

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28 Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement – Key Outcomes*, Annexure to Interim Report by the Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, Chapter 4, Key Outcomes, pp.4-6

29 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004

30 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, p:vii

1.60 The report made an estimate of the likely outcome for the Australian economy ten years after implementation. The central results from that exercise indicated that:

- real gross domestic product (GDP) would be \$6.1 billion or 0.7% higher than it might otherwise be.
- real gross national product (GNP) was likely to be \$5.6 billion higher than it might otherwise be.<sup>31</sup>

1.61 The study uses a discounted present value approach to quantify the benefits of the Agreement. It estimates that over 20 years, Australia will receive a net welfare benefit of \$52.5 billion if measured as real GNP or \$57.5 billion if real GDP is used.<sup>32</sup>

1.62 CIE's analysis indicates that in the first year immediate benefits will be partly offset by adjustment costs. Thereafter, the benefits will increase, as tariffs are reduced and new investment takes effect. CIE estimates that investment liberalisation will make the biggest contribution to economic growth and welfare.<sup>33</sup>

1.63 This study differs in several ways from the first study by CIE. It takes into account factors which were either unknown or unclear in 2001, namely that:

- full liberalisation has not been achieved;
- not all services trade barriers will be removed;
- investment liberalisation has this time been explicitly considered; and
- quantitative effects have been analysed.

1.64 According to CIE, the largest contribution to economic growth and welfare is expected to come from investment liberalisation. Reduction of barriers to investment is expected to reduce the equity risk premium and lower the cost of capital, leading to a rise in investment.<sup>34</sup>

1.65 Trade liberalisation is expected to increase welfare and GDP by about \$1 billion per year. It should reach this level within ten years. There is also potential for future additional gains, which are not quantifiable at this early stage. There will be

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31 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, p.vii

32 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, p.xi

33 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, p.ix

34 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, p.ix

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some offsetting losses through trade diversion. CIE commented, however, that trade diversion in services trade should be minimal.<sup>35</sup>

1.66 Export gains deriving from trade liberalisation will initially be offset by import increases associate with increased investment. After the first ten years, however, CIE's projections indicate that exports will grow faster than imports.<sup>36</sup>

1.67 The exchange rate is expected to appreciate slightly against the \$US initially, then ease to end the decade in a small depreciation. Labour effects are also expected to change direction, an initial rise in employment to 0.3% of total jobs by 2012, then easing to the 'natural rate of full employment'. At that time benefits will be in the form of an increase in real wages of about 1.4%.<sup>37</sup>

1.68 CIE also assessed the likely effects of agreements reached in other sectors of the Agreement. In summary, its findings were that:

- the commitment relating to the PBS is not likely to have a material effect on the cost of the scheme itself, or of medicines supplied under it;
- the incremental cost of the extension of copyright could not be accurately determined. The study estimated that it would be marginal;
- safeguard provisions on beef and horticulture products are not expected to have any material effect;
- commitments on services will allow foreign-owned subsidiaries or branches in Australia to benefit from the Agreement. Any concessions on services given by either country to third countries must be passed on to the other. In effect, this will minimise the possibility of trade diversion in services.
- the Agreement should not have an adverse impact on the Australian environment. It does not prevent Australia from meeting its international environment obligations and should lead to an expansion in energy efficient industries.<sup>38</sup>

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35 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, p.ix

36 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, p.ix

37 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, p.xi

38 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, pp: xii and xiii

1.69 The dynamic effects of this AUSFTA take on special significance because of the long phasing period being applied to some of the arrangements. The use of two separate models enabled CIE to assess the likely progressive results of the AUSFTA and also to take advantage of the greater level of detail available through the GTAP model.<sup>39</sup>

1.70 Because of the disagreements over methodologies, particularly over the size of dynamic gains, CIE also employed a sensitivity analysis covering the most probable range of estimates. That analysis predicts a 95% chance that welfare in Australia will be improved by between \$1.1 billion and \$7.4 billion per year after 20 years, when all of the liberalisation commitments will have worked through the economy.<sup>40</sup>

### Study by Dr Philippa Dee

1.71 The Senate Select Committee commissioned a highly experienced economist and modeller, Dr Philippa Dee, to assess the Agreement and the modelling that had been done by the CIE. Her task included carrying out a sensitivity analysis of the text of the Agreement, and examining the assumptions that informed the CIE modelling. A copy of Dr Dee's report appears in a supplementary volume to the Select Committee's report.

1.72 Changes in market access for most goods were fairly easy to determine, being reflected in tariff reductions or tariff quota increases. Most non-agricultural tariffs are to be removed on day one and the remainder phased out by 2015 (mainly textiles, clothing and footwear and, in Australia, passenger motor vehicles).<sup>41</sup>

1.73 Tariffs on most agricultural products will be phased out. The exceptions are sugar and sugar products and the out-of-quota duties on dairy products. Australia's quota access for beef, dairy, tobacco, cotton, peanuts and avocados will be increased.<sup>42</sup>

1.74 The promises of greater market access for services and investment are more difficult to assess. In this Agreement, services and investment are covered, unless

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39 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, pp:vii and viii

40 Centre for International Economics, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Study commissioned by the Department of Foreign Affairs and Trade, Canberra, April 2004, pp.ix and x

41 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.3

42 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.3

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specifically excluded. In the WTO, however, a positive listing is used – i.e. only those areas listed are covered.<sup>43</sup>

1.75 The study identifies what it calls 'a small but significant number of instances where AUSFTA has gone beyond the GATS ...' Those instances are identified in Tables 2 and 3 (and summarised on pages 7 to 9) of Dr Dee's study.<sup>44</sup>

1.76 The issue causing most discussion is Australia's commitment to relax FIRB screening thresholds on United States investments that are not in sensitive areas.<sup>45</sup>

1.77 The Agreement does not include provisions to ensure the free movement of professionals and businessmen on temporary visits to the United States and there is a related concern over the likely influence of citizenship or residency requirements applied at State level.<sup>46</sup>

1.78 The Government Procurement chapter gives Australia access to United States government procurement in areas other than defence, R&D, foreign aid, procurement between governments and offshore procurement. It also gives Australia access to State procurement in those States listed in Annex 15C to the Agreement. This Annex can be added to, as further States agree to allow access.<sup>47</sup>

1.79 The benefits in the procurement area will depend on whether Australian businesses are able to take advantage of the opportunities. Dr Dee considers it 'doubtful' that Australia will achieve CIE's estimate of 30 per cent as much market penetration as Canadian businesses achieve.

1.80 Canada tends to trade significantly more than normal with the United States on all fronts, not just on government procurement, because of their adjacency and the prevalence of north-south rather than east-west land transport links on the North American continent. There is a long history of econometric work that has quantified the effects of distance on the volumes of trade between countries. Even using a relatively conservative estimate of the effect of distance, such as the recent one from Anderson and Wincoop (2003), Australia's trade with the United States could only be expected to be 4 per cent as large as that of Canada.

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43 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.4

44 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, pp.4 and 7-9, Tables 2 and 3

45 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p. 9

46 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p. 9

47 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.10

1.81 Dr Dee indicated some concern over the potential for provisions in the Intellectual Property Rights chapter to restrict market opening, either by restricting access by users or increasing costs. There was also the possibility that the provisions on patents could delay the release of some generic drugs in Australia and increase their prices to consumers.<sup>48</sup>

1.82 The study by Dr Dee identified a number of additional provisions which could have the effect of restricting market access:

- Rules of Origin: Australia, having operated for many years on the basis of very simple rules of origin, is now faced with a set of rules which are both complex and variable (depending on the product involved). A further complication is that NZ content, which is usually treated as if it were Australian content, is not eligible under AUSFTA.<sup>49</sup>
- Safeguard Provisions: Quantity or price-based trigger mechanisms (such as those on beef or horticultural products) or mechanisms designed to protect against import surges (such as those applicable to textiles and clothing).<sup>50</sup>
- Dispute Settlement Provisions: These provisions allow for trade remedies, trade compensation or payment of a monetary assessment, where a breach of the agreement has occurred. Dr Dee commented that many would regard these as 'very blunt and poorly-targeted ways of correcting particular breaches'.<sup>51</sup>

1.83 The Agreement establishes the need for additional consultation or new administrative procedures in several areas. Dr Dee notes that some of these arrangements, where the United States has not achieved its aims, may be used as a means of keeping continual pressure on Australia, e.g. the mechanism allowing a review if an application to add a drug to the PBS is rejected, and the establishment of a Medicines Working Group.<sup>52</sup>

1.84 The study also calls to attention the precedents set in a number of areas, which may 'affect Australia's options in subsequent bilateral or multilateral forums'. In this category, Dr Dee includes the:

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48 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.10

49 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.10

50 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.11

51 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.11

52 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, pp.11-12

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- omission of the sugar industry from the Agreement;
  - apparent acquiescence with the use of "tailor made" rules of origin for different products;
  - acceptance of wide-spread safeguard provisions.<sup>53</sup>

1.85 One area which stands out in the study's assessment is the Intellectual Property chapter. Dr Dee comments that this chapter sets a number of precedents, some of which override existing domestic law provisions or run contrary to current recommendations by legislative review bodies.<sup>54</sup>

1.86 As an example, the Digital Agenda Act creates a:

...right of communication to the public, which is then protected, and protecting against the circumvention of 'effective technological measures', i.e. measures which control access to a protected work.

1.87 AUSFTA takes a much more expansive definition of 'controlling access' than Australia's legislation; this clashes with a recent review of the Australian legislation which recommended the opposite.<sup>55</sup>

1.88 In another area, the Agreement allows copyright holders to transfer their rights by contract. The United States Trade Advisory Group sees this as taking precedence over exceptions, such as 'fair use' – if so, this would contradict a recommendation of the Commonwealth Law Reform Commission, that parties should not be allowed to contract out of exceptions.<sup>56</sup>

1.89 The requirement to extend the term of copyright protection by 20 years, similarly conflicts with a recommendation by the Australian Intellectual Property and Competition Review Committee. That Committee recommended that any extension of the copyright term should only be adopted after a public inquiry.<sup>57</sup>

1.90 The study found there is some potential for trade diversion in the application of the Agreement. In the main, it would take the form of a redistribution of customs revenue as profits to United States suppliers. This would occur in cases where the United States wins trade away from another source by virtue of a reduced tariff, but is

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53 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, pp.12-13

54 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, pp.13-15

55 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, pp.13-14

56 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.14

57 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.14

a less efficient producer of the relevant product. A similar situation could occur with, for example, professional licensing requirements. Insofar as these requirements restrict the quantity of service, they create artificial profits. Preferential relaxation of these requirements would redistribute those profits and cause trade diversion, especially where the United States is not the world's best producer.<sup>58</sup>

1.91 Several commentators have suggested this trade diversion could provoke a backlash from any of Australia's other trading partners who might suffer a loss of market share. Professor Garnaut commented that, although it is difficult to quantify the effects, he believes that the increased recourse to preferential agreements (particularly in Asia), will have detrimental effects for Australia. He indicated that whether or not there is active trade diversion, this trend is damaging to Australia's aims:

...the proliferation of FTAs, encouraged influentially by Australia since late 2000, has substantially affected the international trading system in ways that are damaging to Australia. Most importantly, the prospects of liberalisation of agricultural trade in East Asia and globally have greatly diminished as a result of these developments.<sup>59</sup>

1.92 In assessing the DFAT/CIE modelling of the likely effects of the Agreement, Dr Dee commented that it is very difficult to assess overall the balance which will be achieved between trade diversion, trade creation and the benefits flowing from the opening up of the market in the other country.<sup>60</sup>

1.93 The analysis presented by Dr Dee indicated that, while the mathematical models used are well-known and well structured, they were not adequate to describe the changes in some sectors affected by the AUSFTA. In the G-cubed model, for example, Dr Dee noted that the level of sectoral detail was '...simply inadequate to capture the trade effects of preferential trade deals'.<sup>61</sup> Dr Dee also expressed difficulty in determining why some of the assumptions used in the DFAT/CIE study had been chosen.

1.94 After reassessing the results indicated by the DFAT/CIE study and making a number of adjustments to the assumptions on which the calculations were based, Dr Dee estimated that the likely overall gain to Australia from AUSFTA was likely to be

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58 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.20

59 Garnaut, Professor Ross, *Notes on CIE Report for DFAT on US FTA for Joint Standing Committee on Treaties*, Supplementary Submission No.160.2, pp:2.

60 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.25

61 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.32

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relatively small; an estimated \$53 million annually. This, the study said, was '...a tiny harvest for a major political and bureaucratic endeavour'.<sup>62</sup>

### ***Other economic modelling***

1.95 This Committee's Interim Report examined the series of modelling exercises applied both before and after the release of the text of the Agreement.

1.96 Some results indicated substantial gains for Australia, others found the gains to be minimal. One study concluded that the Agreement would disadvantage Australia considerably by weakening its sovereignty. For some witnesses, econometric studies are somewhat beside the point. One business and trade analyst declared:

I can tell you that most of our members would not use an econometrics study to assess whether or not there were a new market. In fact, a lot of the debate we are having here is reminiscent of theological debates about how many angels can dance on the head of a pin. The actual amount of extra change being talked about—either winning or losing—in real terms is so small that one of the golden rules of econometrics is met, which is: don't use it for small gains or losses; it doesn't tell you anything. What should be done is a proper economic analysis, and that is the way in which business would look at it.<sup>63</sup>

1.97 The Select Committee considered that, due to the wide variation in the outcomes of these exercises, the results were too inconclusive to be used as a basis for solid conclusions. It noted that the results gained in each study reflected the underlying assumptions used to establish the equations applied in the mathematical model of the economy.

1.98 In addition, the Committee found that, whatever the reliability of the calculations, the results would be incomplete. The mathematical models could not include assessments of some important areas (such as social policy issues), because of the impossibility of putting a quantitative value on them. Dr Dee's comments have reinforced this impression.

1.99 The Committee has therefore used these studies as a guideline for some individual sectors that lend themselves more readily to quantitative analysis. It has not used the results to draw overall conclusions on the value of the Agreement to Australia.

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62 Dee, Dr Philippa, *The Australia – US Free Trade Agreement – An Assessment*, Australian National University, June 2004, p.35

63 *Transcript of Evidence*, 5 May 2004, p.26 (Oxley, AUSTA)

## What the AUSFTA delivered for America

1.100 The US objectives in negotiating the AUSFTA are listed in an appendix to this report. Some of the more significant objectives related to:

- eliminating Australia's export monopoly arrangements and government practices affecting exports of agricultural products;
- to seek reaffirmation of Australia's WTO commitments on SPS and eliminate unjustified restrictions and to strengthen co-operation between US and Australian authorities;
- collaboration in implementing the WTO SPS agreement and in relevant international bodies;
- to seek Australia's ratification of World Intellectual Property Organization (WIPO) treaties;
- establish standards to build on WTO and WIPO agreements; enhance Australia's level of protection for intellectual property rights and increase protection of patents and undisclosed data;
- strengthen Australia's domestic IP and enforcement procedures;
- ensure trade-related procedures are fair and transparent;
- address anti-competitive business practices, state monopolies and enterprises.

1.101 Following the signing of the Agreement, the AUSFTA received unprecedented support from American legislators in both the House and the Senate. It was also received with considerable enthusiasm by most business and trade groups in the United States:

This superb agreement can result in close to 2 billion dollars in new US manufactured goods exports...making this the most front-loaded FTA ever.  
( Jerry Jasinowski, NAM President)

[T]his agreement will immediately eliminate tariffs on 99.5% of all trade between the two countries. This is the most significant reduction of industrial tariffs ever achieved in a US free trade agreement...American workers will benefit most from this deal, especially manufacturing jobs.  
(Anne Wexler, AAFTAC Chair)

This agreement provides a model for intellectual property protection and enforcement that should be embraced worldwide and clearly demonstrates that promoting both cultural expression and open trade can be achieved in a trade agreement. (Robert M. Kimmitt, Executive Vice President, Global Public Policy, Time Warner Inc.)<sup>64</sup>

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64 Quotes selected from USTR website at <http://www.ustr.gov/new/fta/Australia/quotes.htm>

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1.102 US Trade Representative Zoellick has consistently extolled the virtues of the AUSFTA, describing the signing of the Agreement as 'a great day for the peoples of two countries with a long history of friendship and partnership'

"This comprehensive FTA between Australia and the United States strengthens our close ties and offers new potential by expanding opportunities for the workers, businesses, consumers and farmers of both countries," said Zoellick, who visited Canberra in November 2002 to announce the negotiations. "This is the most significant immediate cut in industrial tariffs ever achieved in a U.S. free trade agreement, and manufacturers are the big winners."<sup>65</sup>

1.103 The Advisory Committee for Trade Policy and Negotiations (ACTPN), which is appointed by the President and is the most senior committee, found that the U.S.-Australia FTA 'is strongly in the economic interest of the United States'. Describing the agreement as 'outstanding' and urging that it 'be adopted quickly', ACTPN described the agreement's rapid elimination of Australian tariffs on U.S. manufactured exports as 'an unprecedented negotiating accomplishment'.<sup>66</sup>

1.104 Broad support was also expressed by the industry advisory committees, covering manufactured goods, services, intellectual property, electronic commerce, standards, and customs matters. These committees, representing the bulk of the U.S. economy and the vast majority of U.S. exports, applauded the rapid reduction of tariffs on manufactured goods, strong protections for intellectual property and digital products, transparency of technical standards, and significant advancements in market access for a wide variety of U.S. financial, professional, entertainment, audiovisual, telecommunications and other services.<sup>67</sup>

1.105 The Committee is in no doubt that U.S. firms and U.S. trade officials have found enormous potential benefits arising from the AUSFTA. The important question is the extent to which Australia realises benefits that outweigh any potential downsides. The opening up of Australia to American manufacturers, service suppliers and investors clearly introduces significant new competition into Australia. Australian firms, too, now have greater potential access to the American market. The key question is the extent to which opportunities are turned into real gains, and whose gains and opportunities are likely to prevail.

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65 USTR Press Release <http://www.ustr.gov/releases/2004/02/04-08.pdf>

66 USTR Press Release <http://www.ustr.gov/releases/2004/03/04-20.pdf>

67 USTR Press Release <http://www.ustr.gov/releases/2004/03/04-20.pdf>



## Chapter 2

### Trade treaty-making: getting the process right

2.1 During the course of the Select Committee's inquiry into the AUSFTA it became painfully obvious that a major deficiency in the negotiating of such an agreement, and in its subsequent implementation, is the inadequacy of the process by which the entire affair is handled.

2.2 At the core of the inadequacy lies the inability of the parliament, as representative of the public and steward of the national interest, to contribute to and scrutinise the making of the Agreement. As a result, it is only after the Agreement has been signed that the parliament becomes a player to the extent that it must pass the relevant domestic legislation that gives effect to what has been negotiated.

2.3 This after-the-fact involvement of the parliament not only impedes sound public policy and law-making. It denies the parliament an opportunity to inform itself, and to guide public opinion, about the complex considerations at play. It encourages an adversarial approach to the Agreement rather than an analytical approach. The national interest is splintered, wedged and variously assaulted as the Agreement's nits are picked, and important complex issues are given short shrift.

2.4 Economic modellers, commissioned to assess the merits of the Agreement, are forced into the role of policy gladiators, pitted against each other in a rather unseemly political tussle. The legislature, in attempting to assess the overall benefits of the Agreement, and to pass laws which will sustain the national interest and avoid a future haunted by unknowable or unanticipated consequences, incurs the wrath of the executive which currently has the right and the responsibility to negotiate the Agreement. A more fraught and unhelpful process could hardly be imagined.

2.5 There is a more detailed discussion below of the standard role of the Joint Committee on Treaties in assessing treaties and international agreements, but it is worth noting here some unusual features of the process as it applied to the AUSFTA.

2.6 In the case of the AUSFTA, the Joint Committee 'stepped a little beyond its usual role'<sup>1</sup> and pursued a rather more in-depth examination of the Agreement than is normally undertaken. The AUSFTA had already been agreed to by the Australian and American governments on 8 February 2004.

2.7 The JSCOT received its first official briefing on the Agreement on 2 April 2004, and concluded its public hearings on 14 May 2004. Four days later, with no considered advice being tendered by JSCOT, the AUSFTA was officially signed in Washington.

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1 JSCOT Report No.61 : *The Australia-US Free Trade Agreement* June 2004, p. 2

2.8 The JSCOT report on the AUSFTA was finally tabled in the Australian parliament on 23 June 2004, and a few hours later the implementing legislation for the AUSFTA was introduced to the House. It was passed by the House of Representatives the following day.

2.9 Thus it was that before parliament's own JSCOT processes for examining treaties and agreements had been completed the AUSFTA had been officially signed. Within hours of the introduction of the JSCOT report's final presentation to the parliament, and without any debate or consideration of the report's contents, the implementing legislation had been introduced and passed.

2.10 Such a sequence of events is self-evidently a mockery of the process that was set up by the parliament ostensibly to ensure that a proper examination of international treaties and agreements took place.

2.11 The issue of process was discussed at some length in the 2003 Senate report *Voting on Trade*, and the Select Committee can only regret that the advice of that report seems not to have been heard. It must therefore be repeated.

## **Treaties and the parliamentary process**

2.12 The structure of the political system in Australia means that it is the role of the executive government to negotiate international treaties. The parliament's role is confined to the passing of legislation which is necessary domestically to give effect to the provisions of the treaty. A parliamentary committee examines and reports to the parliament on the treaty, but cannot amend it.

### **The Constitution and the treaty-making process**

2.13 Under the Australian Constitution, there are two different powers relevant to the treaty-making process. The power to enter into treaties is an executive power, conferred by section 61 of the Constitution. The power to implement treaties however is a legislative power, contained in section 51(xxix) of the Constitution.<sup>2</sup>

2.14 Section 61 of the Constitution states as follows:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

2.15 Section 51(xxix) of the Constitution confers on the Commonwealth parliament the power to legislate with regard to 'external affairs'. This has been

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2 See Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995, pp:45. Chapter 4 of this report discusses in some detail the constitutional power to enter into and implement treaties, as well as the history of the executive power to make treaties.

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interpreted by the High Court to mean that the Commonwealth parliament may legislate under this section to implement in domestic law a treaty which has been entered into by the Executive pursuant to its power in section 61 of the Constitution.<sup>3</sup>

2.16 As indicated above, the decision to enter into a treaty is one which is made by the Executive, rather than the parliament. Decisions about the negotiation of bilateral agreements or multilateral conventions, including determination of objectives, negotiating positions, parameters within which the Australian negotiators can operate and the final decision about whether to sign and ratify are taken at ministerial level, and in many cases, Cabinet.<sup>4</sup>

2.17 Although there is no formal role set out in the Constitution for parliament in the treaty-making process, the Joint Standing Committee on Treaties (outlined below) involves tabling treaties in parliament for at least 15 sitting days, prior to binding treaty action being taken. However, a treaty is generally tabled *after* it has been signed for Australia but before any action is taken which would bind Australia under international law.

2.18 Negotiations for major multilateral treaties are often lengthy and quite public, which means there are opportunities for parliamentary debate, questions on notice and questions without notice as the issues become publicly known. In addition, it is argued, there is the opportunity for further debate on any implementing legislation which is required as a result of the treaty.<sup>5</sup>

2.19 The government's determination with regard to whether to become a party to a treaty or not is based on an assessment of what is in Australia's national interest. What is in the national interest is decided on the basis of information obtained in consultations with relevant sections of the community. The practice is to provide public information about the treaty being considered, and if possible, develop a consensus within the community before taking definitive treaty action. This inevitably involves balancing a range of competing interests.<sup>6</sup>

2.20 Generally speaking, included in the consultations are State and Territory governments, which are a primary focus, and industry and other interest groups, including non-government organisations (NGOs). There is a range of formal and informal consultation processes involved, which are outlined in a general way below.

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3 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995, pp:46. Chapter 5 of this report discusses the evolution of the High Court's interpretation of the 'external affairs' power.

4 DFAT, *Australia and International Treaty Making Information Kit* (2002), p.4

5 DFAT, *Australia and International Treaty Making Information Kit* (2002), p.5

6 DFAT, *Australia and International Treaty Making Information Kit* (2002), p.5

## The 1996 reforms

2.21 In recognition of the need for greater openness and transparency in the treaty-making process, the government implemented a number of reforms to the existing processes in mid-1996. These reforms included the establishment of the Treaties Council, the formation of the parliamentary Joint Standing Committee on Treaties (JSCOT) and the establishment of the Australian Treaties Library. The Commonwealth-State-Territory Standing Committee on Treaties (SCOT) is another important consultation mechanism.<sup>7</sup>

2.22 The peak consultative body is the Treaties Council, the members of which are the Prime Minister, the Premiers of the States and the Chief Ministers of the Territories. The aim of the Council is to facilitate high-level consultation between the States and Territories and the Commonwealth, and allow States and Territories to draw to the Commonwealth's attention treaties of particular sensitivity and importance to them. The Council meets as agreed by the Commonwealth and the States and Territories.

2.23 The Select Committee notes that the Treaties Council has met only once, in 1997, and did not meet to consider the AUSFTA. This is discussed further below.

### *Joint Standing Committee on Treaties*

2.24 The parliamentary Joint Standing Committee on Treaties (JSCOT) was established in 1996, its role being to review and report on all treaty actions proposed by the government before action is taken which binds Australia to the terms of the treaty.<sup>8</sup>

2.25 The Committee's resolution of appointment empowers it to inquire into and report on:

- (a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the parliament;
- (b) any question relating to a treaty or other international instrument whether or not negotiated to completion, referred to the committee by:
  - (i) either House of parliament; or
  - (ii) a Minister; and
- (c) such other matters as may be referred to the committee by the Minister for Foreign Affairs on such conditions as the Minister may prescribe.

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7 See DFAT, *Australia and International Treaty Making Information Kit* (2002), pp.21-34 for a detailed discussion and evaluation of the reforms undertaken in 1996.

8 This section on the role of JSCOT is drawn from the Joint Standing Committee on Treaties web page detailing the establishment, role and history of the Committee, at <http://www.apf.gov.au/house/committee/jsct/ppgrole.htm>, accessed 29 October 2003.

2.26 The current treaty-making process requires that all treaty actions proposed by the government are tabled in parliament for a period of at least 15 sitting days before action is taken that will bind Australia at international law to the terms of the treaty.

2.27 When tabled in parliament, the text of a proposed treaty action is accompanied by a National Interest Analysis (NIA) which explains why the government considers it appropriate to enter into the treaty. An NIA includes information about:

- the economic, social and cultural effects of the proposed treaty;
- the obligations imposed by the treaty;
- how the treaty will be implemented domestically;
- the financial costs associated with implementing and complying with the terms of the treaty; and
- the consultation that has occurred with State and Territory governments, industry and community groups and other interested parties.

2.28 The text and the NIA for each proposed treaty are automatically referred to the JSCOT for review. When its inquiries have been completed, the JSCOT presents a report to parliament containing advice on whether Australia should take binding treaty action and on other related issues that have emerged during its review.

### **Consultation and parliamentary scrutiny of treaties**

2.29 In the main, the reforms undertaken since 1996 have been successful in enhancing the level of public awareness of Australia's participation in the treaty-making process and improving the accessibility of information to the general public about treaties through the development of the Treaties Library.

2.30 Notwithstanding these successful reforms, the Select Committee remains concerned that, particularly with regard to trade agreements, there is insufficient consultation and community involvement in the treaty-making process and inadequate opportunities for parliamentary scrutiny of proposed treaties *prior* to signature by Australia – as opposed to *following* signature but *prior* to any action which binds Australia in international law (i.e., ratification).

2.31 The Select Committee believes that trade agreements, because of their potentially broad ranging impacts, are in a different category to other types of international treaties. Trade agreements are not, for example, like treaties that might be ratification of international standards that have gone through numerous processes of discussion. They are significantly about the shape of Australia's economic and social future.

2.32 The Select Committee also makes the point that trade agreements now cover a wide range of issues, and are not just about trade in goods and lowering of tariffs. Trade agreements can have wide ranging impacts in areas such as social policy, health

and environmental policy and legislation, intellectual property rights, sanitary and phytosanitary measures, trade related investment and government procurement.

2.33 Bilateral and regional trade agreements cover a potentially wider range of issues, and usually adopt a ‘negative list’ approach rather than the ‘positive list’ approach. These types of agreement have the potential to impact on any area of government regulation which is not specifically excluded from the agreement.

2.34 Once signed, trade agreements effectively bind future governments and are difficult to change. Amending Australia’s commitments could involve long lead times, loss of trade access or payment of compensation. Because of this limiting effect on the ability of future parliaments to legislate, it is essential that parliament is fully aware of the content of trade agreements and has the opportunity to debate such agreements, prior to Australia being bound to comply with the agreement in question.

2.35 The Select Committee believes that trade agreements can and should be distinguished from treaties such as United Nations human rights treaties, international labour conventions and international environmental agreements. Unlike labour, human rights and environmental agreements, trade treaties incorporate dispute settlement processes and binding enforcement mechanisms, including sanctions and compensation, making them more analogous to private law or contract law than traditional human rights treaties.

2.36 A key distinction between conventional treaties and trade treaties is that states can choose to ‘selectively exit’ conventional treaties with relative impunity. Trade treaties impose penalties for serious breaches. Although governments are obliged to adhere to their responsibilities under conventional treaties, in reality, these treaties often have ineffectual enforcement mechanisms. As a consequence, states that choose to ignore their obligations may face diplomatic pressures or possibly sanctions. In contrast, trade agreements impose binding justiciable constraints on governments regarding the conduct of fiscal, monetary, trade and investment policies

2.37 In the United States, international trade agreements cannot be ratified until they are approved by both houses of the Congress. This process can be time consuming and cumbersome, the difficulties of which have been overcome by the introduction of legislation providing for a Trade Promotion Authority. The legislation in the US ensures that other factors, such as the effects on workers, the broader community and the environment cannot be ignored in the ratification process. (The process in the US is discussed elsewhere in this Report.).

2.38 In the absence of a similar process in Australia, it seems even more important that parliamentary approval of trade agreements should be a necessary precondition of ratification. After negotiation and signature, a treaty should not become legally binding until there has been sufficient parliamentary scrutiny, and after sufficient debate, parliament and not the executive should have responsibility for ratification.

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### *Senate Legal and Constitutional Committee Report—Trick or Treaty?*

2.39 The Select Committee notes that the Senate Legal and Constitutional References Committee considered the issue of parliamentary involvement in the treaty-making process in its comprehensive report *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*.<sup>9</sup> This report gave detailed consideration to a range of issues including accountability and sovereignty and whether there is a need for greater parliamentary involvement in the treaty-making process.<sup>10</sup>

2.40 That Committee was of the view that a range of arguments could be made for increased parliamentary involvement in the treaty-making process, and that there was strong support for this proposition in the evidence before it. The key point in favour of greater involvement was the increasing number and wide range of subjects covered by treaties. The Committee reasoned that the more important the subject matter, the greater the need for parliamentary involvement.<sup>11</sup>

2.41 With regard to the democracy or otherwise of the treaty-making process, the Legal and Constitutional Committee concluded that the act of entering into a treaty is a free decision of Australia as a sovereign nation, entered into by a democratically elected government. Further, parliament must pass any legislation necessary to implement the treaty in domestic law. The process itself was regarded as democratic, but in need of some enhancement, for example, by improving consultation mechanisms.<sup>12</sup>

2.42 In *Trick or Treaty*, the Committee acknowledged that, by incurring international obligations under treaties, the government exerts influence on the Commonwealth parliament and/or the States and Territories to fulfil those obligations. For this reason, the Committee advocated greater involvement by the parliament prior to ratification of a treaty, so that it can ‘make a free choice without the pressure of a potential breach of treaty obligations’.<sup>13</sup>

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9 The report was tabled in November 1995 and is available at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/treaty/report/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/treaty/report/index.htm)

10 See Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995, chapter 14. This Chapter also considers whether there could be said to be a ‘democratic deficit’ in the current processes, coming to a conclusion that there probably wasn’t sufficient evidence to indicate that this was the case.

11 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, p. 239

12 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, p. 246

13 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* p. 247

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**Joint Standing Committee on Treaties Report—Who's afraid of the WTO?**

2.43 The JSCOT considered a range of issues relating to Australia's relationship with the WTO in its report *Who's Afraid of the WTO? Australia and the World Trade Organisation*<sup>14</sup>, including community education and consultation and parliamentary scrutiny of WTO agreements.

2.44 The JSCOT's view was that, while the government had made considerable improvements in the level of consultation undertaken with interested parties during the development of WTO negotiating positions, there are few opportunities for parliamentary involvement in these debates. The JSCOT acknowledged that beyond the work of the Trade sub-committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, parliament's role in reviewing trade policy is limited to *ad hoc* scrutiny through Senate Estimates and occasional debate and questions.<sup>15</sup>

2.45 The JSCOT pointed out that, given the impact that global trade has on the lives of Australians, parliament should take a more prominent role in debating the many trade related issues which are of concern to the general community. The JSCOT recommended the establishment of a Joint Standing Committee on Trade Liberalisation, to allow parliament to play a more active role in reviewing Australia's engagement in the multilateral trading system. Further, it was recommended that this committee undertake an annual review of Australia's WTO policy, including negotiating positions, dispute cases, compliance and structural adjustment.<sup>16</sup>

2.46 It was envisaged that this proposed committee could comment on Australia's negotiating proposals, before WTO negotiations commence, and could undertake extensive community consultations on trade policy and WTO matters. The JSCOT noted that a Canadian parliamentary committee did just this prior to the 1999 Seattle WTO meeting.<sup>17</sup>

2.47 Further, the JSCOT noted that much of the focus of Australia's engagement with the WTO seemed to be on the opportunities for Australian exporters, rather than the domestic impacts of trade liberalisation. The JSCOT saw that the proposed joint committee dedicated solely to international trade matters could help redress this balance, allowing parliament to examine and report on the domestic impact of the government's trade policies and proposed outcomes.

2.48 In response to the recommendations regarding greater parliamentary scrutiny of Australia's trade policies and relationship with the WTO, the government

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14 Joint Standing Committee on Treaties (JSCOT), Report 42: *Who's Afraid of the WTO? Australia and the World Trade Organisation*, September 2001. Available at <http://www.aph.gov.au/house/committee/jsct/wto/index.htm>, accessed 31 October 2003

15 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, p.68

16 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, pp:68, 69

17 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, p.68

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acknowledged that it is a matter for parliament to determine what committees it wishes to establish, but indicated that it thought the establishment of a separate committee dealing with trade liberalisation was not necessary. The government noted that the Joint Standing Committee on Foreign Affairs, Defence and Trade and its Trade Sub-committee already has a mandate to review and examine developments in the international trade environment and Australia's trade priorities, including the WTO.<sup>18</sup>

### ***Consultations with the States and Territories about the AUSFTA***

2.49 Any international treaty – and especially a trade agreement with comprehensive coverage of matters that cut across various jurisdictions – will necessarily be of considerable interest and significance to state, territory and local governments.

2.50 The fact that a national government can enter binding undertakings with an international trading partner means that such treaties can effectively extend the constitutional reach of the Commonwealth.

2.51 Given that many aspects of the AUSFTA have important implications for the States and Territories, the Select Committee sought advice from them about the AUSFTA and in particular about their involvement in its development. The Select Committee has discerned several weaknesses in the process.

2.52 A major weakness in process was the failure to convene the Treaties Council of first ministers which was established specifically for the purpose of such consultation and advice.

COAG agreed that (taken from the 1996 revised Principles and Procedures for Commonwealth-State Consultation on Treaties):

5.1 There will be a Treaties Council consisting of the Prime Minister, Premiers and Chief Ministers. The Treaties Council will have an advisory function.

5.2 The role of the Treaties Council is to consider treaties and other international instruments of particular sensitivity and importance to the States and Territories either of its own motion, or where a treaty is referred to it by any jurisdiction, a Ministerial Council, an intergovernmental committee of COAG or by SCOT [Standing Committee on Treaties]. Senior Officials will co-ordinate and prepare the agenda for the Treaties Council. The Treaties Council will also be able to refer treaties to Ministerial Councils for consideration.

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18 Government Response to Report 42 of the Joint Standing Committee on Treaties, 29 August 2002, available at <http://www.aph.gov.au/house/committee/jsct/governmentresponses/42nd.pdf> at 31 October 2003.

5.3 The Treaties Council will meet at least once a year. The Prime Minister will chair the meetings, with the Minister for Foreign Affairs in attendance when appropriate. Meetings of the Treaties Council will normally take place at the same time and place as COAG.

2.53 Despite 5.3 above, the Treaties Council has met only once, in 1997. It did not meet to consider AUSFTA. The Select Committee considers that, in the light of the Treaties Council's terms of reference, there could scarcely have been, in the case of the AUSFTA, an agreement that would be of 'particular sensitivity and importance to the States and Territories'.

2.54 The Victorian Government's July 2003 request for the Treaties Council to consider the AUSFTA was not agreed to. The Queensland government advised that, while it did not request that course of action, the Attorney General (Hon Rod Welford MP), in an address to a seminar in March 2002 entitled *Treaties in a Global Environment*, had 'reiterated Queensland's concern regarding the apparent reluctance of the Commonwealth to convene a Treaties Council meeting'.<sup>19</sup>

2.55 Queensland also referred to the existence, under COAG, of an officials-level Standing Committee on Treaties, which was to advise the Treaties Council on relevant matters, monitor treaties, and coordinate State and Territory representation on delegations where appropriate. While the Committee has met regularly, in the view of the Queensland government 'it has not met the original expectations of its role'.<sup>20</sup>

2.56 States and Territories have raised concerns about the effectiveness of current measures used by the Commonwealth Government to consult on treaties. At its meeting on 28 May 2004, the COAG Senior Officials Meeting (SOM) established a review of the procedures. For Queensland, areas which should be considered in that review include:

... the Treaties Council, timely consultation with States and Territories regarding National Interest Analyses, a more systemic approach to consultation which currently does not follow a standard or reliable path and consideration of when negotiations should be elevated to Ministerial level. In addition, because of the significant increase in negotiation of bilateral agreements, we propose that the review should consider mechanisms to ensure that current legislation/regulation across all jurisdictions, conforms and continues to conform to treaties.<sup>21</sup>

2.57 In late 2002, the Commonwealth Minister for Trade wrote to the State and Territory Ministers with trade portfolios encouraging State and Territory submissions outlining any issues and priorities they would like to see pursued in the negotiations

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19 Queensland Government, *Answers to Questions on Notice*, 19 July 2004

20 Queensland Government, *Answers to Questions on Notice*, 19 July 2004

21 Queensland Government, *Answers to Questions on Notice*, 19 July 2004

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with United States. There were no formal arrangements whereby State and Territory leaders discussed the AUSFTA, although there appears to have been contact between the States and Territories at officials' level.

2.58 Consultation by the Commonwealth appears to have been 'really a matter of the States and Territories being provided with information, unless the Commonwealth specifically needed the input of the States and Territories, such as in the government procurement chapter'.<sup>22</sup> Briefings were also provided at some national level meetings such as the National Trade Consultations and the Primary Industries Ministerial Council.

2.59 According to the WA government, at least, the information obtained was, for the most part, not adequate to brief ministers for cabinet level discussion or to enable departments to analyse the AUSFTA properly.

While some information was provided, there was insufficient detail to allow analysis of the impact of the proposed AUSFTA on Western Australia.<sup>23</sup>

2.60 As well, just before the third round of negotiations when a State and Territory member was to have attended negotiations for the first time, permission for that person to attend was withdrawn because 'the USA had some issues with a State and Territory representative attending'<sup>24</sup> For the last round of negotiations in Canberra, however, a Queensland trade official attended as an observer.

2.61 There have been no formal arrangements agreed on for State and Territory participation in ongoing consultations or negotiations associated with the various working groups established under the AUSFTA. DFAT officials advised states that 'a lack of a formal arrangement does not imply that State and Territory input would not be sought'.<sup>25</sup>

## Conclusions

2.62 The Select Committee concurs with the analysis and assessment of the Senate Legal and Constitutional Committee discussed above with regard to parliamentary involvement in the treaty-making process, and the democracy of the process. The more important the subject matter of the treaty, the greater the level of scrutiny is required. The Legal and Constitutional Committee's assessment was made in 1995 and there are now even stronger reasons for greater parliamentary scrutiny given the proliferation of trade agreements, and, in particular, the trend towards bilateral agreements. These developments have occurred largely since the Legal and Constitutional Committee's report was tabled.

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22 WA Government, *Answers to Questions on Notice*, 14 July 2004

23 WA Government, *Answers to Questions on Notice*, 14 July 2004

24 WA Government, *Answers to Questions on Notice*, 14 July 2004

25 Queensland Government, *Answers to Questions on Notice*, 19 July 2004

2.63 The crux of the issue regarding treaty-making processes is that there is a valid distinction to be made between human rights type treaties (which have no enforceable dispute resolution mechanisms and no financial penalties for withdrawal) and trade treaties (in particular, bilateral agreements such as AUSFTA and WTO agreements including GATS). Trade agreements, including AUSFTA, have binding dispute resolution processes and parties are exposed to potentially significant financial penalties or ‘compensatory adjustment’ if they withdraw from commitments made.

2.64 This means that future governments and future parliaments are bound to comply with Australia’s current AUSFTA commitments.

2.65 In the Select Committee’s view, the argument that the treaty-making process is sufficiently democratic because governments are elected and because legislation is required to be passed to implement treaties into domestic law does not have a great deal of force with regard to trade treaties which bind future governments and parliaments. Moreover, governments seldom, if ever, could be said to have a mandate to enter into trade agreements given that such agreements are rarely referred to or given coverage prior to elections.<sup>26</sup>

2.66 Problems will always arise when citizens feel that the government is not apprising them adequately of the matters being placed on the negotiating table, or when they sense that a veil of secrecy is being drawn over agreements that may have far-reaching consequences for their economic, social, environmental or cultural futures.

2.67 While the Select Committee appreciates that negotiating tough trade deals requires the parties to observe a considerable degree of discretion, and that to reveal one’s hand is rarely an appropriate strategy, the Select Committee is also strongly of the view that the process by which major trade deals are initiated, developed and prosecuted must be as transparent as possible.

2.68 The Select Committee also regards as very inadequate the manner in which the States and Territories were enabled to participate in the development of the AUSFTA. The States and Territories ministers seemed not to have been in any position to make an informed assessment of the impact of the AUSFTA on their areas of responsibility, and the lack of involvement of state officials during the negotiating rounds was a major shortcoming.

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26 The Senate Legal and Constitutional Committee Report *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* at pages 232-233 refers to evidence from Professor de Q Walker of the University of Queensland, who argues that even the most important treaties lack anything resembling a mandate from the electorate, giving the example of the Closer Economic Relations (CER) treaty with New Zealand. The CER had a major impact on the economy but was not mentioned in any party’s campaign during the federal election prior to its ratification.

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2.69 The collective commitment of Australian governments to advance the wellbeing of all Australians relies to a considerable degree on trust and confidence. The Select Committee is persuaded that the translation of that sentiment and principle into a standard practice by which Australia progressed its trade deals would overcome much of the public anxiety and suspicion. It would also encourage the public to engage more fully in the debate, enable citizens to be better informed, and most importantly assist both state and federal governments towards a full appreciation of the views of its electors. In short, the public interest would be served.

### *The practicalities of parliamentary involvement*

2.70 The Select Committee believes that a strong case can be made for greater parliamentary involvement in setting the negotiating priorities and monitoring the impacts of trade treaties, in addition to the kind of scrutiny undertaken by the JSCOT.

2.71 The Select Committee accepts in part the view of the JSCOT in its report on Australia's relationship with the WTO, discussed earlier, that the focus of Australia's trade policy and trade consultations has been, and perhaps continues to be, too much on the opportunities for Australian businesses seeking to export globally and too little on the domestic impacts of trade liberalisation in general, and of the proposed AUSFTA in particular.

2.72 Any trade liberalisation is likely to disrupt some existing industries and promote the development of others. This has implications for patterns of employment and raises complex domestic policy questions centred on managing the impact of change which in the aggregate benefits the economy but has negative impacts on certain sub-groups. The challenge for governments is to ensure that there are appropriate structural adjustment mechanisms in place to minimise the negative impacts.

2.73 The Select Committee notes that the Joint Standing Committee on Foreign Affairs, Defence and Trade's (JSCFADT) Resolution of Appointment empowers it to consider and report on such matters relating to foreign affairs, defence and trade as may be referred to it by either House of parliament, the Minister for Foreign Affairs, the Minister for Defence, or the Minister for Trade.<sup>27</sup>

2.74 The JSCFADT resolved in August 2001 to 'undertake continuous and cumulative parliamentary scrutiny of the World Trade Organisation.' However, there is no similar initiative for the scrutiny and discussion of proposed free trade agreements, in particular the AUSFTA. The JSCOT's role in this process (at least in the vast majority of cases) is limited to scrutinising the proposed agreement once it has been signed for Australia, but before it is ratified.

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27 Joint Standing Committee on Foreign Affairs, Defence and Trade Resolution of Appointment. See <http://www.aph.gov.au/house/committee/jfadt/resoltn.htm>, accessed 31 October 2003.

2.75 The crucial point for trade agreements is ‘prior to signature’, because once a treaty has been signed it would be extremely unlikely for the government to refuse to ratify a treaty on the basis of, say, any JSCOT recommendations, or indeed for any other reasons.

2.76 The Select Committee’s view is that parliament needs to be more involved in the process prior to signature of treaties. The focus of parliament’s involvement should be more balanced, not just on the opportunities and benefits of increased export opportunities for Australian businesses, but also on the domestic impacts of trade liberalisation in general, including social, cultural and environmental impacts, including measures to offset or manage adverse adjustment impacts.

2.77 There seems to be scope under the terms of reference for the JSCFADT and of the JSCOT to allow for greater involvement in scrutiny of proposed trade treaties than is currently the case. The Trade Sub-committee of the JSCFADT for example, could fulfil the role of the proposed new committee on trade liberalisation recommended by the JSCOT in its report on Australia and the WTO, discussed earlier. This could involve monitoring the impacts of trade agreements on Australia, opportunities for trade expansion and trade negotiating positions developed by the government.<sup>28</sup>

2.78 The government is currently required to table a National Interest Analysis along with each treaty tabled. The NIA includes information about the economic, social and cultural effects of the proposed treaty, and the obligations imposed by it. However, the NIA is a cursory statement of impacts that the Select Committee regards as ‘too little too late’. Information in a more comprehensive form is required at a much earlier stage in the process, and prior to the government committing Australia to be bound by multilateral obligations or by a proposed free trade agreement.

2.79 The Select Committee has referred above to the process by which trade negotiations are initiated by US administrations. In brief, the Congress must approve a Trade Promotion Authority which sets out the objectives of the negotiations, and any conditions which must be met. The US government can then negotiate with its trading partner(s) to settle a proposed agreement. This proposed agreement is then tabled in the US Congress, where it must remain for a fixed period of time to enable sufficient scrutiny by members before being put to a vote by which the agreement will be either rejected or accepted—but not modified.

2.80 As discussed earlier, the potentially dramatic impact that trade treaties in particular can have on the lives of citizens and on the shape of a country’s economy means that there is significant justification for parliament exercising careful scrutiny of the whole process. The process that operates in the United States facilitates a level of congressional/parliamentary scrutiny that is worth emulating. It provides for

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28 See JSCOT, *Who’s Afraid of the WTO? Australia and the World Trade Organisation*, Recommendation 6, p.69

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executive authority to negotiate trade agreements while also allowing proper congressional monitoring and approval.

2.81 Trade Promotion Authority is nothing more than a kind of agreement between Congress and the President about how trade negotiations will be handled. It is an attempt to achieve cooperation and coordination between the executive and legislative branches of government.

2.82 Under Trade Promotion Authority, Congress usually spells out specific negotiations and objectives that it would like to see achieved. Congress also outlines how the chief executive will keep them apprised and briefed on developments in trade negotiations. Finally, Trade Promotion Authority always includes an agreement from Congress that once a trade negotiation is finished, the legislation implementing it will be handled on the floor of the House and the Senate without amendments. Members of Congress are given only the chance to vote the agreement up or down, but not to “nit pick” it until it unravels as a balance of trade concessions.<sup>29</sup>

2.83 There appears to be no formal impediment, constitutional or otherwise, to the Australian parliament adopting a similar arrangement to that operating in the US Congress. Not only will such an arrangement provide for transparency and accountability in the negotiation and execution of trade agreements, but it will also give considerable comfort to the government in terms of securing the implementation of the agreement.

2.84 In any event, current procedures require the parliament to pass relevant implementing legislation before any agreement can properly come into effect. Until all the relevant domestic legislation is passed, Australia is not able to go to the United States and say, ‘We have fulfilled the obligations under article X, Y or Z and we are now in a position to have the agreement enter into force on such and such a date’.

2.85 Under the existing state of affairs, the government can sign off on an agreement, but find itself confronted with, say, amendments by the Senate of some elements of the domestic legislation necessary to implement the agreement. If the prospect of such amendments was known in advance, the trade negotiators could take them into account.

2.86 The issue of implementing legislation for the AUSFTA has emerged as a significant consideration for the Select Committee. Indeed, it was not until the implementing legislation was introduced to the parliament that the Select Committee was in a position to examine whether, or to what extent, that legislation might address many of the concerns that had been raised by witnesses in the course of its inquiry.

2.87 Moreover, it may be the case – as indeed it seems here – that the implementing legislation may not necessarily go to all the areas of concern. Where

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29 Description provided at <http://www.cwt.org/learn/whitepapers/tradepro.html>, accessed 29 October 2003

implementing legislation *does* relate to contentious issues, it is proper for the Senate to require that those aspects receive adequate scrutiny. As well, there is the question of any delegated legislation that may flow from the need to amend regulations – an area in which the Senate has traditionally taken a keen interest, and where it has shown itself quite willing to disallow regulatory instruments, especially when they remove the opportunity for adequate parliamentary oversight.

2.88 In the case of the current AUSFTA, where cultural protection, intellectual property and the Pharmaceutical Benefits Scheme have been contentious issues, the Senate may choose to vote down some of the relevant domestic legislative instruments. It is extremely unlikely that such a situation would arise under conditions where both houses of the Australian parliament have been closely involved throughout the treaty-making process.

2.89 With a formal parliamentary arrangement in place the trade agreement would progress on the basis of ‘no surprises’. This can only benefit all parties to the agreement, and will ensure that Australia is able to negotiate with authority internationally.

2.90 Because of the domestic significance of international trade treaties it is imperative that they be predicated on what is in Australia’s national interest. The parliament and the government share that interest. However, the government has the authority to make treaties, so it is essential that the roles of parliament (as watchdog) and the government (as executive) be reconciled where such a major undertaking is at stake.

2.91 The Select Committee therefore sees considerable merit in the establishment of a formal arrangement, with a proper legislative basis, whereby the government can embark on trade negotiations with the parliament’s endorsement of the trade objectives and any conditions that must apply.

2.92 The Select Committee proposes the following process for parliamentary scrutiny and endorsement of proposed trade treaties:

- (a) Prior to making offers for further market liberalisation under any WTO Agreements, or commencing negotiations for bilateral or regional free trade agreements, the government shall table in both Houses of parliament a document setting out its priorities and objectives, including comprehensive information about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.
- (b) These documents shall be referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for examination by public hearing and report to the parliament within 90 days.
- (c) Both Houses of parliament will then consider the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, and vote on whether to endorse the government’s proposal or not.

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- (d) Once parliament has endorsed the proposal, negotiations may begin.
  - (e) Once the negotiation process is complete, the government shall then table in parliament a package including the proposed treaty together with any legislation required to implement the treaty domestically.
  - (f) The treaty and the implementing legislation are then voted on as a package, in an ‘up or down’ vote, that is, on the basis that the package is either accepted or rejected in its entirety.

2.93 This process should be set out in legislation and complemented by appropriate procedures in each House of parliament. The legislation should specify the form in which the government should present its proposal to parliament and require the proposal to set out clearly the objectives of the treaty and the proposed timeline for negotiations.

2.94 A vote in favour of a proposed set of objectives at the initial stage would be an ‘in principle’ endorsement of the treaty and would give the government a greater democratic mandate in negotiations. A concluded trade agreement that conformed to already agreed objectives would be more likely to receive final parliamentary approval.

2.95 The Select Committee recognises that, as with the current JSCOT processes, there will occasionally be a need to ‘fast track’ a proposed treaty for security or other reasons. Implementing this type of process recommended by the Committee for proposed trade agreements may mean that the negotiating process takes longer. However, given the potential impact of trade agreements such as the AUSFTA on all areas of Australian society, and the binding effects of these agreements on future parliaments, any possible delays are more than justified by the benefits of having comprehensive parliamentary debate on the pros and cons of proposed trade agreements.

2.96 The Committee hopes that a focus on the provision of more comprehensive information at an earlier stage in the process will ensure that through the mechanism of early parliamentary involvement, the Australian public will be better informed about the impacts of trade agreements, the consequences of services trade liberalisation and of bilateral free (preferential/discriminatory) trade agreements.

### **Transparency and independent analysis**

The road back must begin with the restoration of the integrity of the policy making process. The Treaties Committee and the Senate Committee can assist that process by insisting that prior to final consideration of the FTA by the parliament the Productivity Commission prepares an independent, transparent report on the costs and benefits of the agreement.

We’ve had all sorts of reports that have been prepared by people who are selling a case for and against, but that’s a very different thing from having a

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careful report properly resourced by an independent group that then becomes the basis of transparent public discussions.<sup>30</sup>

2.97 The Select Committee is alarmed by the lack of adequate research being undertaken prior to Australia committing itself to trade agreements. Balanced and comprehensive research on the economic, social, cultural and policy impacts of any trade treaty Australia proposes to enter into is a vital part of ensuring that there is proper scrutiny of the agreement and would contribute greatly to the quality of the public debate on these issues.

2.98 Elsewhere in this Report, the Select Committee has discussed the various economic assessments of the AUSFTA and noted that these assessments have tended to generate more heat than light in enabling the parliament and the public to discern the impact of the Agreement on Australia's national interest. Similar controversy had been generated before the negotiation of the Agreement with reports that delivered contrary conclusions about the likely economic benefits of the (proposed) AUSFTA.

2.99 In the 2003 report *Voting on trade*, the Senate Foreign Affairs and Trade Committee noted the emergence of a common thread of concern among public witnesses (both in relation to GATS and the AUSFTA) about the perceived shortcomings of DFAT in the coverage and balance of its published information and advice. The perceived lack of serious attention to any negative impacts of these agreements seems to have made many people suspicious. They sense that they are not being told the full story - that the government is being insufficiently frank, that it seems only to present information that is favourable to its case, and that the government is exaggerating the benefits.

2.100 The Select Committee appreciates that DFAT's task is to communicate, promote and implement government policy. However, it is problematic if that communication is perceived by many to be at best insufficiently nuanced, or at worst, brute propaganda. This situation is compounded by a subsequent adversarial approach to the consideration of contrary opinions and assessments - especially economic modelling outcomes.

2.101 The Select Committee does not question the professional competence of any of the agencies or individuals that produce the various assessments. However, it understands how perceptions have arisen among some members of the public that DFAT attends almost exclusively to those reports and assessments that are favourable to its policy objectives and that DFAT either disregards or denigrates alternative assessments.

2.102 The Select Committee notes that the JSCOT in its report on Australia's relationship with the WTO recommended that the government commission multi-disciplinary research to evaluate the socio-economic impact of trade liberalisation in

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30 Garnaut, R. *Vital Issues Seminar*, Parliamentary Library, 17 June 2004

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Australia since the conclusion of the Uruguay Round in 1994.<sup>31</sup> The JSCOT further recommended that in evaluating whether Australia should enter into any future WTO Agreements, the government should assess the likely socio-economic impacts on industry sectors and surrounding communities.<sup>32</sup>

2.103 The Select Committee further notes that the government to date has not commissioned multidisciplinary research as recommended by the JSCOT, in particular before commencing negotiations for the AUSFTA. The Select Committee also notes that in its June 2004 report on the proposed AUSFTA, the JSCOT recommended that the Productivity Commission produce a report on the impact of the AUSFTA five years after its implementation.

2.104 The Select Committee believes that it would be highly desirable if the services of the respected and independent Productivity Commission were drawn upon by the government to provide analysis and advice concerning proposed trading agreements. Not only would this add significantly to the pool of information available to government for decision-making and policy development, but it would also militate strongly against the perception that the government was relying on advice that was highly coloured by its particular view.

2.105 Transparency is vital not only during the negotiation of any agreement, but during its implementation. The AUSFTA provides for a range of committees and working groups to address various aspects of the Agreement. The role of these prescribed committees is not fully discernible in the text of the Agreement, and their effectiveness and influence can only be fully appreciated once they are in operation.

2.106 The Select Committee regards it as imperative that the operation of these groups is open to scrutiny, and that their contribution to the effectiveness and evolution of the Agreement is fully understood. To that end, it should be a requirement that these committees and working groups report annually to the government, and that these reports are tabled in parliament.

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31 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, Recommendation 1, p.26

32 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, Recommendation 2, p.33



## Chapter 3

# Intellectual Property

### Introduction

3.1 Chapter 17 of the AUSFTA, the Intellectual Property (IP) Chapter, is the largest chapter in the AUSFTA in content and substance. It refers to all the major forms of intellectual property rights and their enforcement including copyright, trademarks, domain names, industrial designs and patents.

3.2 The IP Chapter contains 29 Articles and 3 exchanges of letters. The exchanges of letters are in relation to Internet Service Provider (ISP) liability, various aspects of IP that apply to Australia, and national treatment in respect of phonograms.<sup>1</sup>

3.3 The IP Chapter contains several obligations concerning copyright. One of the key obligations requires Australia to extend its term of copyright protection by an additional 20 years. Australia is also committed to ratifying certain international IP agreements such as the World Intellectual Property Organisation (WIPO) Copyright Treaty 1996. Australia has already implemented most of its obligations under the WIPO Copyright Treaty, however the AUSFTA requires Australia to go further in some respects, to more closely align with US law. For example, Article 17.4.7 requires a ban on devices for circumventing technological protection measures (TPMs) and extends the scope of criminal offences relating to the manufacture and sale of circumvention devices.

3.4 DFAT advised the Joint Standing Committee on Treaties (JSCOT) that a large number of the obligations in the AUSFTA are drafted in a way that reflects the highly sophisticated IP regimes both in Australia and the US and to ensure consistency with the US template approach to its free trade agreements.<sup>2</sup>

### Background

3.5 In general terms, IP rights are the legal rights which arise as a result of intellectual activity. There are two main reasons for the creation of these rights. The first is to give public recognition of the creative, moral and economic rights of the creator and the rules to govern the rights of the public for access. The second reason is

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1 DFAT, *Australia-United States Free Trade Agreement: Guide to the Agreement*, March 2004

2 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.225

to foster creativity and promote innovation by rewarding the creator a monopoly economic right for a limited period of time.<sup>3</sup>

3.6 The exclusive right to exploit the innovation quite often conflicts with the idea of competition policy which at its basic level seeks to remove impediments to the functioning of markets such as by minimising the power of monopolies. The crucial consideration in the creation of any IP rights is the balance between the incentive that those rights give to innovation or creativity and the impact that the creation or extension of a monopoly right will have on consumers. The IP Chapter of the AUSFTA reinforces IP rights, and in some places strengthens them to take account of developments in technology.<sup>4</sup>

3.7 The Paris Convention for the Protection of Industrial Property of 1883 (the Paris Convention) is the earliest multilateral treaty to recognise the value of intellectual property and its importance to protecting the value of ideas. The Paris Convention was closely followed by the Berne Convention for the Protection of Literary and Artistic Works in 1886. These two conventions recognise the two distinct branches of IP, namely industrial property and copyright.<sup>5</sup>

3.8 Since the Paris Convention, there are now more than 23 different IP multilateral treaties all administered by the World Intellectual Property Organization (WIPO).<sup>6</sup> Australia is a party to many of these treaties.

### **Rationale for inclusion of Intellectual Property in the Free Trade Agreement**

3.9 There is some debate about whether it is appropriate to include IP in agreements that aim to advance free trade. The purpose of free trade is to eliminate or reduce government interference in trade across international borders. In contrast, stronger IP rights interfere in the market for the benefit of rights holders. The AUSFTA reinforces and, in Australia's case broadens, the protection given to holders of IP rights.<sup>7</sup>

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3 WIPO Intellectual Property Handbook: Policy, Law and Use, Chapter 1, p. 3 in Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.226

4 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.226

5 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.226

6 [http://www.wipo.int/about-wipo/en/gib.htm#P61\\_9104](http://www.wipo.int/about-wipo/en/gib.htm#P61_9104), accessed on 7 June 2004, in Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.226

7 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.1. The following section of Chapter 3 draws heavily on this paper.

3.10 Since IP rights are a restraint on commerce and can be used to preserve monopoly power and to inhibit technological developments, to some it is not clear why measures to strengthen these rights should be included in a free trade agreement.<sup>8</sup> Many believe that the IP Chapter of the AUSFTA will in fact limit free trade between Australia and the US by effectively expanding US barriers to cover Australia, rather than reducing barriers to trade.<sup>9</sup>

3.11 Although traditionally treated by many countries as a cultural issue not subject to negotiation, at the persuasion of the US, stronger IP protections are now often included in trade discussions and trade agreements. One example is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the auspices of the World Trade Organisation. In addition, the coverage of IP rights has extended into new areas such as software and genetic material. Since TRIPS, the US has engaged in a series of free trade agreements in which it has promoted stronger IP rights than those provided under TRIPS.<sup>10</sup>

3.12 Professor Michael Geist, a Canadian IP law expert, has argued that:

The delay in spreading the WIPO standard throughout the world has frustrated the U.S., which as a major producer of movies, music, and books, has long promoted stronger copyright protections. In response, it has begun to demand inclusion of copyright protections akin to those found within the WIPO treaties when negotiating bi-lateral free trade agreements.<sup>11</sup>

3.13 Australia's interests in this context need to be taken into account. While to date there has not been a comprehensive economic evaluation of IP rights in Australia, the Productivity Commission has found that, as a net importer of IP<sup>12</sup>, Australia would lose more than it gains by strengthening IP rights. Further it suggests that strong IP rights are turning the terms of trade against Australia.<sup>13</sup>

3.14 A significant amount of evidence presented to the Committee throughout the course of its inquiry supported this proposition, arguing that extension of the copyright term in Australia, in particular, will come at a cost to the Australian

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8 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.3

9 See, for example, *Submission 164*, (Linux Australia).

10 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.3

11 *Submission 26*, p. 2 (Geist)

12 Australia is a net importer of IP as measured by the value of goods and services with IP content among Australia's imports and exports: D Richardson, Department of Parliamentary Services, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, footnote 26, p.23

13 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.9-10

economy.<sup>14</sup> Since Australia is a net importer of IP and a small economy, it is likely to benefit from lower protection for IP while larger economies and exporters of IP, such as the United States, Japan and Europe, are likely to benefit from stronger protection.<sup>15</sup> The effect on a country like Australia may be to turn the terms of trade towards those countries that disproportionately hold IP rights.<sup>16</sup>

3.15 Professor Geist has also contended that:

Developed countries such as Australia may recognize the importance of a balanced copyright policy to both their cultural and economic policies, but they are increasingly willing to treat intellectual property as little more than a bargaining chip as part of broader negotiation. Since most trade deals are judged by an analysis of the bottom-line, economic benefits that result from the agreement, and since quantifying the negative impact of excessive copyright controls is difficult, the policy implications of including copyright within trade agreements is often dismissed as inconsequential.<sup>17</sup>

3.16 DFAT has been dismissive of such arguments. Although conceding that extension of the copyright term 'is the single biggest concession that Australia made in the negotiations'<sup>18</sup>, representatives from DFAT have stressed the positive aspects of the extension. For example, Ms Harmer told the Committee that

... term extension applies to all copyright works, so it will apply also and equally to Australian authors, artists and musicians as it will to Disney corporation and their copyright works. I think that is an important issue to remember. I think our copyright industry is a growing industry. It remains a fact that currently we are a net importer of copyright material, but that may change in the future. Certainly, it is something which our copyright industry strongly supported through the negotiations. Term extension was something that they saw as being beneficial to them.<sup>19</sup>

3.17 Mr Stephen Deady from DFAT reiterated this view:

... we are a net importer of copyright material—and that is not at issue—but at the same time we do have very active creative industries that would benefit from the copyright extension ... There are some groups within the Australian community and economy that certainly see some of the benefits that accrue even from something like copyright extension. We had this

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14 For example, see *Submission 336*, p.4 (Australian Vice-Chancellors' Committee)

15 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.4

16 D Richardson, Parliamentary Library, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.21

17 *Submission 26*, p.2 (Geist). The Committee notes in this context that Canada has consistently refused to extend duration of copyright beyond the Berne Convention requirement, despite a long record of bilateral trade agreements with the United States.

18 *Transcript of Evidence*, 6 July 2004, p.104, (Deady, DFAT)

19 *Transcript of Evidence*, 18 May 2004, p.104, (Harmer, DFAT)

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debate about what are the actual costs. There would be some—there is no doubt about that—with copyright extension, but we do not believe they would be that great, and there are those offsetting gains.<sup>20</sup>

3.18 The Commonwealth Government commissioned the Centre for International Economics (CIE) to undertake an economic analysis of the impact of the AUSFTA on certain outcomes in the negotiations, including changes to IP legislation. Although the CIE's report contains some discussion of IP in the AUSFTA it does not attempt to quantify its economic impact. For example, the report states that the copyright extension in the AUSFTA 'does not seem likely to provide additional incentives to create new works, but may in some cases impose costs on consumers.'<sup>21</sup> While in many cases 'the increased cost faced by consumers is not likely to be significant'<sup>22</sup> the report states that 'it is difficult to quantify the extent of this effect'.<sup>23</sup> The report also fails to quantify the other IP issues it identifies as arising under the AUSFTA.

3.19 The CIE's report<sup>24</sup>, has been widely criticised because, amongst other things, it 'fails to contextualise the major changes that have taken place [in the AUSFTA] and fails to grapple with some of the main economic studies that have been done in relation to particular areas.'<sup>25</sup> It has also been described as 'utterly implausible',<sup>26</sup> on 'legal grounds or economic grounds or political grounds'<sup>27</sup>, particularly because it puts forward the proposition 'that there will just be a marginal impact'<sup>28</sup> from the IP Chapter of the AUSFTA.

3.20 The US motive for the strong protection of IP rights is clear. The US has a disproportionately high share of IP rights and products that contain IP rights in its exports. It has therefore been proactive in promoting the rights of its own IP owners.

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20 *Transcript of Evidence*, 6 July 2004, p.105, (Deady, DFAT)

21 Centre for International Economics, *Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, Canberra and Sydney, April 2004, at <http://www.intecon.com.au/reports/AUSFTA.pdf>, p.39 (accessed 3 June 2004)

22 Centre for International Economics, *Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, Canberra and Sydney, April 2004, at <http://www.intecon.com.au/reports/AUSFTA.pdf>, p.39 (accessed 3 June 2004)

23 Centre for International Economics, *Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, Canberra and Sydney, April 2004, at <http://www.intecon.com.au/reports/AUSFTA.pdf>, p.39 (accessed 3 June 2004)

24 Centre for International Economics, *Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, Canberra and Sydney, April 2004

25 *Transcript of Evidence*, 17 May 2004, p.27 (Rimmer)

26 *Transcript of Evidence*, 17 May 2004, p.6 (Rimmer)

27 *Transcript of Evidence*, 17 May 2004, p.26 (Rimmer)

28 *Transcript of Evidence*, 17 May 2004, p.6 (Rimmer)

3.21 The US International Trade Commission's report *U.S.-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects*<sup>29</sup>, has acknowledged that the IP Chapter of the AUSFTA addresses 'many of the most significant concerns that US industry representatives have expressed' about IP law in Australia. Tellingly, the report noted numerous advantages for the US, its economy and its corporate interests:

The FTA is expected to result in increased revenues for U.S. industries dependent on copyrights, trademarks, patents, and trade secrets. However, owing to the much smaller size of the Australian economy compared to that of the United States, and the relatively small contribution of Australia to U.S. IPR receipts from the world ..., any increase in revenues for the U.S IPR industries likely would have a limited effect on U.S IPR-related industries and the U.S economy as a whole.

Among the U.S copyright industries that would potentially benefit most due to the increased digital technology features of the FTA are the motion picture, sound recording, business software applications, entertainment software, and book publishing industries. Industries that might benefit from the greater patent and trade secret protections, including the protection of confidential data, are the pharmaceutical and agricultural chemicals industries. A broad range of U.S. industries should benefit from strengthened trademark and other IPR provisions of the FTA. By comparison, because the United States already meets the relatively high standards of IPR protection and enforcement included in the U.S.-Australia FTA, there would be little if any effect on U.S. industries or the U.S. economy based on U.S implementation of its obligations under the FTA provisions.<sup>30</sup>

3.22 Similarly, in a report entitled, *The U.S.-Australia Free Trade Agreement (FTA) The Intellectual Property Provisions*, the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3) has highlighted the significant advantages garnered by the United States in the AUSFTA:

The United States is the world's largest producer and exporter of copyrighted materials and at the same time loses more revenue from piracy and other inadequate copyright protection than any other country in the world. High levels of copyright protection and effective enforcement mean more revenue and more higher-paying jobs benefiting all Americans. The copyright industries account for over 5% of U.S. GDP and have employed

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29 Investigation No. TA-2104-11, Publication 3697, May 2004

30 US International Trade Commission, *U.S.-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects*, Investigation No. TA-2104-11, Publication 3697, May 2004, pp.116-117

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new workers at over three times the rate of the economy as a whole over the last 25 years.<sup>31</sup>

3.23 In particular, the copyright extension under the AUSFTA is seen as a major 'win' for the United States. However, the IFAC-3 report states that the United States will push for even further extensions of the copyright term in future negotiations with Australia:

In a major advance, Australia has agreed to extend its term of protection closer to that in the U.S.-to life of the author plus 70 years for most works. While industry sought to have the term of protection for sound recordings and audiovisual works extended from 50 years from publication to a term matching the U.S. law's 95 years, a compromise was struck at 70 years. We urge that future agreements move that level to the full 95 years ...<sup>32</sup>

3.24 The report congratulates the United States negotiators on the outcomes they achieved in negotiations:

Other than [a few perceived shortcomings], the substantive copyright text achieves all that U.S. industry sought in this negotiation and the negotiators are to be commended in achieving this most important result that expands U.S. economic opportunities for some of America's competitive industries.<sup>33</sup>

3.25 Dr Matthew Rimmer has argued that:

... copyright term extension is not a final upper limit set by the Australian Government. Rather, it is a provisional standard that will be open to further negotiation in the future. Copyright law will be a moveable feast for the United States industry in the years to come ... the free trade agreement represents a down payment on perpetual copyright on the instalment plan.<sup>34</sup>

3.26 The IP issues arising under the AUSFTA reflect the general tension between the goals of promoting competition in the economy at large and providing appropriate protection for new works. However, it is clear that those tensions take on new meaning in the context of commercial and trade relations between Australia and the United States. Not only does the AUSFTA push Australia further than it has

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31 Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), *The U.S.-Australia Free Trade Agreement (FTA) The Intellectual Property Provisions*, 12 March 2004, p.8, at <http://www.ustr.gov/new/fta/Australia/advisor/ifac03.pdf> (accessed 28 June 2004)

32 IFAC-3, *The U.S.-Australia Free Trade Agreement (FTA) The Intellectual Property Provisions*, 12 March 2004, p.10, at <http://www.ustr.gov/new/fta/Australia/advisor/ifac03.pdf> (accessed 28 June 2004)

33 IFAC-3, *The U.S.-Australia Free Trade Agreement (FTA) The Intellectual Property Provisions*, 12 March 2004, p.10, at <http://www.ustr.gov/new/fta/Australia/advisor/ifac03.pdf> (accessed 28 June 2004)

34 *Submission 183*, p.61, (Rimmer)

previously gone in the past in relation to the protection of IP rights, there are also concerns that the AUSFTA prevents Australia from retreating from this position in future and implementing policies and laws which do not accord with the provisions of the AUSFTA.<sup>35</sup>

### **Objections to the process**

3.27 Many submissions and witnesses raised strong objections to the process by which the IP Chapter has been formulated and negotiated, as well as the requirement of consequential major legislative changes in Australia. These objections were across the board and included creators, users, consumer protection organisations and economists.

3.28 For example, the Australian Vice-Chancellors' Committee (AVCC) expressed the following concerns:

The AVCC is deeply concerned about the nominated timeframe and consulting process under which the necessary legislative changes will be effected, given the level of detail and the extent of changes needed to the Copyright Act and the implications that these changes will have on the daily operations of the universities. In the rush to consolidate the AUSFTA Australia risks introducing a serious imbalance between the interests of owners and users which it has achieved under current arrangements.<sup>36</sup>

3.29 The Music Council of Australia was also apprehensive:

We have come to the view that regardless of the merit or demerit of the changes in [intellectual property rights] in AUSFTA, it was not the appropriate place to make these decisions. AUSFTA has displaced or forestalled a more democratic consideration of the issues within Australia and makes our position effectively irreversible regardless of success or failure of the measures, unless the US consents to change. The FTA seems to change Australian law to match United States law, possibly more for the benefit of the US than Australia.<sup>37</sup>

3.30 Similarly, the submission on behalf of the Australian film and television production industry by the Australian Writers Guild, the Australian Screen Directors Association and the Screen Producers Association of Australia stated that:

We informed DFAT that the US audiovisual industry saw intellectual property as the 'main game' and that making concessions in this area should be seen as part of an overall concession in regards to audiovisual services.

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35 D Richardson, Department of Parliamentary Services, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.2

36 *Submission 336*, p.4, (Australian Vice-Chancellors' Committee)

37 *Submission 220*, p.7, (Music Council of Australia)

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DFAT indicated that the Government was unwilling to make any concessions to the US on intellectual property.<sup>38</sup>

3.31 In response to a question on notice from the Committee, the Australian Writers Guild reiterated this point:

... a bilateral trade agreement is not the forum through which such monumental changes to Australian copyright policy should have been made and we had been assured by Australian negotiators throughout the negotiating period, that those changes would not be made. Indeed we were assured of this again in our meeting with the Prime Minister in November 2003.<sup>39</sup>

3.32 The ALCC stated that:

The process of negotiating the FTA ... has been accelerated. Although some consultation processes took place throughout last year, the negotiation process had been closed; participants in consultation were not privy to information at an appropriate level of detail as to the nature of provisions being considered until the release of the draft text in March this year. Current political developments have created unrealistic pressures in time and a climate that could lead to the enactment of rash and ill-considered legislation.<sup>40</sup>

3.33 Mr Peter Gallagher from Inquit Communications Pty Ltd told the Committee that the AUSFTA would result in Australia being a 'wealthier and more economically secure country'<sup>41</sup> and that 'the benefits plausibly outweigh the costs'<sup>42</sup>. However, he noted some problematic issues pertaining to, amongst other things, the inclusion of IP in the agreement:

The copyright extension creates a new property right. It seems to me that no substantial decisions on intellectual property should be made on the basis merely of an economic exchange with a foreign government. The key consideration in the creation of any intellectual property is a balance to be struck between the interests of our society in the incentive that the IP right gives to innovation or creativity and the impact that the creation or extension of a monopoly right will have on the welfare of Australian consumers. Foreign commercial interests do not appear on either side of this ledger, because intellectual property is inherently a territorial right ... Even the WTO TRIPS agreement provides only for the harmonisation of

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38 *Submission 163*, p.18, (Australian Writers Guild, Australian Screen Directors Association, Screen Producers Association of Australia)

39 *Answer to Question on Notice*, 4 May 2004, p.2, (Australian Writers Guild)

40 *Submission 298*, p.5 (Australian Libraries' Copyright Committee)

41 *Transcript of Evidence*, 7 June 2004, p.91 (Gallagher, Inquit Pty Ltd)

42 *Transcript of Evidence*, 7 June 2004, p.94 (Gallagher, Inquit Pty Ltd)

procedures and minimum standards as they apply in the territory of individual member states.<sup>43</sup>

3.34 Mr Gallagher continued:

In my view it was inappropriate for the Australian government to undertake to change this property right for reasons mainly of a balance of rights and obligations in a trade agreement rather than on the basis of an evaluation of a balance of rights and benefits in Australia of such an extension. Although I think it is possible given the benefits of integration ... that the recommendation if they had made the judgment on this basis would have had the same effect, this does not allay my disquiet with the way in which this concession was made.<sup>44</sup>

3.35 The Australian Digital Alliance pointed out the IP Chapter's language is 'opaque' and its structure 'complex'. This means that 'some margin exists for different interpretations of the provisions.'<sup>45</sup> It is certainly clear, however, that overall the provisions in the IP Chapter significantly raise the level of IP rights protection if adopted into the current Australian IP regime. This is particularly apparent in the text of the AUSFTA:

... the FTA is concerned solely with strengthening the rights of copyright owners, scarcely mentions the rights of users and makes no reference to the need for balance.

3.36 Ms Kimberlee Weatherall argued that IP law is a policy instrument designed to achieve certain social and economic aims. It must be flexible, and balanced, and subject to constant review for its appropriateness in light of technological developments. The AUSFTA is an overly detailed, inflexible agreement, containing many provisions which prevent Australia from introducing new exceptions or changes to its laws in the future.<sup>46</sup>

3.37 Ms Weatherall also argued that disputes may arise because of Australia's chosen form of implementation of its obligations under the IP Chapter. Her concern was that, since the provisions are largely modelled on United States law, it could be said that the United States has certain 'expectations' about what they mean, regardless of Australia's views of their legal effect and interpretation. In Australia, on the other hand, there is a lack of official information about what the legal effect of the FTA is because negotiations did not occur in public. Although DFAT has made some statements to the Committee in previous hearings, Ms Weatherall's view was that

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43 *Transcript of Evidence*, 7 June 2004, p.92 (Gallagher, Inquit Pty Ltd)

44 *Transcript of Evidence*, 7 June 2004, p.92 (Gallagher, Inquit Pty Ltd)

45 *Submission 299*, p. 6, (Australian Digital Alliance)

46 *Submission 294*, p.4 (Weatherall)

these statements have been 'vague', 'qualified' and 'too often [referred to as being] matters for implementation.'<sup>47</sup>

3.38 DFAT has expressed strong disagreement with this argument:

Australia's implementing legislation is now in the public domain and negotiators have clearly stated Australia's understanding of its obligations to the Committee. These statements are available through Hansard.

...

The final text of the Agreement represents the negotiated outcome agreed by the two Governments. Should any dispute cases be taken under the dispute settlement provisions of the Agreement these will be considered by a panel on the facts of the particular case and in a manner consistent with the international law standards of treaty interpretation.

...

As is the case in any treaty level negotiations, the final text of the FTA represents the negotiated outcome agreed by the two Governments. Both Parties will implement the Agreement in good faith. Should any dispute cases be taken under the dispute settlement provisions of the Agreement these will be considered by a panel on the facts of the particular case and in a manner consistent with the international law standards of treaty interpretation.<sup>48</sup>

3.39 Further, Ms Weatherall submitted that any appearance of flexibility in the language used in provisions of the AUSFTA:

... is likely to prove illusory in practice, in light of the proven attitude of IP Owners, particularly US IP Owners, who will, I believe, not hesitate to urge use of the Dispute Settlement Chapter (Chapter 21) if they do not agree with Australian implementation of the AUSFTA.

To the extent that IP Owners support provisions in this Agreement, as good policy for Australia, their submissions do not answer a more basic problem: that putting these provisions in a treaty is a very damaging way to implement that policy. Even if you thought these provisions were good IP policy – they shouldn't be in a treaty.<sup>49</sup>

3.40 Ms Weatherall also submitted that the negotiation of the IP chapter was a 'failure of sound and transparent policy making' and that it is 'far too detailed and will seriously hinder future IP policy making'.<sup>50</sup> Australia's lead negotiator, Ms Toni Harmer from DFAT, disagreed with this assessment:

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47 *Submission 294A*, p.4 (Weatherall)

48 DFAT, *Answers to Questions on Notice*, 15 July 2004, pp.5-6

49 *Submission 294*, p.4 (Weatherall)

50 *Submission 294*, p.4 (Weatherall)

We certainly would disagree with that and we would argue that, whilst there are criticisms of the IP chapter, intellectual property is a very important sector of our economy, particularly in developing value added exports. I do not see somehow strengthening our IP protection at the same time as providing the ability to make exceptions where they are appropriate in the national interest as a bad policy outcome for Australia at all.<sup>51</sup>

3.41 Ms Harmer informed the Committee that DFAT consulted widely about the impact of the AUSFTA on IP law in Australia, and will continue to do so:

We conducted very broad consultations across the community and industry in relation to the intellectual property chapter, as we did across the FTA.

...

It is fair to say that the response has been unsurprising in the sense that you can see continuing divergent views on some aspects of intellectual property. We have been at pains to explain to those music interests that are concerned that, whilst we have strengthened copyright in some areas, we have retained the ability to make exceptions and that, whilst we have agreed to adopt elements of United States law, we have not agreed to implement US law word for word. Therefore, continued consultations with industry about the most appropriate way to do that in the context of our regulatory and legal environment are important.<sup>52</sup>

### **Australia's obligations under the Intellectual Property Chapter**

3.42 The most significant evidence received by the Committee in relation to the IP Chapter was the obligations relating to the extension of the term of copyright protection and technological protection measures (TPMs). The following section of the Committee's report will focus on these issues, as well as issues relating to 'contracting out' of exceptions to copyright infringement, temporary copying, ISP liability and patents.

#### ***Extension of the term of copyright protection***

3.43 Article 17.4.4 of the AUSFTA sets out the obligations on both parties in relation to the term of copyright protection. Australia is required to extend the term of copyright protection by an additional 20 years, bringing it into closer conformity with the United States. The AUSFTA provides for an extension of the general term of copyright protection in Australia from 50 years from the death of the author to 70 years after the death of the author, in line with United States law. This is beyond the minimum international standard stipulated in the Berne Convention.

3.44 The United States extended copyright protection from 50 years to 70 years under the *Sonny Bono Copyright Extension Act 1998*. Several submissions and

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51 *Transcript of Evidence*, 18 May 2004, p.101 (Harmer, DFAT)

52 *Transcript of Evidence*, 18 May 2004, p.102.(Hammer, DFAT)

witnesses to the Committee noted that this legislation was the result of intense lobbying by the Motion Picture Association of America, the United States copyright owner group which represents such corporations as the Disney Corporation, Sony Pictures Entertainment, MGM, Paramount Pictures, Twentieth Century Fox, Universal Studios and Warner Brothers.<sup>53</sup> The main advocate for the copyright term extension was the Disney Corporation which was facing the expiration in 2003 of its copyright on Mickey Mouse and other characters.<sup>54</sup>

3.45 In 2000, the Australian Intellectual Property and Competition Review Committee (IPCRC) recommended that the current copyright protection term should not be extended and that no extension of the copyright term should be introduced in Australia in the future 'without a prior thorough and independent review of the resulting costs and benefits.'<sup>55</sup> The Commonwealth Government accepted that recommendation in 2001, stating that it 'has no plans to extend the general term for works'.<sup>56</sup> The AUSFTA will require Australia to extend its copyright term, without any significant independent analysis of the costs and benefits of the extension being undertaken.<sup>57</sup>

3.46 The Committee notes that the inclusion of extension of the copyright term contradicts assurances by the Commonwealth Government throughout the negotiation process that it was resistant to such an inclusion. The Trade Minister, the Hon Mark Vaile MP, is reported as saying that the copyright term extension was one of the 'standout issues' where Australia and the United States remained at odds in the IP part of negotiations. Specifically, he is quoted as saying that '(t)here is a whole constituency out there with a strong view against copyright term extension and we are arguing that case'.<sup>58</sup>

3.47 Evidence presented to the Committee expressed disappointment in relation to the Commonwealth Government's considerable 'about face' in relation to IP issues. For example, Create Australia noted that AUSFTA negotiators had 'informed cultural representatives a number of times that the government would not support an

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53 See, for example, *Submission 183*, pp:25-26, (Rimmer)

54 See, for example, *Submission 183*, p.12, (Rimmer)

55 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, September 2000, p.13

56 *Government Response to Intellectual Property and Competition Review Recommendations - Information Package*, at <http://www.ag.gov.au/www/securitylawHome.nsf/Web+Pages/A6C3825011D8A8B1CA256C33000CF9A?OpenDocument>, p.1, accessed 7 June 2004

57 *Submission 294*, p.12, (Weatherall)

58 Australian Financial Review, 'Mickey Mouse holds key to the future', 8 December 2003

extension' of the copyright term.<sup>59</sup> The Music Council of Australia expressed a similar view.<sup>60</sup>

3.48 Evidence received by the Committee in relation to the copyright extension was split between those who support the copyright extension and those who strongly oppose it. The weight of evidence was overwhelmingly against the extension. The following discussion provides a summary of arguments for and against that were presented in the course of the Committee's inquiry.

*Arguments for extension of copyright*

3.49 Evidence supporting the extension of copyright was mainly from organisations which represent or protect the interests of copyright owners, such as the Copyright Agency Limited (CAL), the Australian Copyright Council (ACC), and the Australian Film Industry Coalition (AFIC). The main arguments presented to the Committee included advantages resulting from harmonisation with Australia's trading partners and the increased benefits for copyright owners ensuing from an extended term.

3.50 Mr Michael Fraser from CAL told the Committee that:

CAL strongly supports the intellectual property chapter in respect of the copyright provisions in the free trade agreement, and we believe these provisions will benefit all copyright owners in Australian and ultimately the nation's long-term economic and social well-being ... it is in the national interest for Australian society and the Australian economy to have strong copyright protection as provided for in this agreement.<sup>61</sup>

3.51 Mr Fraser also offered the following opinion:

In my view it is an opportunity for Australian creators to have strong copyright laws. The US wants strong copyright laws, I presume in their own national interest. Their copyright based industries are worth more to their economy than agriculture. I think the fact that we are a net importer of copyright should not dictate to us a short-term view about copyright. I think the better and more productive argument is not to say that we should weaken copyright so we can get cheaper access to other creators' work, but to strengthen copyright so that we can support our own creative industries, giving them the security to create and produce and distribute product knowing that they can get a good return and compete with the international providers, both in providing material to our own community, education and readership in general, and create products and services that will compete successfully into our region.<sup>62</sup>

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59 *Submission 459*, p.8, (Create Australia)

60 *Submission 220*, p.7, (Music Council of Australia)

61 *Transcript of Evidence*, 4 May 2004, p.33, (Fraser, Copyright Agency Limited)

62 *Transcript of Evidence*, 4 May 2004, p.45, (Fraser, Copyright Agency Limited)

3.52 Several proponents of the extension referred to the report produced by the Allen Consulting Group in 2003 on the costs and benefits of a copyright extension to Australia (the Allen Report).<sup>63</sup> The Allen Report was commissioned by the Motion Picture Association and supported by Australian proponents for extension of the term of copyright such as the Australasian Performing Rights Association, the Copyright Agency Limited, and Screenrights.

3.53 The Allen Report recommended extending the term of copyright to harmonise Australian law with that of its major competitors, to encourage further foreign investment and create incentives to copyright owners whose protection has been undermined by technological developments. The Allen Report also stated that harmonisation would result in cost savings in managing IP rights, with portfolios expiring at the same time across Australia's major markets and argued that additional costs to users from an extension of the copyright term would be minimal.<sup>64</sup>

3.54 However, the Allen Report has been widely criticised and discredited. One submission received by the Committee argued that the Allen Report 'is deeply flawed in terms of its methodology and legal analysis' and 'fails to produce any empirical economic evidence that supports an extension of the copyright term.'<sup>65</sup>

3.55 A United States IP law expert, Professor Lawrence Lessig of Stanford University, has been highly critical of the Allen Report. On his website he wrote that '(t)he report is embarrassingly poorly done.'<sup>66</sup> Professor Lessig was particularly disparaging of the economic value of the Allen report:

More frustrating is the pudginess of this argument that purports to be economics. There's lots saying that both sides exaggerate their claims, but nothing to provide any actual evidence to evaluate whether any claim is exaggerated. And then, after acknowledging there is no useful evidence at all, the report concludes that on balance, the effect of the extension would be neutral, and so Australia should do it.<sup>67</sup>

3.56 Professor Lessig has also been a sardonic observer of the effect of 'Australia's caving to United States pressure'<sup>68</sup> in relation to the copyright term extension in the AUSFTA:

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63 The Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs*, July 2003, at [http://www.allenconsult.com.au/resources/MPA\\_Draft\\_final.pdf](http://www.allenconsult.com.au/resources/MPA_Draft_final.pdf) accessed 23 June 2004

64 *Submission 309*, p.3, (Copyright Agency Limited)

65 *Submission 183*, p.29, (Rimmer)

66 L Lessig, 'Copyright Term Extension: does a bad report cost more than a good report?', at <http://www.lessig.org/blog/archives/001522.shtml> accessed 22 June 2004

67 L Lessig, 'Copyright Term Extension: does a bad report cost more than a good report?', at <http://www.lessig.org/blog/archives/001522.shtml> accessed 22 June 2004

68 L Lessig, 'Copyright Term Extension: does a bad report cost more than a good report?', at <http://www.lessig.org/blog/archives/001522.shtml> accessed 22 June 2004

The result: Australian film and culture will be harder to spread and preserve; Hollywood will get richer. I hope the voters in Australia are ok with that, because god knows, we Americans need lots of help with our balance of trade debt.<sup>69</sup>

3.57 The Australian Digital Alliance has also been extremely critical of the Allen Report:

Given the difficulty of accurately assessing such economic effects, it may be forgiven that the report presented little meaningful data. However, it remains baffling the manner in which its acknowledgement of the lack of evidence is reconciled into a conclusion that extension of term would be advantageous to the Australian economy.

...

The report is also alarmingly dismissive of what would seem to be an extremely important factor in the consideration of economic costs and benefits of copyright term extension in Australia; Australia remains by far a net importer of copyright materials. The report brushes over the point as if it were a pesky detail rather than a primary concern for Australia's present and future trading strategy and does not provide any basis for its assertions that copyright extension would be positive for the future of Australia's copyright industries.<sup>70</sup>

3.58 Some of the other arguments advanced in favour of the copyright extension were:

- harmonisation of the term of protection with that of Australia's major trading partners can assist copyright compliance with clearance of rights for material distributed or made available overseas, including online;<sup>71</sup>
- the benefits of harmonisation will assist in ease of negotiations for global contracts with living copyright creators;<sup>72</sup>
- standardised copyright term arrangements will reduce the costs associated with processing royalties, thereby increasing the proportion of royalties made available to copyright holders;<sup>73</sup> and
- counter-balancing the increased risk proposed by piracy and the losses it causes is assisted by an extension of the term.<sup>74</sup>

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69 L Lessig, 'Copyright Term Extension: does a bad report cost more than a good report?', at <http://www.lessig.org/blog/archives/001522.shtml> accessed 22 June 2004

70 M Lee, 'Copyright Term Extension: the pressure rises', *The Australian Digital Alliance Monthly Intellectual Property Wrap-Up*, October 2003, at <http://www.digital.org.au/issue/ipwoct03.htm> accessed 23 June 2004

71 *Submission 462*, p.3, (Australian Copyright Council).

72 *Submission 520*, p.2, (Viscopy)

73 *Submission 520*, p.2, (Viscopy)

3.59 Mr Fraser told the Committee that CAL was aware of concerns raised by the educational sector and libraries in relation to the copyright extension. CAL presented the results of its own research into copying of out-of-copyright materials in the education sector:

We have looked at works that are currently over 50 years but less than 70 years from the death of the author, and asked what would be the impact of an extension tomorrow on the payments for copying to copyright owners from educational institutions and who would be the copyright owners that benefit.

It is interesting to know that there has been a lot of comment about how it would be of benefit to foreign copyright owners and not to Australian copyright owners. The proportion of copying in the educational sector of out-of-copyright material within the period of extension—that is, 50 to 70 years—is 0.02 per cent. That would be the increase. These results have not surprised us because copying in schools and universities is of the most recent material, typically. It is mainly of books and journals which have recently been published.<sup>75</sup>

3.60 The Commonwealth Government argues that harmonisation with United States law will be economically beneficial to Australia through increased trade and investment.<sup>76</sup> The essence of this view has been summarised as meaning that a stronger IP rights regime will encourage growth through trade and investment, closer alignment of IP rights will increase exports to the United States, and closer alignment of IP rights will increase United States investment in Australia.<sup>77</sup>

3.61 Interestingly, Mr Stephen Deady from DFAT told the Committee that harmonisation under the AUSFTA does not actually oblige Australia to harmonise its laws with those of the United States:

On the question of harmonised IP laws ... If you look at that language, it talks about 'endeavouring to work together'. It is a best-endeavours clause; it does not commit Australia. There are no obligations there for Australia to harmonise anything but rather to work with the United States and where appropriate—if future governments decide it appropriate—to work together in those areas. It is a best-endeavours clause and there are no obligations there.<sup>78</sup>

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74 *Submission 178*, p.4 (Business Software Association of Australia)

75 *Transcript of Evidence*, 4 May 2004, p.35, (Fraser, Copyright Agency Limited)

76 See, for example, Attorney General, the Hon Philip Ruddock MP, 'Opening Address – Australian Centre for IP and Agriculture Conference: Copyright: Unlucky for Some', <http://www.ag.gov.au/www/ministerruddockhome.nsf/Alldocs/RWP21E60A98ACC4ECE2CA256E3B0080AA84?OpenDocument&highlight=unlucky%20for%20some> accessed 16 June 2004.

77 D Richardson, Department of Parliamentary Services, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.10

78 *Transcript of Evidence*, 21 June 2004, p.17, (Deady, DFAT)

*Arguments against extension of copyright*

3.62 The vast majority of evidence received by the Committee in relation to the extension of the copyright term expressed strong opposition towards it. Much of this evidence referred to the adverse economic impact on libraries, universities, cultural institutions, and the wider public. The main arguments against extension included the extended term of payment of royalties, increased costs through the statutory licenses issued to educational institutions by collecting societies, the increase in transactional and tracing costs for an extra twenty years, and the reduction of the incentive to create more works. Some submissions and witnesses focussed on broader IP policy issues, arguing that the copyright extension inappropriately alters the balance between the interests of copyright owners and users.

3.63 A number of submissions noted that the extended term of payment of copyright royalties will impose significant economic burdens on educational and research providers. For example, the Australian Vice-Chancellors' Committee (AVCC) stated that:

... our education institutions will now be required to pay licence fees under the statutory licences for the additional 20 years of copyright ... the USA education sector is not impacted by the FTA but the Australian sector is, and in a significant way.

The extension of the term of copyright means an increase in the net cost of access to copyrighted material – for universities, for libraries, and for all other users. In simple terms, universities and other users will now have to re-assess their copyright and information budgets. The actual increase in costs that they are face is difficult to approximate – but given high demand and static funding it is likely that some trade-offs will be required.<sup>79</sup>

3.64 The AVCC also noted the considerable flow-on effects of the copyright extension:

If the balance between owners and users is upset it is not just a question of higher costs to users. The more significant loss will be the capacity for further creation through all researchers having open access to all source materials once passed a reasonable period of protection. If copyright becomes too strong, innovation will be shackled.<sup>80</sup>

3.65 The Australian Digital Alliance (ADA) noted that:

Chapter 17 creates obligations to amend the Australian copyright regime in ways that will reduce access to materials, increase costs for institutions which provide public access to knowledge, and ultimately curb innovation. The neglect is disturbing and unsatisfactory given that a balanced

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79 *Submission 336*, p.5, (Australian Vice-Chancellors' Committee)

80 *Submission 336*, p.5, (Australian Vice-Chancellors' Committee)

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intellectual property regime forms the research and resource base upon which our knowledge and creative industries depend.<sup>81</sup>

3.66 The Australian Libraries' Copyright Committee (ALCC) expressed the following view:

... Australia is a net importer of copyright materials from the U.S by a substantial margin; an extension of copyright term will, other things being equal, lead to a reallocation of resources and adversely affect our balance of trade. An extension of copyright term has serious consequences for libraries, cultural and educational institutions in relation to raised costs of maintaining access to information and increased costs associated with the already formidable and resource-intensive task of tracing copyright owners and requesting permissions. The group of people who will be ultimately affected by the added burden of term extension include historians, scholars, teachers, writers, artists and researchers of all kinds.<sup>82</sup>

3.67 DFAT has admitted that there may be some increased costs involved for the education and research sector. Ms Harmer told the Committee:

To the extent that the uses that people wish to make of that material ... relate to exceptions for research and education, that will be no different. Certainly in relation to works that do not fall within those exceptions there may be some increased cost involved in seeking permission to use those works. That is not something that we were to know.<sup>83</sup>

3.68 The ALCC argued further that extension of the term of copyright is also likely to 'restrict traditional dissemination of copyrighted works, inhibit new forms of dissemination through the use of new technology, and threaten current efforts to preserve historical and cultural heritage.'<sup>84</sup> Dr Matthew Rimmer pointed out that, in some cases, copyright works will be 'orphaned' because the owner of a copyright work will be impossible to trace.<sup>85</sup>

3.69 Dr Phillippa Dee's report also highlighted the significant estimated costs arising from extension of the copyright term:

The DFAT/CIE report made some simplifying assumptions in order to quantify the benefits of extending the term of copyright protection. While the report was not able to make the same assumptions to quantify the costs, this has been done in Box 2. The net effect is that Australia could eventually pay 25 per cent more per year in net royalty payments, not just to US copyright holders, but to all copyright holders, since this provision is not preferential. This could amount to up to \$88 million per year, or up to

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81 *Submission 299*, p.4, (Australian Digital Alliance)

82 *Submission 298*, p.8, (Australian Libraries' Copyright Committee)

83 *Transcript of Evidence*, 18 May 2004, p.104, (Harmer, DFAT)

84 *Transcript of Evidence*, 18 May 2004, p.104, (Harmer, DFAT)

85 *Submission 183*, p.43, (Rimmer)

\$700 million in net present value terms. And this is a pure transfer overseas, and hence pure cost to Australia.<sup>86</sup>

3.70 Dr Dee noted that 'even the current term of copyright protection is probably too long, from Australia's perspective.'<sup>87</sup>

3.71 The Committee notes that DFAT strongly disagrees with Dr Dee's assertions:

Dr Dee took some of the assumptions that were cited in the CIE report—assumptions that were identified as unrealistic in the CIE report—and she came up with a figure of something like \$88 million per annum as additional costs of extending the copyright from 50 to 70 years. However, this assumption overlooked what everybody involved in copyright knows, and that is that copyright material typically depreciates over time and has an economic life which typically is quite short. If we make allowance for that in our analysis, that \$88 million becomes relatively insignificant.<sup>88</sup>

3.72 Nevertheless, the Committee considers the evidence expressing opposition to the copyright extension to be extremely valid. The Committee also notes that since the United States extended its term of copyright protection from life of the author plus 50 years to life of the author plus 70 years under the *Sonny Bono Copyright Term Extension Act 1998*, three constitutional challenges have been made.<sup>89</sup>

3.73 In the first of these, *Eldred v Ashcroft*,<sup>90</sup> Justice Breyer made a dissenting judgement and noted, amongst other things, the significant impact of transactional and tracing costs<sup>91</sup> and 'the serious public harm and the virtually nonexistent public benefit'<sup>92</sup> arising from the extension. Justice Breyer also observed that the economic effect of the copyright extension is to make copyright almost perpetual in nature:

The economic effect of this 20-year extension – the longest blanket extension since the Nation's founding – is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but

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86 P 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, June 2004, p.31

87 P 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, June 2004, p.22

88 *Transcript of Evidence*, 6 July 2004, p.17, (Brown, DFAT)

89 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.231

90 (2003) 123 S. Ct. 769

91 *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 806.

92 *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 813.

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to inhibit, the progress of "Science" – by which work the Framers meant learning or knowledge.<sup>93</sup>

3.74 Dr Rimmer provided the Committee with a number of examples where the extension of copyright has had significant impacts on cultural and socially significant projects in the United States.<sup>94</sup> Dr Rimmer also pointed out that the Public Domain Enhancement Bill 2004 (US) was introduced into Congress in 2003 with a view to addressing some of the impacts of the *Sonny Bono Copyright Term Extension Act 1998*, in particular various concerns relating to 'orphaned' works.<sup>95</sup>

### *Harmonisation*

3.75 Despite the Commonwealth Government's argument about the need for and benefits of international harmonisation in light of the 'International Standard ... emerging amongst our major trading partners for a longer copyright term,'<sup>96</sup> Dr Rimmer contested that the extension of the term of copyright is following an emerging international trend. Dr Rimmer argued that under the Berne Convention and the TRIPS Agreement, Australia is not obliged to provide any more protection than life of the author plus 50 years.<sup>97</sup> Further, Australia has not followed emerging international trends in other important fields and has not adopted, for example, *sui generis* database laws or traditional knowledge laws:

Indeed Australia has preferred to wait for the development of multilateral agreements on such matters – before passing domestic legislation of its own.<sup>98</sup>

3.76 The Committee also notes that, despite the arguments promoting the concept of harmonisation, there do not appear to be any examples that show Australia has missed out, or evidence that it might miss out, on investment or trade opportunities through inadequate levels of protection for IP rights.<sup>99</sup>

3.77 Many submissions questioned the benefits of harmonisation. For example, the Australian Writers Guild (AWG) asked:

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93 *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 801

94 *Submission 183*, p.17, (Rimmer)

95 *Submission 183*, p.24, (Rimmer)

96 Attorney General, the Hon Philip Ruddock MP, 'Opening Address – Australian Centre for IP and Agriculture Conference: Copyright: Unlucky for Some', <http://www.ag.gov.au/www/ministerruddockhome.nsf/Alldocs/RWP21E60A98ACC4ECE2CA256E3B0080AA84?OpenDocument&highlight=unlucky%20for%20some> accessed 16 June 2004.

97 *Submission 183*, p.37, (Rimmer)

98 *Submission 183*, p.37, (Rimmer)

99 D Richardson, Department of Parliamentary Services, *Intellectual property rights and the Australia-US Free Trade Agreement*, Research Paper No. 14 2003-04, 31 May 2004, p.10.

The AWG queries the fundamental use of the extension to copyright in a context where there will be little Australian product to protect for an additional twenty years. The AWG asks what is the point of harmonising our copyright laws with the US and the EU if the cultural material which is protected for an additional 20 years is primarily American in origin?<sup>100</sup>

3.78 The Australian Libraries' Copyright Committee (ALCC) submitted that:

... no compelling rationale has been put forward to demonstrate how an extension of copyright might yield significant trade benefits; the vague position that term extension would encourage trade due to increased U.S. confidence in the strength of the Australian copyright protection is laboured. No claims have been made that the economic benefits of harmonisation with the U.S. is any more than marginal and no data has been presented to substantiate even this weak assertion. Although the benefits of harmonisation are theoretically plausible, the reality is that the beneficiaries of harmonisation will be multinational companies, who are based mostly in the U.S. and European Union.<sup>101</sup>

3.79 The Australian Digital Alliance (ADA) submitted that even though the Commonwealth Government has repeatedly run with the argument that the overall benefit of the IP Chapter is the harmonisation of Australian and United States copyright legislation, the AUSFTA provisions closely mirror the provisions of the United States legislation. Therefore, in reality, in the ADA's view:

... harmonisation equates to unilateral action to amend Australian copyright legislation to U.S. legislation. The alignment of our copyright legislation to meet obligations created by the FTA has dangerous potential to create severe distortions within our domestic regime. Although Australia and United States share a common law tradition, some divergence has developed in recent years, marked by the emergence of powerful U.S. copyright markets which have been extremely successful at legislative lobbying. Consequently, the U.S. copyright regime sets one of the highest standards of copyright protection in the world but one which is not recognised as providing a balance between the interests of users and copyright owners.<sup>102</sup>

3.80 Other witnesses agreed. For example, Mr Charles Britton from the Australian Consumers' Association told the Committee that Australian consumers would be the real losers under the AUSFTA:

... the copyright clauses in the free trade agreement threaten consumer rights and upset the balance with producers' rights. It is difficult to discern the consumer benefit in a closer harmonisation of Australian and United States intellectual property rules. It is imperative to note some critical

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100 *Answer to Question on Notice*, 4 May 2004, p.2, (Australian Writers Guild)

101 *Submission 298*, p.7, (Australian Libraries' Copyright Committee)

102 *Submission 299*, pp.6-7, (Australian Digital Alliance)

differences between the two systems. The United States has a constitutional guarantee of free speech; we do not. The United States has fair use provisions which provide some protection for consumers in home copying; we do not. The United States constitution establishes some ground rules for intellectual property; our Constitution does not. Therefore, adopting the more draconian United States line on intellectual property without attending to the crucial aspects of consumer protection would, in our view, deliver a bad result for Australian consumers.<sup>103</sup>

3.81 While the extension of copyright has been touted as being beneficial for creators, arguably the IP Chapter actually does little more than concentrate power in the hands of major IP-owning businesses. EFA was of the view that the extension of the copyright term:

... comes not from a desire to promote innovation and enhance our nation's public domain, but rather from a corporate desire to enhance monopoly profits. In practice, given that the extra 20 years would be enjoyed long after the author's passing, it is large corporations that are most likely to benefit from the change.<sup>104</sup>

3.82 Ms Weatherall warned that 'copyright industries' should not be confused with Australian creators and innovators:

We need to avoid "slippage" between copyright owners and managers and copyright creators – they are not the same thing and they quite often do not have the same interests.

The only proper conclusion is that views from those involved in the creative industries are mixed. Some organisations support copyright extensions.

Notably, however, many organisations representing creators and authors are not supportive of copyright term extension.<sup>105</sup>

3.83 Further, EFA argued that it is unlikely that the extension will have a significant impact on the creation of new works:

[In the US] there is no evidence that the extension has resulted in increased innovation and creative effort. In fact, there is no evidence suggesting that further incentives are needed at all. Even if such a need were present, the very abstract benefit provided to creators by the proposed 20 year extension would be unlikely to have any real impact on rates of development.<sup>106</sup>

3.84 Indeed, the opposite effect may be more likely:

... any lengthening of copyright terms would tend to impede creativity and development. In the next 20 years, the monopolies over many works are

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103 *Transcript of Evidence*, 7 June 2004, p:59, (Britton, Australian Consumers' Association)

104 *Submission 282*, p.8, (Electronic Frontiers Australia)

105 *Submission 294A*, p.13, (Weatherall)

106 *Submission 282*, p. 8, (Electronic Frontiers Australia)

due to expire ... Building upon public domain material is a rich source of creativity and anything that serves to further limit the public domain also serves to impede creativity.<sup>107</sup>

3.85 Some submissions and witnesses pointed out that implementation of the AUSFTA will not actually result in a complete harmonisation of Australian copyright laws with those of Australia's major trading partners such as the United States and the European Union. In fact, 'there will be a number of important discrepancies between the copyright duration in Australia and the term provided for in other countries.'<sup>108</sup> Dr Rimmer described the issue of international harmonisation with respect to the copyright extension as 'a myth'.<sup>109</sup>

3.86 A significant number of Australia's trading partners provide copyright protection for the life of the creator plus 50 years. The AUSFTA will not necessarily result in harmonisation between Australia and trading partners such as Asian countries, countries in the Middle East, Canada and South Africa. Indeed, Dr Rimmer submitted that 'the copyright term extension in Australia will only exacerbate the wide variations in the treatment of copyright duration.'<sup>110</sup>

3.87 DFAT told the Committee that the Commonwealth Government does not agree with this view:

Enhancing 'harmonisation' reduces differences in law and practice so that owners and users of intellectual property may interact in a familiar legal environment, thereby reducing transaction costs. The fact that complete harmonisation is not achieved at any point in time does not lessen the value of movement towards greater harmonisation. Also so long as Australia remains consistent with its international obligations, then the AUSFTA does not constrain future government's abilities to make laws relevant to intellectual property to suit our social and legal environment.<sup>111</sup>

3.88 The Select Audio-Visual Distribution Company submitted that:

The world has managed with different copyright regimes in different countries for a long time and will continue to manage without harmonization. If anything, in the interest of the consumer, copyright protection should be harmonized at the lowest level, which is prevailing in most of the developed world and not at the level prevailing in the United States.<sup>112</sup>

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107 *Submission 282*, p.8, (Electronic Frontiers Australia)

108 *Submission 183*, p.39, (Rimmer)

109 *Transcript of Evidence*, 17 May 2004, p.6, (Rimmer)

110 *Transcript of Evidence*, 17 May 2004, p.40, (Rimmer)

111 DFAT, *Answers to Questions on Notice*, 15 July 2004, p.1

112 *Submission 341*, p.3, (Select Audio-Visual Distribution Company)

3.89 The effect of the application of Article 18 of the Berne Convention is that there is no obligation on Australia to enact retrospective protection of copyright material that has already fallen into the public domain. This means that in Australia the copyright extension will be prospective so that the term of protection will be extended for works created after 1955. By contrast, the United States retrospectively extended copyright in 1998 to protect works created from 1928. Therefore, while the United States has provided copyright protection for works created between 1928 and 1954, Australia will not have equivalent protection.<sup>113</sup>

3.90 There will remain discrepancies in other important areas, including protection for works made for hire, anonymous works performers' rights and moral rights. In relation to moral rights, for example:

The United States is very hostile to moral rights—the moral right of attribution and the moral right of integrity for creators. Australia will supposedly provide comprehensive protection of moral rights for the life of the author plus 70 years, but the United States will only provide protection for life in relation to the visual artists' rights regime. So there are fundamental and significant differences in the way harmonisation is dealt with.<sup>114</sup>

3.91 DFAT has rejected that this will be problematic:

Moral rights are not specifically addressed in the IP chapter, so I have a lot of difficulty seeing how those rights could be somehow subject to dispute resolution under the FTA ...

...

I have to say that I do not see any foundation for that concern at all.<sup>115</sup>

3.92 The Committee notes the views of DFAT in relation to the issue of moral rights and particularly acknowledges its statement that, under the AUSFTA, either party may wish to provide for more extensive protection than that provided for by the IP Chapter.<sup>116</sup> Moral rights provide important protection, particularly for Indigenous Australian interests, and the Committee is not convinced that such important protections currently enshrined in Australian law can be guaranteed under the AUSFTA, particularly in the event of any dispute arising between Australia and the United States in relation to them.

#### *Standard of originality and 'fair dealing' v 'fair use'*

3.93 The Committee heard evidence and received submissions that should the term of copyright protection be extended, consideration should be then given to extending

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113 *Submission 341*, p.3, (Select Audio-Visual Distribution Company)

114 *Transcript of Evidence*, 17 May 2004, p.29, (Rimmer)

115 *Transcript of Evidence*, 18 May 2004, p.105, (Harmer, DFAT)

116 DFAT, *Answers to Questions on Notice*, 15 July 2004, p.3

the fair dealing doctrine to a much more open-ended defence, similar to the situation in the United States. The arguments centred around the balance between copyright owners and users in the *Copyright Act* 1968, and the change in that balance under the AUSFTA.

3.94 In his submission, Dr Rimmer noted that the AUSFTA is very selective in its harmonisation of copyright laws between Australia and the United States:

In this agreement, Australia has adopted the harsher measures of the *Digital Millennium Copyright Act* 1998 (US) and the *Sonny Bono Copyright Extension Act* 1998 (US). However, Australia has not adopted features of the United States law which support copyright users – such as the higher standard of originality or the open-ended fair use defence of United States law.<sup>117</sup>

3.95 Ms Kimberlee Weatherall agreed that the AUSFTA will distort the balance of interests between IP owners and IP users in Australia:

One important reason why the provisions may not strike an appropriate balance of interests is that the Australia-US FTA seeks to introduce IP-protective US laws but does not "harmonise" aspects of US law protective of the interests of members of the public. The result of introducing these provisions in Australia without making appropriate adjustments to strengthen users' interests may be to skew IP law in Australia to be even more protective of IP owners than American law.<sup>118</sup>

3.96 For example, Australia has one of the lowest standards of originality in the world: it appears that copyright protection will be granted on the basis of the expenditure of skill and labour alone.<sup>119</sup> In the United States, however, the threshold of originality is much higher, requiring some degree of creativity.<sup>120</sup> This means that there will be a wider range of copyright material protected in Australia than in the United States. In particular, a greater amount of factual information which would not be protected by copyright law in the United States (or which would have only limited protection) is protected under copyright law in Australia.<sup>121</sup>

3.97 In evidence, Dr Rimmer told the Committee that the disparity in the standard of originality would have serious implications:

That means that [in Australia] more material qualifies as copyright work and a whole range of junk, for instance, would be affected by the copyright term extension. The copyright term extension would apply to such things as the White Pages, the Yellow Pages, blank accounting systems and gambling

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117 DFAT, *Answers to Questions on Notice*, 15 July 2004, p.40

118 *Submission 294*, p.17, (Weatherall)

119 See *Desktop Marketing Systems v Telstra Corporation* (2002) 119 FCR 491

120 See *Feist Publications Inc v Rural Telephone Service* 499 US 340 (1991)

121 *Submission 183*, p.40, (Rimmer); *Submission 294*, p.17, (Weatherall)

mechanisms and forms. Material that you would not think was particularly creative is being given very long protection and very strong protection. That is a very important difference between United States law and Australian law. That will have a quite significant impact ... because a much wider range of material is going to be protected in Australia that will have an important impact in terms of what will happen.<sup>122</sup>

3.98 In her submission, Ms Weatherall made a similar argument:

The effect of adopting the AUSFTA without addressing this difference may be to tip the balance too far in favour of copyright owners, and in particular, in favour of the compilers of collections of fact, at the expense of the interests of users. At the very least, this issue needs to be considered holistically.<sup>123</sup>

3.99 The Australian Vice-Chancellors' Committee (AVCC) was also concerned about upsetting the balance between the interests of copyright owners and users:

... the AUSFTA is very much pitched at the interests of copyright owners at the expense of users to such an extent that it alters the balance ... very much in favour of owners. There is no surprise that the USA would want to do this because most of the international publishers and major copyright owners are multinational organisations based in the USA, and combined they have been a formidable lobby both in the USA and internationally in changing the balance to suit owners. The so-called harmonisation outcome of the AUSFTA will benefit the USA and EU based multinational publishers but Australia will lose out – and the main losers will be the users of copyright material, notably the education sector.<sup>124</sup>

3.100 Likewise, the Australian Consumers' Association noted that the IP Chapter :

... embod(ies) consumer detriment because of the way [it] shift(s) the balance in favour of the producer interest. This is illustrated by the extremely scant reference to users of IP in Chapter 17 – users are mentioned chiefly in terms of obligations and limitations, and never in terms of rights, exceptions or expectations. Consumers are not mentioned at all.<sup>125</sup>

3.101 Doctrines exist in both the Australian and United States copyright regimes which allow for exceptions to when copyrighted material may be used without payment of a royalty. In Australia this is known as 'fair dealing', and in the United States it is known as 'fair use'.

3.102 The 'fair use' defence to copyright infringement in the United States operates more broadly than the Australian 'fair dealing' defences to copyright infringement. In

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122 *Transcript of Evidence*, 17 May 2004, p.12, (Rimmer)

123 *Submission 294*, p.17, (Weatherall)

124 *Submission 336*, p.3, (Australian Vice-Chancellors' Committee)

125 *Submission 522*, p.11, (Australian Consumers' Association)

Australia, to gain the benefit of the defence, the alleged infringer is required to show that the purpose of their use of copyright material falls within one of those enumerated in the Copyright Act: criticism and review, research and study, news reporting, or judicial proceedings.<sup>126</sup> However, the defence is not confined to those purposes and there has been much confusion in Australia about the scope of 'fair dealing'.<sup>127</sup>

3.103 In the United States, a non-exhaustive, flexible list of purposes is provided which has allowed United States courts to find 'fair use' for uses such as parody or other transformative use, time-shifting, space-shifting and device-shifting.<sup>128</sup> Simply put, in the United States courts have the power to find new, or unforeseen but economically insignificant uses 'fair'. Australian courts do not have that power.

3.104 The Committee notes that, in 1998, the Copyright Law Review Committee (CLRC) recommended 'the expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes ... but is not confined to those purposes'.<sup>129</sup> However, this recommendation has not been adopted in Australian law. As a result, under the AUSFTA, Australian users of information will have more restricted access to copyright material than users in the United States due to the higher standards of copyright protection overall and the lesser usage rights available.

3.105 Nothing in the AUSFTA would prevent Australia from implementing legislation to raise the level of originality and to introduce a 'fair use' defence to copyright infringement. However, the Committee received evidence which suggested that IP owners would oppose any move to adopt a 'fair use' defence,<sup>130</sup> and comments from DFAT in the course of the inquiry have suggested a preference for a continued 'purpose-based' approach<sup>131</sup> which 'would not provide the kind of flexibility that is important if IP law is to be strengthened'.<sup>132</sup> In relation to raising the threshold for originality, the Attorney-General's Department did not indicate that the standard of originality in Australia would change.<sup>133</sup>

3.106 However, in its response to a question on notice from the Committee, DFAT stated that:

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126 *Submission 294*, pp.17-18, (Weatherall)

127 *Submission 183*, pp.40-41, (Rimmer)

128 *Submission 183*, p.41, (Rimmer); *Submission 294*, p.18, (Weatherall)

129 Copyright Law Review Committee, *Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners*, September 1998, Recommendation 2.03

130 *Submission 294A*, p.6, (Weatherall)

131 *Transcript of Evidence*, 18 May 2004, p.93, (Harmer, DFAT)

132 *Submission 294A*, p.6, (Weatherall)

133 *Transcript of Evidence*, 18 May 2004, p.102, (Creswell, Attorney-General's Department)

The Government is still considering this recommendation of the Copyright Law Review Committee ... The report of the Joint Standing Committee on Treaties (JSCOT) on the AUSFTA has recommended consideration of the US 'fair use' defence to copyright infringement. The Government will be responding to that report.

It is open to the Government to consider a fair use style exception or any other exceptions in the future provided that any exceptions comply with international treaty standards.

The standard of originality in Australian copyright law is not an issue which is addressed in the AUSFTA. It is a matter for judicial interpretation on a case by case basis, according to a consideration of well established copyright principles. In examining the issue of originality the courts may have regard to legal precedents in other jurisdictions especially those of other common law countries such as the United States.

The Government is currently considering its response to a recommendation in the JSCOT report on the AUSFTA that the present standard of originality under Australian copyright law be reviewed.<sup>134</sup>

3.107 Ms Weatherall argued that the Commonwealth Government should undertake a review to ascertain precisely how Australia's obligations under Chapter 17 of the AUSFTA will sit with its domestic legislation:

... it is not appropriate to take on extensive obligations to enact further laws protective of IP interests without a full analysis of how these provisions will operate in the context of Australian law, which is – and under the AUSFTA provisions, will remain – different from US law in certain key respects. Any Australian government considering acceding to such a treaty should undertake to review those areas of Australian IP law is stronger than that provided elsewhere in the world, and undertake to redress that imbalance.<sup>135</sup>

3.108 Dr Rimmer told the Committee that the defence of 'fair use' should have been enunciated in the AUSFTA:

It is such a fundamental doctrine that affects all the different areas of intellectual property, and its absence from the free trade agreement is very significant. Even if this government, for instance, made legislative changes and recommended that there should be a defence of fair use, they could be wound back. But if you tried to make changes in relation to the areas that are mentioned in the free trade agreement and you violated those articles, you would be subject to a trade action. So the failure to include the fair use provisions in the free trade agreement makes it very provisional. Even if this parliament makes those reforms, they can be very easily wound back by a later parliament. That is the real significance: what is included in the free trade agreement is then locked into that free trade agreement because it is subject to those very strong alternative dispute resolution mechanisms

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134 DFAT, *Answers to Questions on Notice*, 15 July 2004, pp:1-2

135 *Submission 294*, p.18, (Weatherall)

and the possibility of trade sanctions if you violate a particular article or even if you violate the spirit of the agreement.<sup>136</sup>

3.109 Mr Charles Britton from the Australian Consumers' Association informed the Committee that a 'fair right' defence would guarantee the rights of consumers:

At the very least, in the legislative changes required to implement the free trade agreement there should be an enactment of a fair use right for Australian consumers, which would harmonise the law with current consumer behaviour and protect consumers as the digital environment moves control from control of copying to control of access.<sup>137</sup>

3.110 However, the adoption of a 'fair use' defence in Australia to redress the imbalance that might be caused by AUSFTA implementation may not, according to some, provide a solution. The ADA articulated this view as follows:

While the ADA recognises the merits and importance of the fair use exception within the U.S. copyright regime, careful thought must be given to the real impacts of such an introduction before foregoing our current mechanisms of balance. Although the fair use exception in the U.S regime offers a broad and flexible defence, its current operation in the U.S regime lacks the certainty that our "fair dealing" provisions provide within the Australian regime to users of copyright material. The ADA would support the introduction of a "fair use" type provision as an addition but not necessarily a replacement of our current "fair dealing" provisions.<sup>138</sup>

3.111 Similar concerns were raised by Viscopy:

The broader US concept of 'fair use' is very different to the Australian concept of 'fair dealing'. To suddenly use the United States concept, as has been proposed by some user groups interested in free access to works of Australian copyright, would have many additional implications for Australian law.<sup>139</sup>

3.112 CAL told the Committee that these issues are 'for another day and another place' and said that it would be opposed to such a move.<sup>140</sup>

3.113 The Australian Record Industry Association (ARIA) expressed strong opposition to the introduction of a US-style 'fair use' exemption and argued that, amongst other things, it would constitute 'an unjustified abrogation of the rights of copyright owners'<sup>141</sup> and would 'significantly increase enforcement difficulties'.<sup>142</sup>

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136 *Transcript of Evidence*, 17 May 2004, p.14, (Rimmer)

137 *Transcript of Evidence*, 7 June 2004, p.60, (Britton, Australian Consumers' Association)

138 *Submission 299*, p.7, (Australian Digital Alliance)

139 *Submission 520*, p.4, (Viscopy)

140 *Transcript of Evidence*, 17 May 2004, p.15, (Fraser, Copyright Agency Ltd)

141 *Submission 133A*, p.2 (Australian Record Industry Association)

3.114 The Committee also heard evidence of an alternative balancing mechanism which would involve creating a system of registration for aging copyright material:

... material deemed valuable could be registered for ongoing protection (at an escalating fee to recompense society for the deprivation of public access) while less valuable material would fall automatically into the public domain where it would benefit the culturally enriching processes of recycling and reuse.<sup>143</sup>

3.115 The Committee notes that a similar mechanism has been proposed by Landes and Posner<sup>144</sup> and in the Allen Report.<sup>145</sup>

3.116 The Committee also notes that the application of 'fair use' in the United States as determined by its legal system specifically provides for several unique copyright doctrines, namely time-shifting and space-shifting. An example of time-shifting is when consumers record a television program for later use, on a device such as a video recorder, or more recently other types of storage mediums.<sup>146</sup> Space-shifting is when digital content is recorded onto a different device than that for which it was originally assigned, for example purchasing a CD and copying it onto an MP3 player.<sup>147</sup>

3.117 Current Australian legislation makes these activities illegal. The Committee is of the view that the application of a broad, open-ended 'fair use' doctrine, similar to that in the United States, may resolve this long-standing legal anomaly in Australian copyright law and assist in legitimising several commonplace actions undertaken regularly by Australians perhaps unaware that they are infringing copyright. The Committee sees this as an opportunity to regulate the fair use environment to harmonise the activities of many Australians with the legal environment. In making its assessment, the Committee is particularly mindful of the recommendation by the CLRC in 1998 to adopt an open-ended United States-style 'fair use' approach.

3.118 The Committee acknowledges the comment in JSCOT's report that the term of copyright protection was defended vehemently by the Australian negotiators, but that the final outcome was necessary to secure the overall package.<sup>148</sup> However, the

142 *Submission 133A*, p. 2 (Australian Record Industry Association)

143 *Submission 522*, p.13, (Australian Consumers' Association)

144 W M Landes and R A Posner, *Indefinitely Renewable Copyright*, University of Chicago Law School, John M Olin Law and Economics Working Paper, No. 154 (2D Series), 2002

145 The Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs*, July 2003, Appendix A1, p.38, at [http://www.allenconsult.com.au/resources/MPA\\_Draft\\_final.pdf](http://www.allenconsult.com.au/resources/MPA_Draft_final.pdf) accessed 23 June 2004

146 [http://www.wordiq.com/definition/Time\\_shifting](http://www.wordiq.com/definition/Time_shifting) in Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.236

147 [http://www.webopedia.com/TERM/S/space\\_shifting.html](http://www.webopedia.com/TERM/S/space_shifting.html) in Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.236

148 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.237

Committee is concerned that the balance of interests between copyright owners and users will be substantially altered under the AUSFTA, with potentially serious implications for Australian consumers. The Committee is also of the view that extending already very broad copyright protection is likely to increase anti-competitive effects in circumstances where it remains unclear that there are significant offsetting benefits.

3.119 At a Senate Foreign Affairs, Defence and Trade Committee Estimates hearing Mr Stephen Deady from the Department of Foreign Affairs and Trade, stated that the rights of consumers would remain appropriately balanced with those of copyright owners:

Under the terms of the agreement we have commitments, which, whilst they require some legislative changes, still provide Australia with sufficient flexibility in these areas to ensure the very high level of intellectual property protection that we already have and balance that against consumer interests and other things. That is what the text of the agreement provides us as we go through this process of putting together the legislative changes required.<sup>149</sup>

3.120 A similar assurance was made by Ms Harmer of DFAT to the JSCOT in the course of its inquiry. Ms Harmer told that Committee that there is nothing in the AUSFTA to prevent Australia from creating exceptions which meet internationally agreed standards and which are, perhaps, comparable to United States-style exceptions if they are considered appropriate:

... we can put in Australian specific exceptions so they may look something more like the US-style exceptions, or we may indeed choose to do something different that we think is better for Australia and the Australian market where we perceive that there is a need to provide more balance. In that way, we actually think that is a more preferable outcome than having just taken exceptions that have been designed for the US market and putting them in place in legislation.<sup>150</sup>

3.121 The concerns raised in submissions and by witnesses in relation to these issues were dismissed by DFAT as being unfounded. The Committee accepts assertions by DFAT that flexibility is retained under the AUSFTA to create appropriate exceptions which reflect the interests of Australian groups and which accord with Australia's legal and regulatory environment. However the Committee is concerned that the United States Free Trade Agreement Implementation Bill 2004 extends the term of copyright protection to 70 years with immediate effect, without including any additional exceptions to counteract the increased rights this gives to copyright owners.

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149 *Transcript of Evidence*, 3 June 2004, p.66, (Deady, DFAT)

150 Joint Standing Committee on Treaties, *Transcript of Evidence*, 14 May 2004, p.51 (Harmer, DFAT)

3.122 The Committee is of the view that such exceptions should have been considered as part of the initial AUSFTA implementation legislation package. The increased copyright protection term is a major amendment to the *Copyright Act 1968* and, without amendments that correspondingly protect the interests of copyright users, the Committee believes that the changes tilt the balance towards copyright owners to an unacceptable degree. This is particularly in light of statements made by DFAT that, throughout the implementation process of translating the agreement into domestic legislation, the Commonwealth Government would be looking at maintaining the balance and how it fits within the Australian context.

3.123 Further, the Committee is not convinced by comments from DFAT that Australia's competition laws will protect against possible abuses of strengthened IP rights under the AUSFTA.<sup>151</sup> The Committee has been informed that Australian competition law is less likely to impose controls on the use of IP than United States anti-trust laws, or the European Union authorities.<sup>152</sup> Without the Commonwealth Government changing the nature of competition law in Australia (which seems unlikely), the Committee cannot see how potential abuses of stronger IP rights under the AUSFTA can be adequately controlled in this way.

3.124 The Committee is also concerned about the general ability of DFAT, DCITA and Attorney-General's department officials to answer questions on the IP issues at the Committee's public hearings. The officials had to take on notice many questions that the Committee believes they should have been able to answer on the day, and took significant amounts of time to provide answers. When answers were eventually provided, they frequently lacked sufficient detail, were dismissive and opaque, and often did not appropriately correspond to the questions asked.

3.125 With IP law emerging as an important area of public policy as well as being a key aspect of the AUSFTA, the Committee considers that greater technical expertise should have been demonstrated. Whether the difficulties answering questions result from lack of departmental cooperation and coordination or from insufficient expertise within relevant departments, the Committee is of the view that the Commonwealth Government must upgrade its IP expertise and ensure that any future changes to IP law are based on a whole-of-government approach. The Committee considers that the performance of the relevant departments at hearings throughout the inquiry invites speculation that proper technical expertise may not have been brought to bear in the negotiation of the IP Chapter.

3.126 The Committee believes that there are measures, in relation to the issue of copyright extension, that can be taken that will assist in redressing the imbalance and ensuring the rights of Australian consumers are appropriately protected.

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151 *Transcript of Evidence*, 18 May 2004, p.93, (Harmer, DFAT). Although the Committee notes the response to a question on notice from DFAT in relation to the operation of the *Trade Practices Act 1974*.

152 *Submission 294A*, p.9, (Weatherall)

### ***'Contracting out' of exceptions to copyright infringement***

3.127 Article 17.4.6 of the AUSFTA allows copyright owners to transfer their rights by contract which would mean that contracts could prevail over exceptions to copyright infringement such as 'fair use'. However, there are some doubts as to whether the relevant provision in the AUSFTA actually achieves this intention.<sup>153</sup>

3.128 The Commonwealth Government has indicated that this provision is consistent with section 196 of the *Copyright Act*,<sup>154</sup> however it contradicts a recommendation of the Copyright Law Review Committee in its 2002 report, *Copyright and Contract*, that the *Copyright Act* 1968 should be amended to provide that a contract that purports to exclude or modify certain exceptions would not be enforceable.<sup>155</sup> The Commonwealth Government has not responded to this recommendation.

3.129 Dr Rimmer told the Committee that:

The Copyright Law Review Committee recommended that you should not be able to contract out of the defence of fair dealing. They provide lots of evidence that publishers were including in their contracts clause which cut down what people could do legitimately in terms of the defence of fair dealing.<sup>156</sup>

3.130 DFAT told the Committee that:

The contracts with which the recommendation in the CLRC report was concerned are contracts relating to the use of copyright material by consumers and other users. The contracts to which Article 17.4.6(a) refers are contracts relating to the transfer of ownership of copyright in a work or other subject matter, not to the use of that material. Thus that provision of the AUSFTA does not appear to contain any obligation with regard to contracting out of exceptions to copyright.<sup>157</sup>

3.131 Dr Rimmer told the Committee that contracting out of exceptions is a controversial issue and may be problematic when interlinked with issues relating to TPMs and 'fair dealing':

I think the FTA is making it worse because there are strong interactions between technological protection measures and fair use. There are many arguments that the ability to engage in, say, fair dealing or fair use is cut

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153 P 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, p.14

154 See DFAT, *Australia-United States Free Trade Agreement, Guide to the Agreement*, para. 5.3

155 Copyright Law Review Committee, *Copyright and Contract*, October 2002, Recommendation 7.49.

156 *Transcript of Evidence*, 17 May 2004, p.14, (Rimmer)

157 DFAT, *Answers to Questions on Notice*, 15 July 2004, p. 4

down once you have technological protection measures happening and once you have contracts that try to do things like contract out of exceptions, which is also a very controversial matter. The Copyright Law Review Committee recommended that you should not be able to contract out of the defence of fair dealing. They provide lots of evidence that publishers were including in their contracts clauses which cut down what people could do legitimately in terms of the defence of fair dealing.<sup>158</sup>

3.132 DFAT's response to such concerns has been evasive:

The interaction of copyright rights, exceptions to those rights and the extent to which those exceptions may be affected by contract, remains an on-going policy issue extending beyond the AUSFTA.<sup>159</sup>

### *Anti-circumvention provisions of the AUSFTA*

3.133 TPMs or anti-circumvention devices are certain types of technology that are associated with copyright material.<sup>160</sup> The IP Chapter of the AUSFTA contains a set of obligations in relation to TPMs which will require significant legislative change in Australia. Under Article 17.12, Australia will have a two year period from date of entry into force of the AUSFTA to implement its obligations in relation to TPMs.

3.134 Article 17.4.7 limits the scope of exceptions in which TPMs may be used and extends the scope of criminal offences relating to the manufacture and sale of circumvention devices. It goes beyond the *Copyright Amendment (Digital Agenda) Act 2000* (Digital Agenda Act), by taking a much more expansive definition of 'controlling access' to a work than is currently embodied in the Digital Agenda Act. The Digital Agenda Act does not currently criminalise the actual use of TPMs, just the manufacture and distribution of them.

3.135 In short, the anti-circumvention provisions of the AUSFTA shift the focus from circumventing TPMs that achieves protection of copyright (through either the specific processes of access codes or through a copy control mechanism) to the distinctly different notion of 'controlling access' and the very broad notion of 'protecting copyright' (without specific reference to illegitimate copying).<sup>161</sup>

3.136 The TPM provisions of the AUSFTA have pre-empted the review of the Digital Agenda Act (the Digital Agenda Review), which was commissioned by the Attorney-General's Department and undertaken by the law firm Phillips Fox. Its report was released in April 2004.<sup>162</sup>

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158 *Transcript of Evidence*, 17 May 2004, p.14, (Rimmer)

159 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.10

160 DFAT, *Australia-United States Free Trade Agreement, Guide to the Agreement*, para. 5.3

161 *Submission 299*, p.8, (Australian Digital Alliance)

162 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, at <http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations> accessed 7 June 2004

3.137 The report by Phillips Fox in the Digital Agenda Review stated that 'submissions to the review accept that, in general, the Digital Agenda Act is achieving its objectives and is working well.'<sup>163</sup> Some changes were recommended by the review, but the overall workings of the Digital Agenda Act were not criticised.<sup>164</sup> In particular, the review recommended that the *Copyright Act* 1968 be amended to expand the definition of 'permitted purpose' for use and sale of TPMs. This would add fair dealing and access to legitimately acquired non-pirated products and, under these circumstances, make end use an infringement unless for a permitted purpose.<sup>165</sup> The AUSFTA does not allow a blanket exemption for non-infringing uses, so it would not permit these recommendations to be enacted.

3.138 Under the AUSFTA, Australia is able to make certain classes of copyrighted work (for example, films on DVD, music, video games) exempt from the normal TPM circumvention prohibitions where the circumvention is for a non-infringing use. However, the decision to exempt these classes – which may be made by parliament or delegated to a minister or public servant – must be reviewed every four years.

3.139 This is similar to the process used in the United States in which the Librarian of Congress may determine that certain users or uses of TPM circumvention devices are legitimate. Notably, the AUSFTA does not require the adoption of certain criteria for determining whether or not a use should or should not be allowed, as in the United States. This leaves the Australian Parliament with some freedom to choose which criteria should be relevant, beyond the adverse effects suffered by non-infringing users.<sup>166</sup>

3.140 On the one hand, this exemption does allow that certain fair dealing and other non-infringing uses may be allowed. On the other hand, the AUSFTA requires that a non-infringing use be illegal until 'an actual or likely adverse impact on those non-infringing uses is credibly demonstrated'. In the absence of well-resourced or organised lobbies representing consumer interests, it is foreseeable that these processes could be dominated by those representing copyright holders. A blanket exemption from non-infringing uses would avoid this problem but is not allowed under the AUSFTA.<sup>167</sup>

3.141 The Australian Digital Alliance informed the Committee:

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163 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, at <http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations> accessed 7 June 2004

164 *Submission 294*, p.20, (Weatherall)

165 J Varghese, Parliamentary Library, *Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004*, Appendix 3, p.29.

166 J Varghese, Parliamentary Library, *Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004*, Appendix 3, p.30.

167 J Varghese, Parliamentary Library, *Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004*, Appendix 3, p.30.

The Digital Agenda Review Report ... considers the issues within the framework of Australian legal history and policy. Most of the recommendations made by the Report on topics common to the FTA in fact make suggestions for legislative change which can more or less be characterised as moving in the opposite direction to that contemplated by the FTA. The recommendations largely (and rightly) adhere to the underlying government policy for balance and does not recommend change in the absence of compelling evidence demonstrating a need.<sup>168</sup>

3.142 The Commonwealth Government has recently announced that:

... [it] is now moving towards signing its Free Trade Agreement with the US and implementing its obligations. In some areas, the copyright provisions of the Free Trade Agreement supersede the recommendations made in the Phillips Fox report. Where relevant the Phillips Fox report is being used to inform the Government's implementation of the Free Trade Agreement obligations.

Following the implementation of the Free Trade Agreement obligations, the Government will conclude its broader review of the Digital Agenda reforms. The broader review will include analysis of the Phillips Fox report in relation to issues that were not considered in the implementation of the Free Trade Agreement as well as other Digital Agenda reform issues that were raised during the review.<sup>169</sup>

3.143 This was confirmed by DFAT which informed the Committee as follows:

Phillips Fox conducted their research and analysis of the copyright Digital Agenda reforms independently of the FTA process being undertaken by the Government. The Phillips Fox report was received by the Attorney-General's Department in February 2004 by which time the bulk of the FTA negotiations had been concluded. Where possible, the Government is taking the Phillips Fox report into consideration in its implementation of the FTA obligations.

In some areas, the copyright provisions of the AUSFTA supersede the recommendations made in the Phillips Fox report. For example, technological protection measures are dealt with in both the Phillips Fox report and the AUSFTA. In the event of inconsistencies between the Phillips Fox report recommendations and obligations under the FTA in relation to technological protection measures, the FTA will prevail.

3.144 However, DFAT also informed the Committee that the Digital Agenda Review process is ongoing and that the report by Phillips Fox was a consultancy paper

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168 *Submission 299*, p.5, (Australian Digital Alliance)

169 Attorney-General's Department, Review of Copyright Digital Agenda reforms, at <http://www.ag.gov.au/www/securitylawHome.nsf/AllDocs/RWP18B3985DD6A0767FCA256D9D00815B56?OpenDocument&highlight=review%20of%20copyright%20digital%20agenda%20reforms> accessed 7 June 2004.

intended to inform the Commonwealth Government's broader review of the reforms. Further:

Where possible, the recommendations of the Phillips Fox Report have been used to inform Australia's implementation of the Agreement. This will continue to be the case in relation to the implementation of the TPM obligations under the Agreement. However, some of the recommendations relating to TPMs have effectively been superseded by the Agreement.<sup>170</sup>

3.145 The Committee remains concerned that the AUSFTA effectively displaces previous extensive public review processes, such as the Digital Agenda Review, which involved widespread consultation and participation. These processes rejected some of the very changes to Australian IP law that the AUSFTA now requires Australia to adopt. This suggests to the Committee that at least some of the changes required to Australian law under the AUSFTA are not desirable from an Australian policy perspective. The Committee considers it neither desirable nor appropriate that domestic law reform processes have been made virtually redundant by the AUSFTA negotiations.

3.146 The Committee received evidence reflecting a range of views, both supporting Australia's obligations in relation to TPMs and raising concerns on, for example, regional coding issues and possible adverse impacts on the open source software industry. Those organisations representing creators and copyright owners were generally supportive of TPM provisions.

3.147 For example, the Business Software Association of Australia argued that:

Strong anti-circumvention provisions will become increasingly important as copyright owners in the digital environment rely on technological protection measures to protect their works and reduce piracy.<sup>171</sup>

3.148 CAL made the following argument:

It is CAL's view that Australian content creators have been reluctant to develop electronic products, as opposed to their US counterparts, and that an important contributor to this has been the concern Australian content creators have with circumvention devices generally as well as a perception by them that the current Australian legislation does not afford them any protection.<sup>172</sup>

3.149 The AFIC were keen to see the implementation of tighter controls on anti-circumvention device as soon as possible:

Given that the US and EU both protect access control measures, the Coalition considers that maintaining the current "gap" in Australia will give

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170 DFAT, *Answers to Questions on Notice*, 15 July 2004, p.5

171 *Submission 178*, p.3, (Business Software Association of Australia)

172 *Submission 309*, p.8, (Copyright Agency Ltd)

rise to just the type of trade barriers that the FTA was designed to avoid, and will discourage online content providers from moving into the Australian market.

...

... the Coalition considers that the prejudice caused to Australia's content industries by failing to implement the extended definition in line with Australia's trading partners as soon as possible, is far greater than any possible prejudice that may be caused to users of copyright material.<sup>173</sup>

3.150 The provision relating to TPMs are based on the *Digital Millennium Copyright Act 1998* (DMCA). It has been an issue of international debate whether the US) is the appropriate model of compliance with the WIPO treaties.<sup>174</sup> The DMCA is quite different to the approach in Australia and has been widely criticised, even within the US. Australian copyright law is more pragmatic and regulated, depending less on litigation and the development of case law than in the United States. Some submissions pointed out that it may not be appropriate for Australia to adopt features of the DMCA. For example, concerns were expressed by the open source software industry that the DMCA has been used to stifle fair competition and to severely limit a consumers right to fair use:

There is accelerating awareness in the United States that these laws are unbalanced, and that the interests of large producers have outweighed the interests of consumers (and smaller producers) in the crafting of these laws, and that they are doing real damage. Sites like [chillingeffects.org](http://chillingeffects.org) document the effect of DMCA on the openness of speech and rights. The site catalogues the cease and desist notices and presents analyses of their claims to help recipients resist the prosecution of legitimate activities.<sup>175</sup>

3.151 Professor Michael Geist submitted:

The reticence to adopt the WIPO standard is understandable. Many believe the U.S. experience illustrates the dangers of adopting copyright protections that may ultimately stifle innovation. The Digital Millennium Copyright Act, the U.S. statute that implements the WIPO standard, has led to scholars declining to publish their research out of fear of lawsuits, hundreds of individual Internet users having their privacy rights ignored, and copyright law being strangely applied to garage door openers and computer printers.<sup>176</sup>

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173 *Submission 300*, p.11, (Australian Film Industry Coalition)

174 P 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, p.13

175 *Submission 164*, pp.8-9, (Linux Australia)

176 *Submission 26*, p.1, (Geist)

3.152 The Committee also heard evidence that the proposed changes to Australian laws in respect of TPMs would be significantly detrimental to some industries and to consumers. In its submission, Linux Australia argued that laws in the United States and Australia give a particular benefit to the producer. If something can be described as a TPM, it is illegal to circumvent it, even if the real purpose of the TPM is to restrict access to content.<sup>177</sup> In the United States, the DMCA has been used to hinder efforts of legitimate competitors to create interoperable products.<sup>178</sup>

3.153 The open source software industry is concerned that the provisions dealing with TPMs might be used to prevent the interoperability of data or the creation of software programs which can access other people's data. Mr Brendan Scott told the Committee that:

I think the open source industry would see the inability to manipulate data that has been saved by other people acting as a barrier to competition to those people trying to put forward competitive products. Effectively, a customer's own data is used as a competitive weapon against competitors for the custom of that customer. If a competitor is not able to interoperate with the data that the customer has stored for however long, then the competitor's product, no matter how good it is, will not be taken up by the customer because all of their legacy data will effectively be lost. In short, the concern is that the chapter 17 provisions will substantially increase compliance costs and that means the engine that is used for the development of open source, which is a low compliance cost environment, may be gummed up and potentially stopped.<sup>179</sup>

3.154 The ADA argued that the AUSFTA provisions in relation to TPMs represent 'a dangerous transformation of our current law.'<sup>180</sup> In particular:

The control of access restricts competition by giving copyright owners power to control markets and structure distribution streams to maximise profit. The provisions of article 17.4.7 create opportunities for abuse of copyright legislation to control access to material not for protection of copyright but for the purposes of market advantage (a current example of this practice is DVD zoning). This is at the cost of reducing the options through which users may access material that they have legitimately purchased or worse, to effectively prohibit *per se* the means by which consumers might access material which they have purchased but which may have become unavailable for various reasons.<sup>181</sup>

3.155 The ALCC submitted that:

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177 *Submission 164*, p.10, (Linux Australia)

178 *Submission 294*, p.24, (Weatherall)

179 *Transcript of Evidence*, 17 May 2004, pp:3-4 (Scott)

180 *Submission 299*, p.8 (Australian Digital Alliance)

181 *Submission 299*, p.8 (Australian Digital Alliance)

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The creation of a blanket ban on the act of circumvention is effectively an overhaul of the careful approach to balance embodied in the Digital Agenda Amendments. The disjunction created by this significant departure from current law is complicated by the lack of clarity and ambiguity of the provision.

...

The lack of clarity in the drafting makes it difficult to assess the impact of the provision and anticipate the standard of protection required to meet the obligations imposed by the FTA in relation to this issue.<sup>182</sup>

3.156 The Australian Consumers' Association warned that Australian consumers would be the big losers:

... extending such measures would intrude into consumers' lives excessively, particularly given the unresolved and potentially very broad definition of Technological Protection Measures (TPM). We are concerned that TPM devices deliver rights and enforcement by assertion, with little room for consumer negotiation or appeal.<sup>183</sup>

3.157 The Committee received evidence expressing concern that the AUSFTA has the potential to entrench, and legally protect, anti-competitive and market segmentation practices of copyright owners, as well as undermine Australia's policies in favour of competition in the supply of legitimate copyright works as implemented through its parallel importation laws.<sup>184</sup> The Commonwealth Government has had an active policy of avoiding the price-inflating effects of market segmentation and has allowed parallel importation on the basis that this would benefit Australian consumers by reducing prices and increasing the availability of copyright material.<sup>185</sup>

3.158 The Australian Competition and Consumer Commission (ACCC) has strongly supported this position and has been vocally opposed to regional coding and to the Digital Agenda Act in general. For example, the ACCC has stated that:

[It] believes region coding is detrimental to consumers as it severely limits their choice and, in some cases, access to competitively priced goods. The ACCC is disappointed that technology which can overcome these unfair restrictions will not be generally available for consumers' use.<sup>186</sup>

3.159 The Australian Consumers' Association explained its view on regional coding:

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182 *Submission 298*, p.9 (Australian Libraries' Copyright Committee)

183 *Submission 522*, p.13 (Australian Consumers' Association).

184 *Submission 294*, p.21 (Weatherall)

185 *Explanatory Memorandum* to the Parallel Importation Bill 2001 (Cwlth)

186 Australian Competition and Consumer Commission, 'Consumers Lose in Playstation Decision', 31 July 2003, at <http://www.accc.gov.au/content/index.phtml/itemId/345939> accessed 7 June 2004.

The zoning system is not designed to counter consumer-level *copying* but is intended to structure the global market to the advantage of the content producers.<sup>187</sup>

3.160 It went on to argue that:

Zoning is a matter of indifference to the US because firstly it originates most of the material consumers want to access, and secondly because it is a huge market into which most product will be released. As a smaller satellite economy, Australia is affected. The system is an imposition on consumers and does control their *access* to material. It places an artificial barrier in the market place where a software product *legally* acquired by a consumer may not work with a hardware product expressly designed and advertised for the purpose of playing the software ... consumers have not means or right to negotiate the nature of the arrangement or its enforcement, irrespective of the impact on them.<sup>188</sup>

3.161 In relation to the issue of parallel importation and regional coding, Ms Harmer from DFAT assured the Committee that:

The anticircumvention provisions really go towards piracy rather than viewing what is a legitimate copy of copyright material. The anticircumvention provisions I think have to be seen in that context. They are not really aimed at stopping people from carrying out legitimate copyright activities.<sup>189</sup>

3.162 Ms Harmer reiterated:

... there will be no change to Australia's parallel importation laws as a result of the FTA.<sup>190</sup>

3.163 Mr Deady made some very encouraging comments in relation to regional coding and parallel importation:

It seems to me that there is the capacity for Australia to introduce exceptions to allow for the legitimate use of non-pirated material here. The agreement, I think, certainly allows for that through exceptions, and I think that is accepted. It does put restrictions on anticircumvention devices. But the agreement ... does provide the government with the flexibility to introduce these exceptions and then to give effect to those exceptions. There is no point in our agreeing to exceptions to allow the 'fair use'—if that is the right term—of this material with the use of non-pirated material and then having no capacity whatsoever to allow that material to be viewed or used ... The agreement clearly allows for exceptions for legitimate use; therefore, in order to give effect to that, to allow that to occur, we certainly

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187 *Submission 522*, p.16 (Australian Consumers' Association)

188 *Submission 522*, p.16 (Australian Consumers' Association)

189 *Transcript of Evidence*, 6 July 2004, p.197 (Harmer, DFAT)

190 *Transcript of Evidence*, 6 July 2004, p.197 (Harmer, DFAT)

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believe that the use of certain devices is provided for under the agreement.<sup>191</sup>

3.164 In answers to questions on notice, DFAT also clarified the position on regional coding:

The viewing of non-infringing material from other countries is a legitimate activity and the obligations of the FTA target piracy. We do not agree that permitting the sale of region-free DVD players in Australia would contravene the provisions of the AUSFTA provided that the legislation is implemented in a manner consistent with the FTA.

The issue of multizone DVD players will be considered as part of the implementation process. The agreement also provides for a 2 year transitional period to implement these provisions, which will present the opportunity for public submissions in this area. It is also important to bear in mind that the IP Chapter does not alter competition law in Australia and competition law can be used to address anti-competitive conduct.<sup>192</sup>

3.165 In response to concerns relating to TPMs, Mr Simon Cordina from DCITA informed the Committee that:

In terms of regional coding itself, if a person is playing a legitimate, non-pirated product, the government's intention would not be for that to fall foul of the laws in relation to technological protection measures. This issue of regional coding is one of the issues that the government will be looking at in terms of the implementation of our obligations under the free trade agreement whereby we can introduce exceptions to the protections we are providing to technological protection measures.<sup>193</sup>

3.166 DFAT repeatedly told the Committee that Australia has retained the ability under the AUSFTA to create appropriate exceptions to suit its own circumstances. Ms Harmer said:

The anticircumvention provisions ... include a list of specific exceptions that we can take advantage of and a mechanism for us to make further exceptions that we consider to be appropriate for the Australian circumstances ... we very specifically negotiated a two-year transitional period for us to phase in our obligations so that we can take account of those concerns that are very specific to Australia. A broad point—and perhaps it is one that I should have made earlier with respect to the FTA in general and the copyright provisions—is that it is correct to characterise it as having strength in copyright in the FTA but we have also been very careful to ensure that we maintain the ability to put in place exceptions where we regard those to be appropriate to the Australian circumstances.<sup>194</sup>

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191 *Transcript of Evidence*, 6 July 2004, p.122 (Deady, DFAT)

192 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.14

193 *Transcript of Evidence*, 18 May 2004, p.91-92 (Cordina, DCITA)

194 *Transcript of Evidence*, 18 May 2004, p.92 (Harmer, DFAT)

3.167 Ms Harmer stressed that the main aim of the TPMs provisions is to guard against piracy:

... the point that I would like to make in relation to all of these issues is that the provisions are designed to assist copyright owners to enforce their copyright and target piracy, not to stop people from doing legitimate things with legitimate copyright material.<sup>195</sup>

3.168 DFAT has attempted to allay concerns raised by the open source software industry:

These obligations do not stifle innovation or require that Australia must prevent consumers and industry from engaging in legitimate activity, including obtaining appropriate access to copyright material. The AUSFTA also allows for the continued development of innovative software products, including Australia's burgeoning open source software development industry.

The Agreement provides for a specific exception to the anti-circumvention provisions which allows reverse engineering of computer software for the purposes of achieving interoperability. Further, the Agreement provides for a review process to be undertaken at least every four years for additional exceptions to those listed, to permit circumvention where the adverse impact or likely adverse impact on certain non-infringing uses is credibly demonstrated in a legislative or administrative review. This would allow the government to assess what other exceptions may be appropriate to put in place to allow interested parties, including the open source software industry to circumvent an access control measure.<sup>196</sup>

3.169 However, Mr Russell from Linux Australia was not convinced that the exceptions under the AUSFTA would allow Australia sufficient flexibility:

The exceptions we can make are defined in these clauses, and they are not clear. The ones that are clear are not sufficient. The uncertainty is a very difficult issue to get around—without placing blanket bans on all use, basically, of these objects.

...

The one exception clause that everybody keeps pointing out is the one where you are allowed to set up a legislative or administrative review or proceeding whose exceptions must be specific to a class of works and renewed every four years. The problem with that is that it is reverse law. That clause is about being guilty until proven innocent. Just the fact that you are not infringing copyright is not a defence, and it can only be made a defence after a protracted and probably expensive procedure. That barrier itself will be high—legal advice at the very least, a submission for review

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195 *Transcript of Evidence*, 18 May 2004, p. 95 (Harmer, DFAT)

196 DFAT, *Answers to Questions on Notice*, 13 July 2004, pp.8-9

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and argument against the same interests who have been pushing for control above and beyond copyright—and potentially against our competitors.<sup>197</sup>

3.170 DFAT insisted that the provisions relating to TPMs do not prevent the manufacture, distribution, sale or importation of all circumvention devices or services, nor do they necessarily restrict all commercial activities in relation to those devices or services.<sup>198</sup>

3.171 DFAT insisted that implementation of Australia's obligations in relation to TPMs will be 'in a manner consistent with Australia's legislative and regulatory framework.'<sup>199</sup> While recognising that these obligations represent a departure from the current law, DFAT has assured the Committee that 'there will be close consultation with stakeholders so as to minimise implementation problems, including any ambiguities that would make compliance problematic in practical terms.'<sup>200</sup>

3.172 Contrary to assertions made in submissions and in evidence at hearings, Mr Stephen Deady, Special Negotiator, Department of Foreign Affairs and Trade told Senate Foreign Affairs, Defence and Trade Committee Estimates hearing that the AUSFTA would not involve Australia being forced to adopt the DMCA:

I know in some of the consultation and discussions we have had with you, and others on the committee and elsewhere, that there is a question about how much of that US legislation we need to bring into our own system. We have tried to explain that the commitments we have entered into in this chapter do not require us to bring into our legislation the Digital Millennium Copyright Act.<sup>201</sup>

3.173 Further:

... these obligations apply as equally to the United States as they apply to Australia. We certainly have negotiated long and hard in this area to ensure that we have the flexibility in certain areas that are important to us to enable us to introduce legislation to meet the commitments under the agreement without changes to legislation to the maximum extent we could. Where we have changes, we will introduce them in a way which is consistent with the agreement but which still reflects the legal and regulatory framework that is important to Australians. That is certainly our objective in this.<sup>202</sup>

3.174 At one of the Committee's public hearings, Ms Harmer put forward a similar view:

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197 *Transcript of Evidence*, 17 May 2004, (Russell, Linux Australia)

198 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.11

199 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.7

200 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.7

201 *Transcript of Evidence*, 3 June 2004, p.66 (Deady, DFAT)

202 *Transcript of Evidence*, 3 June 2004, p.67 (Deady, DFAT)

... the IP chapter does contain elements of the US Digital Millennium Copyright Act. It also contains flexibility for us to implement that in a way that is appropriate for us. So I believe it is an incorrect reading of the IP chapter to think that it requires us to implement US law word for word in our system. Whilst we have treaty level obligations, we will be implementing those within our own legal context.<sup>203</sup>

3.175 However, the Committee remains concerned that the AUSFTA goes too far. TPM circumvention may be done for legitimate, non-infringing purposes, not simply piracy. A ban on TPM circumvention, while possibly assisting to curb some piracy, may also prevent many legitimate purposes. This severely interferes with the rights of consumers to do as they wish with property that they have legally purchased. It is important to ensure that certain classes of copyrighted work be exempt from the normal TPM circumvention prohibitions where the circumvention is for a non-infringing use.

### ***Internet Service Provider Liability***

3.176 Article 17.11.29 and Side Letter 1 cover Internet Service Provider (ISP) liability obligations. These obligations establish a system for dealing with allegedly infringing material on ISP systems and networks. An ISP will receive 'safe harbour' immunity when dealing with alleged copyright infringements on their system or networks if they comply with certain conditions.

3.177 DFAT explained the ISP liability provisions as follows:

... what the agreement does is put in place a set of rules, if I can call it that, so that Internet service providers, copyright owners and users are clear about their rights and obligations .... I think we would see that very much as being of benefit to ISPs in providing certainty and of benefit to copyright owners in providing the ability for a take-down and notice regime. It would also assist users to have that certainty about how the system works. I would see the ISP provisions as being something that would certainly assist copyright owners to enforce their copyright at the same time as introducing appropriate safeguards for users and ISPs.<sup>204</sup>

3.178 The ADA argued that, while recognising the perceived problems of uncertainty associated with current Australian ISP provisions, the need for further clarity does not necessarily mean that the United States model should be adopted. Such a model, 'if followed closely, imposes unreasonable burdens upon ISPs, ignores the requirement for due process and privacy rights of individuals and enhances the already extensive powers of copyright holders.'<sup>205</sup>

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203 *Transcript of Evidence*, 18 May 2004, p.102 (Harmer, DFAT)

204 *Transcript of Evidence*, 18 May 2004, p.106 (Harmer, DFAT)

205 *Submission 299*, p.9 (Australian Digital Alliance)

3.179 The EFA stated that the way in which the provisions of the AUSFTA would 'effectively empower large copyright holders to control flows of information and impose various burdens upon ISPs'<sup>206</sup> was of major concern. The EFA also pointed out some particular problems it sees with the provisions:

EFA is opposed the idea that mere linking to a website which allegedly contains infringing material is or should itself constitute infringement of copyright. EFA is also opposed to a system of take-down notices that allows copyright holders to exert such wide powers over internet content, forcing content offline without any actual evidence of infringement ...

A system of take-down notices like that proposed by Chapter 17 would subject a wide array of internet 'service providers' to burdensome compliance requirements, whilst empowering copyright holders to force content offline without evidence of infringement, and in situations where the law is unclear or untested. Such a system should be rejected, as it simply enhances the power of copyright holders to control the activities of others and, in practice, labels defendants as guilty unless proven innocent.<sup>207</sup>

3.180 The University of Melbourne submitted that there should be no liability for infringement for an ISP in circumstances where the ISP did not know of a particular infringement and that this principle should be affirmed in the AUSFTA implementation legislation.<sup>208</sup> It went on to stress the importance of allowing ISPs to cache materials 'without running the risk of being held liable for infringement of copyright or the payment of royalties to copyright owners'.<sup>209</sup> The ADA agreed with this point stating that ISPs should not be excluded from limitation of liability when engaging in 'the configuration of settings or maintenance activities that are designed to enhance the efficiency of networks'.<sup>210</sup>

3.181 The process of caching was explained to the Committee by Mr Peter Coroneos from the Internet Industry Association:

It is essentially just temporary storage so that, if your users are requesting material off the Internet that is being hosted in another country, rather than going and dragging it back to Australia every time a new user wants it you bring it here once and store it in a temporary cache. The speed of delivery is quicker to the end user and you do not have to pay for the same content to be transited every time. Parliament recognised the public interest in allowing caching, because it recognised, for the reasons I have just said, that it is better for Internet users to have this material held here.<sup>211</sup>

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206 *Submission 282*, p.12 (Electronic Frontiers Australia)

207 *Submission 282*, p.14 (Electronic Frontiers Australia)

208 *Submission 493*, p.4 (The University of Melbourne)

209 *Submission 493*, p.5 (The University of Melbourne)

210 *Submission 299*, p.14 (Australian Digital Alliance)

211 *Transcript of Evidence*, 17 May 2004, p.85 (Coroneos, Internet Industry Association)

3.182 The Committee received submissions that expressed concerns that the failure to appropriately address the issue of temporary copying in the AUSFTA may disadvantage Australia's cultural and educational sectors, as well as consumers. Cultural and educational institutions undertake necessary and extensive caching of internet material to minimise external bandwidth limitation and to maintain security.<sup>212</sup>

3.183 Mr Coroneos from the Internet Industry Association noted that:

When you look at the free trade agreement, it talks about caching carried out through an automatic process. The point I am trying to make is that our current Copyright Act makes no distinction between automatic and non-automatic caching..<sup>213</sup>

3.184 The Committee notes the recommendation in the IPCRC report that recognised the need for legislation to allow caching activities designed to enhance the efficiency of systems.<sup>214</sup>

3.185 DFAT addressed concerns raised in the course of the inquiry by informing the Committee that:

The AUSFTA requires Australia to extend the definition of reproduction to cover all reproductions in any manner or form, permanent or temporary (including temporary storage in material form). Australia retains its ability to include specific exceptions to allow reproductions in certain circumstances. The AUSFTA will not limit the scope of the caching exception in the Copyright Act, which will continue to apply to temporary reproductions.<sup>215</sup>

3.186 Most submissions and witnesses who commented on the issue of ISP liability agreed that current Australian provisions relating to ISP liability are uncertain.<sup>216</sup> However, concern was expressed that the level of detail in the ISP liability provisions of the AUSFTA is inappropriate and does not allow for sufficient flexibility in implementation.<sup>217</sup>

3.187 The Phillips Fox report in the Digital Agenda Review determined that greater certainty is required as to what steps ISPs need to take to protect themselves from

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212 *Submission 298*, p.14 (Australian Libraries' Copyright Committee)

213 *Transcript of Evidence*, 17 May 2004, p.85 (Coroneos, Internet Industry Association)

214 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, September 2000.

215 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.4

216 See, for example, *Submission 294*, pp:27 (Weatherall); *Submission 282*, p.12 (Electronic Frontiers Australia)

217 See, for example, *Submission 294*, pp:27 (Weatherall); *Submission 282*, p.12 (Electronic Frontiers Australia)

liability, however it recommended that a 'co-regulatory' model be adopted.<sup>218</sup> This would mean that, while minimum standards would be prescribed in legislation, there would remain freedom for development of a flexible industry code of conduct. The Digital Agenda Review also noted this approach as the preference of Australian stakeholders.

3.188 Ms Anne Flahvin, on behalf of the AVCC, argued that:

With respect to service provider liability, universities in particular need certainty. The current provisions do not provide the level of certainty that the education system requires in order to understand what its liability is for infringements taking place on its networks. We do, however, have some concerns with the highly prescriptive approach that is contained in the free trade agreement. In particular we are concerned that it provides little scope for Australia to develop appropriate safe harbour provisions and to avoid some of the flaws that we see apparent on the face of the Digital Millennium Copyright Act provisions on which these provisions appear to be based.<sup>219</sup>

3.189 Mr Peter Coroneos from the Internet Industry Association told the Committee that:

What we would say is that perhaps the free trade agreement gives us the opportunity to pick up on some of those areas in [the Copyright Act] that may still be slightly ambiguous and give them further definition so that the immunities of the ISPs are very clear and it is very clear where their rights and responsibilities begin and end. There may also be scope to include a framework for a notice and take-down structure within the [Copyright Act].<sup>220</sup>

3.190 The Committee acknowledges that several organisations are highly in favour of the scheme set out under the AUSFTA.<sup>221</sup> For example, Mr Michael Williams, on behalf of the AFIC, explained its opinion as follows:

We see ... safe harbours as an essential trade-off for other obligations that we believe should be maintained and implemented to their fullest. They are the obligations to control or monitor to the extent possible activities of individual customers of ISPs and also to take appropriate action where that information comes to the knowledge of ISPs along the way. Perhaps some of the submissions that have been put forward raise more extreme, and in our experience hypothetical, examples of how Internet service providers

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218 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, at <http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations> accessed 7 June 2004

219 *Transcript of Evidence*, 17 May 2004, p.7 (Flahvin, AVCC)

220 *Transcript of Evidence*, 17 May 2004, p.83 (Coroneos, Internet Industry Association)

221 For example, *Submission 301* (Interactive Entertainment Association of Australia); *Submission 178* (Business Software Association of Australia); *Submission 520* (Viscopy).

might be exposed to liability to their customers, when no real world examples have ever existed to our knowledge.<sup>222</sup>

3.191 In relation to the issue of self-regulation, Mr Williams stated that:

In short, we do not believe that leaving the regulation of the online liability arena to the industries is the appropriate course. The industries have tried over many years to negotiate a code ... Essentially, the FTA process is one which would enable a super-imposition of a scheme which has been operating in the United States and which will not be delayed by further negotiations between the industries.<sup>223</sup>

3.192 Mr Jorg Speck from Music Industry Piracy Investigations was highly critical of the Internet industry's approach in relation to liability:

The Internet industry already submit themselves to a pro-forma take-down protocol. We have for five or six years sent a single document—a one-page letter—to ISPs in Australia and indeed many other countries around the world when we have identified sound recording copyright infringements, and invariably Australian ISPs take that material down without complaint within 24 hours. Yet they come to this committee and revisit the entire issue.

They further accommodate their own concerns, and I suggest the most fanciful is their fear of being sued by a customer for wrongfully taking material down. Apart from the protection afforded by section 202 of the Copyright Act, most ISPs protect themselves with comprehensive terms and conditions.<sup>224</sup>

3.193 Mr Speck also highlighted the benefits derived for ISPs under the AUSFTA:

Quite simply, the one thing they want is less responsibility than any other corporation for activity that takes place in their own infrastructure that they profit from. They already have protections in their contracts almost universally with their customers. They already take down material almost instantaneously on the provision of a letter asserting copyright infringement, contrary to what was said to this committee. They invariably can find customers when they are served with discovery or preliminary discovery orders, but they consistently take a position that there is an Internet cloud through which passes a stream of data into the ether and it is beyond their control—when otherwise it is likely to have the consequence of diminishing revenue opportunities for that industry. Nothing in this agreement should come as a surprise; nothing in this agreement does anything other than slightly improve their position. As a total package, it provides an effective balance.<sup>225</sup>

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222 *Transcript of Evidence*, 8 June 2004, p.4 (Williams, Australian Film Industry Coalition)

223 *Transcript of Evidence*, 8 June 2004, p.4 (Williams, Australian Film Industry Coalition)

224 *Transcript of Evidence*, 8 June 2004, pp.5-6 (Speck, Music Industry Piracy Investigations)

225 *Transcript of Evidence*, 8 June 2004, p.13 (Speck, Music Industry Piracy Investigations)

3.194 Several groups disputed claims that the AUSFTA would result in increased litigation. For example Mr Williams, on behalf of the AFIC, argued that the opposite would be true:

The simplest example is that the notice and take-down procedures and the procedures for quick and easy discovery or production of names and identities of Internet infringers or alleged Internet infringers is all designed with one aim in mind: to reduce the number of cases that would otherwise be running. Our courts have the capacity right now, as has been demonstrated in Australian cases, to make orders across those different areas, but that is after you run a whole case with all the costs attendant upon that. So we see the FTA as actually part of the solution to what might otherwise be an environment with a lot of litigation.<sup>226</sup>

3.195 The Committee notes the assurance given to JSCOT that, although the wording in the AUSFTA closely resembles some of the provisions of the United States legislation, it is not the United States system and provides Australia some flexibility in implementation. JSCOT was informed that:

... to some extent I think our implementation will be informed by some of the issues that the US have encountered domestically. We do not necessarily have to do it exactly the way that they do it.<sup>227</sup>

3.196 The Committee understands that the United States Free Trade Agreement Implementation Bill 2004 generally implements the prescriptive scheme required under the AUSFTA. An assessment of the approach taken to implementation of the ISP provisions is contained at Appendix 3. The Committee is unable to comment on the draft regulations required under the Bill because they have not been made public. The Committee notes that DFAT has not been forthcoming about what the regulations will contain and is concerned that the regulations will be enacted without proper consultation and debate. This is despite claims by the Commonwealth Government that the interests of the Internet industry would be taken into account in developing legislation to implement the AUSFTA.<sup>228</sup> The Committee also notes with some concern that it will not be possible to adopt the recommendations of Phillips Fox report in the Digital Agenda Review under the terms of the AUSFTA.

### *Temporary copying*

3.197 Temporary copying has been the subject of debate in copyright circles since the emergence of computers, the internet, gaming machines and so forth. Questions have arisen as to the changing status of a copy in a temporary state, that is, at what

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226 *Transcript of Evidence*, 8 June 2004, p.15 (Williams, Australian Film Industry Coalition).

227 Joint Standing Committee on Treaties, *Transcript of Evidence*, 2 April, p. 69 (Harmer, DFAT)

228 Minister for Communications, the Hon Daryl Williams AM QC MP, 'The Year Past and the Year Ahead for the Internet: the Government's perspective', Internet Industry Association (IIA) annual gala dinner, at [http://www.dcita.gov.au/Article/0,,0\\_7-2\\_4011-4\\_117825,00.html](http://www.dcita.gov.au/Article/0,,0_7-2_4011-4_117825,00.html) accessed 14 July 2004

point can the owner of the IP no longer determine what or how it should be used, or demand remuneration for it.<sup>229</sup>

3.198 The Committee notes the recommendations in the Digital Agenda Review report in relation to temporary copying. Recommendation 15 of the report provides that:

That the sections [of the Digital Agenda Act] be further amended by inserting a new subsection to include a definition of 'temporary reproduction' for the purposes of the section, as meaning any transient, non-persistent reproduction that is incidental to the primary purpose or act for which the work is made available and which has no independent economic significance.<sup>230</sup>

3.199 Recommendation 16 of the Digital Agenda Review report states that:

That the educational statutory licence provisions be amended to allow an educational institution to make active caches of copyright material for the purpose [of] a course of instruction by the educational institution, in return for a payment of equitable remuneration to the copyright owner.<sup>231</sup>

3.200 An assessment of the provisions of the United States Free Trade Agreement Implementation Bill 2004 is contained at Appendix 3. The Committee is pleased that some of the issues raised during its inquiry in relation to temporary copying are addressed and clarified in the Bill but is particularly concerned about the 'exception to the exception' anomaly which could lead to end users of infringing materials becoming infringers in their own right. This is a significant, perhaps unintentional, extension to the scope of copyright law in Australia. The Committee understands that removal of proposed subsections 43B(2) and 111B(2) would not be prevented by the AUSFTA.

### ***Patents***

3.201 Article 17.9 of the IP Chapter deals with Patents.

3.202 The Committee received and heard evidence raising concerns in relation to Article 17.9, specifically in relation to the granting of software patents. Software and related patents are often considered to be potentially damaging to commerce and the development of technology. In particular, the open source software industry expressed grave concerns, arguing that the provisions of the AUSFTA will have the effect of severely limiting the industry's ability to function and develop.

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229 Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement*, June 2004, p.242

230 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, p.95 at <http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations> accessed 7 June 2004

231 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, p.98 at <http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations> accessed 7 June 2004

3.203 The DFAT fact sheet issued shortly after the finalisation of negotiations referred to harmonisation and reducing differences in law and practice, including in the area of patents.

3.204 In a newspaper article, Mr Henry Ergas, the former Chair of the Intellectual Property and Competition Committee, predicted a worrying future for patent law in Australia:

The FTA foreshadows further "harmonisation" in patent law, which most likely means future increases in patent protection.<sup>232</sup>

3.205 Further, Mr Ergas highlighted the problems with United States patent law:

Ironically, while Australia is being obliged to adopt IP laws that can disproportionately favour producer interests, US policy-makers have taken a more critical stance on their IP laws. Late last year, the US Federal Trade Commission (the US counterpart to the ACCC) released a report on the proper balance between competition and patent laws.

The FTC report, which follows a three-year investigation, highlighted the anti-competitive effects of two emerging problems in the US, namely the granting of excessively broad patents, that is, those that cover an excessively wide range of follow-on activities, and the granting of too many trivial patents.<sup>233</sup>

3.206 He made the following summation:

... these misapplications of patent law can have an adverse effect on innovation, especially in those areas where innovation tends to be cumulative (in that each generation of innovations builds on the one before).

Such problems could be materially greater in Australia given our status as a large net importer of IP.<sup>234</sup>

3.207 Concerns presented to the Committee generally related to the phrase 'in all fields of technology' in Article 17.9.1. The EFA expressed its apprehension as follows:

... the FTA would commit Australia to making patents available "in all fields of technology", regardless of whether such monopolies are needed or are in our interests. Australia would only be permitted to exclude from patentability medical treatments and inventions that are against public order or morality.

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232 H Ergas, 'Patent protection an FTA complication', *Australian Financial Review*, 24 February 2004

233 H Ergas, 'Patent protection an FTA complication', *Australian Financial Review*, 24 February 2004

234 H Ergas, 'Patent protection an FTA complication', *Australian Financial Review*, 24 February 2004

This would mean that Australia would be committed to a system of patents of processes, software and any yet to be conceived technology. There is no evidence to suggest that patents are at all necessary in order to promote innovation in business processes or computer software. The only apparent reason for such patents is to provide profit and power opportunities to those companies able to secure the strongest patents. This is an abuse of the proper purpose of the patent system and service only to raise the cost of doing business and reduce levels of innovation.<sup>235</sup>

3.208 Mr Paul Russell from Linux Australia, the peak body representing the wider open source and the Linux community in Australia, voiced concerns about the United States approach to patents:

... we have serious doubts about the US tendency to broaden patent ability to cover software and business methods, doubts that are so strong that we believe binding ourselves, as we do in clause 17.9.1, to patents ability for 'any invention in all fields of technology' is a mistake as business methods and software patents are causing real harm in the United States, growing debate both in the United States and elsewhere, and it is in general a mistake to use these laws as a model.<sup>236</sup>

3.209 In its submission, Linux Australia argued that:

Taking on the American system of software patents will stifle Open Source software initiatives and force Australian users and businesses into using costly and potentially inferior software, without the ability to alter it to suit their needs.<sup>237</sup>

3.210 Linux Australia asserted further that the AUSFTA binds Australia 'to a blanket statement that anything is patentable, despite widespread disagreement on the utility and wisdom of granting software and business method patents'.<sup>238</sup> It also pointed to the restriction under the FTA for 'future Australian lawmakers to support Open Source software innovation and infrastructure against patent claims, should the situation get out of control'.<sup>239</sup>

3.211 Mr Brendan Scott summarised his major concern as follows:

The main issue I see for the open source industry in Australia is that the chapter 17 provisions are likely to create or increase compliance costs that these small enterprises are going to incur in the development of their software. Assuming that they are not infringing or intending to infringe on anyone else's material, they are still required to put in place processes to ensure compliance. For example, in the case of patents, to date they have

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235 *Submission 282*, p.14 (Electronic Frontiers Australia)

236 *Transcript of Evidence*, 17 May 2004, p.49 (Russell, Linux Australia)

237 *Submission 164*, p.1 (Linux Australia)

238 *Submission 164*, pp.17-18 (Linux Australia)

239 *Submission 164*, p.18 (Linux Australia)

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been able to rely on the structure of the copyright law, which says that if you have not copied something—if there is not a causal connection between something you have started and the ultimate copy—then you are safe. So these organisations could put processes in place which say, ‘Develop everything in-house and you are safe.’ However, patents do not allow you to put those processes in place, because independent creation is not a defence against a patent infringement.<sup>240</sup>

3.212 However, DFAT assured the Committee that the various concerns raised in relation to software patents will not eventuate under the AUSFTA and the AUSFTA will not change what is patentable in Australia under current law:

The free trade agreement does not change in any way the scope of what we currently consider to be patentable or what would be patented in Australia. We currently allow patents for software, and there will be no change to that. We are not being required to take a United States approach in relation to that type of patent, so I do not think that that concern is well founded. It will be business as usual for IP Australia in terms of granting patents.<sup>241</sup>

3.213 And:

In relation to the patentability issue, it is not envisaged that there will be any changes to our laws concerning what can be patented in Australia as a result of the Free Trade Agreement. Nor is it considered that the FTA requires or will lead to any change to Australian practice regarding the grant of patents in relation to business methods or software. Business methods and computer software inventions are already patentable in Australia provided they meet the patentability requirements set out in the Australian Patents Act. Nothing in the Free Trade Agreement requires Australia to adopt a US approach to the grant of such patents.<sup>242</sup>

3.214 The Committee is satisfied that fears about 'harmonisation' of Australian and United States patent law are probably unfounded. It bases this conclusion on DFAT's assurances that the AUSFTA will not change the nature of what is patentable in Australia. Further, the Committee considers that that many of the concerns expressed about the patent provisions might be assuaged by what is *not* articulated in the United States Free Trade Agreement Implementation Bill 2004.

3.215 It is clear from the Bill that the Commonwealth Government already considers that current patent law reflects the 'all fields of technology' element of the AUSFTA. The Committee notes also that the changes to the grounds of opposition to patents actually expand the grounds for opposition which, unlike most of the other

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240 *Transcript of Evidence*, 17 May 2004, p.105 (Scott)

241 *Transcript of Evidence*, 18 May 2004, p.105 (Harmer, DFAT)

242 DFAT, *Answers to Questions on Notice*, 13 July 2004, p.8

changes required under the IP Chapter, reduces the rights of IP rights holders in favour of competitors or consumers.<sup>243</sup>

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243 See further J Varghese, Parliamentary Library, *Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004*, Appendix 3.

## Chapter 4

### Pharmaceuticals and Health

4.1 The possible impact of the FTA on pharmaceutical prices in Australia, and on the Pharmaceutical Benefits Scheme (PBS) in particular, has been a critical issue in this inquiry. The PBS's capacity to contain drug prices affects all Australians, and should not be traded off for potential economic gains in certain areas of the economy. The level of public interest is evidenced by the many submissions to this inquiry expressing concern that the FTA will ultimately undermine the PBS and result in higher drug prices in Australia. This issue has also attracted significant media coverage, which has both reflected and heightened public concern. In light of the significant interest, the committee held a roundtable discussion on 21 June 2004 that brought together academic experts, health professionals, consumer advocates and members of the government negotiating team.<sup>1</sup> This roundtable discussion helped clarify some of the issues facing this committee, and the input of those involved was greatly appreciated.

4.2 Any increase to the price of pharmaceuticals in Australia would impact on both Commonwealth and state governments as well as Australian consumers. The Commonwealth subsidises around 80% of all prescription drugs bought in Australia through the PBS at a cost of over \$5.1 billion per year.<sup>2</sup> State governments are also major pharmaceutical purchasers, with around \$1.1 billion worth of pharmaceuticals dispensed in public hospitals in 2001-02.<sup>3</sup> If pharmaceutical prices were to increase, Australian consumers would ultimately pay for this through their taxes as well as facing higher out-of-pocket prices for non-subsidised medicines.

4.3 There are two sets of commitments in the FTA that have potential consequences for the PBS and drug prices in Australia. First, the provisions of Annex 2-C and the side letter on pharmaceuticals relate to listing and pricing arrangements of the PBS. These arrangements are central to the Australian government's ability to get maximum value for money in buying pharmaceuticals for Australian consumers. Second, the sections of Chapter 17 relating to pharmaceutical patents and the marketing approval process for generic drugs threaten to impact on the ability of cheaper generic pharmaceuticals to enter the market promptly when a patent expires. This would have flow-on consequences for the PBS, as the availability of generic drugs is important to the PBS's pricing system of comparing the cost-effectiveness of drugs. In this chapter the committee examines these two sets of issues in some detail.

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1 See *Transcript of Evidence*, 21 June 2004

2 [www.health.gov.au/pbs/general/aboutus.htm](http://www.health.gov.au/pbs/general/aboutus.htm), accessed 26 July 2004

3 Australian Institute of Health and Welfare, *Australia's Health 2004*, p.237

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## The Pharmaceutical Benefits Scheme

4.4 The PBS is an integral part of Australia's health care system. It is widely recognised as a world leader in controlling government expenditure on pharmaceuticals while providing consumers with equitable access to affordable medicines. Through the PBS, the Australian government can use its power to determine which pharmaceuticals will be eligible for PBS listing to negotiate prices often significantly lower than prices in other countries.<sup>4</sup> The result is that taxpayers and consumers benefit from comparatively low drug prices.

4.5 Many witnesses to this inquiry said unequivocally that Australia's social policies, such as the PBS, should be off limits for trade negotiations. The committee agrees that, as a core social policy in Australia, the PBS should never have been on the negotiating table. It notes with interest that several members of the US Congress expressed similar views during their debate on the FTA, for example:

...I question whether it is appropriate to use trade policy to interfere in other nations' health systems. We certainly wouldn't accept such a demand from other countries.<sup>5</sup>

Domestic healthcare policy should not be decided in trade agreements...It is wrong for us to interfere with another country's domestic health policy, particularly when it comes to the affordability of medicine which is an equally sensitive issue here in the United States...This is special interest policy making at its worst. The Bush Administration is letting the pharmaceutical industry use trade agreements to manipulate the drug laws of the United States and other countries in ways that the industry could not otherwise achieve.<sup>6</sup>

I am concerned about the potential precedent of the Administration meddling excessively in the internal affairs of a trading partner. With regard to this treaty, the USTR initially sought substantial changes in Australia's drug-pricing program. Though the USTR was not completely successful, the agreement does give U.S. drug companies more say in what drugs are included under Australia's universal drug coverage program. While market access for U.S. goods is important, we shouldn't be in the business of bullying the world and potentially undermining a country's ability to provide prescription drugs to its citizens.<sup>7</sup>

This committee concurs with these members of congress that using a trade negotiation to interfere with another country's health system is inappropriate. It creates resentment

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4 Productivity Commission, *International Pharmaceutical Price Differences*, Research Report, July 2001, p.6

5 *Congressional Record – House*, 14 July 2004, p. H5717 (Mr Tom Allen)

6 *Congressional Record – Extensions of Remarks*, 16 July 2004, pp.E1397-E1398 (Mr Henry A. Waxman)

7 *Congressional Record – Extensions of Remarks*, 16 July 2004, p.E1399 (Mr Mark Udall)

and undermines support for the trade agreement. Just why the Australian government has not objected to this unreasonable interference in our domestic health policy is a question that has yet to be adequately answered.

4.6 Equally disturbing to this committee is that commitments relating to the PBS and pharmaceuticals were discussed even while the government was assuring parliament and stakeholders that the PBS was not on the negotiating table. Trade Minister Mark Vaile told parliament on several occasions in 2003 that the US negotiators were 'in no way going after the PBS'.<sup>8</sup> As late as November 2003, the Prime Minister was saying:

...the elements of the PBS system are not going to be traded away in those negotiations...I want to make it very clear that we are not going to trade that wonderful facility away in the Free Trade Agreement...the PBS in its essential character is just not on the list and is not up for grabs or not up negotiation [*sic*]<sup>9</sup>

4.7 Representing the Minister for Health, Senator Ian Campbell told the Senate in December 2003 that:

The Prime Minister and the Minister for Trade have both made it very clear that the PBS is not on the table...the government is committed to maintaining a viable generic medicines industry and the negotiation of a free trade agreement will not – I repeat, not – compromise this commitment. I should also add that the United States has made no proposals to Australia regarding the PBS.<sup>10</sup>

4.8 But this committee now knows that, contrary to these misleading assertions, the PBS was in fact 'on the table' from the very first round of negotiations.<sup>11</sup> While the government may choose to characterise the initial phase of talks on the PBS as 'discussions' rather than 'negotiations', the fact remains that the PBS was being talked about with US negotiators from the outset. This occurred even while the government made assurances clearly designed to convince Australians that the PBS was not up for grabs in the FTA.<sup>12</sup>

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8 See *House Hansard*, 26 May 2003, p. 14869 (Vaile) and *House Hansard*, 13 August 2003, p.18408 (Vaile).

9 Transcript of the Prime Minister the Hon John Howard MP, Ryde Business Forum, Sydney, 21 November 2003, found at: [www.pm.gov.au/news/speeches/speech589.html](http://www.pm.gov.au/news/speeches/speech589.html) accessed 26 July 2004

10 *Senate Hansard*, 2 December 2003, p. 18638 (Campbell)

11 Chief Negotiator Mr Stephen Deady told this committee that, 'discussions' on the PBS commenced in the first round of negotiations in March 2003. *Transcript of Evidence*, 21 June 2004, p.23 (Deady).

12 According to the AMA, their expressions of concern early in the piece that the PBS was on the table in the FTA negotiations were met with denials that the PBS was part of the negotiation process. *Transcript of Evidence*, 21 June 2004, p.30 (Haikerwal, AMA).

4.9 Having noted its concern about the way this issue has been handled by the Australian government, this committee must acknowledge the political reality that the PBS entered the negotiations at the insistence of US trade negotiators. US Congress requires American trade negotiators to seek "the elimination of government measures such as price controls and reference pricing which deny full market access for United States products" in overseas markets.<sup>13</sup> As an example of a reference pricing system that affects market prices, albeit one that does not discriminate on the basis of country of origin, Australia's PBS was a clear target for US trade negotiators bound to follow this Congress directive. It could be argued that US negotiators could not sign up to a trade agreement that did not show that at least some attempt had been made to open up the listing and pricing arrangements of the PBS to market competition.

4.10 This committee considers it most unfortunate that the Australian government has allowed provisions affecting the PBS to be included in a trade agreement. However, now that this has occurred, our task is to examine closely the relevant provisions and assess the possible impact and implications for the PBS into the future. Any outcome that would diminish the ability of the PBS to provide affordable, equitable access to pharmaceuticals for all Australian consumers would be an unacceptable trade off for possible gains in other areas of the economy.

### **The current system: Pricing and listing arrangements of the PBS**

4.11 The pricing and listing arrangements of the PBS are crucial to its ability to contain costs. The Productivity Commission has summarised PBS listing and pricing arrangements as follows:

Before a new pharmaceutical can be listed on the PBS, the supplier first must obtain marketing approval from the Therapeutic Goods Administration (TGA). The TGA analyses the product's quality, safety and efficacy before awarding marketing approval. The approval specifies, amongst other things, the approved uses (indications) for the pharmaceutical. Pharmaceutical manufacturers also must be licensed by the TGA and ensure that their manufacturing processes comply with principles of Good Manufacturing Practice.

Once approved for sale, suppliers may seek to have their products listed on the PBS by applying to the Pharmaceutical Benefits Advisory Committee (PBAC). The PBAC is a statutory committee of independent experts that reviews applications against a number of criteria including: the need for the product; the outcomes and costs of a particular pharmaceutical when weighed against other available therapies; and whether any restrictions should be imposed on new listings (such as limits on the number of items that may be prescribed or restrictions on the indications for which a PBS subsidy is available).

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13 (US) Trade Act of 2002, 107-210, §2102(b)(8)(D). Deputy Trade Representative Josette Sheeran Shiner confirmed that this section applies to pharmaceuticals in evidence before a Joint Session of the (US) Senate Finance Committee, Subcommittees of Health and Trade, April 27 2004, "International Trade and Pharmaceuticals", p.5

In reviewing applications for listing, the PBAC is required to consider both the effectiveness and cost of therapy involving the use of new pharmaceuticals. Under the *National Health Act 1953*, the PBAC cannot recommend listing unless the pharmaceutical provides ‘a significant improvement in efficacy or a reduction in toxicity over the alternative therapy’. To this end, an important feature of Australia’s system for listing new pharmaceuticals on the PBS is the reliance on requiring evidence that new pharmaceuticals offer significant benefits over those available from alternative forms of therapy. If the PBAC recommends that an item be listed on the PBS, the Pharmaceutical Benefits Pricing Authority (PBPA) will recommend a reimbursement price which may include a price-volume arrangement. According to Professor David Henry (a former member of the PBAC), the price at which a pharmaceutical is considered to be of acceptable cost-effective [*sic*] (that is, the cost of the item is justifiable based on the clinical outcomes which it is likely to deliver) by the PBAC has typically been the starting point for negotiations with manufacturers.

The reimbursement price is the maximum amount that the Government will reimburse to pharmacists, and it may be set with reference to the price of identical or similar pharmaceuticals that are already available under the PBS.

The PBPA recommends to the Government the price at which pharmaceuticals should be listed on the PBS. DHAC negotiates, on behalf of the Government, with pharmaceutical manufacturers the price of the pharmaceuticals using the PBPA recommendations as its basis. The Government then makes the final determination on whether to list a product at a particular price (although it cannot list a new pharmaceutical unless the PBAC has made a positive recommendation).

...

The PBPA also conducts annual reviews of the prices of products listed on the PBS. Also, suppliers may request a price review or seek to have pharmaceuticals already listed on the PBS approved by the PBAC for use to treat other conditions.<sup>14</sup>

## FTA provisions relating to the PBS

4.12 Mr Stephen Deady told this committee that Australian negotiators went into negotiations on the FTA with "an absolutely clear mandate to protect and preserve the fundamentals of the PBS".<sup>15</sup> Nevertheless, the final FTA contains two sections directly relevant to the operations of the PBS.

4.13 **Annex 2C** of the agreement sets out specific commitments in the area of pharmaceuticals. The key parts are:

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14 Productivity Commission, *International Pharmaceutical Price Differences*, Research Report, July 2001, pp.4-5 (footnotes omitted)

15 *Transcript of Evidence*, 21 June 2004, p.12 (Deady, DFAT)

1. **Agreed Principles:** Sets out agreed four agreed principles emphasising the value of 'innovative pharmaceuticals'.
2. **Transparency:** sets out requirements for transparency of process for listing and pricing of pharmaceuticals under federal healthcare programs. They include giving applicants rights to provide submissions, get detailed information on the basis for decisions and have access to an independent review process.
3. **Medicines Working Group:** Establishes a Medicines Working Group comprising of federal government officials to "promote discussion and mutual understanding of issues relating to this Annex, including the importance of pharmaceutical research and development to continued improvement of healthcare outcomes."
4. **Regulatory Cooperation:** Agrees to advance existing dialogue between the TGA and the US Food and Drug Administration with a view to making innovative medical products more quickly available to their nationals.
5. **Dissemination of Information:** Provides that pharmaceutical manufacturers may use internet sites to 'disseminate...truthful and not misleading information' on their pharmaceuticals to medical practitioners and consumers.

4.14 An **exchange of side letters on the PBS** clarifies the commitments Australia has made regarding the operation of the PBS. Key points are:

1. Australia will give applicants for listing on the PBS an opportunity to consult with officials prior to submission of application; an opportunity to respond to PBAC reports; an opportunity for a hearing before PBAC; and sufficient information about reasons for a PBAC decision to facilitate an application to the Pharmaceutical Benefits Pricing Authority.
2. Australia will provide an opportunity for independent review of PBAC decisions not to recommend a drug for listing.
3. Australia will make selection, listing and pricing process more expeditious by: reducing the time required to implement PBAC recommendations; introducing procedures for more frequent revisions of the Schedule of Pharmaceutical Benefits; and making available expedited procedures for processing applications not requiring an economic evaluation.
4. Australia shall provide opportunities to apply for an adjustment to a reimbursement amount.

## Areas of concern

4.15 Submissions concerning these sections of the FTA were received from consumer organisations, professional bodies, industry groups and academics as well as many individuals.<sup>16</sup> Several state governments also raised questions about Australia's commitments on the PBS.<sup>17</sup> In a general sense, their concerns centred on the possibility that Australia's FTA commitments will open Australia's PBS to institutionalised pressure from the US government (on behalf of the US pharmaceutical lobby) to recognise the value of "innovative pharmaceuticals" in the PBS listing and pricing system. This would be contrary to current practices that have kept prices down by emphasising cost-effectiveness in comparison with alternate treatments as a prerequisite for listing.

4.16 The following section sets out point by point the major specific concerns that have been raised regarding these sections of the FTA, and the government's response to those concerns. It then considers the more generalised issue of whether Australia's commitments FTA commitments on pharmaceuticals, taken together, provide a 'foot in the door' for the US pharmaceutical lobby to exert greater pressure on Australia's policies than at present to the long term detriment of the PBS.

### *Agreed principles*

4.17 Witnesses to this inquiry have expressed concern that the agreed principles set out in Annex 2-C (1) are unbalanced and unduly reflect the agenda of US pharmaceutical companies in their emphasis on the value of 'innovative pharmaceuticals' rather than affordable access to medicines.<sup>18</sup> In addition, the principles leave out the principle of the Doha Declaration on the TRIPs Agreement that trade agreements should be interpreted and implemented so as to protect public health and promote access to medicines for all.<sup>19</sup> At a glance it would seem that the principles set out in Annex 2-C do indeed reflect the agenda of the US pharmaceutical lobby. The question is whether they impact on Australia's ability to set its own domestic policies that emphasise other priorities as well as those set out in this agreement.

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16 Submissions relating to the PBS were received from, among others (submission numbers in brackets): the Doctors Reform Society (407), the Australian Consumers Association (522), the Australia Institute (171), the Public Health Association of Australia (369), Dr Thomas Faunce et al (129), Dr Ken Harvey (80), the Australian Medical Association (105), Catholic Health Australia (405), the National Centre for Epidemiology and Population Health (445), Healthy Skepticism (467), Generic Medicines Industry Association (75), Medicines Australia (140), Australasian Society for HIV Medicine (349), National Association of People with HIV/AIDS (175), Australian Nursing Federation (147), Queensland Nurses Union (54).

17 New South Wales Government (*Submission 69*), Queensland Government (*Submission 66*), Victorian Government (*Submission 66*), Western Australian Government (*Submission 142*)

18 See, for example, *Transcript of Evidence*, 4 May 2004, p.87 (Harvey)

19 Dr Ken Harvey, *Answer to question on notice*, 4 May 2004, no.2

4.18 Government officials have assured this committee that the agreed principles are not exhaustive and do not bind any party to the agreement to a particular course of action. Dr Ruth Lopert told the committee that:

I think it is really important to recognise that these are statements of principle and they do not confer or imply any rights to any of the parties. They also do not convey any specific obligations on the parties and they are indeed consistent with the current principles and practices underlying the operation of the PBS.<sup>20</sup>

4.19 Dr Lopert further stated that these principles:

...are not intended to encompass all important principles and practices underlying the operation of the PBS. They are not intended to encompass all important principles to which Australia or indeed the US subscribe – they are not exhaustive. They do not prevent the continued priority being accorded to fundamental principles that are articulated in a national drug policy, particularly in relation to affordable and timely universal access to medicines, innovative or otherwise. They do not preclude the continued recognition of the importance of public health as encompassed by Doha paragraph 6.<sup>21</sup>

4.20 It has been put to this committee that these agreed principles are more important than Dr Lopert suggests. Some say that, if a dispute arose in the future on whether Australia was meeting its obligations in this area, a three-member panel appointed to adjudicate would use the agreed principles set out in the text to interpret the agreement and would not necessarily take account of social justice considerations not set down as part of the agreement.<sup>22</sup> While this committee appreciates officials' assurances that the principles are not designed to be exhaustive, it must note with some concern the possibility that this part of the agreement could have unintended consequences should a dispute ever arise. If the agreed principles set out in Annex 2-C will not carry at least some weight in the future interpretation of this agreement, it is curious that US negotiators would not agree to inclusion of wording health enshrining the principles of equitable access to essential drugs.<sup>23</sup> If they serve no purpose, why are they included at all?

### ***Independent Review of PBAC decisions***

4.21 The most significant change to PBS listing processes under this agreement is that, where PBAC recommends against listing a drug, the sponsor company will be able to apply for an independent review of PBAC's decision. Although companies can currently re-submit an application to the PBAC if their product is not listed on the first

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20 *Transcript of Evidence*, 21 June 2004, p. 19 (Lopert, DoHA)

21 *Transcript of Evidence*, 21 June 2004, p. 19 (Lopert, DoHA)

22 *Transcript of Evidence*, 21 June 2004, p.9 (Faunce)

23 *Transcript of Evidence*, 4 May 2004, p.91 (Harvey)

application, this independent review is a new, additional mechanism in the PBS listing process. This committee has heard many witnesses express concern that the independent review of PBAC decisions could lead to more drugs being listed at higher prices than would otherwise be the case. Other concerns have related to the possibility that the independent review could undermine the authority of PBAC or the principles on which PBAC's decisions are based.

4.22 At the time of this committee's hearings, the government could not provide information on what form this review would take. We were told that it was undertaking consultations with key stakeholders on this very issue, including who and how many people will do the review and what the terms of reference and procedural rules will be.<sup>24</sup> Health Minister Tony Abbott was reported in the press as saying that the government would not necessarily give the committee this information as it will not "bow in worship" to a Senate committee.<sup>25</sup> A public consultation document was finally released on 25 July 2004, after the House of Representatives had voted on the implementing legislation and only one week before it was to be introduced into the Senate. Neither Mr Abbott nor his department actually forwarded this document to this committee, despite repeated requests to departmental officers to provide further information on the independent review once they became available. The committee did not have the chance to question officials about the document, which is in any case only an initial discussion paper on how a review might operate, not a full blueprint of how it will work. This committee takes strong exception to a government asking the parliament to pass this legislation while full information on the implementation of a key aspect of the agreement is not available.

4.23 During public hearings, officials did give several assurances about what the independent review will *not* be able to do. First, DFAT and DoHA officials stressed that nothing in the FTA requires Australia to change the legislation governing the operation of the PBS.<sup>26</sup> According to DoHA, this means that the independent review will not have the capacity to overturn PBAC decisions. Dr Lopert told the committee that:

...without change to the National Health Act there is no capacity whatsoever for any review mechanism to overturn a recommendation of the PBAC. The PBAC will remain the only body which may recommend to the Minister for Health and Ageing whether a drug may be listed on the PBS.

4.24 Second, Mr Deady said that the side letter on the PBS limits Australia's commitment to providing an independent review only of PBAC decisions not to list a drug.<sup>27</sup> According to Dr Lopert, this is important because PBAC can impose

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24 *Transcript of Evidence*, 21 June 2004, p.42 (Lopert, DoHA)

25 "Pact with US approved but drug scheme doubts", *The Weekend Australian*, 17 July 2004

26 *Transcript of Evidence*, 21 June 2004, p.13 and p.16 (Deady, DFAT) and *Transcript of Evidence*, 21 June 2004, p.18 (Lopert, DoHA)

27 *Transcript of Evidence*, 21 June 2004, p.38, p.39 (Deady, DFAT)

conditions on a recommendation for listing, including that a drug be listed only at a price comparable to an equivalent drug. She assured the committee that the conditions imposed on a recommendation to list, including pricing conditions, cannot be challenged under this review process, as these conditions do not amount to a decision not to list a drug.<sup>28</sup> In other words, where PBAC recommends a drug be listed at a price less than the manufacturer is seeking, the manufacturer will not have recourse to the independent review.

4.25 Mr Deady further assured us that individual decisions of the independent review could not be taken to the dispute resolution panel set up under chapter 21 of this agreement for adjudication. He stated unequivocally:

There is no capacity under the agreement for a particular decision of the review or decision of the PBAC to be challenged under the agreement.<sup>29</sup>

4.26 What DFAT and DoHA told this committee during hearings appears consistent with the AMA's stated position, which stipulates that:

The "independent review process" of PBAC recommendations required by the FTA must be truly independent and not dominated by any sectional interest, be that industry, professions, consumers or government. Any such reviews should:

- focus on the issues of concern and not re-open the whole application;
- be undertaken by a specialised subcommittee comprising experts relevant to the subject of the requested review;
- consider only information originally provided to the PBAC, and relevant to the requested review;
- report back to PBAC and not directly to government;
- be pragmatic and facilitate, not delay, the PBAC approval processes for PBS listing of pharmaceuticals.<sup>30</sup>

4.27 This position was picked up by JSCOT in its report, which included a recommendation along similar lines.<sup>31</sup>

4.28 The consultation paper released by the health minister on 25 July suggests that the review mechanism in contemplation will be along these lines. Among other things, that document states that the review will:

- Be independent of the applicant, the PBAC and staff or contractors of DoHA involved in any prior evaluations

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28 *Transcript of Evidence*, 21 June 2004, pp.51-52 (Lopert, DoHA)

29 *Transcript of Evidence*, 21 June 2004, p.41 (Deady, DFAT)

30 Australian Medical Association Federal Council Resolution of 28 May 2004

31 Joint Standing Committee on Treaties, *Report 61: The Australia-United States Free Trade Agreement*, Recommendation 5, p.90

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- Only be available at a sponsor's request where an application to PBAC has not resulted in a recommendation to list
  - Be conducted by an expert with relevant expertise appointed by a convenor. The expert may consult in private with the applicant, PBAC, DoHA or other experts following consultation with the review convenor. Any person consulted would be identified in the reviewer's report.
  - Report back to PBAC
  - Be conducted to a timeframe that does not delay PBS processes
  - Consider only issues identified by the applicant that reflect PBAC's reasons for rejecting the application
  - Have access to all information placed before PBAC as well as PBAC deliberations, but will not consider new data.

4.29 Although this document suggests that DoHA has taken on board stakeholder concerns in designing this review process, it unclear how anyone can guarantee at this stage that this additional mechanism will not have any impact on the operations of the PBS. Pharmaceutical companies seeking PBS listing will naturally use every available avenue available to exert pressure on PBAC to list their products. This review mechanism provides one more step through which they can seek to influence PBAC recommendations. How the availability of an additional review affects the effectiveness of the companies' lobbying and public relations strategies and the ability of the PBAC to withstand such pressure in cases where a drug is not considered cost-effective remains to be seen.

4.30 The committee accepts that DFAT and DoHA understand that the commitment to provide an independent review does not automatically mean that the independent review mechanism will have the power to override individual listing decisions of the PBAC or the principles on which those decisions are based. What is not clear is whether this understanding of the commitment would be open to challenge if the US were not satisfied with a review mechanism along these lines. Australian officials have told us that this is their understanding of the commitment, but cannot speak for the US and cannot necessarily predict how the US will act in the future.

4.31 This committee will continue to have reservations about the commitment to institute an independent review mechanism until it can be proved that a mechanism along the lines set out by the AMA and in DoHA's discussion document does not make PBS listing processes unwieldy and will not be open to challenge by the US. It would also expect close monitoring of the impact of this review mechanism on the operations of the PBS as a whole. Any suggestion that the review mechanism could be used to pressure PBAC to list drugs on grounds other than their cost-effectiveness and superiority to other available treatments would undermine the government's assurances to date that the fundamental architecture of the PBS will not be affected by this agreement.

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### ***Increased transparency of PBS pricing and listing processes***

4.32 In addition to the independent review mechanism, some of the other transparency commitments under Annex 2-C(2) will require adjustments to current procedure. The side letter on the PBS suggests that companies seeking to have a drug listed on the PBS will be guaranteed the opportunity to consult with officials and provide further written submissions at certain stages of the listing process, be given the opportunity of a hearing in front of PBAC, and be given 'sufficient information on the reasons for PBAC's determination...to facilitate any application to the Pharmaceutical Benefits Pricing Authority'.<sup>32</sup>

4.33 Some of the transparency commitments under Annex 2-C reflect current practice. Currently, sponsors making submissions to PBAC are provided with the section of the minutes of the PBAC meeting that provides detailed information on the basis of PBAC's recommendation on their application.<sup>33</sup> Where PBAC recommends against listing a drug, it provides the company with specific issues that should be addressed in any revised application. Companies have the opportunity to meet with the chair of PBAC or health department officials to clarify these issues.<sup>34</sup>

4.34 Giving pharmaceutical companies the opportunity of a hearing with PBAC on their application is new. DoHA's public consultation document sets out a number of points detailing how it intends implementing this requirement.<sup>35</sup> It says, *inter alia*, that hearings should be confined to specific issues, limited in scope, duration and frequency, and that Medicines Australia will develop a code of practice to guide applicants in the most appropriate circumstances for seeking a hearing before PBAC. This committee is concerned that the points contained in this document are too vague to ensure that pharmaceutical manufacturers having hearings before PBAC will not make PBAC's consideration process unwieldy if not unworkable. It is unconvinced that a code of practice prepared by an industry lobby group will be designed with the best interests of the government or Australian consumers at heart.

4.35 Another required change is that the PBAC will provide public written information on its recommendations or determinations, while protecting confidential commercial information. According to DoHA representatives, this will provide more scope to put information into the public domain than at present.<sup>36</sup> DFAT has said:

Currently the amount of information made available to the public is limited to brief explanations of the nature and principle reasons for PBAC's

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32 Minister for Trade, Side letter to AUSFTA of 18 May 2004, 1(d)

33 DFAT and DoHA, *Answer to Question on Notice*, 7 July 2004

34 *Transcript of Evidence*, 6 July 2004, p.80, (Lopert, DoHA)

35 Minister for Health and Ageing, *AUSFTA – Implementation of the Obligations to Improve Transparency of the Pharmaceutical Benefits Scheme: Public Consultation Document*, 25 July 2004, p.5

36 *Transcript of Evidence*, 21 June 2004, p.37 (Lopert, DoHA)

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recommendations. These are posted on the departmental website following each PBAC meeting. Substantially more details of the recommendation and the PBAC's reasoning may be made available in future, in particular to inform the independent review mechanism.<sup>37</sup>

4.36 The public consultation document released on 25 July suggests that providing more public information on PBAC recommendations will promote better understanding of the operation of the PBS. It outlines the following principles that, subject to further consultation, should guide implementation of this commitment:

- Details of all recommendations made by the PBAC should be available to the public in a timely manner following each PBAC meeting;
- The information should include the relevant clinical, economic and utilisation data justifying PBAC's recommendations;
- Material agreed as confidential should be protected.<sup>38</sup>

4.37 This document is only an initial consultation document, however, providing little detail and leaving key questions unresolved. There is no guidance, for example, on who needs to agree that material should be confidential or on what basis this will be determined.

4.38 During this committee's hearings officials assured us that:

The transparency provisions of the Annex 2-C on pharmaceuticals are intended to provide greater transparency to both the applicant and the Australian public. Implementation of these transparency provisions will carefully balance the needs of the PBAC, prescribers, consumers and the pharmaceutical industry.<sup>39</sup>

4.39 DFAT also told this committee:

They are about improving transparency... There is still flexibility there for future governments of Australia, certainly on a best-endeavours basis, to try and improve that timeliness also. So I think they do get to try to improve the PBS system also where that can be done.<sup>40</sup>

4.40 Some stakeholders have told this committee that greater transparency of the PBS listing process is a welcome development. A number of state governments

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37 DFAT and DoHA, *Answer to Question on Notice*, 7 July 2004

38 Minister for Health and Ageing, *AUSFTA – Implementation of the Obligations to Improve Transparency of the Pharmaceutical Benefits Scheme: Public Consultation Document*, 25 July 2004, p.5

39 DFAT and DoHA, *Answer to Question on Notice*, 7 July 2004

40 *Transcript of Evidence*, 21 June 2004, p.37, (Deady, DFAT)

expressed support for greater transparency of the PBAC and accelerated processes for getting medicines to market.<sup>41</sup>

4.41 Others have put the view that, while increased transparency overall is a good thing, this is an unbalanced transparency requirement. The Public Health Association of Australia, for example, wrote that:

The PHAA strongly endorses transparency in decision-making. However, transparency under the FTA needs to be explicitly spelt out. It must not just mean that the Australian Government has to provide information to pharmaceutical companies about aspects of how, and on what evidence, the Pharmaceutical Benefits Advisory Committee (PBAC) has made its recommendations and the Government has made its decisions. Rather, it must explicitly include both this and transparency from the pharmaceutical companies of the submissions they have made to the PBAC, the government and any review mechanism, such that only material that is truly "business in confidence" is not made public.<sup>42</sup>

4.42 Likewise, the AMA expressed support for greater transparency across the PBS process for all parties involved, including pharmaceutical companies. According to the AMA, the "commercial-in-confidence" secrecy surrounding clinical research data presented to the PBAC is a major restraint on the quality use of medicines in Australia. The AMA stated that greater transparency across the whole PBS approval process is fundamental to the AMA's support for the AUSFTA.<sup>43</sup>

4.43 Some witnesses expressed fear that these transparency requirements, unbalanced as they are, will simply provide greater scope for lobbying from pharmaceutical companies who are likely to use every available avenue to exert pressure on PBAC to list their drugs at the highest possible price. The Western Australian government, for example, listed the increased transparency of PBAC processes without a corresponding improvement in transparency of information from manufacturers as one factor that could lead to pressure on drug prices.<sup>44</sup>

4.44 A number of academics, some of them former members of the PBAC, point out that pharmaceutical companies are very profitable and spend large amounts of money on public relations to gain positive media coverage of the benefits of their products. This can result in considerable public pressure on the PBAC to list a new drug. According to these academics:

It is against this backdrop that the new provisions of the FTA need to be considered. The PBAC members, although unable to publicly defend themselves, have had the advantage that they are the only independent

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41 See, for example, *Submission 508*, Queensland Government, p.8

42 *Submission 369*, Public Health Association of Australia, p.2

43 *Submission 105*, Australian Medical Association, p.2

44 *Submission 142*, Western Australian Government, p.4

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authority that has fully examined the data. Now it will have another authority (the review panel) that has the power (officially appointed) but no responsibility (it cannot legally list a drug on the PBS), which presumably will be unfettered in terms of the secrecy of its considerations and advice. This body will only consider drugs that have been 'rejected' by PBAC; when its advice differs from the PBAC, this will be seized on by all of the vested interests, who will use the media to undermine the integrity of the committee. The confidentiality provisions of the *National Health Act* will effectively prevent the committee from defending itself.

Add to this the effects of the other provisions considered in this chapter, which are all directed at increasing the pressure to list (never not to list). This will be a grossly unfair process in which the PBAC, although still working under Section 101 on the *National Health Act*, will effectively be under siege: the number of interests attacking any negative decision will have multiplied both in number and in strength. Despite its present powers under the *Act*, it is difficult to see how the committee can continue to serve the public's interest properly under such conditions.<sup>45</sup>

4.45 As a matter of principle, this committee believes that any change to the PBS should be driven by domestic circumstances, not by the demands of a trading partner. On balance, however, the committee accepts that, carefully implemented, the transparency measures may not be harmful to the PBS and may even result in some improvements. This will only be the case if DoHA ensures that the transparency requirements are implemented in a balanced way. If more information about the rationale for PBAC decisions and the independent review process is to be made public, it is only fair that the submissions of pharmaceutical companies also be made public, including the relevant clinical data. The question of what material is legitimately 'commercial in confidence' must be resolved in a way that takes into accounts the interests of all stakeholders, not just the pharmaceutical companies.

4.46 One factor that should be noted here is that the additional transparency measures are likely to increase the administrative cost of running the PBS. The independent review mechanism as set out in the consultation document would require the government to pay for at least one convenor plus expert reviewers. It seems likely that the other transparency requirements will require at least some additional resources. It is most unfortunate that this extra cost is being incurred not to benefit Australian taxpayers but to satisfy US demands.

4.47 The effect of additional transparency measures over time must be monitored carefully. The government must take steps to ensure that any changes to current listing procedures do not undermine the ability of PBAC and the PBPA to gain maximum cost-effectiveness for Australian consumers. Any change that increases the negotiating power of pharmaceutical companies in the listing and pricing process would

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45 *Submission 44*, Professor Peter Drahos, Dr Thomas Faunce, Martyn Goddard and Professor David Henry, p.42

undermine the government's repeated assurances that drug prices in Australia will not rise as a result of this FTA.

### ***Medicines Working Group***

4.48 The medicines working group to be set up under Annex 2-C of this agreement has also caused some concerns among stakeholders giving evidence to this inquiry. The text of the agreement itself provides little detail about the group. DFAT's Guide to the Agreement simply states that the medicines working group:

...will be similar to other Working Groups that will be set up to discuss other aspects of the Agreement. The Working Group will comprise appropriate government officials. The details of how the Working Group will operate and the frequency of meetings are yet to be decided.<sup>46</sup>

4.49 At the committee's last hearing, DFAT and DoHA were not much more forthcoming with details of this new institutional arrangement. The committee was told that the working group will not meet until after the agreement enters into force, the terms of reference will not be finalised until after the working group meets, and the precise way in which the terms of reference will be progressed is not clear.<sup>47</sup> The latest available statement is that:

The Medicines Working Group will comprise officials of relevant Government departments. The timing, frequency and agenda of the MWG are not yet determined, and the first meeting of the MWG will not take place until after entry into force of the Agreement. Consultative mechanisms have not yet been determined.<sup>48</sup>

4.50 DFAT and DoHA also state that:

The Medicines Working Group is limited to promoting discussion and mutual understanding of issues related to the topics outlined in Annex 2-C, but explicitly excludes consideration of regulatory cooperation issues referred to in paragraph 4 of Annex 2-C. The Medicines Working Group is not a decision making body and cannot consider any changes to the Pharmaceutical Benefits Scheme.<sup>49</sup>

4.51 Some stakeholders expressed the belief that this working group will simply open the door for the US government to continue pressuring Australia to 'recognise the value of innovative pharmaceuticals' by paying more for them. Among those to voice this concern was Dr Ken Harvey, who wrote:

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46 DFAT, *Australia-United States Free Trade Agreement: Guide to the Agreement*, March 2004, p.11

47 *Transcript of Evidence*, 6 July 2004, p.101 (Lopert, DoHA and Myler, DFAT)

48 DFAT, *Answer to question on notice*, 7 July 2004

49 DFAT, *Answer to question on notice*, 7 July 2004

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The medicines working group is yet another US strategy whereby pressure will be brought upon Australian DoHA officials to pay more attention to the principles of Annex 2-C (higher profits for American pharmaceutical companies) rather than PBS principles (equitable access to affordable drugs). Clearly, the US PhRMA published goal is to raise Australian drug prices. It is naïve to think that the provisions they have inserted in the FTA, such as the medicines working group, are not part of that strategy.<sup>50</sup>

4.52 Dr Thomas Faunce described the medicines working group as a "siege engine to figure out ways in which the pharmaceutical companies can exploit the terms of this agreement."<sup>51</sup>

4.53 Comments made about this working group in the US seem to justify these concerns to a certain extent, as negotiators on the US have described it as a forum to continue seeking the greater changes to the PBS's reference pricing system they did not achieve in the FTA itself. US Trade Representative Josette Sheeran Shiner told a US Senate Committee hearing that:

Crucially, the FTA also establishes a Medicines Working Group that will provide a forum for ongoing dialogue on Australia's system of comparing generics to innovative medicines and other emerging health care policy issues.<sup>52</sup>

4.54 Senator Kyl told the US Senate that:

During our meetings in Australia we suggested such a working group as a way to guarantee that, if our pricing concerns could not be resolved in the FTA, we could continue to discuss the issue. The subject matters that the group might consider are not limited by the agreement, and therefore can be expected to include the importance of market-based pricing.<sup>53</sup>

4.55 Having said that, this committee appreciates that these kinds of inter-governmental working parties are not unusual, and will normally not have any kind of authority in domestic policy making. In the normal course of things, these institutional arrangements will not achieve changes unless both parties want such changes. Provided it is only a forum for discussion and has no formal decision-making role, the medicines working group need not necessarily spell the end of the PBS as we know it.

4.56 This was the view taken by the AMA, which said:

The AMA notes and endorses assurances we have been given that the Medicines Working Group envisaged as part of the AUSFTA will be

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50 Dr Ken Harvey, *Answer to question on notice*, 4 May 2004, no. 19

51 *Transcript of Evidence*, 5 May 2004, p.89 (Faunce)

52 Josette Sheeran Shiner, Evidence to a Joint Session of the (US) Senate Finance Committee, Subcommittees of Health and Trade, April 27 2004, "International Trade and Pharmaceuticals", p.5

53 *Congressional Record – Senate*, 15 July 2004, p.S8208 (Senator Kyl)

merely a consultative forum, and have no role in either rule-making or decision-taking.

We would be very concerned if this group of federal health officials from the US and Australia assumed any role in either rule-making or decision-taking, which would constitute a breach of Australian sovereignty.<sup>54</sup>

4.57 Overall, the committee appreciates the point made by Australian negotiators that the medicines working group is simply a consultative forum which will discuss issues of mutual concern without having any decision making authority. Nevertheless, it would be naïve to believe that the US will not use this as a forum to put pressure on Australia's drug pricing system in line with US trade policy. This raises the question of how the government can guarantee that it, or indeed a future government, will be able to withstand that pressure in circumstances that cannot be predicted now. With the scant detail provided to date about how the medicines working group will operate, the government is asking this committee to take on trust that it will be able to look after the best interests of Australian consumers in the face of intense pressure from our most powerful trading partner.

4.58 The lack of information provided to this committee about the Australian government's approach to the medicines working group is unacceptable. It is simply not good enough to ask parliament to pass an agreement that effectively gives the executive *carte blanche* to do what it likes in further talks with the Americans without reference to the legislature. If Australians are to be convinced that this agreement is in their interest and will not ultimately undermine a key pillar of the Australian health system, parliament must be kept informed of any further talks that take place in forums like the medicines working group.

### **New pressure points on the PBS**

4.59 The committee accepts that Australian officials have told us in good faith that none of the commitments entered into in the FTA will change the fundamental architecture of the PBS or lead to higher drug prices in Australia. Looking point by point at the commitments set out in the text, it is true that no one of them guarantees that US pharmaceutical companies will immediately be able to demand more for their drugs. However, the committee remains concerned that these commitments could have implications in the long term that cannot be accurately predicted or measured now but may over time have this very effect. By allowing the PBS to enter a trade negotiation in the first place, the government has opened the door to forces that it ultimately may not be able to control.

4.60 Without doubt the US objective in including these commitments in the PBS is to benefit US pharmaceutical manufacturers by pushing for higher drug prices in the long term. Pharmaceutical industry advocates in the US have long argued that the high cost of pharmaceuticals in the US is due because of other countries' price controls.

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54 *Submission 105*, Australian Medical Association, p.3

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They claim pharmaceutical manufacturers cannot charge prices abroad that factor in the cost of research and development, and therefore R&D costs are being borne by American consumers alone. They suggest that making pharmaceuticals in other countries more expensive would make them cheaper in America. Although dismissed as 'specious' and 'absurd'<sup>55</sup> even by some members of Congress, this argument is nevertheless the basis for a vigorous campaign by the USTR to drive up pharmaceutical prices worldwide.

4.61 It would be naïve in the extreme to think that the American pharmaceutical lobby will be happy to rest with what has been agreed to in this FTA and will not push for further changes. This has been openly stated in Congressional debate by Senator Kyl. He told the US Senate that what has been negotiated through the FTA is 'an important first step' to ensuring that Australians pay more for research and development. He suggested that this FTA 'makes suitable progress' on pushing Australia to embrace a free market pricing system for drugs, but has not yet fully achieved this goal. Importantly, he suggested that this agreement lays the groundwork for further work, saying:

It will...begin an important dialogue with our Australian friends about the importance of R&D and of paying for R&D.<sup>56</sup>

4.62 While the Australian government may honestly believe its FTA commitments will not be detrimental to the PBS, its formal commitments do give a powerful trading partner institutional arrangements to continue exerting pressure for change. While no single one of the specific commitments will create immediate and measurable price rises for the PBS, the new measures may well over time alter the bargaining power between the PBS and pharmaceutical companies. This may have long term ramifications that are not in the interest of Australian consumers.

4.63 Professor Ross Garnaut put his concerns about including PBS related commitments in a trade agreement persuasively as follows:

One thing that worries me in particular about the PBS is that there is clearly a very big divergence in expectations between American and Australian political interests about the effects of what has been negotiated on the PBS. We have not yet seen all the details about how this will be implemented, but I know that there is an expectation in industry and relevant parts of the US polity that there will be change as a result of these provisions. Now we have received assurances from the Australian trade minister that there will be no changes in Australia. If you just looked at the words that we have seen so far in the agreement, you would reasonably conclude that a strong and determined Australian health minister, supported by his government, could resist change, but the new processes are likely to generate pressure for change, backed by the US government in some cases. Not every Australian trade minister or Australian government is able to or sees benefit

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55 *Congressional Record – House of Representatives*, 13 July 2004, p.H5615 (Mr Brown)

56 *Congressional Record – Senate*, 15 July 2004, p.S8208 (Senator Kyl)

in resisting great pressures from the United States. So the political process of consideration over pharmaceutical questions will be affected. That does not mean that there will be change with certainty, but some American expectations will be disappointed if there is not change, and that disappointment will have consequences.<sup>57</sup>

4.64 From all accounts this is the first time that measures affecting a country's pharmaceutical scheme have been specifically included in a trade agreement.<sup>58</sup> It is a precedent-setting move, and, in this committee's view, a dangerous one. Government officials have assured us that its commitments under this agreement can be interpreted so as to ensure that the fundamentals of the PBS are not seriously affected. But the Australian government is only one of the parties to this agreement. How can it guarantee that, should a dispute ever arise on Australia's implementation of this part of the agreement, a three-member panel of trade lawyers would share the Australian government's view of what the commitments mean?

4.65 This government has gambled that it will be able to control the pressure this part of the FTA will inevitably bring to bear on the PBS in perpetuity, contrary to the wishes of our most politically powerful trading partner. Verbal assurances that the PBS will not be adversely affected are all very well, but this committee would like to see concrete steps to monitor the impact of the FTA related commitments on the operations of the PBS. This should include an independent audit of the implementation of the new transparency arrangements to assess both their cost and their impact on PBS listing process and outcomes. It should include an ongoing system for monitoring the price of pharmaceuticals listed on the PBS. If there is no system in place to monitor the PBS after these changes are made, the Senate cannot be expected to be satisfied that the PBS has not been compromised.

## **Intellectual property and pharmaceuticals**

4.66 Many witnesses told this inquiry that the changes most likely to impact on drug prices in Australia in the short term are found in Chapter 17 of the agreement. These relate to patent law and the marketing approval process for generic drugs. The availability of generic medicines has a direct impact on drug prices, as they provide competition and thus lower prices for pharmaceuticals. PBS data shows that on average the price for a drug falls by 30% when generics enter the market.<sup>59</sup> Any change that delays the introduction of generic pharmaceuticals effectively extends a

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57 *Transcript of Evidence*, 15 June 2004, p.30 (Garnaut)

58 Deputy US Trade Representative Josette Sheeran Shiner confirms that "the US-Australia FTA [is] the first to include special provisions addressing market access for pharmaceuticals". Testimony before a Joint Session of the (US) Senate Finance Committee, Subcommittees of Health and Trade, April 27 2004, "International Trade and Pharmaceuticals", p.5

59 *Submission 142*, WA Government, p.5

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patent holder's monopoly for a particular medication and keeps the price of that medication higher.

4.67 The availability of generic drugs is an essential factor in the PBS's ability to contain pharmaceutical prices, as they provide a lower-cost benchmark against which to assess the value of new drugs. They are also important to containing state governments' costs for pharmaceuticals in public hospitals. According to the Western Australian government, medicines are the second most expensive item after salaries in the health budget, and a small increase in costs would have a significant impact on health spending.<sup>60</sup> The availability of generic medicines is particularly important in hospitals where generics are used extensively.<sup>61</sup>

4.68 This committee has received a substantial volume of evidence about the possible impacts of the FTA provisions linking pharmaceutical patents with marketing approval. Many witnesses have said that these provisions are likely to result in delays to the introduction of generic drugs in Australia. One submission asserted that DoHA representatives had conceded that delays in the introduction of generic pharmaceuticals can be expected.<sup>62</sup> If true, this would result in Australians paying more for certain drugs while marketing approval for generic equivalents was delayed. Even minor delays could have significant costs.

4.69 The CIE Report had the following to say on the implications of a delay in generic drugs reaching the market:

If generic versions of products under patent were reaching consumers prior to patents expiring, the required changes to the marketing approval process would be expected to increase the price of pharmaceutical products – as the generic versions, which cost less than their patented equivalents, would be prevented from entering the market.<sup>63</sup>

4.70 The CIE went on to say that it is extremely rare for a generic drug to enter the market while a patent is current, so the impact of the changes will be minimal. It notes that the way the changes are implemented in legislation is critical to making an assessment of their likely impacts.<sup>64</sup> This committee is therefore very concerned to examine the detail of this part of the agreement and attendant legislative changes.

4.71 It is noteworthy that most of the submissions to this inquiry were prepared before the actual text of the implementing legislation was introduced to Parliament.

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60 *Submission 142*, WA Government, p.5

61 *Submission 142*, WA Government, p.5

62 *Submission 171*, Australia Institute, p.2. No source is given in the submission for this statement.

63 Centre for International Economics, *Economic Analysis of AUSFTA*, report prepared for DFAT, April 2004, p.42

64 Centre for International Economics, *Economic Analysis of AUSFTA*, report prepared for DFAT, April 2004, p.42

Some papers that have been extensively cited by stakeholders concerned about this aspect of the FTA were prepared well before negotiations were finished. Without in any way denigrating those who have expressed concerns about this aspect of the agreement, it is fair to say that some of the concerns aired both before this committee and in the media relate to fears of what might have eventuated rather than the actual negotiated outcome or the actual legislative changes.

4.72 A paper written for the Australia Institute before the text of the FTA was finalised set out two key areas of concern about what the negotiations on IP could lead to. These are: first, that linking marketing approval to generics to patent expiration as per the US system would provide loopholes that pharmaceutical firms could use to block generic competitors from entering the market. Second, providing extensions to the 'data exclusivity' period would delay the entry of generic drugs since generic drug manufacturers rely on test data produced by patent holders to gain marketing approval. Based on US experience, and on what US negotiators had sought and achieved in other Free Trade Agreement negotiations, the authors suggested that:

The changes being sought by US drug companies would see this effective monopoly extended for two to three years by creating legal obstacles to the rapid approval of generic competitors to patented medicines at the end of the 20 year patent life.<sup>65</sup>

4.73 The AUSFTA has not produced all the changes to Australia's patent regime that US negotiators may have sought or hoped. It is clear from DFAT's evidence to this committee that negotiations on this part of the agreement were long and hard.<sup>66</sup> The wording finally agreed upon is different to that of other US free trade agreements.

4.74 According to DFAT, the FTA does not require any changes to Australia's patent extension regime or to our regime for the protection of pharmaceutical test data.<sup>67</sup> However, Australia has committed to take measures linking patent expiration with marketing approval. Exactly what effect these changes will have on generic drugs entering the market has been a matter of some debate. Since this is the key change to Australia's existing practice required by the FTA, the committee examines it in detail below.

### **Marketing approval for generic drugs**

4.75 One factor enabling prompt entry of generic drugs to the Australian market after a patent has expired is the practice of 'springboarding'. Springboarding allows a generic drug to gain marketing approval on the basis of test data supplied by the patent holder. This means that generic manufacturers can avoid the duplicating the

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65 Dr Buddhima Lokuge, Dr Thomas Faunce, Richard Denniss, "A backdoor to higher medicine prices? Intellectual property and the Australia-US Free Trade Agreement", Australia Institute, November 2003, (*Submission no. 171b*), p.23

66 *Transcript of Evidence*, 6 July 2004, p.97 (Deady, DFAT)

67 DFAT, *Answer to question on notice*, 18 May 2004, no. 22

costly and time-consuming process of drug testing and enter the market quickly with a cheaper product once the patent and a five-year 'data exclusivity' period has expired.<sup>68</sup>

4.76 Australia's current rules allow a generic drug manufacturer to seek TGA marketing approval even if the patent has not expired. The TGA assesses applications for marketing approval purely on safety and efficacy grounds and is not required to examine patent issues. It is not the role of the TGA to prevent marketing where the patent might be infringed.<sup>69</sup> Effectively, a generic manufacturer can obtain marketing approval based on the patent holder's test data and be ready to enter the market as soon as a patent expires. In cases where a generic manufacturer considers a patent is invalid or that marketing their product would not infringe that patent, they might even release the product onto the market regardless of the claimed patent. It would then be up to the patent holder to sue the generic manufacturer for an infringement of the patent, and a court would decide whether their claim was valid.

#### ***FTA provisions relating to marketing approval of generic drugs***

4.77 When asked to identify what provisions in the FTA were likely to lead to higher drug prices, several experts pointed to article 17.10.4.<sup>70</sup> This article provides that where a party to the agreement permits the practice of springboarding:

(a) That Party shall provide measures in its marketing approval process to prevent those other persons from:

- (i) marketing a product, where that product is claimed in a patent; or
- (ii) marketing a product for an approved use, where that approved use is claimed in a patent,

during the term of that patent, unless by consent or acquiescence of the patent owner; and

(b) if the Party permits a third person to request marketing approval to enter the market with:

- (i) a product during the term of a patent identified as claiming the product; or
- (ii) a product for an approved use, during the term of a patent identified as claiming that approved use,

the Party shall provide for the patent owner to be notified of such request and the identity of any such other person.

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68 This is explained in more detail in Appendix 4, Dr Kate Burton and Jacob Varghese, *The PBS and the Australia-US Free Trade Agreement*, Parliamentary Library Research Note no. 3, 21 July 2004

69 Dr Kate Burton and Jacob Varghese, *The PBS and the Australia-US Free Trade Agreement*, Parliamentary Library Research Note no. 3, 21 July 2004 (Appendix 4)

70 *Transcript of Evidence*, 21 June 2004, pp.4-6 (Faunce, Lokuge)

4.78 In other words, part (a) requires Australia to 'provide measures' in its marketing approval process to prevent entry of generics into the market during the life of a patent. Part (b) requires Australia to 'provide for' patent holders to be notified of an application to market a generic drug during the life of the patent.

4.79 This commitment prompted great concern among both academics and the generic drug industry in Australia as it appeared a significant diversion from current practices and one which could seriously delay the entry of generics onto the market. Before seeing the legislation, the Generic Medicines Industry Association (GMiA) submitted that:

Article 17.10.5<sup>71</sup>, if not implemented carefully, would enable [large pharmaceutical] companies to further protect and in some cases extend patent life by various legal stratagems.<sup>72</sup>

4.80 GMiA took issue with the wording of the agreement, saying that:

The current wording of this paragraph requires that marketing of a generic equivalent must be prevented where the product or use is "claimed" in a patent.<sup>73</sup>

4.81 Dr Thomas Faunce also expressed concern about the possibility that a drug being "claimed in a patent" would be grounds to prevent marketing approval:

The reason why 17.10.4 is so disadvantageous to the generic industry in Australia is that all that has to happen is that a patent is claimed, it does not say what type of patent.<sup>74</sup>

4.82 According to GMiA:

Whether a product or use is claimed in a patent is not always clear from the terms of the patent itself and it is certainly not possible to identify in every case, whether such a claim is made.<sup>75</sup>

4.83 Many stakeholders were concerned that this provision of the FTA appears to require the TGA to refuse marketing approval of a generic version of a drug that is 'claimed in a patent'. As noted above, it is currently up to the courts, not the TGA, to determine whether a product or use is claimed in a patent, and whether that patent is valid. Courts have sometimes overturned the validity of a patent. As GMiA points out, forcing generic manufacturers to wait for possibly invalid patents to lapse or for a

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71 This number refers to the draft text, which was renumbered as 17.10.4 in the final text.

72 *Submission 75*, Generic Medicines Industry Association, p.2

73 *Submission 75*, Generic Medicines Industry Association, p.2

74 *Transcript of Evidence*, 21 July 2004, p.5 (Faunce)

75 *Submission 75*, Generic Medicines Industry Association, p.2

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court ruling that a drug is not claimed by a valid patent before gaining marketing approval would delay the entry of generics onto the market.<sup>76</sup>

4.84 GMiA's submission further suggested that making marketing approval dependent on proving that a drug was not 'claimed' in a patent would encourage the practice of 'evergreening'.<sup>77</sup> This is where patent holders attempt to prolong their monopoly over a particular drug by filing patents for a new use or delivery system shortly before the original patent for the drug compound expires. They then use these new patent claims to assert that production of a generic version of the drug would be infringing their patent rights even after the patent for the compound itself expired.

4.85 According to the Canadian generic drug industry, the practice of evergreening in Canada has made it "virtually impossible" to bring out a generic version of a drug there.<sup>78</sup> This is because Canadian legislation allows pharmaceutical patent holders to gain an automatic 24-month injunction preventing marketing approval of a generic drug where there is an allegation of patent infringement. Pharmaceutical companies can thus 'evergreen' their patent monopoly by lodging any number of additional patents for specific aspects of a drug and use these to gain an injunction preventing generic competition while the patent claims are litigated. As a consequence, entry of generics can be delayed for 24 months for each patent claim, regardless of the merit (or lack thereof) of the patent claims.

4.86 Similar provisions apply in the US. When a generic manufacturer seeks marketing approval in the US it must certify either that the patent covering the product has expired or will expire or that the patent is invalid and will not be infringed. In the latter case, the patent owner must be notified, and has 45 days to bring an infringement suit. If the patent owner brings a suit, they can get an automatic injunction preventing marketing approval of the generic for 30 months. These provisions have led to abuse of the patent system in the US through evergreening tactics that delay the introduction of generic drugs, a fact acknowledged by President Bush.<sup>79</sup>

4.87 Without question, changing Australia's marketing approval process in a way that allowed evergreening patent claims to prevent marketing approval of generic drugs would have serious consequences for the generic drug industry and drug prices in Australia. The issue then is whether the actual legislative changes required by the FTA will stop generics gaining marketing approval while patent claims are resolved.

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76 *Submission 75*, Generic Medicines Industry Association, p.2

77 *Submission 75*, Generic Medicines Industry Association,, pp.2-3

78 *Submission 75*, Generic Medicines Industry Association, Attachment, p.ii

79 *Transcript of Evidence*, 21 June 2004, p.5 (Faunce)

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### *Legislative changes*

4.88 The legislation required to implement this commitment has been carefully framed to minimise the changes to Australia's current marketing approval process. The FTA implementation bill<sup>80</sup> basically institutes one new step in the marketing approval process. Companies seeking to register a drug will be required to certify either: a) that they do not intend to market the drug in a manner that infringes a patent, or; b) that they have notified the patent holder of their intention to market a drug in a manner that infringes a patent. Where other listing requirements are satisfied, the TGA must proceed to list the goods without inquiring into the correctness of the certificate and is protected from injunction for relying on that information. The bill creates a new criminal offence with a significant penalty<sup>81</sup> for giving a false or misleading certificate.

4.89 Essentially, this means that the TGA will not be put into a position of checking whether a drug is claimed in a patent, and will not be required to deny marketing approval to a drug even where a patent is claimed. It will be up to generic drug manufacturers to check the existence or non-existence of a patent and certify to the TGA that they have done this. Provided they believed they would not be violating a patent when they marketed the drug, they would simply certify this to the TGA. If they did intend to market a product in violation of a current patent, they would also need to certify to the TGA that they had notified patent holder of their intention. Issuing a false or misleading certificate would be a criminal offence, although this would appear to apply only where a false or misleading certificate was intentionally or recklessly provided, not where due diligence had been carried out and a false certificate was mistakenly provided.<sup>82</sup>

4.90 The important difference between this process and that which has caused delays in generic drug entry in the US and Canada is that the legislation does not provide scope for patent holders to gain an automatic injunction preventing the TGA granting marketing approval of generics while patent claims are resolved in the courts. Even in the event that a generic manufacturer certified that they did intend marketing in violation of a patent, the TGA would nevertheless be required to register the drug provided that the generic manufacturer had notified the patent holder of their intention.

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80 The amendments to the *Therapeutic Goods Act 1989* are found in Schedule 7 of the US Free Trade Implementation Bill 2004

81 The maximum penalty is a fine of 1,000 penalty units, which is currently \$110,000

82 According to the Explanatory Memorandum, the *Criminal Code Act 1995* (the Criminal Code) provides that 'recklessness' is the necessary mental element which would apply to the false or misleading nature of the certificate provided by the applicant... Recklessness can be established by proving intention, knowledge or recklessness. (See subsections 5.6(2) and 5.4(4) of the Criminal Code). US Free Trade Agreement Implementation Bill 2004, Explanatory Memorandum, para 225.

4.91 Government officials have said that this certification process is simply a technical legal requirement that gives effect to Australia's commitment to 'provide a measure in our marketing approval process to prevent persons from marketing a product that is claimed in a patent'.<sup>83</sup> According to Dr Lopert:

Under the current legislation, if the generic manufacturer then places that generic version of the product on the market while the patent is in force, they are in breach of current IP laws. What they are required to do under this process is simply to certify to the TGA that they will not do that. It does not affect the TGA's process of marketing approval; it is merely a certification to the TGA that they will not proceed to actually put the drug in the marketplace until any patents covering the product have expired.<sup>84</sup>

4.92 Dr Lopert further stated that this new requirement will not promote the practice of evergreening:

...evergreening is a practice that pharmaceutical companies will pursue if they believe it is in their interests to do so. There is nothing in this legislation that either promotes or discourages evergreening. Evergreening is the practice of registering additional patents as a result of slight changes – that is, changes in additional uses, changes in methods of production or changes in the colour or the presentation that a company may seek in order to prolong the patent protection of a product. This legislation neither encourages it nor prevents it; it does not affect it.

4.93 It is true that this legislation does not affect pharmaceutical companies' ability to file extra patents at the end of the original patent life in an attempt to prolong patent protection. That is a matter of patent law, which is unchanged by these new provisions. What it could potentially do is to increase the incentive for pharmaceutical companies to file additional patents if it provided an opportunity to use these additional patents to delay the entry of generics onto the market. This possibility appears to be limited by the wording of the new section 26B(1)(a) that requires manufacturers simply to certify that they will not market the goods "in a manner, or in circumstances, that would infringe a patent".<sup>85</sup> Presumably, if a manufacturer intended only to market a generic drug after the original patent for the drug compound had expired, and did not intend marketing it for additional uses covered by other patents, they could still provide a certificate under s26B(1)(a) and would not need to notify the patent holder. However, this is a matter that the committee would like clarified in the legislation.

4.94 The requirement to notify patent holders of an intention to market a generic while a patent is in force seems odd at first glance, as marketing a drug in violation of a patent is illegal anyway under current law. However, under the current procedures, there are times where, if it is unclear whether a drug is covered by a valid patent, a

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83 *Transcript of Evidence*, 6 July 2004, p.82 (Deady, DFAT)

84 *Transcript of Evidence*, 6 July 2004, p.83 (Lopert, DoHA)

85 FTA Implementation Bill 2004, Schedule 7 part 6

generic manufacturer will bring a generic version to market knowing that they could be sued by the patent holder and the validity or otherwise of the patent would be determined by a court.

4.95 According to the negotiators, the requirement to notify of an intention to bring a drug to market while a patent stands is simply an additional requirement inserted into the marketing approval process at the request of US negotiators, but not one that will diminish the integrity of our marketing approval process.<sup>86</sup> Medicines Australia, representing (mostly international) research-based pharmaceutical manufacturers, asserts that these provisions merely provide greater transparency to the existing law. Their submission says:

Notification provisions on their own do not delay or impede the capacity of generic manufacturers to prepare for generic production.<sup>87</sup>

4.96 It is true that notification procedures do not on their own delay the introduction of generics. It is the *effect* of this new notification requirement on litigation tactics used by patent holders to maintain or extend their effective patent monopoly or on the business strategies of generic manufacturers that could result in delays. It is obvious that the US intention in seeking a notification requirement is to forewarn patent holders of possible competition so that they could commence pre-emptive litigation to prevent a generic drug coming to market before a court determines the validity of the patent. Under current arrangements, the generic manufacturer can bring a drug to market and make a profit from it until the patent holder can gain an injunction. While the new legislation does not allow a court to prevent the TGA giving marketing approval to a generic, a court could order the generic manufacturer not to market their product before litigation was finalised. The new notification requirement may dissuade generic manufacturers from taking a risk in bringing generics to market before the patent claim is settled. This would be to the detriment of the PBS, which benefits from accessing cheaper generic drugs before litigation is settled.

4.97 This committee appreciates that the implementing legislation has been framed with the intention of minimising the potential for patent disputes to impact on the marketing approval process. What is less certain is how the tactics of generic manufacturers will be impacted by the new administrative procedures, especially in cases where a patent is unclear or they wish to challenge the validity of a patent. This issue has been considered in a paper by parliamentary library researchers as follows:

One difficulty is that ‘infringement’ is not always clear. For example, a patent may have expired on one use of the drug but not another, as new patents are filed for newly discovered uses. Similarly an active patent may not be valid because it does not fulfil one of the requirements for

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86 *Transcript of Evidence*, 6 July 2004, p.97 (Deady, DFAT)

87 *Submission 140*, Medicines Australia, p.21

patentability, such as novelty or inventiveness. These are complex legal issues that only the courts can resolve.

Under the certification scheme, generic manufacturers would have three options before applying to springboard. They could:

- certify that they will not infringe, if they believe that to be the case
- apply for a court declaration to settle the uncertainty before certifying, or
- notify the patent holder of the application and certify to that effect.

Taking [the] first option would risk a fine if the certification is later found to be false or misleading. However, it might be a safe option where the patent has clearly expired, or where other generics are on the market already.

Where the issue is particularly complex, the last two may be the only options. The second option involves the commencement of litigation. The third option allows the patent holder to consider litigation. In either case, litigation of these matters would be happening before rather than after the generic has entered the market. Currently, generic manufacturers have much more control over when any litigation takes place, with the option to enter the market first.

In practice, it is unclear that this shift, on its own, would make a significant difference in practice. A reduction in control over timing may have adverse consequences for generic manufacturers' litigation and business tactics. It may also increase the likelihood of early injunctions being ordered against generic manufacturers that delay their initial entry to market. The complexity of the scheme, costs of litigation and risk of penalties for false and misleading certification might theoretically deter generic manufacturers from entering a generic drug on the market. On the other hand, the regulatory and IP environment for generics is already complex, so the new scheme might be accepted as a relatively small technical change in an uncertain business. Overall, the effect of these subtle technical changes on the time it takes for generics to enter the market are difficult to predict.<sup>88</sup>

#### 4.98 Before the legislation was released, Dr Faunce et al expressed the view that:

Tighter IP provisions...would create uncertainty for generic producers. It would provide multinational pharmaceutical corporations with additional opportunities to engage smaller generic producers in preemptive legal disputes over IP.<sup>89</sup>

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88 Dr Kate Burton and Jacob Varghese, *The PBS and the Australia-US Free Trade Agreement*, Parliamentary Library Research Note no. 3, 21 July 2004 (Appendix 4)

89 Dr Buddhima Lokuge, Dr Thomas Faunce, Richard Denniss, "A backdoor to higher medicine prices? Intellectual property and the Australia-US Free Trade Agreement", Australia Institute, November 2003, (*Submission 171b*), p.8

4.99 Having seen the legislation, Dr Thomas Faunce continued to contend that the new s26B will inhibit generic drug companies' commercial decisions about whether to seek to enter the market near the end of patent expiry. He identified as inhibiting factors:

1) the expense of doing an exhaustive search for both product and process patents, many of which may be complicated by spurious "evergreening" patents designed to prolong monopoly rights at the expiry of the compound by "claims" to patent rights over method of delivery etc. Companies do this already of course, but if foreign trends are anything to go by patent offices in Australia will soon witness an inrush of complex patent "claims" making the task much more difficult.

2) The risk of filing a misleading certificate: this will expose the intended generic to a criminal penalty (under s26A) and invalidate its marketing approval. Effectively this now prevents a generic manufacturer banking on a period of profit making while it held the patent until the spurious "evergreening" patent claims could be worked out in the Federal Court. The fact that s26(1A) allows listing with[out] the TGA inquiring into the correctness of the certificate, does not solve the problem that if the original patent holder subsequently challenges the certificate as misleading because it fails to mention a "claimed" patent then the generic manufacturer will have committed a crime and the marketing approval would be invalid.

4.100 In her assessment for this committee, Dr Philippa Dee said:

Now that the enabling legislation has been tabled, it is reassuring to see that Australia will not be providing drug innovators with the ability to take out injunctions. Nevertheless, the provisions do strengthen the enforcement of the current legislative framework preventing the marketing of generics while a patent is still in place. Whether this will have any effect depends on judgements about whether enforcement activity is useful.<sup>90</sup>

4.101 This committee has not heard directly from the generic drug industry since the legislation was released, however DFAT told us that GMiA had been consulted in preparing this legislation. DFAT said that while GMiA was still in the process of obtaining legal advice on the full ramifications of the bill and had not written formally to the government, their initial impression is that they do not expect the legislation to result in delays to the launch of generics.<sup>91</sup>

4.102 Altogether, this committee accepts that every effort has been made to construct legislation that will not cause delays to the entry of generic drugs onto the market. However, there will remain some uncertainty about their full impact unless and until the changes are actually implemented and we can see how they affect litigation strategies and outcomes. *Any* delay to the marketing of generic drugs as a

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90 Dr Philippa Dee, Supplementary note prepared for the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, 15 July 2004, p.7

91 DFAT, *Answer to question on notice*, 7 July 2004

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consequence of these changes, however slight, will have a cost to the PBS, state governments and consumers.

4.103 The committee is concerned that there are no plans to monitor the entry of generics onto the market after these changes are introduced to assess whether there are in fact any delays. DFAT simply told the committee that they would expect the industry to make any concerns known to the government.<sup>92</sup> With several high-volume medicines due to come off patent over the next few years, it is crucial to ensure that any changes to the legislative environment do not impede the process of bringing in generic competition. If there is no monitoring, how can the government be sure that the changes are not having an adverse impact on the speed at which generic drugs can come on to the market?

***Different understandings of the FTA commitment?***

4.104 Assuming that DFAT and DoHA are correct in telling this committee that there is no possibility that these provisions will delay the entry of generic pharmaceuticals while patent claims are litigated raises a second question. Will these provisions satisfy the US that Australia's commitments under the FTA have been met? If what US negotiators were after was a measure that would delay marketing approval while patent claims are settled, there is a chance they may not be satisfied with this measure. If there is any scope for doubt, it seems highly likely that the powerful US pharmaceutical lobby would pressure the US government to use the dispute resolution mechanism to push for further changes.

4.105 The US International Trade Commission report on the FTA suggests that the US side were expecting that the TGA would deny marketing approval to products still under patent. It says:

The FTA also ensures that government product approval agencies deny marketing approval to patent-violating products.<sup>93</sup>

4.106 When asked about whether DFAT's understanding of these commitments conformed with US expectations, Mr Deady said that the Americans 'very knowingly' agreed to the exact wording of Article 17.10.4:

You negotiate these things in good faith, and this was certainly thrashed around for a very long time with the Americans. I take great comfort from the fact that it is different from what they have negotiated in other agreements... They wanted additional wording in this article which we did not agree to. It stands the way it is; that was the negotiated outcome. I think that is the understanding of the United States. That is the language that was agreed to and that we have now given effect to.<sup>94</sup>

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92 *Transcript of Evidence*, 6 July 2004, p.100 (Deady, DFAT)

93 US International Trade Commission, *US-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects*, USITC Publication 3697, May 2004, p.115.

94 *Transcript of Evidence*, 6 July 2004, p.97 (Deady, DFAT)

4.107 Asked about whether any jurisprudence the Americans might set up under their preferred set of words in other agreements would apply in the case of this agreement, Mr Deady said:

...the very fact that the language is different means that any panel would say, 'Hang on. There must have been a reason why the language is different in this agreement.' We would certainly highlight the language in other agreements, if it ever came to it – and that is what a panel's jurisprudence takes into account in these sorts of agreements.<sup>95</sup>

4.108 The committee respects Mr Deady's expertise and sincerity in offering this judgement. However, his opinion is one side of the story, and this committee is not in a position to clarify with the US side whether they are satisfied that Australia's new legislation satisfies their demands and will not be a cause for dispute down the track. No one can predict with absolute certainty that, if a dispute did arise down the track, a three-member panel would accept Mr Deady's argument and find in favour of Australia's interpretation of its commitment, regardless of the difference in wording between the AUSFTA and other US FTAs.

### **Other IP measures affecting pharmaceuticals**

4.109 Witnesses to this inquiry raised concerns about several FTA IP provisions affecting pharmaceuticals that do not require changes to current legislation but do limit the flexibility of governments to make changes in the future. The committee considers some of these below.

#### ***Parallel importing***

4.110 Article 17.9.4 of the FTA provides that patent owners shall have exclusive rights to prevent importation of a patented product. This is effectively a ban on 'parallel importing', which is when legally purchased patented goods are imported into a country without the authorisation of the patent holder. Although parallel importing is currently not allowed in Australia anyway, this provision locks Australia into this ban at a time when many governments around the world are looking to parallel importing as a way of promoting competition and containing drug prices. Dr Faunce told the committee that, while parallel importing is not allowed in Australia at the moment;

...in a lot of other countries it is allowed. It is a major means of providing competition; and one of the only mechanisms – in fact the only mechanism – by which drug prices are ever lowered is increased competition. So provision 17.9.4, by absolutely preventing us from ever having parallel importing, is another mechanism whereby drug prices will rise in Australia through lack of competition.<sup>96</sup>

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95 *Transcript of Evidence*, 6 July 2004, p.98 (Deady, DFAT)

96 *Transcript of Evidence*, 21 June 2004, p.6 (Faunce)

4.111 DFAT's response to this concern was simply to reiterate that parallel importing is currently not allowed in Australia anyway, and that this provision simply reaffirms the status quo.<sup>97</sup> This ignores the point that by locking in the status quo, Australia is limiting its capacity to lift the ban on parallel importing should this be considered necessary to promote competition in the pharmaceutical sector in the future. Studies suggest that in the EU, where parallel importing is allowed, competition from parallel importation of certain drugs has helped contain drug prices.<sup>98</sup> Under the terms of the FTA, Australia will not be able to go down this path in future.

4.112 The parliamentary library paper at Appendix 4 has the following to say about parallel importing:

These rights allow patent-holders to prevent products they have sold in one country to be exported to another. For example, if parallel importing is allowed and drugs are wholesaled cheaper in, say, China than in Australia, importers are able to import (legitimately purchased) drugs to Australia from China, resulting in a lower price of the drug for the PBS. Restrictions on parallel importing, on the other hand, allow drug companies and other IP holders to divide the world into several markets and sell their product at the most favourable price in each. As David Richardson of the Parliamentary Library has noted, this is effectively privatised protectionism.

Globally, parallel importing has developed into a significant issue. Least developed countries have argued that restrictions on parallel importing make life-saving drugs too expensive for public health authorities to afford. In the US itself, where drugs are sold at higher prices than in Canada, consumers in northern states have been reported to be crossing the border in significant numbers to purchase drugs, performing their own small scale and illegal parallel importing. There have been increasing calls in the US to reduce the exclusive rights of patent-holders so that this can be done legally and in commercial quantities.

AUSFTA requires that Australia maintain either:

- a system of 'national exhaustion', in which exclusive importation rights of the patent-holder continue even after the product has been sold abroad, or
- (at least) the current system in which the patent-holder may impose restrictions on the exportation of the product to Australia when it is sold in foreign countries.

Over the last two decades Parliament has been progressively allowing parallel importing of other forms of IP, such as copyright over music, books and computer software. Similarly, Australian patent law now provides that

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97 *Transcript of Evidence*, 21 June 2004, p.17 (Deady, DFAT)

98 For example, Mattias Ganslandt and Keith E. Maskus, "Parallel Imports of Pharmaceutical Products in the European Union", World Bank Research Working Paper no. 2630, 1999, accessed 16 July 2004 at: <http://econ.worldbank.org/view.php?id=2240>

patent-holders cannot place certain anti-competitive restrictions on the sale of products.

Given these trends, combined with escalating PBS costs and the competitive advantages that parallel importing may provide, it is reasonable to assume that future parliaments would have considered changes to patent law that would void restrictions on parallel importing. AUSFTA would remove this as an option for pharmaceutical reform.<sup>99</sup> [Footnotes omitted]

4.113 This committee is seriously concerned that the Australian government has effectively signed away its right to allow parallel importing should future circumstances make it in the public interest to do so. Even in the US, this part of the agreement has been criticised. This was a major sticking point during Congressional debate on the FTA because of the negative consequences for American consumers at a time when parallel importation is being considered as a way to drive down the high cost of pharmaceuticals there.<sup>100</sup> Some members also criticised the US administration for using a trade agreement to further the domestic agenda of big pharmaceutical companies. One member commented that:

The last time I checked, re-importation of pharmaceutical drugs was a domestic health policy issue that should be debated in Congress, and we should be making domestic health policy in this Chamber, not the U.S. Trade Representative.<sup>101</sup>

4.114 This committee agrees that a decision to permanently ban parallel imports of pharmaceuticals, or any other product, should only be taken by parliament if it decides it is in our national interest after due consideration. It should not be forced on us as part of a trade deal. It is ironic that a "Free Trade Agreement" would contain an anti-competitive provision effectively limiting the free trade of certain goods. This is one provision the committee views as a negative for Australia.

### ***Compulsory licensing***

4.115 Article 17.9.7 of the FTA limits the circumstances in which governments can allow compulsory licensing. Compulsory licensing is when a government allows someone else to produce a patented product or process without the consent of the patent owner. Under current Australian law, this can be done by a court when it is satisfied that "the reasonable requirements of the public with respect to the patented invention have not been satisfied" and that "the patentee has given no satisfactory reason for failing to exploit the patent."<sup>102</sup>

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99 Dr Kate Burton and Jacob Varghese, *The PBS and the Australia-US Free Trade Agreement*, Parliamentary Library Research Note no. 3, 21 July 2004 (At Appendix 4)

100 See, for example, *Congressional Record, House*, 14 July 2004, pp.H5968 – H5720

101 *Congressional Record, House*, 14 July 2004, p.H5699 (Mr Stark)

102 *Patents Act 1990* s133(2)

4.116 Dr Thomas Faunce suggested that the FTA provisions on compulsory licenses in 17.9.7 of the agreement will have an effect on drug prices. He said:

By effectively restricting the situations in which governments can issue compulsory licenses to particular manufacturers to produce cheap drugs, we are really giving a hostage to fortune in terms of public health. In an era where we are at risk of bioterrorist attack and unusual viral diseases such as SARS, this agreement essentially locks us out of compulsory licenses in all except very restricted circumstances...[T]his restriction is a breach of United States law...which requires any bilateral treaties such as this to respect the capacity of countries to use the flexibility to the full to implement the public health exceptions in the TRIPS Doha declaration.<sup>103</sup>

4.117 In response to this concern, Mr Deady said:

My understanding is that this reflects current TRIPS commitments of Australia. In any event, just looking at the language makes it very clear that, despite what Dr Faunce...has said, there are exceptions in the case of public non-commercial use, legitimate government use, national emergency or other circumstances or circumstances of extreme emergency. There are exceptions that would allow future Australian governments to deal with these sorts of issues in an appropriate way.<sup>104</sup>

4.118 He also said that:

There is nothing in [Article 17.9.7] that affects our existing WTO rights and obligations....these articles reflect the status quo in Australia. We have not taken on additional commitments with the United States as part of the FTA in this area<sup>105</sup>

4.119 Although there is nothing in the FTA implementation bill that changes the status quo in Australia, the wording in the FTA is significantly different to TRIPs. TRIPs neither lists nor restricts the circumstances in which compulsory licences can be issued provided that a number of conditions aimed at protecting the patent holder are met.<sup>106</sup> Some of these conditions are waived in "national emergencies", "other circumstances of extreme urgency", "public non-commercial use" or anti-competitive practices. In contrast, the FTA appears to limit compulsory licensing only to cases where it is needed to remedy anti-competitive practices or to public non-commercial use, national emergency or other circumstances of extreme urgency. This is a significant departure from TRIPs, and one which the government has not adequately explained.

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103 *Transcript of Evidence*, 21 June 2004, p.7 (Faunce)

104 *Transcript of Evidence*, 21 June 2004, p.18 (Deady, DFAT)

105 *Transcript of Evidence*, 21 June 2004, p.53 (Deady, DFAT)

106 TRIPs Article 31.

***Patent extensions and data exclusivity***

4.120 Article 17.10.1(a) of the FTA requires Australia to maintain a five-year "data exclusivity" period for pharmaceutical test data. As discussed in the library research paper at Appendix 4, data exclusivity periods in practice prevent the entry of generic drugs, as generic drug companies cannot rely on test data generated by a patent holder to register an equivalent product until the data exclusivity period has expired. Thus, a longer data exclusivity period would delay the introduction of generic drugs. While the five-year minimum requires no change to current Australian law, it does limit Australia's ability to reduce this in future. This goes well beyond our TRIPs obligations, as TRIPs does not set a minimum data-exclusivity period.

4.121 Article 17.9.8(b) requires that Australia will provide patent extensions in cases where delays in marketing approval curtail the effective life of the patent. Again, this is current practice in Australia and does not require legislative change. However, it is yet another area where the FTA goes beyond the TRIPs agreement. There is no requirement in TRIPs that governments provide patent extensions to compensate for regulatory delays in marketing new pharmaceuticals.

***Export of generic drugs***

4.122 Article 17.9.6 provides that export of drugs under patent can only be permitted for the purposes of gaining marketing approval in another country. According to Dr Faunce:

That will stop the generic industry in Australia from exporting medicines to other countries and earning profits through that mechanism. In a sense it will affect drug prices here because we do not have a generic industry in Australia and so we have no means of competing against the major pharmaceutical companies that drive prices up.<sup>107</sup>

4.123 In response, DFAT said that the Australian generic industry has maintained the ability to export for marketing approval. Mr Deady said that the ban on exporting commercially while a patent is in place in Australia is status quo, and reflects the obligations of the TRIPs agreement.<sup>108</sup> DFAT also said that this agreement would not affect Australia's ability to export under compulsory licence if, for example, there were a national emergency in a country that could not produce necessary drugs domestically.<sup>109</sup>

4.124 This committee believes that, whether new or not, preventing generic pharmaceutical manufacturers from exporting to a country where the drug is not under patent is a blatantly protectionist measure that should not be borne. This measure limits the capacity of Australian generic manufacturers to make a profit in the global

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107 *Transcript of Evidence*, 21 June 2004, p. 6 (Faunce)

108 *Transcript of Evidence*, 21 June 2004, p.17 (Deady, DFAT)

109 *Transcript of Evidence*, 6 July 2004, p.129 (Quinn, DFAT)

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marketplace by taking away export opportunities. It could undermine the profitability of the Australian generic drug industry and force jobs offshore. Whether this obligation is found in TRIPs or is new in the FTA, it is a highly undesirable restraint to free trade.

4.125 This committee is of the view that it is entirely inappropriate to go beyond our TRIPs commitments in negotiating a bilateral trade deal. US negotiators have been pushing for a 'TRIPs-plus' standard of patent protection in all its free trade agreements. This seeks to benefit US pharmaceutical companies by strengthening and prolonging their patent monopoly. The end result in the Australian FTA is considered a 'win' by the US International Trade Commission, which notes that: "The FTA also extends patent and trade secret protections beyond TRIPs and other applicable international agreements"<sup>110</sup> and identifies the pharmaceutical industry as a beneficiary.

4.126 While many of the pharmaceutical-related commitments do not require changes to existing patent law in Australia, they do limit future governments' ability to make changes in this area that could allow generic drugs to enter the market sooner. Perhaps more importantly, by making these commitments in a treaty with the US, Australia is effectively providing greater legitimacy to a strategy that the US has employed aggressively around the world to ramp up standards of IP protection for pharmaceuticals at the cost of developing countries seeking access to affordable medicines.

### **A sustainable generic drug industry?**

4.127 Another difficulty with the intellectual property provisions is that Australia's commitments, whether to change the law or bind the status quo, could have unintended and unforeseen consequences for the viability of Australia's generic drug manufacturers. A viable generic medicines industry is essential to creating the competition needed to contain drug prices. It is important to the PBS's reference pricing system and hence to Commonwealth government expenditure on drugs. It is important to containing state governments' expenditure on drugs in public hospitals. There are currently only six generic drug manufacturers in Australia. Any changes that would undermine the viability of this industry and further limit competition would have implications for the cost of pharmaceuticals across the board.

4.128 The pharmaceutical-related provisions of the IP chapter are complex and may appear trivial, but the possible impacts over time for Australia's generic drug industry are important. The most obvious change for the generic industry is the additional step to the marketing approval process. Just how much of a burden this will be for manufacturers may not be known until the legislation is implemented. Whether any of the commitments binding the status quo will limit future development of this industry

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110 US International Trade Commission, *US-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects*, USITC Publication 3697, May 2004, pp.115-116

also remains to be seen. This committee believes that the government must ensure that its FTA commitments do not work to the detriment of the generic drug industry in Australia.

### **Blood fractionation services**

4.129 An exchange of letters attached to Chapter 15 (Government Procurement) deals with trade in blood plasma products and blood fractionation services. Procurement of plasma fractionation services has been excluded from coverage of the Government Procurement Chapter (Annex 15-E Services). The side letter provides that Australia will undertake a review of its blood fractionation arrangements by 2007. If, after this review, Commonwealth and state and territory governments reach an agreement to move to tender processes for fractionation services consistent with Chapter 15, Australia will remove the blood fractionation exclusion.

4.130 In Australia decisions on the blood supply are a joint responsibility of the Commonwealth, State and Territory Governments under the National Blood Agreement. Plasma fractionation services are purchased by the National Blood Authority on behalf of all governments. Australia has a longstanding policy of national self-sufficiency in blood and blood products sourced from voluntary, non-remunerated blood donation. The Australian Red Cross Blood Service is the sole collector of blood, and the bulk of that blood plasma collected is sent to CSL Limited (formerly Commonwealth Serum Laboratories) for fractionation.<sup>111</sup>

4.131 A review of blood fractionation services in March 2001 found that Australia's blood needs were best provided through the CSL as the national plasma fractionation provider.<sup>112</sup> The review, conducted by Sir Ninian Stephen, recommended that self sufficiency should remain an important national goal for Australia.<sup>113</sup>

4.132 As the Australian Red Cross Blood Service pointed out in its submission, self sufficiency in blood is important to reduce the risk of infectious agents such as Creutzfeldt-Jacob disease, West Nile virus or as yet unidentified pathogens or contaminants entering the blood supply.<sup>114</sup> Separate processing facilities for Australian blood plasma are advantageous because they ensure segregation of Australian plasma from other overseas sources as an additional risk management strategy.<sup>115</sup>

4.133 This committee has heard some concerns about the possibility that blood plasma fractionation services could be covered by the government procurement

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111 *Submission 143*, Australian Red Cross Blood Service, p.6

112 *Submission 69*, New South Wales Government, p.3

113 *Submission 143*, Australian Red Cross Blood Service, p.9

114 *Submission 143*, Australian Red Cross Blood Service, pp.9-10

115 *Submission 143*, Australian Red Cross Blood Service, p.4

provision in future and the consequences that could follow from that. The NSW government expressed support for Australia's policy of self-sufficiency in blood products and suggested that:

The implications of tendering for the supply of blood and blood products could lead to the Commonwealth Government losing its strong control and oversight role in this area, jeopardising the quality and high standard of Australia's blood supplies.<sup>116</sup>

4.134 The Australian Red Cross Blood Service also noted the benefits of self-sufficiency in blood products, including specifically the voluntary blood donation system. It stressed that any departure from this would impact on Australia's long standing policy and risk management strategy.<sup>117</sup>

4.135 DFAT has offered assurances that Australia's policy on self sufficiency in blood products will not be affected and blood plasma products for use in Australia will continue to be derived from plasma collected from Australian blood donors.<sup>118</sup> The side letter on blood plasma specifically provides that: 'A Party may require that blood plasma products for use in its territory be derived from blood plasma collected in the territory of that Party'. However, it is possible that blood derived from Australian donors could be sent to the US for fractionation. Baxter Healthcare, a possible competitor for CSL in blood fractionation services, confirmed that it would use overseas processing facilities if it were to provide blood fractionation services.<sup>119</sup>

4.136 Paragraph 4 of the side letter recognises the right of any party to require any supplier of blood plasma products or fractionation services to fulfil safety, quality and efficacy standards. However, it also states that: "Such requirements shall not be prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to trade. This caveat should not be taken as permitting the current Australian practices of self-sufficiency or quality and safety regulations to be overridden.

4.137 This committee firmly believes that the Australian government must ensure the integrity of Australia's blood supply. It should not only maintain the right to regulate for self-sufficiency, it must exercise that right. It must also protect the safety of blood products by ensuring that any facilities used to process Australian blood conform to Australian standards.

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116 *Submission 69*, New South Wales Government, p.3

117 *Submission 143*, Australian Red Cross Blood Service, p.5

118 DFAT, *Fact Sheet – Health*, [www.dfat.gov.au/trade/negotiations/us\\_fta/outcomes/10\\_health](http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/10_health), accessed 30 April 2004

119 *Transcript of Evidence*, 22 June 2004, p.40 (Coy, Baxter Healthcare)

## **Conclusion**

4.138 Much of the debate over the impact of the FTA on pharmaceutical policies and prices in Australia has focused not so much on the text itself but on what might eventuate once the agreement is implemented.

4.139 This committee appreciates that Australia's negotiating team has negotiated long and hard in the face of considerable pressure to ensure that Australia's commitments in this area have much less impact on our existing law and policy than US negotiators would no doubt have liked. The committee does not doubt the sincerity of government witnesses who have told us that nothing in these changes will result in increased drug prices in Australia. It is clear that Australia's negotiators have come away with an agreement that they believe does not make specific commitments that will automatically push up the price of drugs in Australia. DFAT has told us that the concerns that witnesses to this inquiry have raised about specific sections of this agreement are unfounded. The committee sincerely hopes this is the case.

4.140 What most concerns this committee is the possibility that allowing Australia's pharmaceutical policies and IP laws to be up for grabs in this agreement could have unforeseen and unintended consequences down the track. This report has repeatedly noted that the FTA is in a sense a living agreement. Further work will take place in forums such as the working groups set up under it. Many of the details of what it means and how it will be implemented will be sorted out later, possibly with the help of the dispute-resolution mechanism. While we understand the Australian negotiators' interpretation of the agreement, we cannot predict the actions of the US or the dispute resolution mechanism into the future. Whatever happens, Australia must retain the flexibility to set its own health policies that are in Australia's national interest.

## Chapter 5

# Sanitary and Phytosanitary Measures

### Introduction

5.1 This chapter gives an overview of Australia's quarantine processes; it summarises the WTO SPS Agreement and explores the arguments raised in submissions and given as evidence on the SPS provisions under Chapter 7 of the AUSFTA. The arguments relate to Australia's scientifically-based quarantine processes, the two proposed bilateral committees and the possible impacts on our international reputation, the environment and agriculture.

5.2 The issues have been canvassed in the Senate Select Committee's Interim Report and also emerged during the Joint Standing Committee on Treaties' inquiry on the AUSFTA.

### The Agreement

5.3 Under Chapter 7 of the AUSFTA, Australia and the United States recognise that, as major agricultural producers, they must work together in the context of facilitating trade that is underpinned by scientifically robust SPS measures. In the AUSFTA, both countries have reaffirmed their commitment to the WTO and the WTO SPS Agreement.

5.4 In trying to foster a better informed and more cooperative relationship, two new bilateral SPS committees will be established. One committee will focus on general information exchange of SPS matters, while the other will be more technically focused. Neither committee is a decision-making body. There are not any legislative changes required on SPS matters as a consequence of the AUSFTA.

5.5 Intertwined with reaffirming the rules and obligations of the WTO SPS Agreement and establishing two bilateral SPS committees under the AUSFTA are the concerns over the possible impacts of the activities of these committees on Australia's quarantine regimes. It is important to have a basic understanding of Australia's quarantine and the WTO SPS Agreement (outlined below), to understand the complexity of the arguments.

### *Quarantine in Australia*

5.6 The Australian government's quarantine policies are administered through Biosecurity Australia. It is responsible for developing new policies or reviewing existing quarantine policies on imports of animals and plants and their products. The development and review of quarantine policy is generally undertaken as an import risk analysis (IRA). It is the results of the IRA that help inform Biosecurity Australia as to whether a commodity may enter Australia.

5.7 Biosecurity Australia operates under the follow legislative framework: the *Quarantine Act 1908* and subordinate legislation; the requirements of the WTO SPS Agreement and with the standards for import risk analysis developed by the Office International des Epizooties (OIE) and the International Plant Protection Convention (IPPC).

5.8 Australia's quarantine processes are critical from an economic and environmental perspective. The task of controlling or eradicating exotic pests or diseases within this large and varying landscape is extremely difficult and costly. Australia's quarantine arrangements are designed to minimise pest and disease incursions and, as such, avoid the need to attempt difficult and costly control and eradication campaigns. It has been estimated that an outbreak of Foot and Mouth Disease could potentially cost Australia over \$2billion in the first year<sup>1</sup>. Early in 1990's, Papaya fruit fly, an exotic species of fruit fly, was introduced and cost the Australian governments \$35m to eradicate. The total cost to Australian growers was estimated at \$100million.<sup>2</sup>

5.9 Import risk analysis is considered within Australia to be the foundation stone on which all quarantine policies and actions are be built. Biosecurity Australia undertakes import risk analysis as a process to identify, assess and manage the risks associated with the importation of animals and animal-derived products, and plants and plant-derived products.

5.10 The process is set out in the Import Risk Analysis Handbook 2003. The handbook builds on the AQIS<sup>3</sup> Import Risk Analysis Process Handbook 1998 that was part of the Government response to recommendations of the Australian Quarantine Review Committee. The revisions to the process are based on Biosecurity Australia's experience with IRAs, the results of relevant parliamentary reviews, advice from the Quarantine and Exports Advisory Council (QEAC) and comments from stakeholders.<sup>4</sup>

5.11 Key to Biosecurity's risk analysis is that it is:

- conducted in a consultative framework;
- a scientific process and therefore politically independent;
- a transparent and open process;
- consistent with government policy and Australia's international obligations (under the WTO Sanitary and Phytosanitary Measures);

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1 [www.affa.gov.au](http://www.affa.gov.au) >Market Access and Biosecurity - accessed 6 July 2004

2 [www.affa.gov.au](http://www.affa.gov.au) > Market Access and Biosecurity - accessed 6 July 2004

3 AQIS's quarantine operations at airports and seaports include the use of Quarantine Officers, specially trained sniffer dogs, and sophisticated imaging machines, all of which are designed to detect unauthorised importations of quarantineable material. This quarantine service has approximately 700 officers and a range of officers in state government departments. The Australian governments and the industries that benefit from international trade contribute to the cost of maintaining an effective quarantine service in Australia.

4 [www.affa.gov.au](http://www.affa.gov.au) > content > publications - accessed 6 July 2004

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- harmonised, through taking account of international standards, guidelines and recommendations; and
  - subject to appeal on process.

5.12 Decisions to permit or reject an import application should be made on sound scientific grounds. It is the Director of Plant and Animal Quarantine who actually makes the quarantine decisions usually on the basis of the outcomes of the import risk assessment. It is Australia's sovereign right to make the quarantine decision as to whether a commodity is traded into Australia.

5.13 Under the proposed bilateral arrangements of the AUSFTA. The relevant agencies for SPS matters within the United States and Australia will work even more closely. The United States Animal and Plant Health Inspection Service (APHIS) is one of the main agencies responsible for protecting and promoting United States agricultural health; administering the Animal Welfare Act; and carrying out wildlife damage management activities.<sup>5</sup> Like Australia, the United States operates in a manner consistent with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (WTO SPS Agreement).

#### ***The WTO Agreement on the Application of Sanitary and Phytosanitary Measures***

5.14 As a member country, Australia is obliged to uphold WTO rules and obligations including the Agreement on the Application of Sanitary (animal) and Phytosanitary (plant) Measures. Most of the WTO Agreements are the result of the 1986–94 Uruguay Round negotiations, signed at the Marrakesh ministerial meeting in April 1994. There are about 60 agreements and decisions<sup>6</sup>.

5.15 Australia, under its commitments to the WTO SPS Agreement, must consider all import requests from other countries concerning agricultural products, just as other member countries are obliged to consider our requests. This does not mean that all requests are granted. Since the WTO SPS Agreement came into force in 1995, Australian has gained access to more than 240 new markets for animal and plant products and foods.<sup>7</sup> Australia works within the parameters of the SPS international criteria and standards. The three main international agencies that set standards for animal and plant health, and food include:

- The Codex Alimentarius Commission<sup>8</sup>, which sets international standards relating to food additives, veterinary drugs, and pesticide residues;
- The Office International des Epizooties<sup>9</sup> (OIE), which informs member countries of animal disease outbreaks throughout the world, and studies new ways of controlling animal diseases and sets international standards; and

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<sup>5</sup> [www.aphis.usda.gov/ipa/about/welcome.html](http://www.aphis.usda.gov/ipa/about/welcome.html) -accessed 25 May 2004

<sup>6</sup> [www.wto.org](http://www.wto.org) accessed 7 July 2004

<sup>7</sup> [www.affa.gov.au](http://www.affa.gov.au) >documents > market access > biosecurity - accessed 26 May 2004

<sup>8</sup> for more information see [www.codexalimentarius](http://www.codexalimentarius)

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- The International Plant Protection Convention<sup>10</sup> (IPPC) which provides a framework for international cooperation sets international standards and exchanges information on plant health.

5.16 To fully understand the rights and obligations of the *WTO SPS Agreement* it is important to read it in its entirety as articles do not stand alone. They must be interpreted in relation to each other.

5.17 The key WTO SPS measures are defined as any measure applied<sup>11</sup>:

- to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms.
- to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs.
- to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests.
- to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

5.18 The key provisions of the *WTO SPS Agreement* are as follows<sup>12</sup>:

- An importing country has the **sovereign right** to adopt measures to achieve the level of protection it deems appropriate (its appropriate level of protection (ALOP)) to protect human or animal life or health within its territory, but such a level of protection must be consistently applied in different situations.
- An SPS measure must be based on **scientific principles** and not be maintained without sufficient evidence.
- In applying SPS measures, an importing country must avoid arbitrary or unjustifiable distinctions in levels of protection, if such distinctions result in discrimination or a disguised **restriction on international trade**.
- An SPS measure must not be **more trade restrictive** than necessary to achieve an importing country's ALOP, taking into account technical and economic feasibility.

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9 for more information see [www.oie.int](http://www.oie.int)

10 for more information see [www.ippc.int](http://www.ippc.int)

11 [www.affa.gov.au](http://www.affa.gov.au) -"Guidelines for Import Risk Analysis - Draft September 2001" p.3

12 [www.affa.gov.au](http://www.affa.gov.au) > Market Access and Biosecurity – accessed 7 July 2004

- An SPS measure should be based on an international standard, guideline or recommendation, where these exist, except to the extent that there is **scientific justification** for a more stringent measure which is necessary to achieve an importing country's ALOP.
- An SPS **measure conforming** to an international standard, guideline or recommendation is presumed to be necessary protect human, animal or plant life or health, and to be consistent with the WTO SPS Agreement.
- Where an **international standard, guideline or recommendation** does not exist or where, in order to meet an importing country's ALOP, a measure needs to provide a higher level of protection than accorded by the relevant international standard, such a measure must be based on a **risk assessment**; the risk assessment must take into account available scientific evidence and relevant economic factors.
- When there is insufficient scientific evidence to complete a risk assessment, an importing country may **adopt a provisional measure(s)** by taking into account available pertinent information; additional information must be sought to allow a more objective assessment and the measure(s) reviewed within a reasonable period.
- An importing country must recognise the measures of other countries as **equivalent**, if it is objectively demonstrated that the measures meet the importing country's ALOP.

5.19 In summary, the WTO SPS Agreement covers food safety and animal and plant health regulations. It provides a right for governments to take SPS measures but only to the extent necessary to protect human, animal or plant life or health. It encourages members to accept SPS measures even if they differ from those used by other member nations as long as they are not used as a trade barrier. SPS measures must be based on international standards and import risk assessments must be scientifically justifiable. There are detailed criteria and procedures for assessing risks and for determining the appropriate levels of protections.

### **AUSFTA dispute settlement, the WTO Agreement and the Bilateral Committees**

5.20 An important aspect of the AUSFTA, is that, the WTO SPS Agreement Article 11, which covers consultation and dispute settlement, will be applied should a dispute arise between Australia and the United States on SPS matters. The dispute mechanisms under chapter 21 of the AUSFTA *do not* apply to Chapter 7 - SPS provisions. As there are not any new obligations or rights established under the AUSFTA for SPS matters, the WTO SPS Agreement was deemed appropriate to address dispute matters between Australia and the United States. The proposed bilateral committee will provide a forum to communicate a better understanding of the basis of Australia's SPS decisions.

5.21 However, as discussed in more detail further in this chapter, there appears to be a contrasting discourse 'coming out' of the United States and Australia regarding the expected outcomes of proposed bilateral committees.

5.22 It is well recognised that the United States is a frequent user of the WTO dispute settlement processes on SPS matters. An Australian agricultural official appearing before the Committee stated that challenges to the decision-making process are allowable but only on the basis of science.<sup>13</sup> In further evidence she stated that:

We know that our measures are based on science. We are not at all afraid of having a technical or scientific consultation with our opposite number in the United States. In fact, we see it as an opportunity for them to understand how science based, transparent and robust our system is, with the hope that they will stop criticising it to quite the same extent as they do now. I think that is part of the reason why there has been some publicity in the United States suggesting that this will mean that our system will change.

5.23 The Australian Government believes that quarantine decisions in Australia are capable of passing the scrutiny of the WTO processes and that the United States will not influence our quarantine regime that would reduce our standards. However, there has been some comment that the bilateral committees may have the potential to be de facto dispute settlement regimes thus circumventing the WTO dispute settlement mechanisms<sup>14</sup>. Given the number of these bilateral committees being established under free trade agreements that the United States enters, it is not difficult to understand why there is concern. Until otherwise proven it must be considered that the United States intention through these committees is benign, and aimed at fostering better communication of SPS matters with its trading partners.

### **The AUSFTA and SPS measures**

5.24 The rules and obligations of the WTO SPS Agreement which have been reaffirmed in the AUSFTA have been generally supported in submissions or by witnesses during the Senate inquiry<sup>151617</sup>. Australian government officials have also given evidence reemphasising the WTO SPS commitments.

....In the context of this particular negotiation on the FTA agreement, the most important thing to say, of course, is that all the rights and obligations and disciplines provided by the SPS agreement under the WTO are confirmed by both sides. Both sides confirmed that this is the framework in which we each make our quarantine decisions.....<sup>18</sup>.

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13 *Transcript of Evidence*, 18 May 2004, p.4, (Greville, DAFF)

14 *Submission 291*, p.19, (Australian Pork Limited)

15 *Submission 153*, p.3, (NFF)

16 *Transcript of Evidence*, 15 June 2004, (Webster - Horticulture)

17 *Submission 291*, p.19, (Australian Pork Industry)

18 *Transcript of Evidence*, 18 May 2004, p.7, (Gosper, DFAT)

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....There is nothing at all in this chapter on the sanitary and phytosanitary aspects of the FTA that will in any way add to or subtract from Australia's rights under the SPS agreement of the WTO.....<sup>19</sup>

5.25 For those who are concerned about alleged threats to Australia's quarantine regime, it is not enough merely for the Government to keep espousing that it works within the framework of the WTO SPS Agreement protection measures, that is 'decisions are based on scientific principle and maintained through scientific evidence / justification'. That there are international SPS guidelines and criteria and that it is up to the WTO member country to adopt and enforce SPS protection measures is undisputed.

5.26 However, the concern is what transpires between the members of the bilateral SPS committees in relation to interpretations of scientific assessment. Interpretation of scientific evidence can be subjective. It relies on available information. Theories can be supported or not supported by scientists. Even whether a provision meets WTO requirements may also be subjective in this context. It is the level of degree of the interpretation and justification that leaves many stakeholders uneasy about the influence of the proposed bilateral SPS committees.

5.27 It appears that stakeholder participation in these two bilateral committees is limited, if at all. All the evidence given to the Select Committee to-date suggests that the main participants of these bilateral committees will be relevant government officials and technical and / or scientific experts. In a response to Senator Conroy's question regarding consultation with industry on the establishment and design of the bilateral committees, Ms Greville gave evidence that:

We have certainly talked to anybody who has asked us about them but, given that they are essentially a formalisation of bilateral government-to-government negotiations, we have not sought industry's input into how they should be constituted. We have told industry exactly the same as what we are telling you, and to a large extent industry knows this already—we have talked regularly competent authority to competent authority in this precursor to the FTA arrangements, in the margins of the SPS committee and in the plant and animal quadrilaterals, which are meetings of the four SPS good guys. They know that and they understand that that process is ongoing.

Industry have not expressed any particular interest or concern to us about how these bodies will be constituted other than the concern that has been expressed by some perhaps less well-informed commentators about the import of these arrangements and how they gel with the import risk analysis process. We have had the same sorts of conversations with them as we are having with you to assure them that there is no suggestion or possibility that the import risk analysis process will be compromised or undermined in any way.<sup>20</sup>

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19 *Transcript of Evidence*, 6 July 2004, p.25, (Deady, DFAT)

20 *Transcript of Evidence*, 6 July 2004, p.5, (Greville, DAFF)

5.28 In the context of stakeholder involvement in quarantine process conducted through Biosecurity Australia, Ms Greville also stated that:

..... When these arrangements are in place, and in fact while the current interim arrangements are in place, any import risk analysis that is being conducted by Biosecurity Australia, we will—as we do—consult with the trading partner through the various forums. We also have a consultative, inclusive and transparent process with stakeholders domestically....<sup>21</sup>

5.29 Providing a forum for robust discussion and information exchange is an admirable endeavour but government is not the only entities that have a stake in achieving better communication on SPS process with the United States. Limiting the membership of these two committees is inhibiting the very aim of the forum. These bilateral committees which will consist and be driven by only government officials and experts may not give the appearance of a transparent, consultative or inclusive process.

5.30 The Federation of Australian Scientific and Technological Societies was particularly concerned that:

There are no provisions requiring independent scientific expertise on the membership of either committee.<sup>22</sup>

5.31 Biosecurity Australia has recently conducted import risk assessments that have been contentious in the industries affected. Several industries<sup>23</sup> conveyed concerns to the Select Committee about what they perceived to be the 'watering down' of risk assessment to facilitate more trading of commodities. It is argued that there is little point having a strong commitment to the WTO SPS Agreement, particularly if there is any truth in the allegation that trade is becoming inappropriately prioritised over scientific risk assessment.

5.32 The Government gave evidence before JSCOT that:

... a disconnect between trade officials and scientist can sometimes result in quarantine issues escalating unnecessarily into trade disputes. The inclusion into both consultative bodies can help to understand better the rules by which the other operates....<sup>24</sup>

### **The SPS committees and quarantine standards**

5.33 Much of the debate over quarantine and the SPS committees is based on the fear of the unknown and future consequences of the influence of these committees. The provisions for these committees fall under Article 7.4 - the SPS Committee and Article 7.4.9 and annex 7-A – the Standing Technical Working Group.

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21 *Transcript of Evidence*, 6 July 2004, p.6, (Greville, DAFF)

22 *Submission 528*, p.9, (FASTS)

23 see *Submissions* - Chicken (108); Pork (291), FASTS (534)

24 Joint Standing Committee on Treaties, *Transcript of Evidence*, 14 May 2004, p.66, (Greville, DAFF)

5.34 Evidence given to the Senate inquiry is that the guidelines under which Biosecurity Australia operates will not be changed as a consequence of the AUSFTA<sup>25</sup>. Chief Negotiator Stephen Deady was at pains to confirm to the Select Committee that there was not any threat to Australia's science-based quarantine regime:

I would just say, if I can, again, as we explained this morning, there is nothing in the establishment of these committees which will impact on the integrity of the IRA processes in Australia. The science based nature of the import risk assessments will not be affected by the establishment of these two committees under the FTA. There is nothing at all in this chapter on the sanitary and phytosanitary aspects of the FTA that will in any way add to or subtract from Australia's rights under the SPS agreement of the WTO. There is nothing here that now gives the Americans any additional rights over Australia beyond what is already agreed to by both countries in the SPS agreement of the WTO.<sup>26</sup>

5.35 Mr Deady's statement - which had been reiterated on many previous occasions by him and other officials including the Minister for Trade - does not appear to have reassured many stakeholders. The Federation of Australian Scientific and Technological Societies stated that:

We are concerned that both the objectives of the committees and their character as bureaucratic instruments to facilitate trade may undermine the fundamental role that proper scientific analysis must have in a sound quarantine system.<sup>27</sup>

5.36 The Select Committee notes the evidence from the government to allay those concerns but the concerns of the critics is understandable. Can Australia afford to compromise its scientifically based importation assessment and subsequent decisions for a promise of increased trade and economic gains? Definitely not. The consequences to Australia's environment and its agricultural sector would be much higher than any potential economic gain should Australia down grade its current standards. It is essential this is clearly understood by all concerned.

5.37 It is important to remember that while Australia may be considered by some to be conservative in its approach to quarantine, applying the 'precautionary principle' to SPS matters, the United States also applies strict SPS protection measures.

5.38 Australia being an island nation has an enviable international reputation as a relatively low diseased country. The recent outbreak in Queensland of the so-called 'Citrus canker' is a stark reminder of the importance of remaining vigilant on quarantine standards. This bacterial disease is not endemic in Australia, but is highly contagious and has seriously impacted the citrus industries in other countries around the world including the United States. The economic or social impact of this outbreak is yet to be determined but some believe that our international reputation will be affected by this outbreak.

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25 *Transcript of Evidence*, 6 July 2004, p.32, (Greville, DAFF)

26 *Transcript of Evidence*, 6 July 2004, p.25, (Deady, DFAT)

27 *Submission 528*, p.9, (FASTS)

5.39 The sensitivity surrounding the bilateral committee's influence and purpose has been reinforced by statements made by the United States that these AUSFTA SPS committees will help to resolve specific bilateral SPS matters<sup>28</sup>. The Chicken Meat Industry stated that:

The statements by the United States that Australia will work to resolve our quarantine barriers on poultry (and the fact that this is being counted as a benefit by the United States) is a very serious concern.<sup>29</sup>

5.40 It is not difficult to reach the conclusion based on comments from the United States agricultural sectors that they believe that these new SPS committees will provide a forum to encourage Australia to reduce quarantine standards. It is this overriding message that is making many Australian stakeholders very nervous, particularly as these bilateral SPS committees, which include trade representatives, are a common theme in the free trade agreements entered into by the United States with, for example, Chile, Morocco, Central America and now Australia.<sup>30</sup> Australia has very high standards and is very different from these countries in terms of trade, social and economic policies and yet it appears that the United States wants these SPS committees regardless if they're warranted, as is the case in Australia.

5.41 Professor Weiss and Dr Thurbon highlighted to the Select Committee several statements made by United States agriculture groups, who see these bilateral committees as an advantage to their respective sectors. The following extract is from their submission:

The Californian Farm Bureau Federation states that Australia's burdensome phytosanitary restriction are currently limiting export opportunities [*so in order to increase export volumes*] the California Farm Bureau Federation requests that.... In addition to the standard WTO-based SPS language that is normally included in a free trade agreement...any FTA with Australia establish a standing SPS committee ...While technical regulators and scientists would of course be active participants, a policy level committee would help ensure that the technical and policy priorities are consistent and compatible (emphasis added).<sup>31</sup>

5.42 Comments like this have not engendered confidence within Australia. Some of Australia's agricultural industries such as horticulture, pork and chicken have, in light of these comments from the United States, expressed concern over the potential influence of these committees.<sup>32</sup> The Western Australia, Queensland and the New South Wales governments have also expressed concerns about the United States

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28 United States International Trade Commission, "US-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects" May 2004, pp.54, 56, 59

29 *Submission 108*, p.7, (Australian Chicken Meat Federation Inc)

30 *Submission 291*, p.19, (Australian Pork Limited)

31 *Submission 307*, pp.3-5, (Professor Weiss & Dr Thurbon)

32 same as above

pressures in light of the comments on the future integrity of Australia quarantine regime.<sup>33</sup>

5.43 Others, however, believe that there is no evidence in the AUSFTA to suggest that these bilateral committees will have the power to undermine Australia's scientific-based assessment processes. The National Farmers Federation submission does acknowledge that some agricultural groups have expressed concerns with regard to the formation of two SPS committees but the NFF overall is not concerned about it nor do they believe that the committees will influence our quarantine processes.

NFF understand one of the outcomes of this meeting was an agreement to develop a closer working relationship on SPS related market access issues. In this regard, the NFF is not concerned if this relationship is formalised by the formation of a committee(s). NFF sees no evidence in the text of the US FTA that US representation on these committees has the power to undermine Australia's scientific-based system or import risk assessment process in particular.<sup>34</sup>

5.44 The United States Trade Representative for the AUSFTA has also stated that science-based assessment will continue to be the basis for importation of agricultural commodities.

The Office of the United States Trade Representative stated that the U.S. and Australia will work to resolve sanitary and phytosanitary barriers to agricultural trade, in particular, for pork, citrus and apples and stone fruits.

- The agreement establishes a new mechanism for scientific cooperation between U.S. and Australian authorities to resolve specific bilateral animal and plant health matters.
- USDA's Animal and Plant Health Inspection Service and Biosecurity Australia will operate a standing technical working group, including trade agency representation, to engage at the earliest appropriate point in each country's regulatory process to co-operate in the development of science-based measures that affect trade between the two countries.<sup>35</sup>

5.45 The Senate Select Committee and the Joint Standing Committee on Treaties inquiries, heard evidence from the Australian Government that:

The FTA agreement does not change the rights of obligations or expectations that we each have and, in determining our own appropriate level of protection, will apply in accordance with the rules and obligations of the [WTO] SPS Agreement<sup>36</sup>

33 *Submission 142*, p.2, (WA) & Joint Standing Committee on Treaties, *Submission 66*, p.5 (NSW) & 206, p.9, (QLD)

34 *Submission 153*, pp.5-6, (NFF)

35 [www.ustr.gov](http://www.ustr.gov) > Trade Facts, p.2, 8 February 2004

36 *Transcript of Evidence*, 18 May 2004, p.7, (Gosper, DFAT)

The US has an SPS regime which is not the same as ours but has some similarities, in the sense that they have a science based, transparent decision making process.....<sup>37</sup>

5.46 At various stages since the announcement of the AUSFTA, members of the Howard's government have indicated that Australia's quarantine standards and processes are not negotiable and were not ever going to be negotiable in the context of the AUSFTA.

5.47 The Chicken Meat Industry, although concerned about the possibility of influence that the bilateral committees may have on quarantine, stated that:

It is perhaps not surprising that commercially aggressive and subsidised exporters of agricultural products, such as the United States, allege that other countries like Australia which they see as an attractive import target misuse bio-security and quarantine measures to protect their markets. The allegations of aggressive and subsidies exporters in this context is familiar "beggar-thy-neighbour" propaganda common in international trade negotiations.

The truth is that all countries who have, or aspire to develop, livestock industries require proper bio-security and quarantine regimes administered by their national governments without which the pre-conditions for orderly investment and large scale agribusiness development in their countries would not occur.<sup>38</sup>

5.48 In the Select Committee's view it will be the capacity of Biosecurity Australia to maintain its integrity that will be key to maintaining quarantine standards that are in Australia's national interest under the AUSFTA.

#### ***The purpose of the SPS committees***

5.49 The SPS Committee and a Standing Technical Working Group have been formed with the purpose to continue to improve Australia's and the United States' understanding of the application of their respective SPS measures and associated regulatory frameworks. DFAT's Mr Sparkes gave evidence that the four objectives<sup>39</sup> that were nominated for SPS matters are reflected in the outcomes of the negotiations, and in particular, the establishment of these committees will continue to foster the objectives. They will:

"seek to strengthen cooperation between Australian and US quarantine authorities"<sup>40</sup>

5.50 According to the Government, Australia's endeavour to facilitate a forum of good will and discussion with the United States is the premise on which these committees have been formed. Currently, many of the free trade agreements the United States has entered into have a provision for SPS committees and all have trade

37 *Transcript of Evidence*, 18 May 2004, p.55, (Greville, DAFF)

38 *Submission 108*, p.7, (Australian Chicken Meat Federation Inc)

39 the four objectives are outlined in DFAT " Guide to the Agreement", March 2004, p.126

40 *Transcript of Evidence*, 18 May 2004, p.39, (Sparkes, DFAT)

representatives on these committee<sup>41</sup>. It could appear that the United States is trying to by-pass the WTO processes by creating these bilateral committees but to date there is no hard evidence to support that they are more than consultative and information-sharing forums.

5.51 The Australian government has at length stated that these committees will not be influencing quarantine processes, that they provide forums for dissemination of information and discussion on technical and scientific interest - these committees are **not** decision making committees.

5.52 The DFAT *Guide to the Agreement* states that the role of the SPS committee is to increase the mutual understanding of SPS policies and regulatory processes of each country. Ms Greville expanded on their role by stating that:

The purpose is to involve all of those bodies [relevant SPS agencies] where necessary, partly because there is a feeling between Australia and the US that we do not necessarily understand each other's division of responsibility—the way that we understand and apply the SPS agreement—and also, to be frank, because within jurisdictions it is not necessarily the case that everybody understands how everybody else works. The idea of the overarching SPS committee is very much about cooperation, increasing understanding and providing each with an opportunity to explain to each other how it works so that misunderstandings do not occur and accusations do not fly backwards and forwards about bad citizenship under the WTO and SPS agreements<sup>42</sup>.

5.53 In general, the SPS committees will be co-chaired and may have trade representatives on the committee. Attendance at these annual meetings may depend on what is on the agenda. These committees will be hierarchical in that the SPS Committee will be the overarching committee for the Technical Working Group. The Technical Working Group will report its activities to the SPS Committee who will in turn report to the Joint Committee (the main committee established under AUSFTA, Chapter 21).

5.54 Ms Greville<sup>43</sup> confirmed that while the working group will be independent of Australia's IRA process but the IRA panel can draw on the technical working group expertise. Annex 7-A of the AUSFTA outlines the Standing Technical Working Group. The working group will consist of scientific / technical experts. It will also have representatives from Biosecurity and the equivalent United States agencies.

The process within the standing technical working group will be that the scientists on either side will attempt to achieve a meeting of their scientific minds and resolve, to use the words of the text, to their mutual satisfaction any of these kinds of issues which are germane in an import risk analysis or which MAY not be related to a specific import analysis but may be alive in

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41 *Submission 291*, pp.18-19, (Australian Pork Limited)

42 *Transcript of Evidence*, 6 July 2004, p.7, (Greville, DAFF)

43 *Transcript of Evidence*, 6 July 2004, p.3, (Greville, DAFF)

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international debate somehow. We consider that to be a very useful process.<sup>44</sup>

*The Select Committee's views*

5.55 It is the Select Committee's view that, with respect to the concerns expressed about the influence and purpose of the two committees and their potential affects on quarantine standards, some of the concerns expressed relate to fears of what might eventuate from these new arrangement rather than what has been agreed under the AUSFTA. It is not in Australia's national interest to reduce Australia quarantine standards. Australia can ill afford for these committees to be an avenue for the United State to influence our policies, as it would be the 'thin end of the wedge' undermining our international reputation and our environmental and agricultural sectors.

5.56 It is clear that constant vigilance is required over our scientifically based quarantine assessment process. The Committee is not overly confident, notwithstanding assurances from the Australian government, that pressure from the United States will not be brought to bear through these two bilateral committees on Australian quarantine decisions. Biosecurity Australia's processes may be robust enough to withstand such pressure should it arise.

5.57 In the Select Committee's view, community anxiety about quarantine matters is just one more symptom of the existing problematic process of agreement making, where the government has agreed to new bilateral arrangements without adequately engaging or building the confidence of the key stakeholders. The Select Committee recognises that the key to successful implementation of government policy is to bring the community along with the process, particularly key stakeholders.

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44 *Transcript of Evidence*, 6 July 2004, p.3, (Greville, DAFF)

## Chapter 6

### Local Media Content

#### The Agreement - Annex I & II (Non-conforming measures)

6.1 Under the AUSFTA, there are a series of Schedules contained within the Annexes that deal with non-conforming measures. Annex I-14 & I-15 and Annex II-6 to 8 & II- 9 relate to the following sectors: broadcasting, broadcasting and audiovisual services and advertising services. The obligations relevant for these sectors are national treatment, most-favoured nation treatment (although Annex II-6 to 8 also includes market access, while II-9 obligation is only most-favoured nation treatment) and performance rights. The measures relevant to those sectors are: *Broadcasting Services Act 1992* and *Radiocommunications Act 1992*.

6.2 The relationship between 'obligations' and ' measures' as they apply to the above-mentioned sectors are important because Annex I sets out, in accordance with Articles 11.13<sup>1</sup> and 10.6<sup>2</sup>, a Party's existing measures that are not subject to some or all of the obligations imposed by the following Articles:

- 10.2 or 11.3 (National Treatment);
- 10.3 or 11.4 (Most-Favoured-Nation Treatment);
- 10.4 (Market Access);
- 10.5 (Local Presence);
- 11.9 (Performance Requirements); or
- 11.10 (Senior Management and Boards of Directors).

6.3 Annex II sets out, in accordance with Articles 10.6 and 11.13, the specific sectors, sub-sectors or activities for which that Party may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by the following Articles: 10.2 or 11.3; 10.3 or 11.4; 10.4; 10.5; 11.9; or 11.10. (Note that these Articles are the same Articles listed above for Annex I.)

6.4 Under Annex I and Annex II, a Party reserves the right to maintain existing non-conforming measures<sup>3</sup> that are specifically identified in its Schedule. One difference between these two annexes is that Annex I cannot make the measures more

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1 AUSFTA Chapter 11 Investment, Article 11.3 - Investment Non-Conforming Measures

2 AUSFTA Chapter 10 Cross-border Trade in Services, Article 10.6 – Services Non-Conforming Measures

3 Non-conforming measures are those that are identified in the relevant schedule that do not conform with the obligations on national treatment, most-favoured nation treatment, performance rights, market access, local presence and senior management and boards of directors.

restrictive whereas Annex II can; and it can adopt new non-conforming measures as long as the measures have been identified in the relevant schedule.

6.5 The DFAT background paper detailing the outcomes as they apply to AUSFTA's local content provisions for audiovisual explains the Annexes as follows:

Under the AUSFTA, Annex I can be used to reserve the right to maintain existing non-conforming measures that are specifically identified in that Annex. Annex II can be used to identify certain sectors, sub-sectors or activities where a Party reserves the right to maintain existing non-conforming measures, to make these measures more restrictive, or to introduce new non-conforming measures.<sup>4</sup>

6.6 Importantly, measures under Annex I are subject to a 'ratchet mechanism', which means if a Party liberalises a measure, making it less inconsistent with the obligations of the relevant Chapter, it cannot then become more restrictive. (i.e. the liberalised measure becomes bound as part of the AUSFTA commitments). For example, if the existing level of the mandated Australian television local content transmission quota were to be reduced, say, from 55% down to 40%, it cannot be returned to the former level (55%) in the future.

6.7 In Australia, programming content is regulated by compulsory standards determined by the Australian Broadcasting Authority. Pay TV drama channels are also regulated by a compulsory standard requiring expenditure on minimum amounts of Australian drama programs. Furthermore, an additional licence condition on some regional commercial television licensees specifies that licensees broadcast minimum amounts of local content within their local broadcast areas<sup>5</sup>.

6.8 The Australian Film Commission is the Australian government agency responsible for supporting the development of film, television and interactive media projects and their creators. It focuses its efforts on the independent production sector, namely companies and individuals who are not affiliated with broadcasters or major distribution and exhibition companies<sup>6</sup>.

6.9 The Film Finance Corporation Australia is the Government's primary agency for funding screen production. It invests in a diverse range of feature films, adult television drama, children's television drama and documentary. It aims to strengthen cultural identity by providing opportunities for Australians to make and view their own screen stories. It invests only in projects with high levels of creative and technical contribution by Australians<sup>7</sup>.

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4 [http://www.dfat.gov.au/trade/negotiations/us\\_fta/backgrounder/audiovisual.html](http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html)

5 <http://www.aba.gov.au/tv/content/index.htm>, accessed 8 June 2004

6 Australian Film Commission, Annual Report 2002-2003, [http://www.afc.gov.au/archive/annrep/ar02\\_03/ar001.html](http://www.afc.gov.au/archive/annrep/ar02_03/ar001.html), accessed 10 June 2004

7 <http://www.ffc.gov.au/about/> accessed 10 June 2004

6.10 As stated in the Committee's interim report the key issue for media and broadcasting is whether the AUSFTA allows sufficient flexibility for the Australian government to pursue cultural objectives through local content regulations now and in the future.

6.11 Representatives of Australia's film industry were passionate about the likely long-term effects of the Agreement on the industry and the audiovisual market, in Australia:

What is in this agreement for the United States of America? One might ask how much bigger a share of the Australian audiovisual market US companies want, or is this free trade agreement with Australia more about setting a precedent for negotiating with the European Union? From the start of this process of negotiation with the United States, our organisations have sought to work in good faith with the government to ensure that the outcome of a free trade agreement with the US is of overall benefit to the nation but does not result in adverse effects on the audiovisual sector, a position which we understood was shared by the government. We have now had the opportunity to study the text of the agreement and we have found that there is no economic benefit to the audiovisual sector from this agreement. Australia will not gain any greater access to the US audiovisual market. The US has no tariff or non-tariff barriers that could be removed by this agreement, yet it will remain one of the most closed markets for audiovisual product in the world. The size of its domestic market and the inward-looking nature of its cultural production make it both entirely self-sufficient and the world's largest net exporter of audiovisual products and services.

The agreement will severely constrain the ability of this and future Australian governments to determine cultural policy, giving to the government of the United States a much stronger role in the determination of that policy. We will be moving from a position of being solely in charge of our own cultural policy to one where we must consult with the largest cultural producer in the world, and our dominant trade partner, on how we determine our future.

The constraints on government policy mean that in the longer term, over the next 10 to 15 years, the audiovisual sector will be worse off than it is today. This agreement is not a blueprint for growth. It is not a vision for an expanding audiovisual sector encouraged by sensible and astute policy intervention. Instead, it represents a declaration by Australia of its declining aspirations for what it can achieve in the promotion of its culture. This is the most disappointing aspect of the agreement. Much has been made by the government of its success in retaining current Australian content standards for commercial television, despite the fact that they cannot be increased and will likely be rolled back in future years. However, as one reads the text it is clear that much lower targets have been set for newer and still-to-be-developed media.<sup>8</sup>

6.12 The Minister for Trade, however, presented a very different view of the provisions of the Agreement in this area:

We knew that the US would push us very strongly in relation to the audio-visual sector, as this is an industry of great economic importance and political clout in the US.

The Australian Government, however, made it clear from the outset of negotiations that any outcome in this area must protect Australian culture.

The end result on audiovisual was, in fact, excellent. It:

- preserves all existing local content requirements on free-to-air and Pay TV;
- allows the Government flexibility to significantly increase local content on free-to-air TV if it moves to digital multichannelling;
- allows the Government to increase the existing 10% expenditure quota on drama channels on Pay TV up to 20% if necessary, and to introduce similar expenditure quotas of up to 10% on four additional program formats (the arts, children's programming, documentaries, and educational programming);
- allows the Government to intervene in the future on interactive media platforms to ensure Australian content is readily available on those platforms.

The bottom line is these commitments give Australia sufficient flexibility to not only maintain the current amounts of local content available to Australian audiences as new media services become more important, but to actually increase these amounts.<sup>9</sup>

### *Adequacy of Levels of Local Content*

6.13 The government has stated consistently, during this inquiry and in published DFAT advice, that the outcome of the negotiations on audiovisual and broadcasting services preserves Australia's existing local content requirements and other measures and ensures Australia's right to intervene in response to new media developments, subject to a number of commitments on the degree or level of any new or additional local content requirements.

6.14 Although the Australian industry seems satisfied with the requirements for local content on free-to-air television, industry witnesses were concerned that the Agreement does not allow for any increase in quotas. They are also concerned that these levels are likely to be rolled back in the future.<sup>10</sup>

6.15 Any diminution of local content would presumably result from the 'ratchetting' provision applying to cross-border trade in services that is contained in *Article 10.6.1(c)* of the Agreement. As explained earlier in this chapter, that provision would prevent an Australian government, if it reduced the transmission quota for free-

9 Minister for Trade, Hon. Mark Vaile MP, Speech to the Business Breakfast Roundtable on USAFTA, 20 February 2004, p.5

10 *Transcript of Evidence*, 4 May 2004, p.2, (Elliott, MEAA)

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to-air television from its current level of 55 percent, from later increasing the quota back up again from the new, lower level.

6.16 Several submissions and witnesses argued that the agreed quotas for new or still-to-be-developed media are too low. Each of these areas is discussed below. The general tenor of the criticism was conveyed to the Committee by the Media Entertainment and Arts Alliance (MEAA):

In subscription television the market share target will be frozen at 10 percent, or possibly 20 percent, for Australian drama. In new media no targets at all have been set, but the strong implication of the agreement language is that they will be small and will have to meet rigorous tests over which the United States will have a large say.<sup>11</sup>

### ***Sub-quotas***

6.17 In its interim report the Committee stated that it had heard conflicting views about the government's ability to change existing sub-quotas or institute new sub-quota requirements for specific program types within the 55 percent content requirement.

6.18 MEAA considers that the wording of *Article 10.6.1(c)* 'would not allow for the introduction of additional sub-quotas nor for an increase in transmission hours for existing sub-quotas'. It suggested that if the Annex I-14 reservations were made Annex II reservations, this would remove the impact of the 'ratchetting' provisions on the sub-quotas.<sup>12</sup>

6.19 The AUSFTA Backgrounder published by the DFAT states that, 'Subquotas may also be applied within the 55% programming quota'. The Committee notes that it is silent on how those subquotas may be applied, and therefore silent on whether they may be increased.

6.20 In evidence that tended to dispel concerns of the kind raised here by the MEAA, the Australian Broadcasting Authority (ABA) informed the Committee that it had been advised that sub-quotas are not caught within the 'ratchetting' rule and that they can be altered and possibly increased provided that overall the 55 percent cap is adhered to.<sup>13</sup>

6.21 In the Committee's view, the matter will probably only be clarified in the event that a dispute arises in this area. The government's view, however, is very clear, and DFAT has published the following statement in relation to the final outcome on audiovisual:

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11 *Transcript of Evidence*, 4 May 2004, pp.2-3, (Elliott, MEAA)

12 *Supplementary Submission 85*, pp.8-9, (MEAA)

13 *Submission 130*, pp.8-9, (ABA)

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Ensures that Australia maintains sufficient freedom to introduce new or additional local content requirements in relation to:

- Possible digital multichannelling on free-to-air commercial TV.
- Subscription TV.
- Interactive audio and/or video services.

This outcome was a carefully negotiated one. Its key aspect was the maintenance of Australia's right to intervene in response to new media developments, subject to a number of commitments on the degree or level of any new or additional local content requirements.<sup>14</sup>

### ***Lower Quotas***

6.22 As indicated earlier, the industry has expressed concerns that the standstill agreement on local content, allied with the 'ratchetting' provision, will result in lower local content requirements. The industry argues that while the quotas are now at their highest levels, they have been significantly lower in the past when the networks were not making profits. If the networks were again to become unprofitable, there would be pressure to lower their costs. Because local productions are expensive compared with the imported product, there would be an incentive to request lower quotas for local content.

6.23 Moreover, the industry argues that as subscription television gains market share, the discrepancy between the 10 percent expenditure quota for subscription television (possibly 20 percent for drama) and the 55 percent transmission quota also will lead the networks to pressure the regulator to lower the free-to-air quota.

6.24 The difficulty for the industry is that, once lowered, the 'ratchetting' provision will prevent any later increase in local content quotas. In the words of Create Australia:

In our accepting this constraint upon our freedom to act the USA has gained from Australia not just agreement to 'stand still', but also to be the basis upon which Australia can be pressured into moving towards progressive liberalisation.<sup>15</sup>

### ***Subscription Television***

6.25 Under Annex II Australia is allowed to impose a local content requirement of 10 percent of a provider's expenditure on the arts, children's, documentary, drama and educational services. Provision is made for an increase in the drama quota to 20 percent of expenditure if the Australian government finds 'that the expenditure requirement for the production of drama is insufficient to meet its stated goal for such expenditure'. The Annex further states that, 'Such a finding shall be made through a transparent process that includes consultations with any affected parties including the United States. Any increase imposed shall be non-discriminatory and no more burdensome than necessary'.

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14 [http://www.dfat.gov.au/trade/negotiations/us\\_fta/backgrounder/audiovisual.html](http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html)

15 *Submission 459*, p.13, (Create Australia)

6.26 The industry's concerns with these provisions, as expressed by MEAA, are that the quotas are too low, essentially token,<sup>16</sup> and that consultation with the United States is 'completely inappropriate'.<sup>17</sup>

6.27 It is suggested that the expenditure quota of 10 percent, especially as it applies to drama, would result in only about three and a half percent of actual programming. Even an increase to 20 percent would translate only into about a 7 percent transmission quota.<sup>18</sup> These figures compare unfavourably with the requirements for local content on free-to-air services. MEAA stated that the quotas also compare unfavourably with those imposed in overseas countries. Canada, for example, is said to have a 60 percent content quota on some channels.<sup>19</sup>

6.28 DFAT argues, however, that (a) expenditure quotas relate to new programming, which translates into new money for the industry, and that (b) programming quotas would allow channels to schedule reruns to meet the quotas. The department informed the Joint Committee on Treaties that:

That is why we think what we have here is a very good outcome.<sup>20</sup>

6.29 It can be argued that, because there will be many subscription channels, a 10 percent expenditure quota imposed on a large number of them would add up to a significant amount of money<sup>21</sup> for programming and production, and hence result in more work for the local industries. MEAA asserted, however, that because each subscription channel spends relatively little on programming, the local industry would have the capacity to meet not only the agreed quotas, but also higher quotas. MEAA stated that:

Essentially we believe that the argument that says we cannot make it [product] because there would be too many channels is simply not true.<sup>22</sup>

6.30 As stated above, the industry is also concerned that the agreement provides that the drama quota may be increased only after consultation with the United States. MEAA informed the Committee that the United States would oppose any increase in quota above 10 percent, and submitted a statement made by the Motion Picture Association of America to support this assertion.<sup>23</sup> MEAA recommended that the words 'that includes consultations with any affected parties including the United

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16 *Transcript of Evidence*, 4 May 2004, p.17, (Harris, MEAA)

17 *Supplementary Submission 85*, p.9, (MEAA)

18 *Transcript of Evidence*, p.17, (Elliott, Brown, MEAA)

19 *Transcript of Evidence*, p.19, (Herd, MEAA)

20 Joint Standing Committee on Treaties, *Report 61, The Australia-United States Free Trade Agreement*, p.181

21 Joint Standing Committee on Treaties, *Report 61 The Australia-United States Free Trade Agreement*, p.178

22 *Transcript of Evidence*, 4 May 2004, p.20, (Harris, MEAA)

23 *Supplementary submission 85*, p.9, (MEAA)

States' and the sentence, 'Any increase imposed shall be non-discriminatory and no more burdensome than necessary' should be deleted from the Agreement.<sup>24</sup>

6.31 The Select Committee notes, however, that it is standard practice in trade agreements to consult with affected parties where changes are sought, and also to proceed on the basis of measures being 'non-discriminatory and no more burdensome than usual'.

### ***Multichannelling***

6.32 While a reservation has been negotiated for local content for multi-channelled free-to-air commercial broadcasting services, the future of this technology is uncertain and it is not clear whether the reservation will have any beneficial effects for the Australian industry. One witness informed the Committee that:

We cannot see any example around the world of a successful free-to-air multichannelling operation. The BBC's Freeview operation is supported by very significant funding with the licence fee that the BBC has. In Australia we saw that the ABC's attempt at multichannelling had to be shut down because they could not afford it.<sup>25</sup>

6.33 According to MEAA the most likely use of multichannelling will be the provision of subscription channels<sup>26</sup> and the low quotas relating to that medium would apply, rather than the more generous quotas that relate to free-to-air services.

6.34 The industry has two other concerns about the agreement on free-to-air multichannelling. First, the industry claimed that it had not been consulted actively and that the Agreement in that regard had been unexpected.<sup>27</sup> Second, it is not clear what the effects of the agreed quotas will be, given uncertainties about how the media might develop.

6.35 MEAA stated that if the technology were to develop so that 24 free-to-air channels became available, the Agreement would require that only three of those channels should carry any Australian content. One witness stated that, 'If that were to emerge, we would be really concerned'.<sup>28</sup> The Committee notes, however, that the Agreement in fact specifies the 55% transmission quota for no more than 2 channels (or 20%) – whichever is the greater) *for any individual broadcaster*. This seems to imply that if there were 3 multichannelled broadcasters, each with 8 channels, then two channels per broadcaster - that is, six channels – would be subject to 55% local content rules

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24 *Supplementary submission 85*, p.9, (MEAA)

25 *Transcript of Evidence*, 4 May 2004, p.22, (Herd, MEAA)

26 *Transcript of Evidence*, 4 May 2004, pp.21-22, (Harris, MEAA)

27 *Transcript of Evidence*, 4 May 2004, p.21, (Brown, MEAA)

28 *Transcript of Evidence*, 4 May 2004, p.21, (Brown, MEAA)

6.36 MEAA is also concerned about sub-quotas for multichannelled television. It has suggested, consistent with its concerns about quotas for other free-to-air television broadcasting, that the words 'in a manner consistent with existing standards' in the reservation would prevent the introduction of new sub-quotas or changes to existing sub-quotas. It has proposed that the words be deleted from Annex II-6(a).

### *Advertising*

6.37 AUSFTA provides, in Annex I-14, that transmission quotas for local content imposed on advertising that is broadcast by free-to-air commercial television broadcasting services shall not exceed 80 percent of advertising time transmitted annually between 6.00 am and midnight. Because the reservation is contained in Annex I, the 'ratchetting' provision applies if the quota requirement is lowered.

6.38 There is no agreed quota for advertising on any other current or future broadcasting medium. The ABA submitted that networks seldom exceed half of the 20 percent of imported product permitted under the Australian Content in Advertising Standard which came into effect in 1992. This suggests that local advertising enjoys a level of natural advantage against imported product.

### *Interactive audio and/or video services*

6.39 MEAA is concerned that the term 'interactive audio and/or video services' may be too restrictive to enable future governments to regulate for Australian content on all future technologies. MEAA stated that it:

... notes that the use of 'interactive audio and/or interactive video services' remains unchanged from the draft text to the final text. It is of real concern that if, as previously advised, this terminology was intended to cover new media –currently known and yet to be devised – that it was not possible for certainty to be achieved by the inclusion of a definition.<sup>29</sup>

6.40 MEAA has proposed that the words of the reservation in *Annex II-7(f)* be changed to 'interactive audio and audiovisual services and all other audio and audiovisual services not yet regulated now known and yet to be devised'.<sup>30</sup>

6.41 DFAT informed the Committee that the wording of the reservation had resulted from close dialogue with the industry during the negotiations and that the wording had been used deliberately to leave open what type of mechanism would be used if governments were to choose to use them.<sup>31</sup> DFAT also stated that if an

29 *Second supplementary submission 85*, p.5, (MEAA)

30 *Supplementary submission 85*, p.9, (MEAA)

31 *Transcript of Evidence*, 6 July 2004, p.121, (Churche, DFAT)

audiovisual service is not interactive, if it is broadcast or if it is pay television, it is covered by other reservations under the agreement.<sup>32</sup>

6.42 The evidence is that both the industry and the negotiators were intent on ensuring that Australian governments would continue to be able to regulate for Australian programming content, whatever media might be developed. The issue is whether the wording of the reservation in *Annex II-7(f)* will achieve that end. The latest advice from DFAT on these matters was presented at the least hearing of the inquiry.

The local content arrangements we have at the moment are all based on forms of media where the viewer really has no control over what is broadcast. The whole point with free-to-air TV as we have historically known it, or with radio, is that someone else has the role of programming it and the audience has very little role in controlling it. So we have particular types of mechanisms. The whole point of that particular category [interactive audio and/or interactive video] was to recognise that, yes, the whole environment is changing. We do not even know what type of local content requirements we would use on interactive media. The whole point of the way in which that part of our reservation is worded is that we have deliberately left open what type of mechanisms we would use if governments were to choose to use them.<sup>33</sup>

### ***Public Broadcasting***

6.43 The government has consistently reiterated its assurances that nothing in the Agreement will affect in any way the government's right to support the cultural sector through the allocation of public funding. Nor will it affect public broadcasting via the ABC or SBS, including the amount of Australian programming on their channels.

6.44 The Australian Broadcasting Corporation (ABC) submitted that while the Agreement apparently is intended to exclude public broadcasters, the text may not have that effect.<sup>34</sup> The ABC has drawn attention to the definition of 'a service supplied in the exercise of governmental authority' which is, 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'.

6.45 The Corporation informed the Committee that while it does not compete with the commercial broadcasters for advertising contracts, it is in competition with them for both audiences and programs, and that a High Court judgement had found that its position is not materially different from a commercial broadcaster with whom it competes.<sup>35</sup>

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32 Foreign Affairs Defence and Trade, Budget Estimates, *Transcript of Evidence*, 3 June 2004, p.69, (Deady, DFAT)

33 *Transcript of Evidence*, 6 July 2004, p.121, (Churche, DFAT)

34 *Submission 130*, p.2, (Australian Broadcasting Corporation)

35 *Submission 130*, p.2, (Australian Broadcasting Corporation)

6.46 The ABC suggests that the matter could be resolved if the definition of 'services supplied ...' were amended to clarify beyond doubt that public service broadcasters are exempt from the operations of Chapter 10. If the ABC's operations could be caught under the operations of Chapter 10, then so would those of the SBS which carries advertisements. MEAA has also noted that the ABC operates retail outlets, music and book publishing arms, merchandising and video and DVD sales. MEAA suggests that an additional clause should be added to Annex II-6 to specifically exempt national and community broadcasters.<sup>36</sup>

6.47 DFAT has stated that because nothing in the Agreement affects the ability of either Party to provide public services, and subsidies and grants are explicitly excluded from the scope of the Chapter, reservations are not required in Australia's schedules in relation to publicly provided cultural activities, such as the public broadcasters (ABC and SBS), public libraries or archives, or in relation to Government funding available to Australian artists, writers and performers.



# Chapter 7

## Manufacturing

### The Agreement

7.1 Chapters of the AUSFTA affecting the manufacturing sector include Chapter 2 (National Treatment and Market Access for Goods), Chapter 4 (Textiles and Apparel) and Chapter 5 (Rules of Origin).

7.2 Chapter 2 applies to trade in all goods and commits both Australia and the United States to non-discriminatory treatment in trade in goods. Only those goods substantially made or transformed in Australia or the United States, which qualify under the rules of origin in Chapter 5, benefit from the commitments contained in Chapter 2. Chapter 2 consists of 13 Articles, 3 Annexes and an exchange of letters. It includes the following subject matter: national treatment; elimination of customs duties (tariffs); temporary admission; waiver of customs duties; import and export restrictions; and export taxes.

7.3 Under Article 2.2 of Chapter 2, Australia and the United States have agreed to abide by their WTO commitments to provide National Treatment. Essentially this means that Australia and the United States will provide the same treatment to imported goods from each other as they do to domestically produced goods. Under Article 2.3, tariffs on originating goods of the other party will be eliminated. The AUSFTA specifies whether the particular category of good will be duty free from the date the agreement comes into force, or will be subject to removal over a specified period.

7.4 Chapter 5 sets out the rules for determining which goods are originating and therefore eligible for preferential tariff treatment under the AUSFTA. The chapter consists of 17 Articles and an Annex.

7.5 Chapter 4 deals with issues affecting the trade in textiles and apparel. The chapter includes emergency safeguard mechanisms, rules of origin and customs cooperation. An Annex to Chapter 4 sets out the product-specific rules of origin applying to textiles and apparel which vary considerably depending on the particular product. The rules of origin which apply to textiles and apparel are based on a change in tariff classification approach and apply the stringent 'yarn forward' test. However, there are some exceptions to these rules of origin.

7.6 Chapter 18 (Labour) of the AUSFTA reaffirms both countries' obligations as members of the International Labour Organisation (ILO) and strives to ensure that the labour principles and rights stated in Article 18.7 are recognised and protected in domestic law.

7.7 The AUSFTA requires that each country effectively enforces its own domestic labour laws and that there be fair, equitable and transparent access to labour tribunals and courts. The AUSFTA recognises that it is inappropriate to encourage trade or investment that may weaken or reduce the protection afforded in each other's domestic laws.

7.8 There is a significant difference between Australia and the United States regarding the enforcement of labour laws. In the United States, labour laws are Acts of the United States Congress and are enforceable by actions of the federal government. Article 18.8.1 of the AUSFTA contains a definition of labour laws. The Australian Government is not able to enforce state labour laws. Therefore the AUSFTA has defined labour laws to mean Act/s of a parliament of Australia or regulation/s promulgated pursuant to such Act/s, directly related to the internationally recognised principles and rights set forth in Article 18.7. This means that the Australian Government would be responsible for a failure to enforce effectively either state or Federal laws. The Australian Government would be required to consult with the relevant state government should a dispute arise.

7.9 The dispute settlement procedures set out under Chapter 21 of the AUSFTA apply to the Labour Chapter in that the members of the panel chosen to determine the dispute are required have expertise or experience in the matter under dispute. Penalties are applied in the form of fines up to US\$15 million p.a. paid to the Party complained against. Within Chapter 21, dispute provisions in relation to labour only apply to domestic labour laws which have not been effectively enforced. It should be noted that conformity to the ILO obligations are not subject to dispute settlement under Chapter 21.

### **Impacts of AUSFTA on manufacturing**

7.10 It is an inescapable fact, given the prime place of manufactured goods in the trading relationship between Australia and the United States, that the AUSFTA will have significant implications for manufacturing firms and workers in both countries.

7.11 Assessing the impact on manufacturing of the AUSFTA must, from Australia's point of view, embrace both export flows from, and import flows to, Australia. Export oriented businesses in both Australia and the United States have been among the most ardent advocates of the AUSFTA.

7.12 A reason for care in trade agreements is that they are per se are a form of economic legislation. Removing barriers to exports obviously increases the competitiveness of Australian firms in foreign markets and often leads to an increase in the goods and services we can sell overseas and the jobs we create in Australia.

7.13 Conversely, allowing foreign firms to compete in the Australian market increases domestic competition applying downward pressure on prices and upward pressure on quality and efficiency. This has obvious benefits for the nation as a whole. However, greater foreign competition in Australia means market forces shape the

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economy, moving it in the direction of greatest efficiency, that is, where it is more competitive. Inefficient firms may lose market share or even go under.

7.14 The immediate increase in competition and unfavourable effect on prices, quality and efficiency will affect Australian industry – particularly Australian manufacturing firms. As a result significant readjustment across industry sectors and individual businesses will be required. This readjustment will mean that Australian businesses will need to invest in research and development (R&D), and skills and training including export skills. This will require a significant culture shift in Australia.

7.15 In the case of private sector investment in R&D, Australia lags behind our competitors, including the United States and significant stimulus from government will be required to ensure companies invest in R&D and that, in the longer term, they will view investment in R&D as necessary for survival.

7.16 Lack of investment in R&D and innovation is particularly stark in the manufacturing sector. The Australian Industry Group says that only one in four manufacturers in Australia invests in R&D and that very few collaborate with a public research institute. They go on to say that most manufacturing firms spend more on their electricity bills than on R&D. This must be readdressed by the government, in partnership with industry, as a priority.

7.17 The adjustment mechanisms to cushion the transitional effects of a shift to a more efficient economy are one of the most important issues in gaining public acceptance for trade agreements. The Centre for International Economics has published a list of where additional jobs will be created and where existing jobs will be lost if this Agreement goes ahead. Both individuals and industry sectors can be adversely affected by the market restructuring an FTA causes. The adjustments required to deal with these adverse effects are appropriate matters for the Select Committee to take into account in arriving at a balanced assessment of whether the FTA, overall, is in the national interest.

7.18 The differences in the economies of scale between industries in the US and Australia are not the only factor that will dramatically impact on Australian industry and Australian manufacturers. There is not a level playing field in the amount of government assistance provided to industry between the two countries.

7.19 The US government and state governments provide significant industry incentives, especially R&D incentives, of a scale such that Australia is currently unable to compete. With over a billion dollars in cuts to industry assistance programs since 1996, it is now imperative, if this Agreement proceeds, that the government increase assistance to industry, particularly by way of a stimulus to encourage investment in R&D.

7.20 The CIE 2004 report notes that Australia's main *exports* to the United States are durable manufacturing products comprising 32 per cent of total exports. Non-durable manufactures and services are the next most significant groups of exports,

each accounting for 28 per cent of total exports. Beef products (\$2 billion), machinery and equipment (\$1.2 billion), manufactures (\$1.2 billion), petroleum (\$1.1 billion), metals (\$1 billion) and automotive products (\$0.9 billion) were the top six commodities exported from Australia to the United States in 2002-03.

7.21 A majority of Australia's *imports* from the United States were durable manufacturing products, comprising 61 per cent of total imports. The top six imported commodities were transport equipment (\$6.4 billion including the significant item of air transport), machinery and equipment (\$6 billion, including medical instruments and earthmoving machinery), chemical, rubber and plastic products (\$3.5 billion), electronic equipment (\$2.2 billion), auto-motive products (\$1.8 billion) and other manufactures (\$1.4 billion). After services, non-durable manufacturing products were the next most significant group of imports into Australia from the United States, accounting for 17 per cent of total imports.

7.22 The degree of significance of manufacturing is further reflected in statistics describing the Australia-US trade relationship. Australia currently has a significant trade imbalance with the United States. The Australian Bureau of Statistics reported that for 2002/03 Australia's merchandise trade deficit with the United States was \$12.13 billion. This was easily the highest merchandise trade deficit that Australia recorded with any trading partner.<sup>1</sup>

7.23 Australia's trade imbalance with the United States was most acute in manufactured goods. For example, in the 12 months ended March 2003 the Australian Bureau of Statistics reported that Australia had:

- a \$2,554 million trade deficit in chemical and related products;
- a \$696 million trade deficit in manufactured goods classified chiefly by material;
- a \$10,459 million deficit in machinery and transport equipment; and
- a \$2,267 million trade deficit in miscellaneous manufactured articles.<sup>2</sup>

7.24 Given the importance of the automotive industry to Australian manufacturing including automotive components, it is appropriate to give additional consideration to the trading relationship between the Australian automotive industry and the United States automotive industry. The latest U.S. Government trade data shows that in 2003 the United States had a massive trade deficit with the rest of the world in the automotive sector, but the country with which the United States had the largest trade surplus in the automotive sector - an amount of \$US 885 million - was Australia. It is notable that in the auto components sector (which is within the broader automotive

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1 Australian Bureau of Statistics - International Trade in Goods and Services - 5368.0 - February 2004

2 Australian Bureau of Statistics - International Merchandise Trade - 5422.0 - March Quarter 2003

sector), the United States recorded a \$US 272 million trade surplus with Australia for 2003.<sup>3</sup>

7.25 The CIE 2004 report has addressed the issue of dynamic productivity gains arising from trade liberalisation. It concludes that in those sectors that are largely free trade already, and hence internationally competitive (typically the agricultural industries), the trade liberalisation undertaken by Australia has a positive effect on output. For those protected sectors (typically in manufacturing), Australian liberalisation may have a detrimental impact on output depending on the relative competitiveness of the United States sectors.

7.26 According to the CIE analysis, the United States trade liberalisation has 'varying effects on Australian industry sectors'. The report states that the impact of United States liberalisation on Australian output levels will depend on whether certain sectors in Australia are favoured more than others by the reduction in United States trade barriers and any resulting competition between expanding Australian sectors for resources. There will also be indirect effects and, depending on the inter linkages between sectors, these could be substantial.

7.27 According to CIE, industries increasing their exports to the United States will likely increase their demand for inputs (unless production is merely diverted from the Australian or other international markets to the US market). Hence, sectors supplying downstream exporting sectors may experience a production increase as a result of the United States trade liberalisation. However, if the increased United States demand results in the price of Australian products increasing, then any (downstream) Australian sector using that product as a production input will be subjected to a cost increase, which may culminate in a decrease in output.<sup>4</sup>

7.28 In short, a clear cut assessment of the impact on Australian manufacturing is not readily available. The CIE report, however, assesses that:

Across sectors, manufacturing and construction are the two largest beneficiaries from AUSFTA in dollar terms... Employment in both sectors is expected to increase.<sup>5</sup>

7.29 The CIE analysis reveals that the output for the majority of Australian sectors 'is estimated to be higher under AUSFTA than otherwise. However, there are some sectors for which AUSFTA is estimated to result in a contraction in output'.<sup>6</sup> Employment, according to the CIE, will move 'in the same direction and by a similar magnitude as the change in industry output. For around 16 per cent of sectors, the

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3 See US Office of Trade and Economic Analysis's "TradeStats Express" website at <http://ese.export.gov>

4 Centre for International Economics *Economic analysis of AUSFTA*, April 2004, p.86

5 Centre for International Economics *Economic analysis of AUSFTA*, April 2004, p.93

6 Centre for International Economics *Economic analysis of AUSFTA*, April 2004, p.84

increase in output is accompanied by a fall in employment. Broadly speaking, this can be attributed to greater capital accumulation in Australia'.<sup>7</sup>

7.30 One econometric assessment that was undertaken specifically to examine the manufacturing impacts of the AUSFTA assessed the overall employment outcomes as negative.

In terms of employment, the expected loss of employment in average annual terms from what would otherwise have been the case is assessed at 57,700. However, by 2025 there is a 2.5 per cent probability that the employment losses will be greater than 195,400 from what otherwise would have been the case. This is balanced by a 5 per cent probability of employment losses in 2025 less than 81,400. This result indicates the extent to which the downside risks are greater than the upside risks.<sup>8</sup>

7.31 Notwithstanding these concerns, many of Australia's peak business and industry groups have warmly welcomed the AUSFTA. These views have been put to the Committee both in submissions and in oral evidence, and in various public statements. The latter are conveniently summarised by DFAT in the following manner.

7.32 The Australian Chamber of Commerce and Industry described AUSFTA as “a high quality agreement which benefits the whole Australian economy, including the manufacturing, services, agricultural, mining and investment sectors”, and which “will give Australian business substantial new market access opportunities in one of the world’s most dynamic and innovative economies.”

7.33 The Business Council of Australia said the agreement “will provide massive opportunities for Australian companies of all sizes to gain access to the world's largest market.” The Chief Executive of Australian Industry Group, the manufacturing peak body stated that “we cannot underestimate the potential benefits of better access to our second largest export market after Japan and the primary source of Australia's foreign direct investment”. The Minerals Council said that the FTA “is just the fillip the Australian minerals industry was looking for from these trade negotiations”.

7.34 While the National Farmers Federation is disappointed with the US's unwillingness to provide early open access for all of the agricultural sector, the NFF has pointed out that the FTA achieves market access gains for a range of agricultural industries - including dairy, beef, horticulture, sheepmeat and wool. The Australian Seafood Industry Council has said benefits of the deal will be felt right across the Australian seafood industry with the abolition of tariffs, and the industry is confident

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7 Centre for International Economics *Economic analysis of AUSFTA*, April 2004, pp.86-87

8 National Institute of Economic and Industry Research, A report for the Australian Manufacturing Workers Union (AMWU) *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* May 2004, p.(v)

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it will be able to boost its current exports into America, which are currently around \$150 million a year.

7.35 With respect to the automotive sector, the CIE 2004 report notes that the tariff reductions by both parties 'opens up new opportunities for Australian exporters and introduces possible threats to the domestic motor vehicle industry'.<sup>9</sup>

7.36 In its earlier 2001 report *Economic Impacts of an Australia-United States Free Trade Area* the CIE predicted a worsening of the bilateral trade balance in the automotive sector under AUSFTA and a contraction in output in the industry.

[T]he majority of additional exports from the US to Australia as a result of AUSFTA are manufactured goods ... For example US exports of motor vehicles and parts to Australia increase by US\$525 million following Australia's elimination of bilateral motor vehicle and parts tariffs...<sup>10</sup>

However we observe a slight fall in the output of the Australian MVP sector, meaning that the sector's loss of market share to United States MVP imports outweighs any expansion effect brought on by cheaper production inputs and increased export opportunities to the United States.<sup>11</sup>

7.37 However, in its 2004 analysis of the actual Agreement, the CIE offers considerable comfort from a special case study of passenger motor vehicles and parts, noting that the AUSFTA has been 'well received by the major motor vehicle manufacturers and FAPM [Federation of Automotive Products Manufacturers]'.<sup>12</sup> The CIE report emphasises the opportunities to both vehicle and components manufacturers, and assesses that threats to the Australian passenger vehicle market as a result of AUSFTA are limited.<sup>13</sup>

7.38 This is regarded as cold comfort by the Australian Manufacturing Workers Union, highlighting the recent loss by an Australian parts manufacturer of a major contract.

The windscreen manufacturer Pilkington, has already announced the reduction of its workforce because of the loss of a 70 year old contract with Holden. The contract was lost due to increased import competition arising out of the Australia - Thailand free trade agreement. Previously Pilkington had lost a contract with Ford Australia who chose to source from China. This occurred because increasingly American companies are being required

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9 Centre for International Economics *Economic analysis of AUSFTA*, April 2004, p.122

10 Centre For International Economics, *Economic impacts of an Australia - United States Free Trade Area*, June 2001, p.43

11 Centre For International Economics, *Economic impacts of an Australia - United States Free Trade Area*, June 2001, p.40

12 Centre for International Economics *Economic analysis of AUSFTA*, April 2004, p.125

13 Centre for International Economics *Economic analysis of AUSFTA*, April 2004, p.124

to source as much auto components as they can from China to sustain their own position inside that country's booming auto industry.<sup>14</sup>

7.39 The Select Committee notes the enthusiastic comments by US automotive industries who regard the AUSFTA as providing an unprecedented opportunity for them to enhance their global market dominance.

This agreement will provide concrete market openings for U.S. auto and auto parts manufacturers, who are already significant exporters to Australia. These expanding trade opportunities are so important for the U.S. economy, and especially the automotive industry, because a strong presence in international markets provides the crucial edge for competitiveness and strength. With a U.S.-Australia Free Trade Agreement, the tariffs we had to pay on our vehicles and parts exports to that country will disappear forever — but they remain in place for our Japanese, Korean and other global competitors. This gives an immediate and major competitive advantage to U.S. automotive products in the Australian market that kicks in the day the agreement is signed.<sup>15</sup>

The U.S.-Australia Free Trade Agreement gives our auto companies a real leg up. As a result of this agreement, on January 1, 2005, American auto exports to Australia will cost 10 to 15 percent less than our Japanese, Korean, and European competitors. That means more work building cars for export to Australia for the 600,000 Americans employed by auto companies and the 2 million Americans who work for auto suppliers, as well as the many industries that support those companies. These are real benefits that we will bring to those American workers and many others by passing this agreement today.<sup>16</sup>

7.40 The AMWU cites reports commissioned by the Victorian and South Australian governments that both point to likely job loss and contraction in the automotive and components industries. The modelling commissioned by the South Australian Government from Allen Consulting Group found that there would be likely job loss and contraction in South Australia's automotive and auto component industry. Allen Consulting Group noted the uncertainty and disagreement amongst auto and component companies about the agreement:

Some segments of the industry in South Australia see opportunities from the AUSFTA. Others are concerned that the AUSFTA could disrupt plans

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14 Bachelard M, "Holden Dumps Its Aussie Glass Firm", *The Australian*, 12 February 2004, p.4

15 Stephen J. Collins, 'Trade pact with Australia will help autos and Michigan' *Detroit News*, 16 July 2004

16 Representative Joe Knollenberg, Speech on United States-Australia Free Trade Implementation Act, US Congress, 14 July 2004

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made under previous assistance arrangements implemented by the Commonwealth Government.<sup>17</sup>

7.41 The study commissioned by the Victorian Department of Premier and Cabinet from the Centre of Policy Studies came to similar conclusions about the impact of AUSFTA on Australia's auto and component industry:

[T]here are seven industries for which the FTA reduces output to baseline values in the long-run year (2020). Prominent among these is motor vehicles and parts. The Australian motor vehicles industry faces quite strong competition in its local market from USA imports; USA import penetration is at 7.3 per cent. Relative to the level of USA-import penetration, though, its USA-export propensity is quite low (2.6 per cent). The relatively high rate of import penetration, combined with an initially high rate of protection in AUS against USA imports means that when the protection is removed the surge in USA imports causes a relatively significant contraction (relative to base) in the output of the local industry.

7.42 The most obvious weakness is motor vehicles and parts. This sector is projected to experience a 1.12 per cent decline in output at the national level (and in Victoria), compared to a rise of 0.17 per cent in real GDP, and is over-represented in Victoria.

...over 1,100 full and part time jobs will be lost from the Motor Vehicles and parts industry in the long-run year. Of this, around 800 will come from Melbourne and almost 200 from the Barwon region.

7.43 The Committee is very concerned about the impact of the agreement on the automotive industry in both Victoria and South Australia. Should the scenario highlighted by the modelling undertaken by Victoria become reality, significant readjustment measures will need to be implemented by the Government.

7.44 The Select Committee also had its attention drawn to comments in the US press that are alarming for the Australian auto industry. The head of GM North American operations, Mr Bob Lutz pointed out in the *Detroit Press*, that if the Australian manufactured Monaro (which is exported to the US) achieves sufficient volumes and market acceptability, production would be shifted from Australia to the US.

7.45 The Committee is very concerned that the only real gain for the automotive sector out of the agreement is the possible increase in exports of utility trucks ('utes') and that the US companies could easily take this gain away. The Government should undertake, as a matter of priority, analysis of the effect of the Agreement on the whole automotive industry.

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17 Allen Consulting Group, "The Australia – United States Free Trade Agreement: Potential Impacts on South Australia", October 2003, p(viii)

7.46 The Federation of Automotive Products Manufacturers appeared before the Select Committee and its views were canvassed on a wide range of issues related to the AUSFTA, ranging from enhanced export opportunities, to employment impacts, to rules of origin. FAPM's Chief Executive summarised his organisation's view as follows:

Certainly I would reiterate my opening remark that the general stance of the components sector was in favour of the United States free trade agreement, without necessarily throwing our hats over the stand. It was seen as positive, but mildly so. Casting that bread on the water, we continued to support it all the way through.<sup>18</sup>

7.47 Mr Upton described the overall consequences of successful implementation of the Agreement as 'roughly neutral to slightly positive'<sup>19</sup>. As far as the impact on employment was concerned, FAPM regards it as:

... neutral because, generally speaking, over the last 15 years or so in automotive companies, increases in production and output have not been matched by increases in employment. The industry generally operates under a pretty severe cost-down methodology. It does that world wide. In order to compete we have to employ that method in Australia. That is translated into employment on the whole being relatively static and/or declining. I would expect that even with an increase in trade to the United States that may be the continued trend. But it won't be the catastrophe, in our view, that Mr Cameron is painting.<sup>20</sup>

7.48 In its submission to JSCOT, the Federal Chamber of Automotive Industries said that it recognised that preferential trade agreements 'form a legitimate part of an appropriate and balanced trade policy', and should ensure a 'proportionate strengthening of market access arrangements for Australian exporters, in return for increased access [by the US] to the Australian market'. FACI drew attention to a statement by its President (Mr Polites) concerning the 'significant opportunities' for Australian automotive exports. The submission went on to say that:

...the Agreement would likely result in some additional competitive challenges for the Australian industry. Under the terms of the Agreement, imports of vehicles and automotive components from the United States will receive preferential access to the Australia market. This may have some impact on future trade and investment patterns, although it is difficult to assess how far-reaching any such outcomes may be in the long term.<sup>21</sup>

7.49 The submission went on to say that 'the pattern of benefits and costs will not be evenly distributed across all participants in the industry'.

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18 *Transcript of Evidence*, 24 June 2002, p.13 (Upton, FAPM)

19 *Transcript of Evidence*, 24 June 2002, p.13 (Upton, FAPM)

20 *Transcript of Evidence*, 24 June 2002, p.10 (Upton, FAPM)

21 Federal Chamber of Automotive Industries, *Submission* to JSCOT, p.2

7.50 The Committee believes that it is imperative that the Government and industry work together to inoculate the industry against these challenges by creating an innovative culture, stimulating investment in R&D and education and training.

7.51 Closer integration of the Australian automotive subsidiaries of US manufacturers, for example, Holden Australia and General Motors in the US, has been widely canvassed in the submissions and the media as a potential negative impact of the agreement. The Committee expresses concern that closer integration will indeed be a product of the agreement that that this could lead to US companies in Australia purchasing more parts and components from businesses associated with their US head office. This poses very real threats to our local automotive component sector.

7.52 The Government has not undertaken any assessment of this issue and it should have done so before finalising the agreement. As the Supplementary Budget Estimates Hearings found, the failure of the Industry Department to undertake any analysis of the impact of the agreement of the automotive sector is of great concern to the Committee.

7.53 This analysis should be completed as a matter of urgency before the Agreement proceeds, and if it is not done so, a reference should be made to the Productivity Commission immediately for this work to be done.

7.54 The ACTU is concerned about the potential exacerbation effect of AUSFTA on job losses in the manufacturing sector, particularly in the Textile Clothing and Footwear and motor vehicle components industries. The 'yarn forward' rule is to the detriment of Australia's exports, and the Textile Clothing and Footwear Union estimates that around 80% of the industry's goods will not qualify for export to the United States using this rule.

Australia argued for the rules of origin as negotiated with the ANZCERTA to apply that is, 50% value-adding qualifies for free trade. The US system is what is called the yarn forward rule. That is, goods can be made-up overseas (the labour component being the costly part) as long as they are made-up using American yarn. This is how they protect their domestic textile industry.

Despite the lack of agreement on rules of origin, the FTA stipulates that textile and clothing items produced in the US and shipped to Australia will immediately be given a two per cent preference over the general tariff rate.

Under the rules, for example, a five per cent tariff would be reduced to three per cent for qualifying US products. Similarly, a 15 per cent tariff would be reduced to a 13 per cent tariff. This form of reduction will continue until all Australian tariffs on clothing and textile products are eliminated by 2015. Given the failure to change the rules of origin this will be a one-way free trade agreement.

The bulk of Australian TCF industry (up to 80%) cannot meet US yarn-forward rules because much of our yarn is sourced from Asia. Most US companies meet this rule which means that by 2015 the benefits of the FTA will only flow to US companies.

These 'rules of origin' issues are in addition to concerns that large US companies with volume production will be able to flood the Australian market with cheaply made goods in some TCF areas where Australia has traditionally maintained a strong domestic base.<sup>22</sup>

7.55 The Regulation Impact Statement, which accompanies the Agreement, states that the regions will benefit from the opportunities created by the Agreement depending on the ability of regional exporters of goods and services to respond to those opportunities. The Committee challenges this assertion, particularly in relation to the TCF industry.

7.56 The TCF sector will be severely hampered by the yarn forward rule, which will not see additional exports to the US. Most of the Australian TCF industry is in regional Australia, in towns such as Devonport, Bendigo, Ballarat, Wangaratta and Wollongong, just to name a few. The committee is most concerned that the agreement will result in significant downsizing of the industry in those regions. Entire towns and regions depend on the TCF sector, and for some towns a TCF business is the only significant employer

7.57 The Australian Industry Group, which has broad coverage of a range of Australian industry sectors, advised the JSCOT inquiry that:

The one area remaining that Ai Group does not endorse is the ROO for TCF products, which virtually ensure the Australian TCF sector does not attain open market access.

...In the case of TCF, very stringent ROO tests, which include the so-called "yarn/fibre forward" rule, effectively excludes a significant proportion of Australian produced apparel as not originating in Australia for the purposes of the FTA, given that most yarn used in production would not have originated in Australia.<sup>23</sup>

7.58 The Select Committee is also concerned about the sheer disparity in scale between the US textile industry and its Australian counterpart. According to the TCFUA:

Our industry is tiny compared to the US. We employ 58,000 workers in the regulated sector, whilst the US employs 520,000 clothing workers and 432,000 textile workers. Capital investment in the US textile sector in 2001 (excluding clothing) was \$2.2B US dollars. The equivalent period in Australia saw \$202M (AUD) invested in the entire Australian TCF industry.

Our industry is tiny, it is a minor player in the US domestic market and yet the US FTA is treating us as though we represent the same level of threat that China represents to the US TCF market. In 2002 the US represented 7% of all Australian TCF imports of textiles and 1.6% of clothing. The US

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22 *Submission 204* (Textile, Clothing and Footwear Union of Australia) p.1

23 Australian Industry Group *Submission* to JSCOT, pp.8-9

FTA is likely to see an increase of textile imports, especially over time with the continued winding down of tariff rates. At the same time Australia's share of the US domestic market is unlikely to change as a result of the FTA.

Australian companies most at risk are those which are more capital intensive, competing at the higher end of the value chain. These are the very companies the Australian Government has earmarked for survival through their SIPS scheme, but ironically are most likely to face competition from volume production from US plants with new capital equipment, who will now see their tariff rates reduced under the agreement.<sup>24</sup>

7.59 Representatives of employees in manufacturing generally have insisted to the Select Committee that there are real risks to having Australian firms exposed to the American manufacturing juggernaut – in particular, the larger economies of scale enjoyed by U.S. manufacturers as well as U.S. manufacturing's higher rates of investment in research and development and technology.<sup>25</sup>

7.60 By way of example, the AMWU provided the following table showing the relative size of a number of U.S. manufacturing sectors compared to the equivalent Australian sectors in terms of each sectors' importance to world production. The figures, which are for 2001, show an Australian manufacturing industry dwarfed by its U.S. counterpart.

	United States		Australia	
	<i>Percentage of World Production</i>	<i>World Rank</i>	<i>Percentage of World Production</i>	<i>World Rank</i>
<b>Food Products and Beverage</b>	22.2%	1	1.8%	12
<b>Wood and Cork Products</b>	24.7%	1	1.8%	14
<b>Printing and Publishing</b>	32.4%	1	1.3%	11
<b>Metal Products</b>	23.4%	1	not available	not in top 15
<b>Basic Metals</b>	19.6%	2	1.7%	14
<b>Transport Equipment</b>	25.9%	1	0.9%	15

24 *Submission 204* (Textile, Clothing and Footwear Union of Australia) p.2

25 *Submission 463* (Australian Manufacturing Workers Union)

7.61 The AMWU argues that the United State's advantages in manufacturing will not disappear overnight, and asks 'What then will happen when Australia surrenders its tariff advantage over the United States virtually overnight?' The AMWU submits that it is clear that to the extent employers are unable to pass losses directly on to their workers through insecure forms of employment and downward pressure on wages and conditions, increasing numbers of Australian manufacturers will either cease production or move offshore.<sup>26</sup>

7.62 The Select Committee was both impressed and concerned by the submissions and evidence from representatives of the petrochemicals industry. The impact on the industry of the AUSFTA highlights the problems that arise when consultations and negotiations are not sufficiently robust, nor consistent across trade agreements. As a result, even high value-adding, strategically-focused and employment-generating industries can suddenly find themselves significantly threatened.

7.63 The industry employs around 70,000 people and turns over somewhere between \$25 billion and \$30 billion per annum, and there are many thousands of jobs, in SMEs and elsewhere that are integrated into various downstream activities. The following overview indicates the nature and scale of the issues at hand:

As an industry we have a track record of demonstrating that we can make the adjustments necessary to stay internationally competitive. So we are not here as a manufacturing group that is seeking to maintain or even increase protection from the outside world. We face the outside world every day of the week. This industry, not much longer than 10 years ago, in the late eighties, operated behind 30-plus per cent tariffs. Today we have a minimal tariff of five per cent. We have demonstrated that we are more than capable of meeting the challenge of making the adjustments necessary to remain competitive.

We build on typically indigenous feedstock. ... to make high-value products that then go into the downstream processing operations. There is an enormous tooling industry and contracting industry that sits on the back of our businesses as well. So whilst we might employ 1,000 people directly, indirectly each of these businesses employs an enormous number of people through the contracting and tooling industry ...

The jobs are very high value added. People do get paid enormously well. These industries will not be replaced if they go. They will not be replaced by greenfield operations; they will be gone forever and the country would be thereafter dependent on imported product to replace the outputs that we make as an industry. So we think we make an enormous contribution to the community and to the Australian economy. ... We think we are capable of making the adjustments to remain competitive, but we need time to make those adjustments.<sup>27</sup>

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26 *Submission 463* (Australian Manufacturing Workers Union)

27 *Transcript of Evidence*, 7 June 2004, p25 (Bell, Qenos Pty Ltd)

7.64 The industry considers the immediate reduction of tariffs from 5% to zero to be hugely problematic, giving no time for appropriate restructuring and reinvestment. The history of the Singapore FTA indicates that such an immediate tariff reduction would see a \$50 per tonne reduction in the prices of products in the marketplace that Australian firms had to match to retain their market position. The AUSFTA also undermines agreements recently entered into by Australia with Thailand.

Principally we are concerned about consistency. For the Thailand FTA—and I represented the plastics and chemicals industry in the negotiation of that FTA—we put forward a submission about phasing on a number of products over a period of time, which was agreed to. We had phasing on a broad range of products in the period to 2008. We put forward the same view for the United States trade agreement, but only two months later we get an outcome which says that the tariff on those products will go immediately.<sup>28</sup>

7.65 The industry also has considerable concerns about the dumping of product on the Australian market, which compounds the difficulties of responding to sudden tariff reductions. The industry is satisfied that Australia's antidumping legislation is sound. The problem, as they see it, is that Australian Customs does not have the resources to implement antidumping measures robustly. Timelines for antidumping cases are a significant problem.

I have just got a case in, and the costs are running at close to \$200,000. I took the decision to lodge that case in May last year. It still has not been initiated. In the meantime I still have to face what I consider to be predatory pricing activities from overseas companies.

The second issue is that we have a range of timelines. We say we will complete a case within 175 days. Cases are routinely given extensions of time—not as a matter of an unusual circumstance but routinely. At one stage last year, 100 per cent of all cases were given extensions of time. So there is a definite problem with the administration of antidumping actions in Australia. ... It is not all Customs' fault. They are asked to do a very difficult job, and they do not have the resources to do it. That needs to be addressed. Equally, some of these are very complex cases, and they do not necessarily have the expertise to deal with them. That is not going to be overcome unless you put some resources in. If we are going to go forward and move tariffs to zero—and we accept that that will be the outcome—we want to make sure that the administration of the one measure that we have available, which is through dumping and countervailing measures, is effective and timely and that the resources and skills that are needed to make pretty complex decisions are available. That is not the case today.<sup>29</sup>

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28 *Transcript of Evidence*, 7 June 2004, p.22 (Winstanley, Australian Vinyls Corporation)

29 *Transcript of Evidence*, 7 June 2004, p.34 (Winstanley, Australian Vinyls Corporation)

7.66 The Select Committee considers that it would be a serious loss to Australia if capable, go-ahead domestic firms were forced to close their doors simply because they had not been given a reasonable time frame to adapt to the conditions imposed by AUSFTA. The example of the petrochemicals industry is a classic case of the problems arising from the way AUSFTA has been negotiated - 'sign in haste, repent at leisure'.

7.67 The question of structural adjustment packages for industries adversely impacted by AUSFTA was raised during the Select Committee's inquiry, prompted largely by the support offered to the sugar industry in the light of its failure to gain access to United States markets. The Select Committee believes that structural adjustment assistance is one of the downstream consequences of significant changes arising from trade liberalisation – especially in the area of tariffs – that governments must take fully into account in assessing the overall benefit to the nation. The costs that government is willing to incur in order to assist industries to adjust appropriately is a proper element to be factored into the AUSFTA equation.

7.68 Work to establish these costs should have been done as part of the economic modelling commissioned by the Government prior to finalising and supporting the Agreement. This work on adjustment costs must now be done as a matter of priority.

### ***Impact of brand recognition***

7.69 Brand penetration, which is a natural consequence of an increase in imports of products such as cars, clothing and textiles, will undermine Australian produced goods and services. As imports increase, so too will US brand recognition, leading to a further undermining of Australian manufacturers, Australian brands, and Australian culture.

## **Rules of Origin**

7.70 Of considerable importance to manufacturing is the issue of rules of origin. It is precisely such importance that, according to DFAT officials, ensured that much attention was paid to how AUSFTA would deal with 'ROOs'.

I can say very clearly that we have had a lot of discussions with Australian industry about the rules of origin. Because it was such a change to our usual approach, we did spend a lot of time talking to them. I think we both learned through that process, and I certainly believe from everything I have heard and you have heard from Australian industry that they are very comfortable now with the rules of origin under this agreement.<sup>30</sup>

7.71 The Select Committee received conflicting advice on whether rules of origin were likely to be problematic. Typical contrary views are the following:

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30 *Transcript of Evidence*, July 2004, p.56 (Deady, DFAT)

The other thing I would say as a lawyer is that... the certificate of origin type rules are extremely expensive. It is very easy to underestimate the cost of complying with regulation, particularly for a business that is not a very large business with economies of scale. Lawyers and complex administrators are expensive beasts. This introduces a whole new bundle of rules which will have to be complied with.<sup>31</sup>

It is said over and over again that the rules of origin are extremely costly. The Australian Industry Group, which represents manufacturing, considers that they will not be a significant impediment to trade between Australian companies and US markets, although there is very little empirical work about the actual impact of them. The Productivity Commission recently looked at the impact of rules of origin on the Australia-New Zealand free trade agreement and found something that I think instinctively you would not be surprised to realise: because of the adaptation and use of IT systems it is now relatively cost-effective for businesses to comply with complicated rules of origin because of the capacity use to computerised systems, like we do with customs clearance, to manage them.<sup>32</sup>

7.72 According to the government, simple and objective tests apply to rules of origin for manufactured products, which must be substantially transformed in either Australia or the United States before they can benefit from the Agreement. The government also states that rules of origin agreed in the AUSFTA will particularly benefit Australian manufacturers that rely on imported petrochemical products and other goods with fluctuating world prices. Not so, claims other witnesses.

The AMWU rejects the government's claims in its fact sheet on the proposed AUSFTA that the rules of origin in the agreement are "simple and objective". On the contrary, the AMWU submits that the hundreds of pages of product specific rules of origin are extraordinarily long and complex.<sup>33</sup>

7.73 The positive view articulated by Chief Negotiator Deady was reiterated in the Regulation Impact Statement prepared by the government:

The rules of origin (ROO) proposed for the agreement, which represented a departure from the existing models used for preferential tariff arrangements by Australia, were the subject of an extensive separate consultation process with all interested industry sectors. The Government's decision to proceed with the proposed system reflected the fact that virtually all sectoral organisations were either positively disposed towards, or prepared to accept, a general rule of origin approach based on change of tariff classification. With the support of Australian industry, the Government also sought to have the latter approach applied to the textiles and clothing

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31 *Transcript of Evidence*, 5 May 2004, p.26 (Buckley, Tim Fischer Centre)

32 *Transcript of Evidence*, 5 May 2004, p.26 (Oxley, AUSTA)

33 *Submission 463*, p.22 (Australian Manufacturing Workers Union)

sector rather than the special “yarn-forward” rule proposed by the United States side, but was unable to persuade the US to move from this position.<sup>34</sup>

7.74 Chapter 5 of the Agreement sets out the rules for determining which goods are originating and therefore eligible for preferential tariff treatment under the Agreement (also Chapter 2). The text comprises 17 Articles and an Annex (5-A). It also refers to Annex 4-A which is part of the Textiles Chapter.

7.75 Technically, the rules of origin for the Agreement mean that there must a change in tariff classification i.e. the inputs move the product from one tariff code to another. Manufacturers need only be aware of the tariff codes for imported inputs and final products.

7.76 Where it is difficult to demonstrate that a product has been 'substantially transformed' through the tariff change rule, an additional or alternative local content threshold test will be applied, under which domestic materials and processes will need to form a set proportion of the final value of the product.

7.77 The AMWU is not persuaded that this approach is effective:

[T]he partial reliance on the change in tariff classification approach used in the AUSFTA incorporates a significant element of arbitrariness into the tariff treatment of many products. The arbitrariness arises in part because the Harmonised System was not designed for the identification of origin but for the presentation of trade statistics. As the Productivity Commission has noted when recommending against a proposal to change the rules of origin under the Australia - New Zealand CER Trade Agreement to a tariff classification approach, "the extent of transformation involved in a change in tariff classification would vary between classification levels and between categories at each level". Merely because a good may have changed (or may have not changed) tariff classification in a country does not mean that a product was (or was not) substantially produced in that country.

On its present analysis the AMWU is not satisfied that the additional requirements attached to some products will be sufficient to remedy this problem.<sup>35</sup>

7.78 Rules of origin were discussed at considerable length during both the Select Committee inquiry and at Senate Estimates hearings. Chief Negotiator Stephen Deady summed up the position as follows:

We have made the point before that we have adopted a different set of rules of origin under this agreement with the United States. It is a change from the normal arrangements that Australia has in place in the CER with New Zealand and what we did with Singapore, but we believe that the rules of origin are in fact a very efficient way of dealing with this issue of

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34 *Submission 161, "Regulation Impact Statement", p.22 (DFAT)*

35 *Submission 463, p.22 (Australian Manufacturing Workers Union)*

substantial transformation. ...A large amount of the trade actually takes place at zero [tariff], so the amount of preferential trade is only a subset of the total trade and, of that subset, most of it in fact does take advantage of the rules of origin and the preferences.

In the case of the dealings with the United States, a vast amount of Australian product is going into the United States, including all the agricultural products and a large amount of the manufacturing products, and—and this has come not just from us but from industry—there is no real concern or doubt that Australia will meet those rules of origin. The one exception to that is the textiles and clothing area, where we acknowledged right from the start that the rules of origin were unfavourable to Australia. That was fully taken into account by Dr Stoeckel in the methodology and calculations, and we stand by the way the CIE calculated this, by rightly assuming that the vast amount of Australian product could meet the rules of origin established under the FTA quite easily.

...Our view, which is supported by Australian industry, is very strongly that that is not the case. A change of tariff classification is in fact a simple way, at minimal cost to Australian industry, to meet those rules of origin. Where there is a value added component, Australian industry is very familiar with such value added components. That is the approach that we use in the CER and, again, they could meet those rules of origin to meet the tests of the US-Australia FTA.<sup>36</sup>

7.79 The Select Committee raised the issue of rules of origin with the automotive peak bodies in particular. The Federal Chamber of Automotive Industries addressed the matter as follows:

I want to briefly comment on the rules of origin, which are a significant part of the agreement as well—and they are obviously an area of key interest to the Australian car industry. The rules of origin in this agreement do represent a significant departure from those adopted in other preferential agreements which Australia has entered into. Under the longstanding Australia-New Zealand Closer Economic Relations Trade Agreement and the more recent Singapore-Australia Free Trade Agreement, for example, the rules of origin for most manufactured goods are based upon the uniform requirements that the last process of manufacture should have occurred within the free trade area. Also, at least 50 per cent of the allowable cost of manufacture—or ex-factory cost, as it is sometimes referred to—must represent qualifying expenditure.

In contrast, the rules of origin in this agreement are based on different criteria, which can vary in application from product to product. In most instances, the rules of origin require that items have undergone a change in tariff classification from one heading or a related group of tariff headings to a completely different heading. For many items the agreement also provides that origin may be conferred if a minimum level of regional value content is achieved. In most instances in the agreement, regional content is measured

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<sup>36</sup> *Transcript of Evidence*, 6 July 2004, pp:55-56 (Deady, DFAT)

on the basis of a transaction value of the final product calculated using either a build-down approach or a build-up method. However, for a number of key automotive products—vehicles, engines, bodies, chassis and many key components—regional content is determined in this agreement using an alternative net cost method. In principle, this is quite similar to the ex-factory cost approach, although there are some differences in what is and what is not included in the measure.<sup>37</sup>

7.80 Automotive component manufacturers agreed that specifically automotive rule of origin 'is approximately the same as the Australia-New Zealand 50 per cent ex-factory cost method'.

[O]n the whole my membership was convinced that it was a fairly straightforward and reasonable rule to adopt. It did not ameliorate entirely the concern that we now face quite a number of rules of origin. There is a different one in the Singapore free trade agreement, a different one in the Thai free trade agreement and a different one yet again in the New Zealand free trade agreement, and some of them require different accounting standards to be adequately met. The NAFTA net cost rule is basically resolved when there is a dispute under the general agreement on accounting procedures that the Americans account under, the NYSE. There is a little bit of familiarity to be gained in there and no doubt some dispute, but the rule will operate as an either/or—if there is a change in tariff classification you can opt for that and if there is not a change in tariff classification then you need to prove local content. It is one or the other. We think that is not too bad.<sup>38</sup>

7.81 The Select Committee acknowledges the problems posed by the 'yarn forward' rule in the TCF area and that this will have a significant impact on the industry's ability to export to the US. Conversely, it will assist US exporters and there is a fear that Australia will be flooded with US made clothing and textiles. This will undermine Australian brands leading to job losses.

7.82 It is clear from both the submissions and the testimony that the ROOS for other industry sectors are complex and costly. However it seems that most industries believe they are, in the words of FAPM, "workable".

Ai Group initially objected to adopting the US product-specific methodology, given its prima facie complexity, unfamiliarity to Australian exporters and potential for manipulation to protect a party's national interests. After months of careful analysis and consultation with Australian industry (see the Section above on "Ai Group and the consultation process") Ai Group changed its position to one of general support for the ROO methodology.<sup>39</sup>

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37 *Transcript of Evidence*, 24 June 2004, p.49 (McKellar, FCAI)

38 *Transcript of Evidence*, 24 June 2004, p.4 (Upton, FAPM)

39 Australian Industry Group *Submission* to JSCOT inquiry, p.8

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## Government procurement

7.83 Chapter 15 of the AUSFTA covers government procurement. It requires each government to afford the suppliers, goods and services of the other country the same treatment that applies to domestic suppliers, goods and services.

7.84 Australia's government procurement process is already largely unrestrained. The United States, however, has two pieces of legislation which currently impact upon Australian companies' ability to supply goods and services to the United States government: The *Trade Agreements Act* of 1979 (which prevents United States Federal Government agencies from accepting bids from Australian companies because Australia is not exempt under the Act); and the *Buy America Act* of 1933, which imposes a 6% penalty on the supply of foreign goods to the United States Federal Government. The AUSFTA would remove the impact of these two Acts on Australian suppliers.

7.85 There are, however, a range of exceptions included in the AUSFTA, particularly in the areas of defence, and in policies designed to favour procurement from small and medium firms, and from minority groups in each nation.

7.86 In practice, the most significant impact on Australian government purchasing will be the imposition of new tender requirements, as set out in Articles 15.7 and 15.8 of the AUSFTA. Under these requirements, there is likely to be a larger number of open tenders (as opposed to selective or invited tenders) for Australian government procurement. The AUSFTA will also impose standards for the advertising of tenders, and requirements for the time between the announcement and the close of tenders.

7.87 The measures in Chapter 15 will be integrated into the existing Commonwealth procurement framework. In general terms, this framework requires agencies and their officials to conduct their procurement activities efficiently, effectively and ethically. The integration of the measures will mainly occur through revision of the CPGs.

7.88 The Australian Government Solicitor has prepared a very useful edition of its *Commercial Notes* dealing with government procurement aspects of AUSFTA, and the Select Committee considers it helpful to reproduce here some of the AGS commentary.<sup>40</sup>

7.89 The key messages for agencies arising from Chapter 15 of the FTA are:

- Many of the measures are consistent with the existing procurement framework applicable to agencies, and reflect current policy and practice in how agencies conduct their procurement. However, there will be some changes.

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40 Australian Government Solicitor, 'Australia-United States Free Trade Agreement' *Commercial Notes* Number 10, June 2004

- Agencies will be required to approach their procurement activities in a more structured, planned and careful way, including publishing an annual procurement plan.
- There is a presumption that agencies will use an open tender process for the conduct of their procurement activities.
- The ability of agencies to use other than open tendering processes will be more circumscribed under the measures. In particular, agencies will not be able to issue a restricted tender based simply on their knowledge of the market.
- Agencies will be more limited in their ability to include industry development requirements in tender documents.
- Technical standards will need to reflect international standards where they are available.
- Agencies may not be able to award contracts to tenderers that do not conform to 'essential requirements' at the time that tenders are opened.
- Agencies may be required to include more information in tender documents about how tender evaluation will be undertaken.
- Agencies will be required to include details of their method of procurement in gazettal notices of contracts.

7.90 Some of the core anxiety around the government procurement chapter lies with those aspects that are seen to inhibit government's capacity to adjust industry policy settings, to support local initiatives, or to expose governments to expensive and time consuming challenges to tender decisions.

7.91 The AMWU has produced a detailed response to the government procurement provisions of AUSFTA which captures all the relevant concerns that have been variously expressed. That response argues strongly that the CIE and DFAT (in its National Interest Assessment) have overstated the potential benefits and ignored significant dimensions of the potential costs.

The problems with the CIE's analysis are highlighted by the following propositions:

According to the CIE Canada wins 0.3% of the U.S. Federal procurement market and Australia will win 0.1%. So Australia will win one third of what Canada wins. However Canada's economy wide share of U.S. imports of goods and services is 16.7% and Australia's 0.7%. Why will Australia win one third of what Canada wins in the procurement market when we only win 4% of what Canada wins economy wide (0.7% is 4.2% of 16.7%)?

The CIE also suggests "most" of Australia's additional wins through exports will be to the \$25 billion GSA procurement market. If "most" means say \$75 million that amounts to 0.3% of \$25 billion. Why will Australia win 0.3% when the CCC (in the same paper quoted by CIE)

says Canada only wins 0.1% of the U.S. non defence Federal procurement market?

The CIE study provides no insights into the consequences of State Government participation on either side of the agreement; and it fails to provide any meaningful analysis of the consequences of changing the Australian Federal procurement market and limiting the capacity of the Commonwealth to pursue industry development objectives.<sup>41</sup>

7.92 A similar view was conveyed in the analysis prepared for the Select Committee by Dr Philippa Dee.

Empirical research has shown that Canada tends to trade significantly more than normal with the United States on all fronts, not just on government procurement... Wall (2000) notes that the United States trades as much with Canada as it does with all 15 countries of the European Union combines, and that its trade with Ontario exceeds its trade with Japan. This is not surprising, given that nearly 90 per cent of the Canadian population lives within 160 kilometres of the United States border, a border that stretches over 6400 kilometres.

There is a long history of econometric work that has quantified the effects of distance on the volumes of trade between countries. Such models, which are based on an analogy with the law of gravity in physics, show how trade volumes tend to increase with the size of the importing and exporting countries, and decrease with the distance between them. The Canadian economy is about 70 per cent larger than the Australian economy. And the Australian economy is almost 30 times further from the United States (using the standard gravity model measure of the distance between largest cities). Even using a relatively conservative estimate of the effect of distance, such as the recent one from Anderson and Wincoop (2003), Australia's trade with the United States could be expected to be 4 per cent as large as that of Canada, on account of these two factors. This is a more appropriate basis for estimating Australia's likely penetration into the United States government procurement market.<sup>42</sup>

7.93 The AMWU analysis referred to earlier concludes that better access to United States Federal and State procurement markets is likely to lead to Australian firms winning less than \$100 million worth of procurement contracts (they already win \$50 million now without the agreement). By 2010, or shortly thereafter, the AMWU contends that Australia will lose in the vicinity of \$400 million to imports as a result of changes to local procurement policies. In support of these estimates, the AMWU's analysis provides detailed reasons why the proposed procurement policies in the AUSFTA are likely to result in only limited gains to Australian suppliers.

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41 AMWU *Discussion Paper: The implications of the AUSFTA for Government Procurement: What Will Australia Win and Lose* pp:4-5

42 Dee, P *The Australia-US Free Trade Agreement: An Assessment*, Paper prepared for the Senate Select Committee, July 2004

7.94 The Australian Government Solicitor's *Commercial Notes* on government procurement states that many of the Chapter 15 measures will be 'business as usual', but it does highlight some notable features of the AUSFTA requirements.

7.95 On the somewhat vexed issue of 'domestic industry involvement' policies in procurement, the Government Solicitor's comments are similar to those of the AMWU.

On its face, Chapter 15 could have major implications for Australia's industry development program... This is because, in the future, an agency will not be permitted to 'seek, take account of, impose or enforce' offsets in its procurements (Article 15.2.5). Accordingly, Australia will need to revise its current industry development policy, and in particular the requirement for agencies to develop model industry development criteria for inclusion in major procurements.<sup>43</sup>

7.96 The AGS notes, however, that the operation of Article 15.2.5 is:

...circumscribed in a couple of respects. First, Australia has expressly reserved the right to maintain the Australian Industry Involvement and successor programs for Defence procurement (Annex 15-A, Section 1, note 3(d)). Second, Australia's small and medium enterprise (SME) policy is preserved because of a reservation that Chapter 15 does not apply to any form of preference to benefit SMEs (see Annex 15-A, Section 7). Accordingly, agencies' 'model industry development criteria' may need to be limited to the extent of SME participation in a tenderer's tender.<sup>44</sup>

7.97 The AMWU argues that this Article will affect a wide range of existing procurement practices. For example for information/ communication/ technology (ICT) tenders in excess of \$250,000 in Queensland there is currently a requirement to provide industry development statements on the benefits to local industry and this counts for at least 10% of the weight of the tender. This would not be allowed if Queensland signed up to the AUSFTA procurement agreement.

More importantly these restrictions on offsets (while partly but not exclusively excluding SME's) would prevent or at least seriously constrain future Australian Governments from designing local industry participation programs not in existence today that aimed to ensure local industry benefits from participation in new technologies or new emerging products through the use of Government purchasing.<sup>45</sup>

7.98 Again, the AGS paper expresses similar concerns:

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43 Australian Government Solicitor, 'Australia-United States Free Trade Agreement' *Commercial Notes* Number 10, June 2004, p.9

44 Australian Government Solicitor, 'Australia-United States Free Trade Agreement' *Commercial Notes* Number 10, June 2004, p.9

45 AMWU *Discussion Paper: The implications of the AUSFTA for Government Procurement: What Will Australia Win and Lose*, p.15

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Given the restriction on 'offsets', it may therefore be difficult for agencies (and government) to take account of regional policy considerations in the future when evaluating and awarding tenders.<sup>46</sup>

7.99 The Select Committee is particularly concerned about the impact of the government procurement provisions on Australian small and medium sized enterprises. Most State and Territory government purchasing policies include specific provisions for assisting SMEs in winning government contracts. These cannot be undermined as they will seriously affect thousands of SMEs that rely on government contracts.

7.100 There is no doubt that United States firms see considerable potential in having access to the Australian procurement market. In testimony before the United States Congress' Ways and Means Committee, the spokesperson for the United States Chamber of Commerce declared:

Under the agreement, Australia agreed to allow U.S. firms to bid for Australian central government contracts. As Australia is not a signatory to the WTO Government Procurement Agreement, this will give U.S. firms a significant advantage over competitors who are not afforded similar treatments. Australia also agreed to no longer subject U.S. firms to local manufacturing and local content requirements. The Chamber looks upon these steps as favorable as they should lead to more business opportunities for U.S. companies.<sup>47</sup>

7.101 The government nevertheless insists that the exclusions to the provisions banning offsets are 'significant exclusions, in particular policies that assist small and medium enterprises, overseas development assistance, and procurement of research and development services. For Australia, there are also exclusions for programs assisting indigenous people; defence procurement; procurement of motor vehicles; blood plasma fractionation; and government advertising'.<sup>48</sup>

7.102 The Select Committee notes that not all US states are covered by the Chapter on government procurement. It is up to each state to decide whether to participate and the level of its specific commitment.

7.103 There seems to have been considerable reluctance on the part of many states of the US to cooperate with the government procurement provisions both in WTO agreements and in FTAs. The USTR has produced a fact sheet aimed at encouraging the reticent states to come on board.

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46 Australian Government Solicitor, 'Australia-United States Free Trade Agreement' *Commercial Notes* Number 10, June 2004, p.9

47 David Sundin, President and Chief Executive Officer, DSI Fluids, Tyler, Texas, on behalf of the U.S. Chamber of Commerce. *Testimony Before the Full Committee of the House Committee on Ways and Means* June 16, 2004

48 DFAT, *AUSFTA - Frequently Asked Questions*

7.104 The USTR fact sheet provides many reassurances to the reluctant states, which in turn convey the extent of the resistance being shown by them. In September 2003, the U.S. Trade Representative sent letters to all state Governors asking whether they would permit the coverage of some state government procurement under FTAs that were being negotiated by the United States.

7.105 Only 28 of the US states have agreed to be bound by the AUSFTA. This falls considerably short of the 37 U.S. states that had agreed voluntarily in the early 1990s to cover some of their state procurement under the WTO Agreement on Government Procurement.

7.106 The USTR fact sheet is at pains to point out that coverage of a state's procurement in an FTA does NOT affect the procurement of any local or municipal (city or county) government in that state. USTR has not asked any cities or counties to cover their procurement under these trade agreements.

7.107 USTR reassures the states that covering procurement under FTAs would not force states to comply with "draconian constraints" on domestic purchasing policies and undermine state authority to make purchasing policies, including promotion of local development. State governments can decide the extent to which a state's government procurement would be covered under the FTAs. It is up to each state to designate the agencies they want to cover, and to identify any goods or services they want to exempt.

7.108 For example, when the 37 states signed on to the WTO GPA, many reserved a number of sensitive procurement areas such as motor vehicles, construction-grade steel, printing, and construction services. If any new states choose to sign on to the procurement agreements, they would also be able to decide whether they want to reserve any sensitive procurement areas, such as measures to promote local economic programs for small businesses, distressed areas, minorities and women are excluded from the agreements.

7.109 USTR also pointed out to US state governments that :

... in the negotiations for an FTA, Australia had been unwilling to cover its states and territories unless the United States covers a significant number of states. Non-discriminatory access to the procurement of Australian states and territories is a high priority for U.S. suppliers of goods and services.<sup>49</sup>

7.110 In short, it seems that while US firms are keen to make inroads into government procurement in Australia, nearly half of the US's own state governments are holding out against such access to their procurement markets by Australian firms.

7.111 The Select Committee does not believe there has been adequate analysis by the government of the effect on the regions through changes that will be necessary to

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49 Extract from <http://www.ustr.gov/new/fta/2004-04-factsheet-gp.pdf>

government purchasing policies. Prior to the agreement being agreed to by the parliament, there is a need to analyse the restrictions of local content specifications and the impact on regional Australia.

7.112 Most the States and Territories have specific regional content provisions as part of their government purchasing policies. The 'Ten Devils in the Detail' pamphlet put together by AFTINET says 'some state governments also have purchasing scheme which require foreign contractors to give preference to local products or to form links with local firms to support local employment. These will not be permitted under the USFTA...Regional Employment studies are needed to assess these impacts'.

7.113 The Select Committee regards the area of government procurement as a very important one, and is concerned by the contrary advice that agitates debate over the costs and benefits arising from the AUSFTA provisions of Chapter 15. The Committee notes that the Chapter provides for a review of the government procurement provisions every two years. This indicates that the provisions of the agreement are not seen to be ideal and this further causes the Committee considerable concern.

7.114 Given the serious reservations expressed in both the submissions and the testimony heard by the committee, the biennial review will provide an opportunity for further detailed analysis of these provisions - but the Committee believes this should have been canvassed before the Agreement was signed. This analysis work should be undertaken prior to the Agreement proceeding, or if this is not possible, at the very least be referred to the Productivity Commission for an in depth inquiry.

### ***Technical and Quality Standards***

7.115 Critical to the capacity of Australian firms to compete in the United States market is their capacity to deliver goods and services at the necessary standard of technical and quality assurance. Potentially, this could represent quite a challenge, and the AUSFTA has sought to address the question of commensurability of standards in a variety of ways.

7.116 The AUSFTA devotes a Chapter to technical standards, commencing with the affirmation that both Australia and the United States affirm their existing rights and obligations to each other under the WTO Technical Barriers to Trade (TBT) Agreement where such issues as standards, technical regulations and conformity assessment procedures are addressed.

7.117 There are many entities in the United States which develop standards in both the government and private spheres as well as at the federal and sub-federal/state levels. Exporters can find it very difficult and costly to meet these different standards and technical regulations. Both Parties have therefore agreed to use, to the maximum extent possible, international standards.

7.118 Both Parties have agreed to give positive consideration to accepting, as equivalent, each other's technical regulations, provided they are satisfied that they

adequately fulfil the objectives of their own regulations. This is important because sometimes the technical regulations of the Parties may be different but achieve the same result.

7.119 For example, if a United States technical regulation stipulates that a product must contain certain features and pass certain tests to ensure safety, and this technical regulation is different from Australia's regulation covering the same product, the United States will give positive consideration to accepting Australia's technical regulation. The result is that the Australian product, subject to United States agreement would enter the United States market without changes to production methods or the characteristics of the end product.

7.120 Products often need to be tested to determine whether relevant standards and technical regulations have been met before they can enter the market. In many cases the tests are carried out in the country from which they are being exported. If the importing country does not accept the results of the test it may require further testing which can significantly add to costs.

7.121 Both Parties have therefore agreed to facilitate the acceptance of each other's conformity assessment procedures. Where they are rejected, the Parties must explain the reason for the refusal in detail. In some cases it may be possible to establish working groups involving practitioners to resolve the problem.

## Chapter 8

### Investment

#### Provisions of AUSFTA relating to investment

8.1 Chapter 11 of the AUSFTA sets out the obligations of the parties in relation to investment.

8.2 In Australian public discourse, the term 'investment' is often used in a somewhat narrow sense, to describe investment in financial products or real property. In the AUSFTA, however, 'investment' is given its technically accurate meaning, and therefore includes almost any activity which involves the commitment of resources in return for reward, with the acceptance of risk. The DFAT Guide to the Agreement offers a series of examples of investments, including the following:

- an enterprise, that is, virtually any form of business for profit;
- financial instruments including equity, debt, and derivatives;
- contracts for construction, management, or revenue sharing;
- and, most broadly, "other tangible or intangible, movable or immovable property and related property rights, such as leases, mortgages, liens and pledges."<sup>1</sup>

8.3 It can be seen from these provisions that the investment provisions capture an extremely broad range of economic activities. They are consequently extremely important in the context of the agreement as a whole.

#### *Requirements under AUSFTA*

8.4 Under the AUSFTA, the Parties agree to provide investors from the other Party either national treatment (that is, the same treatment afforded to domestic investors) or most-favoured-nation treatment, whichever is most advantageous to the investor. It also contains a number of provisions designed to reduce sovereign and other policy-related risks associated with investors from each Party investing in the economy of the other Party.

8.5 Specifically, the Parties agree to:

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1 Department of Foreign Affairs and Trade, March 2004, "Australia – United States Free Trade Agreement – A Guide to the Agreement", p.53

- provide national treatment or most-favoured nation treatment to investors from the other Party (Articles 11.3 and 11.4)
- provide the protection of law to investors and investments, in a manner consistent with international law (Article 11.5);
- provide investors and investments with protection or restitution in the event that a civil or military emergency requires the requisitioning or destruction of the investment in question (Article 11.6);
- refrain from nationalising or expropriating investments from the other party, except in accordance with law, and with appropriate compensation (Article 11.7);
- allow the free transfer of funds connected to covered investments from one Party to another (Article 11.8);
- not to establish discretionary performance requirements in relation to import or export content, local content, preference for local inputs, transfer of intellectual property, or restrictions on sales (Article 11.9);
- refrain from requiring that senior managers or board members be of a particular nationality (Article 11.10); and
- reserve the capacity to implement policies which may be otherwise prohibited under the agreement, but which are necessary for environmental reasons (Article 11.11).

### ***Reservations***

8.6 Not all investment falls under the AUSFTA. Annex I and Annex II of the Agreement contain reservations allowing Parties to maintain existing non-conforming measures. Both Australia and the United States have included measures relative to investment in Annexes I and II. Any matter not mentioned in Annex I or Annex II is subject to the AUSFTA by default. Such investments are referred to in the Agreement as 'covered investments'.

8.7 Australia's reservations include:

- the preservation of current non-conforming measures undertaken by State and Territory governments (Annex I – Australia 1);
- retention of assessment by the Foreign Investment Review Board, though with substantially increased financial value thresholds (discussed below) (Annex I – Australia 2-5);
- investment in urban land (Annex II – Australia 3);

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- additional support for indigenous involvement in enterprises (Annex II – Australia 1);
  - measures relating to leases on airports (Annex II – Australia 13);
  - preservation of export requirements in the government IT outsourcing program (Annex I – Australia 8);
  - any measure with respect to primary education (Annex II – Australia 10);
  - authorisation and levying of foreign fishing vessels (Annex I – Australia 10);
  - wheat exports (Annex I – Australia 11);
  - foreign ownership and foreign director limits for Telstra (Annex I – Australia 13);
  - foreign ownership and control of media companies (Annex I – Australia 15-16);
  - votes of foreign shareholders for Board positions on the Commonwealth Serum Laboratories board (Annex I – Australia 17); and
  - foreign interests in Qantas (Annex I – Australia 19-20).

8.8 The United States' reservations include:

- regulation of atomic energy for industrial purposes (Annex I – United States 1);
- regulation of leases relating to mining and energy (Annex I – United States 4);
- preferential treatment for minority groups (Annex II – United States 4);
- access to Overseas Private Investment Corporation insurance and loan guarantees (Annex I – United States 5);
- regulation of commercial aviation (Annex I – United States 6-7);
- securities exchange registration and initial public offers (Annex I – United States 9);
- ownership of broadcasting licenses (Annex I – United States 10);
- ownership of cable television facilities (Annex II – United States 2); and
- the preservation of current non-conforming measures undertaken by States, the District of Columbia, and Puerto Rico (Annex I – United States 12).

8.9 Submissions and evidence raised a number of issues of concern in relation to Chapter 11 of the AUSFTA. These were foreshadowed briefly in the Committee's interim report<sup>2</sup> and will be discussed in greater detail below.

*Overall impact on investment*

8.10 The central concern is clearly to determine the impact the AUSFTA will have on investment in Australia. On the one hand, the Agreement may encourage additional investment in Australia by United States investors. On the other hand, it may encourage Australians to invest in the United States where previously they may have invested at home. Inevitably, of course, both of these situations will occur, and a great deal of energy has been spent during public debates on the AUSFTA in recent months trying to anticipate what the net effect on investment is likely to be.

8.11 The Department of Foreign Affairs and Trade cited investment as one of the most significant benefits of the AUSFTA:

It is in the area of investment that the gains from the Agreement will perhaps be most significant over time. Already the United States supplies nearly thirty per cent of Australia's foreign investment, more than any other economy. Australia ranks 12th among destinations for US direct investment abroad. The United States is the biggest destination — 43 per cent — for Australia's foreign direct investment (FDI), and Australia is the 10th largest foreign owner of US assets.

The Agreement will enhance Australia's attractiveness as a destination for US investment as it puts in place legal guarantees and other measures that provide greater certainty for investors. The negotiation of the Agreement has already made Australia a greater focus of US investor and media attention, and this will continue during the US domestic approval process and beyond.<sup>3</sup>

8.12 The official analysis of the AUSFTA by the United States International Trade Commission does not attach the same significance to the investment aspects of the Agreement, offering a more subdued assessment:

The FTA will add transparency to the investment regimes of the United States and Australia, but is not expected to generate significant amounts of new investment between the two countries, as the investment environment in each is already substantially open.<sup>4</sup>

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2 Select Committee on the Free Trade Agreement between Australia and the United States of America, *Interim Report*, June 2004, pp.39-40

3 Department of Foreign Affairs and Trade *Australia-United States Free Trade Agreement (AUSFTA) – Advancing Australia's Economic Future*, p.4

4 United States Trade Commission, May 2004, *US-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects*, USITC Publication 3697, p.xxvii

8.13 These more subdued claims are also reflected in the government's own Regulation Impact Statement:

Similarly, Australia's commitments under the Agreement with regard to screening of foreign investment is unlikely to have a major impact on US investment in Australia...<sup>5</sup>

8.14 Attempts to quantify, or to quantitatively verify these alleged gains have given rise to significant debate and various alternative analyses. The Department of Foreign Affairs and Trade commissioned the Centre for International Economics to assess the economic impact of the AUSFTA, which it did using the G-Cubed and Global Trade Analysis Project (GTAP) models. With respect to investment, the CIE made the following observation:

Lowering transaction costs, strengthening the security of the investment framework and highlighting the openness of Australia's foreign investment regime in non-sensitive sectors have the potential to reduce a proportion of the risk-related cost of capital in Australia (which reflects investor uncertainty and transaction costs). It is therefore likely that, whatever the impact on actual investment flows, the overall impact of the investment provisions in AUSFTA will be positive.

A difficult question is how positive is the result likely to be and how will the gains be distributed, particularly in more illiquid segments of the market?<sup>6</sup>

8.15 The CIE endeavours to quantify this benefit by indicating the likely fall in equity risk premiums on the implementation of the FTA. The term "equity risk premium" is a useful measure of the cost of capital. A reduction in the restrictions and risks associated with investing in a particular economy leads to a reduction in the risk premium, and therefore to less expensive access to capital for investee enterprises. The CIE, in a process outlined on p. 34 of its report, arrives at a conclusion that under the AUSFTA the risk equity premium would fall by 5 basis points (or .05 percentage points). It should be noted, though, that their analysis delivered an outcome of 10 basis points, which the CIE then halved in order to deliver a conservative result. It should also be noted that this figure does not appear to emerge from either G-Cubed or GTAP, but rather from a 'pragmatic'<sup>7</sup> series of calculations outlined in the report.

8.16 In a newspaper article in May 2004, Professor John Quiggin made the following observation critical of the CIE finding:

...the CIE is right to focus on the equity premium. The difficulty is in the assumption that capital market liberalisation will reduce the equity

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5 Commonwealth Government's AUSFTA *Regulation Impact Statement (RIS)* March 2004, p.8

6 Centre for International Economics, April 2004, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, p.31

7 Centre for International Economics, April 2004, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, p.34

premium and will have no offsetting adverse effects. The proposed changes are tiny by comparison with the floating of the dollar, the associated removal of exchange controls over the 1970s and 1980s and the associated domestic liberalisation. Yet there is no convincing evidence that these changes had any effect on the risk premium for equity.<sup>8</sup>

8.17 In an assessment of the CIE findings for this Committee, Dr Philippa Dee argued against the CIE's link between the AUSFTA changes to Foreign Investment Review Board (FIRB) assessment of investments (discussed further below) and the equity risk premium in Australia:

The equity risk premium is a concept that captures the effects of events that happen ex post, after an investment is made, that reduce or eliminate the expected returns on that investment. A negative ruling does not put at risk the entire amount that would have been invested. The potential investor still has their uninvested capital that they can put elsewhere ...

There is no doubt that events that affect a country's equity risk premium can have a powerful effect on investment inflows, and hence on output and consumption levels in a country ... A key factor likely to account for Australia's apparent equity risk premium is that we have a commodity-driven currency, so that the repatriated value of an investment in Australian manufacturing can be greatly affected 'after the event' by the price Australia gets for its wheat or coal.<sup>9</sup>

8.18 If Professor Quiggin and Dr. Dee are correct, and the AUSFTA does not result in a significant reduction of equity risk premiums in Australia, this in turn is likely to result in a dramatic reduction in the forecast economic benefits from the AUSFTA. DFAT, however, rejects Dr. Dee's assessment of the impact of the changes to FIRB review thresholds:

The CIE found substantial gains to Australia from the liberalisation of FIRB restrictions under AUSFTA. These findings are rejected by Dr. Dee on the ground that FIRB liberalisation will not reduce the risk premium on investment in Australia. But there is evidence that complying with its provisions is seen by investors as onerous. In addition, other provisions of AUSFTA will improve the investment climate and create added certainty for investors. The CIE's modelling assumes a very small reduction in the risk premium of only 5 basis points, and in sensitivity analysis, this is reduced to 2 basis points.<sup>10</sup>

8.19 In evidence the Department of the Treasury was reluctant to endorse the CIE's expectation of a 5 basis point reduction, but noted that in its view the precise number was less important than the policy message it signalled:

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8 Quiggin, J "Downside of the FTA" *Australian Financial Review*, 6 May 2004, p.70.

9 Dee, P, June 2004, *The Australia-US Free Trade Agreement – An Assessment*, pp. 29-30

10 *Submission 161b*, p.12 (DFAT)

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Investment in particular is a very difficult activity to model, so the modellers have come up with something that is logically consistent and fits with what we call mainstream theory, but we also need to keep in mind that this is giving us an indication.<sup>11</sup>

### *Dynamic productivity gains and economy-wide benefits*

8.20 As the Committee noted in its interim report, the impact of Chapter 11 of the AUSFTA on the overall economic outcomes for Australia will depend substantially on the impact of dynamic productivity gains (or losses) arising from the AUSFTA. The CIE Report outlines the concept in the following terms:

It is widely accepted that trade liberalisation allows countries to move resources to more valuable sectors of the economy and consequently brings about allocative efficiency gains. However, trade reform does more than simply shift resources. When trade barriers are reduced on an industry, competition increases. Increased competition can change the behaviour of firms in that industry, encouraging businesses to use better technology and business practices either through innovation or quicker adoption of new ideas. Improvements to efficiency due to improved work practices (as opposed to resource re-allocation) are referred to as 'dynamic productivity gains'.<sup>12</sup>

8.21 Following World Bank research, the CIE identifies four sources of dynamic gains, two of which are relevant to investment. The CIE describes those two as follows:

- *Dynamic investment* – As tariffs are often imposed on investment goods, a reduction in trade barriers on these goods can lead to an increase in the return to capital and therefore a rise in real investment and productivity. Higher incomes from increased productivity lead to higher savings and thus further capital accumulation.
- *Endogenous capital flows* – There is significant empirical evidence that gains from international capital mobility are quantitatively important. Foreign direct investment from abroad may bring new and improved technologies that could flow into the domestic economy and increase market productivity.<sup>13</sup>

8.22 Because of the multitude of factors which can influence the dynamic productivity changes associated with a policy measure, and because consideration of dynamic productivity changes is a relatively new science, such gains are extremely

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11 *Transcript of evidence*, 18 May 2004, p.60. (Kennedy)

12 Centre for International Economics, April 2004, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, p.17

13 Centre for International Economics, April 2004, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, p.18

difficult to quantify with any accuracy. The CIE has dealt with this difficulty by developing, based on a series of empirical studies, assumptions about the likely dynamic productivity gains in several economic sectors.<sup>14</sup> These productivity gains have then been used as inputs into the calculation of the macroeconomic impacts of the AUSFTA on Australia. As can be seen below, the importance of dynamic productivity gains in terms of overall gains in real GDP is significant:

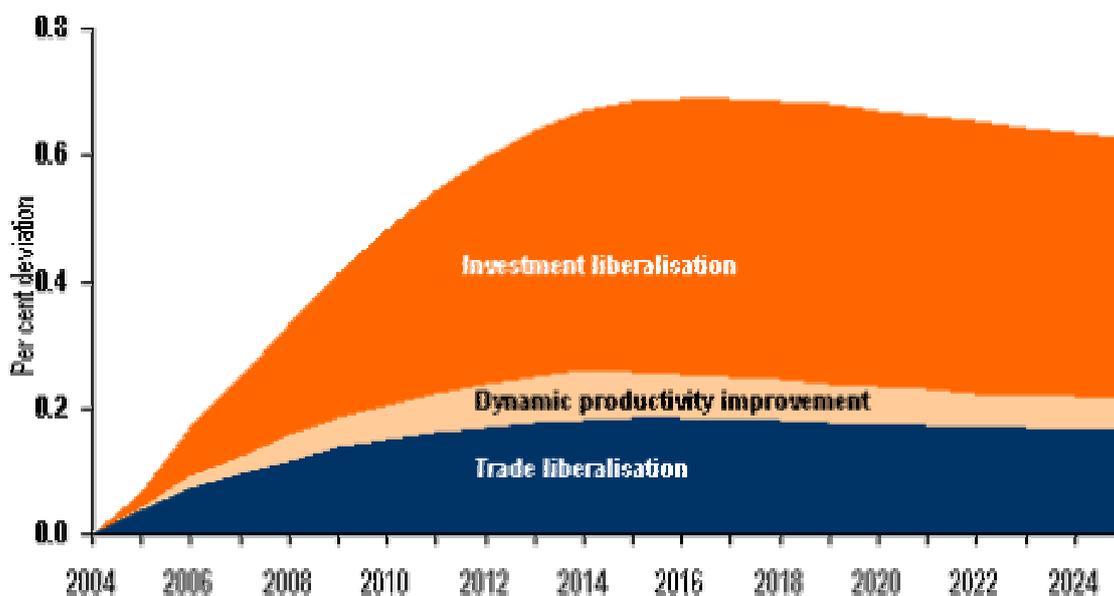


Figure 1- Changes in Real GDP<sup>15</sup>

8.23 The potential benefits arising from dynamic productivity gains have underpinned much of DFAT's process of selling the AUSFTA. The following extract from their submission gives an indication of both the tone, and the significant extent to which the outcomes of the AUSFTA rely on the forecast (direct and dynamic) benefits from investment liberalisation:

According to the CIE's modelling, Australia's annual GDP could be up by around \$6 billion (about 0.7 per cent of GDP) as a result of the AUSFTA a decade after the Agreement's entry into force. Total GDP increase over 20 years is expected to amount to almost \$60 billion in today's dollars.

Much of this growth will be generated by the dynamic gains expected from the deeper links the Agreement establishes between Australia and the US, with the CIE finding investment liberalisation the biggest contributor to the projected increase in Australia's GDP. But even if these benefits and other 'dynamic' effects of trade liberalisation are excluded, liberalisation of trade

14 See Centre for International Economics, April 2004, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, table 3.5, p.21

15 Source: Centre for International Economics, April 2004, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, p.78

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in goods and services alone would contribute about \$1 billion to real GDP.<sup>16</sup>

8.24 The CIE's assessment of dynamic productivity gains under the AUSFTA has been criticised. In her report for the Committee, Dr. Philippa Dee did not reject the consideration of dynamic impacts altogether, but argued that a more conservative approach would have discussed dynamic impacts without including them in the modelling:

The DFAT/CIE study draws on empirical work that shows that, in addition to having so-called static effects on allocative efficiency, tariff cuts can also have a so-called dynamic effect on sectoral productivity. The study quantifies these dynamics effects by assuming them to be proportional to the size of their tariff cuts.

The studies that the DFAT/CIE study draws on examine productivity levels in Australian manufacturing during a period of substantial unilateral tariff cuts. AUSFTA does not cut tariffs unilaterally, but preferentially ... this means that the reductions in price on any given import can be substantially less than the size of the preferential tariff cut. ...

The existence of such 'cold shower' effects of tariff cuts on productivity has been hotly debated. Conservative evaluations might note their possible existence, but do not include them in the quantitative analysis.<sup>17</sup>

8.25 Dr Peter Brain of the National Institute of Economic and Industry Research made a similar point:

In terms of a general methodological issue or how the economic assessment should be made, the idea of bottom line point estimates is absurd. I think we can all agree that whatever the dynamic of flow-on effects will be, they will be large—whether it be a multiplier of two, four, six or whatever—compared with the direct effects. Therefore, the analysis should simply focus on the direct effects. This should be done with some humility because there is a wide range of possible outcomes. To accommodate this as best we can, one should try to take into account all possible outcomes in a framework of decision making which allows an assessment of the probable range of outcomes, which we have tried to do.<sup>18</sup>

8.26 Other evidence suggested that, even accepting the inclusion of dynamic effects in the CIE model, the outcomes forecast are far too optimistic. Professor Ross Garnaut, for instance, stated:

The third element of gain is so-called dynamic effects which, if you read the logic of the report, depend on the trade liberalisation being genuinely liberalising. But if the trade liberalisation is not liberalising, if it moves in

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16 Submission 161a, p.2 (DFAT)

17 Dee, P, June 2004, *The Australia-US Free Trade Agreement – An Assessment*, pp.31-32

18 *Transcript of Evidence*, 7 June 2004, p.78 (Brain)

another direction, then there is no reason to think the dynamic gains will be positive. In fact it is very likely that if the trade liberalisation effects are negative the dynamic defects will be negative as well. So just on a straightforward application of the logic of the models—not the words, and above all not the words of the executive summary, but the logic of the models—suggests that the median estimate of gains would be approximately zero. It would be possibly slightly negative but approximately zero, way below the bottom end of the range of outcomes that CIE and DFAT suggested and put the 95 per cent probability bounds around.<sup>19</sup>

8.27 In other appearances before Senate Committees, officers of the Treasury have been reticent about relying on dynamic effects as a basis for policy decisions, instead adopting an approach more in line with that suggested above by Dr. Brain and Dr. Dee. During an appearance before the Senate Economics Legislation Committee's inquiry into the International Tax Agreements Amendment Bill 2003, Mr Greg Smith, Executive Director, Revenue Group, Department of the Treasury, made the following statement in relation to a double taxation treaty:

The Treasury, perhaps conservatively, but along with longstanding practice and what is also a common practice in many countries—I will not say every country, but in most countries—take the first-round effect and publish that. We draw attention to the other effects—second-round effects, assumption driven effects or other things which we are less certain about—but we have not incorporated them in the official costing ... We do a similar thing really, when you think of it, with most of these sorts of things. For example, we may well publish a costing for the research and development tax concession, but of course the purpose of the research and development tax concession is to create dynamic benefits in the Australian economy. We do not publish, and we do not seek to estimate, in our costing what those benefits are.<sup>20</sup>

8.28 Treasury made similar statements directly in relation to the FTA at an Estimates Committee hearing in October 2003:

The long term, significant benefits from this agreement will come from the dynamic interrelationship with the intangibles: competition policy; certainty; work programs on financial services, which will be done through a financial services committee that is being established between the two countries; and work programs on recognising professional qualifications, which is one of the big impediments to service trade at the moment. All of those things are very powerful but they are impossible to quantify, so what

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19 *Transcript of Evidence*, 5 May 2004, p.22 (Garnaut)

20 Senate Economics Legislation Committee *Transcript of Evidence*, 13 October 2003, p.14 (Smith)

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you are left with when quantifying the model are things that are easy to measure but perhaps not the most important part of the agreement.<sup>21</sup>

8.29 DFAT, however, rejects criticism of the CIE's assessments of dynamic productivity gains. In a rebuttal of Dr. Dee's comments on this issue, DFAT stated:

Dr Dee rejects the idea of including 'dynamic gains' which flow from the greater competition under trade liberalisation because 'their existence has been hotly debated, and conservative evaluations omit them.' But there is a wealth of econometric evidence which supports the existence of these effects. The CIE has been conservative in its assumptions and has adjusted the magnitude of the gains to reflect the fact that it is a bilateral agreement which has been negotiated.<sup>22</sup>

8.30 The Committee is interested in DFAT's claim of 'econometric' evidence. If such evidence exists and is sufficiently reliable to support this claim, why did the CIE rely instead on assumptions based on empirical evidence?

8.31 It is clear to the Committee that the CIE's estimates of the dynamic benefits of the AUSFTA should, at the very least, be treated with a great deal of caution and scepticism. Instead, the Committee should follow the approach recommended by Dr Dee and Dr Brain, and indeed by Treasury in previous inquiries. The Committee recognises that dynamic effects may result, and may have substantial benefits. However, as Professor Garnaut points out, they may not. Policy decisions in relation to the FTA should therefore be made principally on the basis of the direct effects, with the recognition that dynamic effects may eventuate.

### ***Changes to Foreign Investment Review Board Thresholds***

8.32 The Foreign Investment Review Board (FIRB) is a statutory body whose principal function is "to examine proposals by foreign interests for acquisitions and new investment projects in Australia and, against the background of the Government's foreign investment policy, to make recommendations to the Treasurer on those proposals."<sup>23</sup>

8.33 Currently, FIRB reviews all proposals for foreign investors obtaining substantial interests in Australian companies valued in excess of \$50 million, and all proposals by foreign interests to establish new businesses in Australia valued at \$10 million or more.<sup>24</sup> If FIRB considers that such a proposal is not in Australia's national interests, it may recommend that the Treasurer block the proposal.

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21 Senate Economics Legislation Committee *Transcript of Evidence*, 19 February 2004, p.88 (Legg)

22 *Submission 161b*, pp:12-13 (DFAT)

23 FIRB Annual Report 2002/03, p.3

24 This is not a complete list of FIRB review thresholds, but these are central to the AUSFTA

8.34 As such, FIRB is clearly a non-conforming measure under AUSFTA. For it to continue in operation, appropriate provisions must be included in Annex I or Annex II of the AUSFTA. Annex I includes provisions which enable FIRB to continue to operate, but it lifts the thresholds. Under the AUSFTA, FIRB will only review the acquisition of a substantial interest in companies valued in excess of \$800 million.

8.35 The Department of the Treasury has indicated that the new FIRB thresholds did not emerge as a result of any perceived problems with FIRB from an Australian perspective. Rather, the new thresholds represented a compromise between the United States' wish to eliminate screening and Australia's wish to retain it:

Ultimately, of course, this was a negotiation, so there was a give and take, if you like. The US were, and remain, very strongly opposed to screening in any form, and they see our arrangements as a potential restriction on investment flows. From our point of view, we felt comfortable raising—and the government's judgment was that it was comfortable raising—it that far because it achieved the balance between, if you like, the level at which national interest concerns are likely to be real and tangible and, below that level, the level at which they are not likely to be sufficient to warrant the compliance costs associated with the screening.<sup>25</sup>

8.36 The Government has also argued that the raised threshold is essentially a benign change for two reasons. First, while the reduced number of cases referred to FIRB would be substantial, "in terms of value of investment—that is, not the number of transactions but the value of investment—under the proposed arrangements with the US we will continue to screen over 70 per cent of investment by value."<sup>26</sup>

8.37 Second, Treasury pointed out that that FIRB has not been a barrier to US investment in the past. Mr Chris Legg, from Treasury, stated that "I do not think there have been many, if any, cases where US investors have been rejected. There may have been one or two."<sup>27</sup>

8.38 A number of submissions remained concerned about both of these issues. On the issue of the reduction in referrals to FIRB, the Australian Council of Trade Unions noted:

The Office of US Trade Representative estimates that 90% of US investment in Australia over the last 10 years would have escaped screening had the new rules applied retrospectively. Using a three-year retrospective time horizon, DFAT estimates in its Regulatory Impact Statement a

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25 Senate Economics Legislation Committee *Transcript of Evidence*, 19 February 2004, p.84 (Legg). It should be noted in this context that Mr Legg is also on the Foreign Investment Review Board

26 Senate Economics Legislation Committee *Transcript of Evidence*, 19 February 2004, p.85 (Legg)

27 Senate Economics Legislation Committee *Transcript of Evidence*, 19 February 2004, p.86 (Legg)

reduction in screened proposals by 65-70%. Some commentators have claimed that, under the proposed AUSFTA rules, around 86% of companies listed on the Australian Stock Exchange could be acquired by US interests without being screened.<sup>28</sup>

8.39 The Australian Manufacturing Workers Union argued:

While the AMWU acknowledges that the national interest test has rarely been invoked to prevent foreign investment in Australia, the AMWU notes that the changes would mean that almost 99% of Australian manufacturing companies could be acquired under the proposed AUSFTA with no regard for whether such an acquisition is in the best interests of Australia or Australian workers.<sup>29</sup>

8.40 The Federation of Australian Scientific and Technological Societies made a similar point:

The second area of major concern in terms of allowing for the cherry picking is the change in the threshold for FIRB, lifting its report threshold from \$50 million \$800 million means that all R&D-intensive science and technology SMEs would fall under that \$800 million threshold and there will be no examination. As you are aware, because of the ratchet mechanism, if a future government decided it was concerned about an emerging trend of US firms purchasing Australian R&D companies and taking them offshore, it would not have the capacity to use FIRB as the instrument to address that policy problem.<sup>30</sup>

8.41 In relation to the argument that FIRB has not rejected incoming investments from the United States, the ACTU made the point that:

We acknowledge that the vast majority of applications that are screened by the Foreign Investment Review Board are approved. However, the Board also has a track record of approving applications subject to conditions set to safeguard the national interest. This aspect of the screening process should be borne in mind when it is argued that the current process is simply a time-consuming one that leads to approval anyway.<sup>31</sup>

8.42 It is useful to also note the United States perspective on this issue, which confirms that the increase in FIRB thresholds is likely to increase US investment in Australia, but that the size of this increase will be muted by the relatively open current arrangements:

US industry representatives would also have preferred to discontinue the investment screening performed by Australia's FIRB. However, the minimum size of most foreign investments that require screening has been

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28 *Submission 392*, p. 11 (Australian Councils of Trade Union)

29 *Submission 463*, p.20 (AMWU)

30 *Transcript of Evidence*, 15 June 2004, pp.35-36 (Smith)

31 *Submission 392*, p.11 (Australian Councils of Trade Union)

substantially raised. In general, U.S. investors in Australia must notify the Australian Government (through the FIRB) of investments only if an investment is value at more than A\$800 million (US \$443.2 million). The previous investment threshold was A\$50 million (US \$27.7 million)... Industry representatives have stated that the higher limits are an improvement in the investment approval process ... Industry representatives indicate that due to Australia's fairly liberal existing investment regime, they have been free to invest in most industries despite FIRB screening, and that is not expected to change.<sup>32</sup>

8.43 The Committee notes that there is substantial evidence that the increased FIRB thresholds will have little impact on US investors because the FIRB review process is not currently a substantial barrier to US investment. However, despite this widespread evidence that the impact is likely to be mild, the changes in FIRB arrangements are considered by the CIE as a major factor underpinning the decrease in Australia's equity risk premium (discussed above) and therefore as a major factor underpinning the predicted benefits of the AUSFTA as a whole.

8.44 The CIE report argues that "Australia has relatively high [foreign direct investment] restrictions compared with other countries in the OECD, surpassed only by Iceland, Canada, Turkey and Mexico. [...] These restrictions range from limits on foreign ownership in certain sectors to modest screening procedures for a wide range of investment proposals."<sup>33</sup>

8.45 Under the AUSFTA Australia continues to maintain specific limits on foreign investment in a range of sensitive areas such as newspapers, broadcasting, Telstra, Qantas, airports, and urban land. That is, Australia's 'relatively high foreign direct investment restrictions' on sensitive sectors will not be reduced under the AUSFTA. This leaves only the reductions in the 'modest screening procedures' as the source of increased liberalisation of foreign direct investment – and the impediment raised by this screening process has been shown to be minimal. The AUSFTA will therefore do little to reduce those core factors which result in Australia having 'relatively high foreign direct investment restrictions'

8.46 It is difficult to reconcile such a view with the view expressed above by the United States International Trade Commission that Australia's investment environment is 'already substantially open'.

8.47 Despite all of this, and without any further explanation, the CIE argues that "we are still left with the fact that Australia's FDI rules are at the 'restrictive end' of

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32 United States Trade Commission, May 2004, *US-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects*, USITC Publication 3697, p.106

33 Centre for International Economics, April 2004, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, p.25

the OECD scale"<sup>34</sup> and uses this as a justification for assuming these restrictions are responsible for fully half of Australia's current equity risk premium. This provides the basis for a further series of calculations resulting in the claims of a 5 basis point reduction in the equity risk premium under the AUSFTA.

8.48 The Committee observes that the assumption that investment rules account for half of Australia's equity risk premium is at best unproven, and may be substantially exaggerated. Even if the assumption is accurate, the AUSFTA appears (on the above analysis) unlikely to reduce investment restrictions substantially. In either case, there would be flow-on consequences which may reduce the predicted benefits from the AUSFTA by billions of dollars.

8.49 Professor Ross Garnaut criticised the CIE analysis of the impact of the changes to FIRB in these terms, arguing that they failed what he described as the "laugh test":

The Department of Foreign Affairs and Trade has now released the results of the consulting firm's assessment of the agreement as negotiated. While the main sources of gain in the original estimate resulting from access to highly protected US agricultural markets have disappeared or shrunk dramatically, somehow the total benefits have greatly increased to \$5.6 billion. That somehow turns out to be mainly through what are described as back of the envelope calculations of gains, hitherto overlooked from easing FIRB restrictions. There is an air of unreality about this revised estimate. The magnitude of the contribution now attributed to changes in FIRB rules and the basis used to assess it heighten the need for an independent analysis conducted at arm's length from those whose job it is to sell the agreement to the Australian community.<sup>35</sup>

8.50 In her report for the Committee, Dr. Philippa Dee also took issue with the CIE findings. She argued as follows:

... it is highly doubtful that ex ante FIRB screening has any general effect at all on Australia's risk premium ... FIRM screening has an unknowable, but probably small, deterrent effect on a few particular investments, but nothing like the number of investments that would be affected by a generalised change in the risk premium.

8.51 The Department of Foreign Affairs and Trade continues to support the CIE's views:

In summary, the CIE found substantial gains to Australia from the liberalisation of FIRB restrictions under AUSFTA. These findings are rejected by Dr Dee on the grounds that FIRB liberalisation will not reduce the risk premium on investment in Australia. But there is evidence from

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34 Centre for International Economics, April 2004, *Economic Analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, p.34

35 *Transcript of evidence*, 15 June 2004, p.23. (Garnaut)

investors that complying with its provisions imposes some costs. This reflects the fact that the existence of a screening mechanism may reasonably be expected to have some impact on the level of uncertainty for prospective investors and to contribute to their general perception of risk, notwithstanding genuine efforts to implement the policy in a way that minimises such effects. In addition, other provisions of AUSFTA will improve the investment climate and create added certainty for investors. The impact on the equity risk premium is inherently difficult to quantify: however the sensitivity analysis does indicate that the gains are significant even with a much smaller reduction than assumed in the base case.<sup>36</sup>

### **Select Committee's view**

8.52 The Select Committee, informed the weight of evidence presented during the inquiry, is sceptical of the forecasts made by the CIE and promulgated by DFAT during public debate on the Free Trade Agreement. The loudly proclaimed benefits to Australia arising from a liberalised foreign investment regime and from dynamic productivity gains are based on a series of inferences and educated guesses. The fact that the US International Trade Commission states that the AUSFTA is 'not expected to generate... significant new investment' cannot be easily dismissed.

8.53 However accurate the CIE and DFAT predictions may turn out to be, educated guesses do not provide an adequate basis for informed policymaking by parliamentarians, investors or citizens. The CIE report's highly-contested views on investment and dynamic gains have inevitably led to a debate played out in academia, in the media, and before this Committee. The result is that the modelling work which was intended by the government to clarify the impact of the AUSFTA and justify its adoption has in fact led to increased confusion.

8.54 Notwithstanding this, the Committee recognises that the AUSFTA, by liberalising investment between Australia and the United States, is likely to provide a net benefit to Australia in the investment arena. The Committee is far from convinced that the benefit will be as great as that claimed by the Government and the CIE, but it remains likely that a benefit will eventuate. Consequently the Committee does not oppose Chapter 11 of the agreement, but its concurrence occurs despite, rather than because of, the analysis undertaken by the CIE and endorsed by DFAT.

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36 DFAT, *Answers to Question on Notice*, 6 July 2004, pp.8-9

## Chapter 9

### Trade in Services

9.1 Chapter 10 of the AUSFTA relates to the cross-border trade in services, that is, services provided under specified conditions. Chapter 13 of the AUSFTA, cross border financial services are treated separately from other cross-border services, and are dealt with separately below. (Financial services include banking, insurance, and similar incidental or auxiliary services.)

9.2 Chapter 10 does *not* include service delivery where an entity in one Party has established a commercial presence in the territory of the other Party. Such an enterprise would fall under the investment provisions in Chapter 11.

9.3 The services sector includes a large number of relatively small enterprises engaged in a wide variety of activities. Consequently, it is difficult to point to a single regime of policies affecting the freedom of trade in this sector. Furthermore, because the trade in services usually does not require the movement of goods across borders, trade restrictions do not tend to occur in the form of tariffs. Two separate forms of trade restriction can generally be identified: policies artificially restricting the supply of services, and policies which increase the real resource cost of services.

9.4 In both Australia and the USA, there are currently relatively low barriers to trade in the services sector. Both countries, for instance, have under the General Agreement on Trade in Services (GATS) a range of obligations in relation to reducing barriers to trade in services.

9.5 Under chapter 10, each Party will accord the other Party national or most-favoured-nation treatment, whichever is more favourable for the service supplier. Neither Party may limit the number of service providers or require those providers to have an office in its territory. There is a range of exceptions specified in Annexes 1 and 2 of the AUSFTA.

9.6 Countries may require, for professional services suppliers, the authorization, licensing or certification of services suppliers. As these requirements may differ between countries, each country, or its relevant professional bodies, may have certain rules about recognising the education or experience obtained, requirements met, or licences or certifications granted in foreign countries. Sometimes this recognition is pursuant to formal agreements with the foreign country concerned or a country might accord such recognition unilaterally.

9.7 Article 10.9.1 makes it clear that the Chapter does not prevent a Party from according such recognition to persons from foreign countries - but under Article 10.9.4 it must not do so in a way that would amount to a means of discrimination between countries in the application of its requirements, or a disguised restriction on trade in services. If a Party accords such recognition to persons from a non-Party then

the MFN Treatment obligation does not require that it accord such recognition to persons from the other Party (Article 10.9.2). However, it must give the other Party the chance to show that it should also be accorded such recognition (Article 10.9.3).

9.8 Article 10.9.5 and Annex 10-A to the Chapter provide a formal mechanism by which the two Parties can encourage such recognition in respect of their professional service suppliers. Annex 10-A also provides for the establishment of a Professional Services Working Group that must report to the Parties, within two years of the entry into force of the Agreement, including with any recommendations for initiatives to promote mutual recognition of standards and criteria. The Working Group has a broad mandate to look at issues relevant to the provision of professional services, but with a particular focus on exploring ways to foster the development of mutual recognition arrangements among the relevant professional bodies, and on the scope to develop model procedures for the licensing and certification of professional services suppliers.

9.9 A substantial number of submissions raised concerns regarding the protection of local content requirements in the entertainment industry. These are discussed in a separate chapter of this Report.

9.10 The services chapter of the AUSFTA operates on the basis of a 'negative list'. That is, a service falls under the AUSFTA if it is not specifically excluded in an Annex. This model may be contrasted with the GATS, which operates on the basis of a 'positive list', where the GATS applies only to those services listed. A number of submissions expressed the view that Chapter 10 of the AUSFTA should operate on the basis of a positive listing of services to be affected. This would provide greater clarity and be consistent with the GATS agreement.

9.11 Under the AUSFTA, newly developed services automatically fall under the agreement. This is described in the Regulation Impact Statement in the following terms:

[The] framework of the Agreement ensures that commitments are more far-reaching than those negotiated under the WTO's General Agreement on Trade in Services (GATS). For example, where GATS follows a "positive list" approach, this Agreement uses a "negative list" under which key obligations like national treatment apply to all services trade, except for measures or sectors specified in annexed lists of reservations. This approach has a liberalising and transparent thrust in that all exceptions must be specifically reserved, or they are deemed to be liberalised. It also ensures that any new services are automatically covered by these obligations.<sup>1</sup>

9.12 Under these provisions, it is argued that Australia would lose the ability to protect new, innovative services from full competition under 'infant industry'

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1 Commonwealth Government *Regulation Impact Statement (RIS)* 30 April 2004, p.10

arrangements. Even if, in Australia's view, it is clearly in our national interest for a new service to be excluded from the AUSFTA, we will be unable to do so.

9.13 It has also been raised that Australia may not benefit from commercialisation of publicly funded Research and Development (R&D)<sup>2</sup>. The concern is related to the threat that the AUSFTA will result in job, production and R&D capacity and export opportunities being taken offshore<sup>3</sup>. The transfer of technology and domestic content requirements for R&D grants constrain the 'national benefits test' and may limit any future Governments capacity to implement national benefits criteria.

9.14 Substantial concern was raised about the treatment of government services offered on a commercial basis, with claims that such services would not be exempt from American competition under the AUSFTA. Given the contraction of direct government services in recent years, and its replacement by outsourced services delivered privately on a competitive basis, substantial elements of Australian government service delivery may fall under the AUSFTA. Submitters expressed concerns about the suitability of arrangements which may see Australian government services delivered by outsourced companies not even operating in Australia.

9.15 The government has consistently stated that governments will retain the right to regulate and that government services are excluded from the Agreement.

There is nothing in AUSFTA that would undermine the right of governments to adopt appropriate regulations that are in the public interest, for example, to achieve health, safety or environmental objectives. Nor does it require the privatisation of government services. Public services provided in the exercise of governmental authority will also be excluded from the scope of the services chapter.<sup>4</sup>

9.1 The Regulation Impact Statement describes the AUSFTA as:

“GATS-plus” in relation to domestic regulation: it respects the right of governments to adopt domestic regulation affecting trade in services, but contains enhanced provisions on transparency and the processes for adopting such regulations. These provisions reflect proposals Australia and other countries have put forward in the WTO services negotiations.<sup>5</sup>

9.16 A number of submissions have called attention to the failure of the AUSFTA to allow for greater temporary movement of professional and business people across borders. The cross-border trade in the services industry, in particular, relies on the ability of the people delivering those services to travel freely between Australia and

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2 Federation of Australian Scientific and Technological Societies, media release, 15 June 2004

3 *Submission 528*, FASTS, p.1

4 DFAT *Frequently Asked Questions on AUSFTA*

5 Commonwealth Government *Regulation Impact Statement (RIS)* 30 April 2004, p.10

the USA. This may in fact be one of the most substantial impediments to free trade in cross-border delivery of services –yet it is untouched by the AUSFTA.

9.17 The representative of the Australian Services Roundtable expressed the group's views about the AUSFTA in general and the provisions regarding movement of people in particular.

Chapter 10 on cross-border trade and services delivers us no new market access. What it delivers us is some limited and highly qualified new legal protection, known as national treatment. It delivers it in roughly half-a-dozen subsectors where we do not yet have that protection in the GATS in the WTO. How useful are those new protections? They are significant but they offer both Australia and the United States scope now to improve their GATS offer. Frankly, though, we would be surprised if Australia went down that particular path, as one of the areas we have given national treatment to is water supply, which we have specifically said we will exclude from our GATS offer. So the legal protections, on balance, are limited.<sup>6</sup>

To conclude, some of our members are deeply concerned. I am not going to cover culture, intellectual property, audiovisual or e-commerce because you will receive submissions directly on all those issues. But in the membership there is no matching enthusiasm in any of the other sectors to counter that deep concern. We see that the positives are in financial services and in government procurement but, with regard to government procurement, the US market is harder to access and more limited than we initially thought, and we are doing a lot of work in that area. On balance, most of the membership sees the agreement as benign.<sup>7</sup>

9.18 On people movement, the Australian Services Roundtable expressed considerable disappointment.

There is one major absence from the FTA—that is, a chapter on the temporary movement of business people. This is something the services industries particularly were seeking. It gets no mention. In services, if you cannot get a visa and get across the border you cannot deliver your service. It is a major omission. It is important.

9.19 This disappointment was reiterated by one of the groups that is most enthusiastic about the AUSFTA. The group's spokesman, Mr Alan Oxley told the Committee:

One thing that our business group, along with the services group, was disappointed about was the failure to include liberalisation of the movement of personnel. We know that officials tried—the timing was against it because of the Iraq war and because of increased security—but we do not see why, if the government is willing to commit to a large package to help

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6 *Committee Hansard* 5 May 2004, pp.23-24 (Drake-Brockman, ASR)

7 *Committee Hansard* 5 May 2004, p.24 (Drake-Brockman, ASR)

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reform the sugar industry as part of the package of responses introduced in this agreement, it should not also adopt, as a major long-term target, an agreement with the United States to improve movement of personnel. As a group, we urge you to adopt that as one of your findings.<sup>8</sup>

9.20 The Select Committee regards the establishment of the Professional Services Working Group as a key feature of the Chapter on Services, and hopes that it will prove its value by exploring ways to facilitate the flow of professionals between the two countries. The mutual recognition of qualifications is clearly one area that requires its attention. But of equal priority is the question of the movement of business people and professional service providers between Australia and the US.

## **Financial Services**

9.21 Under chapter 13 of the AUSFTA, cross border financial services are treated separately from other cross-border services. Financial services, in this context, include banking, insurance, and similar incidental or auxiliary services. The separate treatment of financial services recognises the particular need for regulation in this sector.

9.22 Chapter 13 requires each Party to accord the other Party national or most-favoured-nation treatment, whatever is more favourable for the financial service supplier. It requires each Party to allow its nationals to freely purchase financial services from the other Party, and prevents Parties from artificially limiting the number or size of financial service providers. There is a range of exceptions to these general obligations, specified in Annexes 3 and 4 of the AUSFTA.

9.23 The AUSFTA sets out requirements for increased transparency in the administration and development of financial services regulations. The AUSFTA also provides for the establishment of a 'Financial Services Committee' with the task of examining ways to further integrate the financial services sectors of the two Parties, and discussing issues which arise in the implementation of this chapter.

9.24 Both the Australian and United States Financial Services markets are currently relatively open, although schemes for prudential regulation operate in both nations.

9.25 Australia and the USA both have sophisticated systems of prudential regulation to ensure that financial services are only undertaken by appropriate service providers, and to ensure that the industry handles clients' funds with probity. Concerns were raised with the Committee asserting that the AUSFTA must not become a means by which Australia's prudential regulatory regime is undermined.

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8 *Transcript of Evidence*, 5 May 2004, p.27 (Oxley, AUSTA)

9.26 The membership, role, and manner of operation of the Financial Services Committee (created under article 13.16, with further information in an exchange of letters) is not currently clear. For instance, the extent of industry involvement or consultation in the Committee's deliberations, and the extent of parliamentary oversight of the Committee's outcomes, is not specified.

9.27 The impact of providing United States investors with direct access to trading screens on the Australian stock exchange (ASX) is difficult to assess. This proposal is not directly included in the AUSFTA, but is one of the items slated for progression by the Financial Services Committee. Currently, Australian investors can invest directly in securities on the New York Stock Exchange, but United States investors must pay intermediaries in Australia to trade on their behalf on the ASX. The extent to which this direct access would provide benefits to listed Australian companies is not yet clear.

## Chapter 10

### Agriculture

#### The Outcome for Agriculture

10.1 Chapter 2 of the Agreement sets out the tariff elimination schedule for agricultural products and Chapter 3 (Agriculture) establishes a Committee on Agriculture, institutional provisions and safeguard measures. Procedures for the elimination of tariffs and the establishment of duty-free tariff rate quotas on some agricultural products, are set out in the Tariff Schedules.

10.2 In the United States' Tariff, five main categories will be established: existing zero tariff, immediate tariff elimination, and elimination of tariffs in equal annual instalments over 4, 10 and 18 years. A few products are covered by additional staging categories (e.g. beef, avocados and wine).

10.3 No provision is included for changes to tariffs on sugar or sugar products, nor for a change to the above-quota duty rate for dairy products. For dairy, there is an increase in the volume of the duty-free quota available. Agricultural tariffs will be eliminated during the phasing period, except for these two industries.

10.4 Most Australian tariff rates on agricultural products are already zero. The remainder will be eliminated immediately the Agreement enters into force.

10.5 Tariff Rate Quotas applied by the United States will apply to beef, dairy, tobacco cotton, peanuts and avocados. The Agreement provides for the quota limits to be progressively increased during the tariff phasing period.

10.6 For beef, in year 1 the duty rate within the quota will be reduced to Free and in subsequent years the quota level will be progressively increased. From years 9-18 the above-quota duty rate will be progressively reduced to zero.

10.7 A safeguard arrangement will apply to beef imports exceeding 110% of the additional AUSFTA quota during the 18-year tariff elimination period. After that, the level of duty-free imports will be unlimited but a price based safeguard will apply. This mechanism can only apply to imports exceeding the year 18 quota level, plus an additional 420 tonnes per year from year 19. However, unlike the WTO agreements on safeguards, AUSFTA does not require that there be a causal link between the surge in imports and the injury.

10.8 There has been some concern expressed over the need for an 18 year phase-in period for beef, and also extension of safeguards beyond that time. It has been broadly recognised that the immediate removal of the tariff and increased quota over the 18 year period is of significant benefit to the development of the beef

industry. In any event, quotas thus far have seldom been met. The phase in period will allow the beef industry time to build up its capacity to supply.

10.9 The National Farmers Federation, while expressing some disappointment about the deal on agriculture, stated that they do recognise that there are some benefits for agricultural producers. The Federation indicated that it would therefore support the Agreement:

...our position is as follows. NFF is disappointed with aspects of the USFTA, and NFF expectations were clearly not met in a range of areas, particularly with regard to the outcome on sugar and beef. However, on balance, as the market access benefits for several agricultural industries are significant and:

- (a) NFF does not believe the US FTA undermines Australia's quarantine system,
- (b) NFF does not believe negotiated outcomes in chapters outside agriculture negatively impact on Australian farmers and
- (c) NFF has seen no evidence at this time that the US FTA undermines Australia's ability to gain a favourable outcome in the WTO negotiations,

NFF supports the US FTA and believes all political parties should support the agreement through the Australian parliamentary system.<sup>1</sup>

10.10 Beef and Livestock Australia was also concerned about some aspects of the Agreement, while indicating that the industry was satisfied overall with the outcome:

I do not think it is any secret that we are disappointed in some aspects of the agreement. We are disappointed at the long time frame to transition. We are disappointed that safeguards apply ad infinitum, beyond the 18 years of transition. But having noted that, on balance it provides us with increased access to that market worth a considerable amount to the Australian industry. So despite being disappointed in some aspects of the agreement—and I have never been involved in an agreement where I have not been disappointed in some aspects—we support the agreement.<sup>2</sup>

10.11 Australian Meat Holdings expressed similar views:

Our company's position is that we are in support of the agreement as it specifically relates to the meat industry. We do not wish to comment on the agreement in its broader sense, but we are supportive of it as it pertains to the meat industry. It delivers some immediate benefits to us in so much as the US4.4c a kilogram on the 378,214 metric tonnes under the WTO quota drops off as of day one. The quantum of the additional tonnage under the FTA of 70,000 metric tonnes puts us at a figure that this industry has traditionally never achieved. Given that there are some concerns about the

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1 *Transcript of Evidence*, 5 May 2004, p.129 (Corish, NFF)

2 *Transcript of Evidence*, 16 June 2004, p.20 (Barnard, Meat and Livestock Australia)

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availability on the supply-side to generate sufficient livestock to deliver that tonnage going forward, we think it is a very appropriate amount of tonnage to be awarded.<sup>3</sup>

10.12 In its submission, the Cattle Council of Australia highlighted the fact that the quota outcome was far from the negotiating position it had set before the government going into the negotiations.

The outcome on beef from the AUSFTA negotiations was substantially different from the negotiating objectives of the CCA. In short, an increase in quota of 70,000 tonnes over 18 years was negotiated. This negotiating outcome can only be described as disappointing. Critically, the increase is not sufficient for Australia to avoid quota restrictions in the US market in many years.<sup>4</sup>

10.13 A number of dairy products will be subject to quota; some of which already have an agreed WTO quota. An additional quota volume will be allocated for each product and the in-quota duty rate reduced to zero immediately. The additional quota amounts will then be increased by 3-6% per year, after year 1. The duty rates on all non-quota dairy products will be reduced to zero over the 18-year tariff phasing period; as will the quota and duty on Goya cheese.

10.14 The dairy industry was quite positive about the outcome for its members and indicated that it saw the possibility of considerable export growth. At the same time the industry noted that the priority is a satisfactory outcome in the Doha Round of the WTO:

The new access offers Australian manufacturers a unique opportunity to grow demand for dairy in the United States, with innovative customer tailored products, before our competitors can secure increased access via either regional agreements or multilaterally through the WTO.

Following are the impacts of the proposed agreement on the dairy industry. The value of dairy exports to the United States in year 1 is estimated to grow by at least \$50 million to \$60 million. The five per cent growth in access each year means that access will double in about 16 years.

The size of these access gains needs to be put in perspective from a US dairy industry viewpoint. In year 1, it is equivalent to about \$169 million litres of milk in a US domestic market of \$75billion litres of milk equivalent. This is about 0.23 per cent of the domestic market in the United States.

We see this as a stepping stone to Doha. It is important to note that the proposed FTA is only a stepping stone to the industry's most important trade objective: fundamental reform of world dairy product trading arrangements through the Doha development round negotiations.

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3 *Transcript of Evidence*, 22 June 2004, p.14 (Keir, Australian Meat Holdings)

4 *Submission 406*, p3 (Cattle Council of Australia)

...In conclusion, the agreement is not a panacea for the challenges currently facing the dairy industry but will give both dairy farmers and manufacturers renewed confidence in the underlying strength and future prospects for their industry.<sup>5</sup>

10.15 New quotas will apply to tobacco, cotton, peanuts and avocados. For tobacco, cotton and peanuts, the year 1 quota will be increased by 3% per year and the outside-quota tariff will be eliminated over 18 years. Avocados will have two seasonal quotas from year 2. A base quota of 1500 tonnes will apply between 1 February and 15 September, and a further amount of 2500 tonnes may enter duty-free between 16 September and 31 January. The outside-quota tariff will be eliminated over 18 years.

10.16 A price-based safeguard will apply to a limited number of horticulture products listed in Section A of Annex3-A. It will take effect if the FOB price of Australian products is lower than the specified trigger price for that product. The trigger price is the average of the prices applying in the two lowest years of the previous five years. The safeguard will be assessed for each shipment individually. After the 18 year tariff elimination period, these products will be duty free and the safeguard will no longer apply.

10.17 The horticultural sector was generally positive about the outcome, although recognising that there were some areas of difficulty:

What came out of it for horticulture? On the positive side, as we stand at the moment, 98 per cent of Australian fresh exports into the United States face tariffs. Under the agreement as struck so far, 99 per cent would actually be tariff free immediately and the remaining tariffs will be eliminated over a transition period, and that does go out to 18 years in some cases. But at the end of the period, for horticulture it is actually a free trade agreement, albeit having to wait for 18 years in some cases for that to occur.

One single tariff rate quota was negotiated, and that was for avocados. Even though there is a tariff rate quota there, the substance of that TRQ was seen as a substantially positive outcome for the avocado industry. However, there are no exports in avocados until the sanitary and phytosanitary issues, which are outside the free trade agreement, are completed. The other good thing is that we have a bunch of industries that are now seeking access to the United States under the sanitary and phytosanitary arrangements, and all of those fresh products will immediately have zero tariff under the agreement. So there is potential for new products to be exported from Australia to the United States.

The other thing we see as positive is that there is no alteration under these agreements to the quarantine market access arrangements, and determinations will continue to be made strictly on the basis of science. On the down side, there were a set of items, particularly in chapter 20, regarding processed products, currently valued at \$7½ million in trade,

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5 *Transcript of Evidence*, 5 May 2004, p.3 (Kerr, Dairy Products Foundation)

which do not achieve immediate market access; in fact, a number of those take 18 years to get tariff elimination. The other negative is that the time period for tariff reduction certainly will take longer than the agreement that was struck previously by the US and Chile. There are also a number of products into Australia that had up to about five per cent tariffs, and those tariffs are taken off immediately. So Australia offered a genuine free trade agreement as an opening case.<sup>6</sup>

10.18 The AUSFTA also declares that the two countries will co-operate on seeking the reform of international agricultural markets in the WTO and in other forums, such as APEC. A Committee on Agriculture will be established and will meet annually.

10.19 Both countries have agreed not to apply export subsidies to agricultural products traded into the other's market. The two countries have agreed to co-operate to remedy the effects of export subsidies applied by third parties.

10.20 The complete exclusion of the sugar industry from the Agreement has provoked considerable discussion. The public debate has resulted in the announcement of a \$444 million compensation package for the industry. This, in turn, has raised the question of whether other industries adversely affected by the Agreement will receive similar assistance packages.

10.21 It has been suggested that Australia's acceptance of the omission of sugar from the FTA will weaken Australia's negotiating position when seeking an ambitious reform package for agricultural products in the WTO.

10.22 This matter was discussed in hearings with the DFAT officials most immediately concerned with WTO negotiations. They have absolutely no concerns about Australia's capacity to continue to play an ongoing leadership role in efforts to improve agricultural trade multilaterally in both the WTO and the Cairns Group.

10.23 According to these senior officials, the Cairns Group continues to operate very effectively. It had a very successful meeting in February 2004 and continues to operate in Geneva, and at ministerial level, with focus on the WTO. Australia continues to put in as much effort as ever, arguably more than ever, to restore some momentum in these negotiations. The officials did not consider that signing AUSFTA would weaken Australia's position in the Group:

I cannot think off the top of my head of any Cairns Group member that is not part of a preferential trade arrangement or negotiating one—most of them are negotiating several. The Cairns Group continues to operate very effectively. It had a very successful meeting in February this year in Costa Rica at which this issue was not raised, either directly or indirectly.<sup>7</sup>

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6 *Transcript of Evidence*, 15 June 2004, p. 2 (Webster, Horticulture Australia)

7 *Transcript of Evidence*, 10 May 2004, pp.47-48 (Gosper, DFAT)

10.24 When asked directly whether this Agreement had undermined Australia's multilateralism, the response from a DFAT official was: "I do not believe so." Further asked about the effect on Australia's role as a leading nation in the Cairns Group, the response was:

I do not see that it has detracted in any way from our Cairns Group role.

10.25 In his current annual statement on trade, the Minister emphasised the importance of the Cairns Group and its role in the WTO negotiations:

Australia's longstanding partnership with other agricultural producers in the Cairns Group of 17 agricultural fair traders is a key aspect of our strategy for achieving agricultural reform.

At the Cairns Group's ministerial meeting in Costa Rica in February, ministers issued a strongly worded communiqué about the Group's readiness to move forward Doha round negotiations and work to lock in a framework agreement on agriculture...<sup>8</sup>

10.26 The Committee was also advised that Trade Minister Vaile had since attended meetings in Paris, including a series of ministerial meetings and informal negotiations, on parts of the agricultural text that are being addressed as part of the Doha round.

10.27 DFAT officials said the specific initiatives that have been put forward, the breadth of Australia's coverage and interest in the Doha round, combined with the energy and activity Australia has put into the Cairns Group and into the overall negotiations, belies any suggestion that Australia is not playing a leadership role in agriculture.<sup>9</sup>

10.28 The DFAT officials agreed that there are aspects of the FTA in the agricultural sector, where an even better outcome was desirable. However, even with those provisos on the outcome for agriculture, they considered the FTA to be a good agreement, and there has been overall support for it from agricultural industries. The officials said that it is a balanced package and one that both governments believe is a substantial outcome for their economies. That was the basis for their agreement.<sup>10</sup>

10.29 Small access gains to the US market deliver potentially very substantial, benefits for industries the size of those in Australia's agricultural sector. The dairy industry is a good example. Having reviewed the Agreement, that industry has made it clear to the Committee that they regard the access gains as significant for the scale of their industry, as it considers investment decisions and changes to the industry's structure and operations over time.<sup>11</sup>

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8 Minister for Trade, Hon Mark Vaile MP, *Trade 2004*, pp. 23-24

9 *Transcript of Evidence*, 10 May 2004, p.48 (Gosper, DFAT)

10 *Transcript of Evidence*, 10 May 2004, p.50 (Deady, DFAT)

11 *Transcript of Evidence*, 10 May 2004, p.51 (Deady, DFAT)

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10.30 An important aspect of the outcome of the Agreement is that the single desk arrangement for export marketing of Australian commodities has been preserved.<sup>12</sup>

10.31 One major concern is the absence of a Most Favoured Nation clause, which would require the United States to extend to Australia, treatment no less favourable than that accorded to agricultural products from a third country. In practical terms that would mean that the United States would have to pass on to Australia, any concessions it negotiates on agricultural products in a trade agreement with a third country, e.g. Chile or NAFTA. This may become extremely important if the negotiations to establish the proposed Free Trade Area of the Americas are successful. That agreement would include several of Australia's main competitors in agricultural exports.

10.32 The NFF indicated in its evidence that AUSFTA would be enhanced with the inclusion (through an exchange of letters) of a Most Favoured Nation provision.<sup>13</sup> This raises the question of why that provision has not been included for agriculture, while it has been included in the Chapters applying to Services (Article 10.3) and Investment (Article 11.4).

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12 Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement: Guide to the Agreement*, 1<sup>st</sup> Edition, March 2004, p.79

13 *Transcript of Evidence*, 5 May 2004, p.147 (Corish, NFF)



## Recommendations of Labor Senators

On March 7 2001, in an appearance before the United States House of Representatives Ways and Means Committee, US Trade Representative Robert Zoellick told Congress that '...if we approach this [Free Trade Agreement with Australia], I want to make sure that it's done in a fashion that has bipartisan support in Australia.'

It is unfortunate that the Government did not listen to this advice. Instead the Government acted unilaterally and pursued a trade deal for political purposes, with an unrealistic negotiating time frame imposed by the US electoral cycle.

This was a deal which Deputy Prime Minister John Anderson said would be un-Australian if it did not include sugar<sup>1</sup>. The Government repeatedly stated that the Pharmaceutical Benefits Scheme (PBS) was 'off the table'. However the Parliament was presented with a deal that did not include sugar and made some changes to the administration of the PBS, yet it was expected to provide immediate support.

In pressing for the passage through the Senate of legislation to implement the Australia-US Free Trade Agreement (AUSFTA) the Government is asking the Parliament, and thereby the people of Australia, to take an enormous amount on trust. There are some outstanding issues surrounding the Agreement that are simply not addressed by the implementing legislation, and set out hereunder is a number of recommendations that seek to address these many and varied shortcomings and unknowns.

It is recommended that the Senate pass the appropriate legislation that will give effect to the Australia-US Free Trade Agreement.

In choosing this path Labor Senators contend that there remain areas of concern which could largely have been avoided if proper process had been followed both in the initiation of the FTA proposal and in its subsequent negotiation and signing. This is elaborated briefly below, and in detail in the body of the report.

In turning to the merits of the Agreement, the Labor Senators note that Australia will enjoy enhanced access to US markets in a number of areas. There are many areas where both the Australian and US markets are already very open.

The gains in agriculture will assist Australia's primary industries sector, although it is universally acknowledged that there is disappointment over extended phasing out periods of tariffs, continued quotas, and let-out clauses which allow for the reimposition of tariffs in the event of strong competition (safeguards) with respect to some important Australian export commodities.

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<sup>1</sup> Australian Financial Review, 24/1/2004, 'Sugar Doubts Could Kill Trade Talks'.

Investment, while already a fairly open market, is further encouraged by this Agreement, although it seems very unlikely that the gains will be anywhere near those that have been proclaimed on the basis of the Government's commissioned study by the Centre for International Economics (CIE). Both the US International Trade Commission and the Government's own impact analysis concur that the Agreement is not likely to produce a new wave of investment in Australia by American interests. It can only be hoped that the much-vaunted 'dynamic gains' actually emerge from the new trading environment – an aspect of econometric guesswork that does not have a track record.

Likewise, the burgeoning services area may enjoy greater opportunities for trade with America, notwithstanding some uncertainty about the willingness of many of the American states to sign on to enhanced access in the area of government procurement. Assistance needs to be put in place for Australian firms to take up the government procurement opportunities provided by the Agreement.

Unfortunately, the FTA has not delivered on the matter of mutual recognition of qualifications and the movement of business people between the two countries. This remains a key impediment to cross-border trade in services.

There have been several economic analyses of the costs and benefits of the AUSFTA, and these have produced wildly divergent assessments. Labor Senators are persuaded that the assessment of the Select Committee's consultant Dr Philippa Dee is the most judicious assessment. It concludes that the Agreement is likely to be beneficial overall, but only marginally so. Dr Dee's report, and the exchange of views that transpired in relation to it, are included in this report.

Notwithstanding the benefits outlined above, there remain a number of areas in the AUSFTA as it stands that require action to ameliorate many of the downsides or threats that flow from the Agreement. These risks are manifested most worryingly in the areas of health care, intellectual property, cultural protection and the impact of the Agreement on Australia's manufacturing sector. They are explored at length in the body of this report.

Again, the concerns that have arisen in relation to such crucial and complex areas as intellectual property would probably not have emerged if the Government, in its undue haste to secure an FTA with America, had not over-ridden the comprehensive review processes and recommendations that had been undertaken domestically to ensure a robust and fair intellectual property regime in Australia.

The question of due process remains one of the outstanding failures of the whole AUSFTA business. Instead of ensuring that the Agreement was initiated and negotiated on the basis of a thorough and independent assessment of what was in Australia's national interest –through the Productivity Commission, for example - the Prime Minister launched an approach to the US government, and then committed Australian officials to an unprecedentedly short time frame in which to negotiate the most complex trade agreement Australia has ever pursued. It is no wonder that various

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assurances and commitments given by Government ministers at the outset were eroded as the US exerted its economic, political and negotiating muscle.

In eschewing due process, the Prime Minister failed to provide the leadership necessary to bring the Australian community along with him. The Select Committee has witnessed much public anger, anxiety and disappointment as it sought to provide at least some opportunity for Australians to have their say about an Agreement with potentially enormous consequences. Almost none of the detail about many aspects of the implementation of the Agreement has been made available. Legitimate concerns were either ignored or summarily dismissed as the Government simply proclaimed more fiercely the alleged benefits and waved about highly-contested econometric 'evidence' to support its claims.

There must be far greater involvement of the Parliament at every stage of the Agreement-making process, and sound proposals are set out in the Committee's report. The States and Territories – who will be significantly impacted upon by the Agreement – had an extremely limited role during negotiations, and none had the necessary information about what was in the deal to enable cabinet ministers to adequately assess the implications of the AUSFTA for their jurisdictions. The Treaties Council of Australian ministers did not even meet to consider the matter. This is a major procedural flaw.

Another major shortcoming is that the Government has not explained – if indeed it has any idea – how the AUSFTA fits into a broader strategy for promoting Australia's national interest through trade. The proliferation of preferential trade agreements involving several of Australia's trading partners throughout the Asia-Pacific risks the emergence of a 'spaghetti bowl' of deals, each with their own special arrangements, which can easily turn into a red-tape nightmare for Australian firms trying to do business in a variety of Asia Pacific Economic Cooperation (APEC) markets.

Moreover, the proliferation of these preferential agreements – although ostensibly promoted by the Government as encouraging 'competitive liberalisation' which sets benchmarks and aspirations for future World Trade Organisation (WTO) discussions - may well have precisely the opposite effect, sucking the oxygen out of multilateral trade negotiations when the multilateral process is universally acknowledged as the best way to liberalise global trade.

In short the Government has attempted to harass the Parliament and the Australian people into accepting an Agreement that has enormous implications for our national interests. The Americans quickly adopted the Agreement. This is no surprise – it clearly delivers Australian markets to high-tech, highly aggressive American firms seeking a big slice of the Australian economic action. Australians are clearly not so sure. It seems there will be an overall economic benefit, but Australia's national interest must always be considered in more than economic terms.

As long as many of the worst fears expressed by people coming before the Select Committee are not realised, the AUSFTA will deliver meaningful benefits. The recommendations made by the Labor Senators must be implemented in order to

provide a robust grounding for the acceptance of the Agreement. A 'trust me' approach is inadequate when Australia's national interest is at stake. Only the actions recommended here can deliver to the Australian people the assurance that they both need and deserve.

### **Recommendation 1**

Labor Senators recommend that the Senate agree to the Australia-US Free Trade Agreement Implementation Bill.

## **Chapter 2 – Process**

The main body of this report raises a number of concerns regarding the process by which the Australia-US FTA was entered into. The following recommendations address these concerns.

### **Recommendation 2**

That the Prime Minister order a review of the Treaties Council with particular consideration to ensuring that when international agreements are being negotiated there is:

- timely consultation with States and Territories regarding National Interest Analyses,
- a more systematic approach to consultation and consideration of when negotiations should be elevated to Ministerial level.

In addition, because of the significant increase in negotiation of bilateral agreements, the review should consider mechanisms to ensure that current legislation/regulation across all jurisdictions, conforms and continues to conform to treaties.

### **Recommendation 3**

Labor Senators recommend that the Government introduce legislation to implement the following process for parliamentary scrutiny and endorsement of proposed trade treaties:

- (a) Prior to making offers for further market liberalisation under any WTO Agreements, or commencing negotiations for bilateral or regional free trade agreements, the Government shall table in both Houses of Parliament a document setting out its priorities and objectives, including comprehensive information about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.
- (b) These documents shall be referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for examination by public hearing and report to the Parliament within 90 days.

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- (c) Both Houses of Parliament will then consider the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, and then vote on whether to endorse the Government's proposal or not.
  - (d) Once Parliament has endorsed the proposal, negotiations may begin.
  - (e) Once the negotiation process is complete, the Government shall then table in Parliament a package including the proposed treaty together with any legislation required to implement the treaty domestically.
  - (f) The treaty and the implementing legislation are then voted on as a package, in an 'up or down' vote, i.e. on the basis that the package is either accepted or rejected in its entirety.
  - (g) The legislation should specify the form in which the Government should present its proposal to Parliament and require the proposal to set out clearly the objectives of the treaty and the proposed timeline for negotiations.

#### **Recommendation 4**

Labor Senators recommend that Australian governments – prior to embarking on the pursuit of any bilateral trading or investment agreement – request the Productivity Commission to examine and report upon the proposed agreement. Such a report should deliver a detailed econometric assessment of its impacts on Australia's economic well-being, identifying any structural or institutional adjustments that might be required by such an agreement, as well as an assessment of the social, regulatory, cultural and environmental impacts of the agreement. A clear summary of potential costs and benefits should be included in the advice.

#### **Recommendation 5**

Labor Senators recommend that all committees and working groups prescribed by and established under the AUSFTA report annually on their activities and outcomes. These reports should be tabled in the Parliament by the Minister for Trade within 15 sitting days of their receipt. Each report shall be accompanied by a statement from the Minister setting out the Government's views on the report received and drawing attention to any notable outcomes.

### **Chapter 3 – Intellectual Property**

A major concern of Labor Senators is that Australia entered into the Intellectual Property (IP) obligations of the Agreement in a manner that cut across established processes for copyright law reform and which did not appear to be part of a strategic vision of intellectual property.

Labor Senators were also concerned that it was difficult to get a comprehensive explanation from Government officials on many of the implications of the FTA on Australia's IP regime.

These concerns and more specific issues raised in the main report are addressed by the following recommendations:

### **Recommendation 6**

Labor Senators recommend that the Senate establish a Select Committee on Intellectual Property to comprehensively investigate and make recommendations for an appropriate IP regime for Australia in light of the significant changes required to Australian IP law by the AUSFTA.

### **Recommendation 7**

Labor Senators recommend that the Commonwealth Government enshrine in the *Copyright Act 1968* the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic, research and related purposes. Labor Senators further recommend that the issue of such use of copyright material should be referred to the Senate Select Committee on Intellectual Property to investigate whether universities, libraries, educational and research institutions should be exempt from paying royalties after 50 years.

### **Recommendation 8**

Labor Senators recommend that the Senate Select Committee on Intellectual Property investigate options for possible amendments to the *Copyright Act 1968* to expand the fair dealing exceptions to more closely reflect the 'fair use' doctrine that exists in the United States and to address the anomalies of 'time shifting' and 'space shifting' in Australia.

### **Recommendation 9**

Labor Senators recommend that the Senate Select Committee on IP review the standard of originality applied in Australia in relation to copyright material with a view to raising the threshold to a standard such as that in the United States.

### **Recommendation 10**

Labor Senators recommend that the Senate Select Committee on Intellectual Property should investigate the possibility of establishing in Australia a similar regime to that set out in the *Public Domain Enhancement Bill 2004 (US)*, with a view to addressing some of the impacts of the extension of the term of copyright, in particular the problems relating to 'orphaned' works.

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**Recommendation 11**

Labor Senators recommend that the Senate Select Committee on Intellectual Property investigate amendments to *Copyright Act 1968* to provide that a contract that purports to exclude or modify exceptions to copyright infringement such as fair dealing is not enforceable.

**Recommendation 12**

Labor Senators recommend that the Commonwealth Government use the two year implementation period applying to effective technological protection measures to ensure exceptions will be available to provide for fair dealing including temporary copies, research and study and the legitimate private use and application of all legally purchased or acquired audio, video, DVD and software items on components, equipment and hardware, regardless of the place of acquisition.

**Recommendation 13**

Labor Senators recommend that the Commonwealth Government use the two year implementation period applying to effective technological protection measures to ensure exceptions will be available to provide for the sale and distribution of legitimate audio, video, DVD and software items, as well as related components, equipment and hardware, regardless of the place of acquisition.

**Recommendation 14**

Labor Senators recommend that the Commonwealth Government ensure that specific exceptions will be available in the implementation of Australia's obligations in relation to Technological Protection Measures (TPMs) to provide for the manufacture of interoperable software products.

**Recommendation 15**

Labor Senators recommend that the Commonwealth Government implement Recommendations 15 and 16 of the Digital Agenda Review report prepared by Phillips Fox to ensure that temporary reproductions and caching are explicitly protected under Australian law.

**Recommendation 16**

Labor Senators recommend that any notice and take-down scheme introduced by regulations should balance the interests of copyright owners while appropriately protecting the personal information of Internet users. Regulations should ensure that carriage service providers are not required to disclose personal information about their customers unless compelled to do so by a court order.

**Recommendation 17**

Labor Senators recommend that the reasonable costs to internet service providers of complying with a notice and take-down procedure should be met by the issuer of the notice.

**Recommendation 18**

Labor Senators recognise that assessing whether a copyright infringement has occurred is a complex issue, appropriately determined by a court. Any notice and take-down scheme should not require a carriage service provider to assess whether a copyright infringement has occurred, or the relative seriousness of any infringement.

**Chapter 4 – Pharmaceuticals****Recommendation 19**

Labor Senators support Joint Standing Committee on Treaties (JSCOT) recommendation 5 that any independent review must ensure the fundamental integrity of the PBS listing processes, should not consider information that was not before the Pharmaceutical Benefits Advisory Committee (PBAC) and should base its recommendation on the same criteria as PBAC. The submission of the pharmaceutical company to the independent review should be made public.

**Recommendation 20**

Labor Senators recommend that an evaluation of the review process should be carried out after 12 months of operation and every 12 months thereafter. As well as assessing the accountability, transparency and practicality of the review process, the evaluation should consider the impact of the review process on the rate at which new drugs are listed on the PBS or the prices at which they are listed. The outcomes of the review should be tabled in Parliament.

**Recommendation 21**

Labor Senators recommend that the ANAO or the Productivity Commission should be asked to carry out an independent audit of the PBS listing process after the additional transparency mechanisms are implemented. This audit should examine the cost and efficiency of the new procedures and whether they benefit the Government, consumers and pharmaceutical companies. It should assess whether the transparency requirements affect the process of negotiating pricing agreements with pharmaceutical companies.

**Recommendation 22**

The Government must ensure that increased information on PBS listing procedures is balanced. Where the Government provides more information on PBAC decision making processes, it must ensure it can disclose the clinical and economic data that

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forms the basis of those decisions. There must be clear guidelines on determining what material is 'commercial-in-confidence' and this should be only material that is genuinely pertinent and sensitive to the business operations of a pharmaceutical company.

### **Recommendation 23**

Labor Senators recommend that the Government should table in Parliament a statement of the terms of reference and schedule of meetings of the Medicines Working Group established under the Agreement as soon as they are determined. The Government should also be required to table an annual statement in Parliament on the operations of the Medicines Working Group. This statement should include details of each meeting, including: who attended, what topics were discussed, the outcomes of those discussions including any commitments made by Australia and what consultation took place with stakeholder groups before and after the meeting.

### **Recommendation 24**

Labor Senators recommend that the Government monitor the impact of the new legislation on the rate at which generic drugs enter the market following expiration of a patent and consult with the generic pharmaceutical industry on the impact of the changes. An independent study of the entry of generic drugs to the market and the strategies of patent holders before and after the legislative changes should be undertaken and the results tabled in Parliament. If the new procedures are found to create incentives for 'evergreening' patents, the Government must amend the legislation so as to minimise the legal obstacles to putting generic drugs on the market once the original patent has expired, while ensuring the integrity of the patent system.

### **Recommendation 25**

Labor Senators recommend the creation of an offence for the lodgement of a spurious patent claim that delays the entry of a generic drug onto the market. The validity of a patent claim would be determined by a court.

### **Recommendation 26**

Labor Senators recommend that consistent with the terms of the Free Trade Agreement that the Commonwealth Government ensure that:

- Whenever possible all blood products to be used in the Australian medical system must be sourced from Australian blood plasma.
- That Australian blood plasma continue to be collected by voluntary donation.
- If plasma fractionation is to occur outside of Australia that Australian plasma should be processed on separate production lines.

- If plasma fractionation occurs outside of Australia then overseas suppliers must satisfy at least the same level of medical standards that apply to Australian suppliers.

## **Chapter 5 – Sanitary and Phytosanitary Measures**

### **Recommendation 27**

Labor Senators recommend that both the bilateral committees operate under a terms of reference that does not provide any avenue for influence on Australia's quarantine decision-making process.

### **Recommendation 28**

Labor Senators recommend that a process to engage key industry and community stakeholders to participate in committee discussions be developed.

### **Recommendation 29**

Labor Senators support the Joint Standing Committee on Treaties recommendation 8 for greater stakeholder consultation.

### **Recommendation 30**

Labor Senators recommend that Australia's Quarantine Import Risk Assessment process be enshrined in regulation to insulate the process from external pressures.

## **Chapter 6 - Local Media Content**

### **Recommendation 31**

Labor Senators acknowledge the concern expressed by many witnesses on the 'ratchet' nature of Australia's commitments for local content. Labor Senators therefore recommend that Australia's local content requirements for free-to-air television, subscription television and radio be enshrined in legislation, so that reductions in these quotas require reference to the Parliament.

### **Recommendation 32**

Labor Senators recognise that the Free Trade Agreement means that Australia's local content quotas cannot be increased above their current level except in limited circumstances. However they also recognise that over the longer term future technologies are likely to result in these quotas becoming an ineffective mechanism for encouraging the creation of local content. Labor Senators therefore recommend that the Government consider new or increased direct incentives to encourage local content production, but that local content requirements apply in emerging technological platforms, wherever possible.

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## Chapter 7 – Manufacturing

The Select Committee found that there is significant debate about the impact of certain provisions of the AUSFTA on Australian industry and that the Government has failed to adequately analyse the impact. As a result the Labor Senators have severe reservations that cannot be tested.

### Recommendation 33

Labor Senators recommend that the Government refer the following to an independent commission of inquiry as a matter of priority.

The review should canvass but should not be limited to:

1. the effect of the Agreement on the manufacturing industry generally, and in particular the Textile Clothing and Footwear (TCF), chemicals, plastics, pharmaceuticals and automotive industries immediately and over the next 20 years. This would include the scale of the threat from imports, affect on employment, investment (capital and research and development), prices, exports, skill acquisition, knowledge transfers, brand recognition;
2. whether the agreement will lead to closer integration between US subsidiaries in Australia and their parent companies in the US, and the potential impact of this integration;
3. the means through which manufacturing, in particular the automotive and TCF sectors, can inoculate itself from these threats through both their own initiative and through assistance from Government;
4. the extent to which industry development measures will be necessary for manufacturing, in particular automotive and TCF manufacturing, and the components and cost of such a package;
5. the impact of the Agreement on manufacturing businesses in regional Australia;
6. the extent to which industry development measures will be needed for regional Australia, the components of these measures / packages, and the cost;
7. the impact of the Rules of Origins provisions on industry, the compliance costs, and whether there are opportunities to achieve greater uniformity through existing agreements; and
8. legislative changes required to facilitate industry development; and
9. the impact on Australian industry of the government procurement provisions on Commonwealth, State and Territory government purchasing policies, and regional Australia.

**Recommendation 34**

Given a possible negative impact of the agreement on the Automotive Components Sector, Labor Senators recommend that the Government develop as a matter of urgency an Industry Development Plan to assist the sector meet future challenges. At a minimum, this package should include:

- a new 10 year industry strategy and vision for the sector to replace the outdated Action Agenda;
- a non-means tested labour adjustment package to assist in education, retraining, developing English language skills, and finding new employment;
- a program that encourages greater linkages across the automotive supply chain and clustering;
- a Research and Development (R&D) grants program dedicated to the industry to assist it to meet emerging markets overseas and to build on existing niche capability, that will assist it to compete with the US; and
- a regional component to assist restructuring in regional towns and cities – both labour adjustment and industry restructuring.

**Recommendation 35**

Given the possible negative impact of the Agreement on the Textile Clothing and Footwear sector, Labor Senators recommend that the Government develop as a matter of urgency an Industry Development Plan to assist the sector meet future challenges. At a minimum, this package should include:

- a new 10 year industry strategy and vision for the sector to replace the outdated Action Agenda;
- a more generous non-means tested labour adjustment package to assist in education, retraining, developing English language skills, and finding new employment;
- an R&D grants program dedicated to the industry to assist it to meet emerging markets overseas and to build on existing niche capability; and
- a regional component to assist restructuring in regional towns and cities – both labour adjustment and industry restructuring.

**Recommendation 36**

Given the possible negative impact of the Agreement on the Chemicals and Plastics sector Labor Senators recommend that the Government develop as a matter of urgency

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an Industry Development Plan to assist the sector meet future challenges. At a minimum, this package should include:

- a new 10 year industry strategy and vision for the sector to replace the outdated Action Agenda;
- a more generous non-means tested labour adjustment package to assist in education, retraining, developing English language skills, and finding new employment;
- an R&D grants program dedicated to the industry to assist it to meet emerging markets overseas and to build on existing niche capability; and
- a regional component to assist restructuring in regional towns and cities – both labour adjustment and industry restructuring.

### **Recommendation 37**

Labor Senators recommend that the Government establish a Manufacturing or Industry Council, similar to that which was established in the late 1970s and abolished by the Government in 1996. The Council should:

- involve industry associations, individual businesses, unions and the research sector;
- undertake an analysis of the state of the manufacturing industry in Australia;
- have a significant research capacity; and
- be provided with adequate resources to represent all industry sectors, to meet regularly, to engage experts as required, and to undertake significant research tasks.

### **Recommendation 38**

It is recommended by Labor Senators that the Industry Department be provided with additional resources to:

- undertake its own analysis of the impact of the AUSFTA on Australian industry, in particular manufacturing industries;
- ensure it is fulfilling its function of providing up to date statistical information on the performance of industry sectors including investment in research and development;
- contribute, in an informed manner, to the development of future trade agreements with other countries; and

- contribute to analysing, at least every 5 years, the impact of existing agreements on certain industry sectors.

## **Chapter 8 – Investment**

Labor Senators acknowledge that there is likely to be a net benefit to Australia from the increase in the threshold for Foreign Investment Review Board (FIRB) screening of foreign investment in Australian companies from \$50 million to \$800 million. Indeed all of the economic modelling examined by the Committee assigned the majority of projected gains to the effects of investment liberalisation.

Labor Senators are however concerned that the implementation of AUSFTA leads to an unusual situation in which investment from the United States is treated more generously to investment coming from any other country. There is also a further concern that such discriminatory treatment may breach Australia's obligations to Japan under the Treaty of Nara and to New Zealand under the Australia-New Zealand Closer Economic Relationship.

### **Recommendation 39**

Labor Senators therefore recommend that the Productivity Commission examine the economic and other impacts of extending this measure to investment from any country. It is further recommended that if the Productivity Commission finds that there is an overall benefit from applying FIRB liberalisation to investment from all countries that this should then be implemented.

## **Chapter 9 – Services**

### **Recommendation 40**

Labor Senators recommend that the Professional Services Working Group address immediately the issues of mutual recognition of qualifications and the movement of natural persons involved in service provision, and make recommendations to the Parties for removing as rapidly as possible any outstanding impediments to these functions. The report of the Working Group should be presented to the Parties within twelve months of the establishment of the Group.

### **Recommendation 41**

That the Australian Government press assiduously, through all available diplomatic, official and professional channels, for the removal of all impediments to the mutual recognition of qualifications and the movement of people involved in cross-border service provision.

## **Chapter 10 - Agriculture**

Labor Senators note that generally the Agreement has resulted in a small net benefit while acknowledging that there will be benefits to agricultural producers in some

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sectors as a result of AUSFTA coming into force. However it is the position of Labor Senators that the best hope for significant trade liberalisation still rests in the WTO.

Labor Senators are also dismayed that the Agreement did not provide for the principle of most-favoured-nation (MFN) treatment to apply to trade in agricultural goods as it did for trade in services and investment.

#### **Recommendation 42**

Labor Senators recommend that Australia should, as a matter of high priority, commence negotiations with the United States to obtain a commitment, through treaty or other process, which will ensure that both Parties to the Agreement will not give more favourable access in agricultural products to any third country without also providing the same access to the other Party.

#### **Recommendation 43**

Labor Senators recommend that the Commonwealth Government should invest significant effort into maintaining the strong relationship of the Cairns Group of countries, as the best vehicle for achieving significant agricultural liberalisation in the next WTO round.

**Senator the Hon Peter Cook, Chair**

**Senator Stephen Conroy**

**Senator Kerry O'Brien**



## Additional Remarks by Government Senators

### Part 1 - GENERAL REMARKS

1. Government Senators welcome the decision of the Committee to recommend that the Senate agree to the Australia-US Free Trade Agreement Implementation Bill. The passage by the Senate of the Bill will clear the last hurdle remaining before the Australia-US Free Trade Agreement ("FTA") can come into effect on 1 January 2005.
2. The overwhelming weight of credible evidence received by the Committee supports the view that the FTA will be of significant benefit to the Australian economy in the short, medium and long term. It gives Australia unparalleled access to the largest market in the world. It strengthens the bonds between the Australian economy and the world's most dynamic economy.
3. From the first day of the FTA, 97% of US non-agricultural tariffs (with the exception of textiles and clothing) will disappear. Other non-agricultural tariffs will be phased out by 2015. From the first day of the FTA, two thirds of agricultural tariffs will disappear. A further 9% of agricultural tariffs will be phased out by 2009, and others by 2016. Australian firms will have unparalleled access to the \$US200 billion government procurement market. According to some witnesses, about 60% of the economic benefits of the agreement will be felt in the field of investment, as the synergies between the two economies strengthen.
4. It cannot be said too plainly that, where there has been criticism of the agreement, much of the disagreement has been about the *extent of the benefits*. The most pessimistic assessment of the agreement, by Dr. Phillipa Dee, estimated the benefits at only \$53 million per annum. The Government's own modelling consultant, the Centre for International Economics, assessed the benefits at \$6 billion per annum. Most econometricians agreed, however, that the "dynamic effects" of the agreement were difficult to quantify, since its real benefits will only be seen in its operation. The Committee heard evidence that the North American Free Trade Agreement had, in the first decade of its operation, achieved benefits which were a multiple of those initially predicted.
5. One of the most impressive witnesses the Committee heard from was Mr. Alan Oxley, former Australian Ambassador to the GATT, and one of Australia's most distinguished trade experts, who (unlike some academic

witnesses) has actual "hands on" experience of the operation of trade agreements. Mr. Oxley told the Committee in his evidence on May 5:

"You asked, Chair, what would be the downside for Australia if we rejected the agreement. We would probably be regarded as the most bizarre country in the world for having rejected a free trade agreement with the world's biggest economy ... an agreement that would give us access in agriculture, which is one of the most difficult areas, notwithstanding the fact that it is not perfect – when many other countries are lining up to have an agreement with them. I honestly do not know how any serious Australian government could justify that to the world at large."

6. While Government Senators accept that the Chairman's Report contains a reasonably balanced canvass of the evidence, we are nevertheless dissatisfied with the approach taken in expressing conclusions. The approach has been to adopt, almost *in terrorem*, warnings based upon the law of unintended consequences. Typical is paragraph 4.140, concerning pharmaceuticals and the PBS:

"What most concerns this committee is the possibility that allowing Australia's pharmaceutical policies and IP laws to be up for grabs in this agreement could have unforeseen and unintended consequences down the track. This report has repeatedly noted that the FTA is in a sense a living agreement. Further work will take place in forums such as the working groups set up under it. Many of the details of what it means and how it will be implemented will be sorted out later, possibly with the help of the dispute-resolution mechanism. While we understand the Australian negotiators' interpretation of the agreement, we cannot predict the actions of the US or the dispute resolution mechanism into the future."

7. That passage (which is typical of so much of the Chairman's draft) reads as if it were written so as to avoid coming to a conclusion. Yet the task of the Committee *is* to reach conclusions, and Government Senators note with satisfaction that, in the end, Opposition Senators have concurred with the Government in supporting the FTA. But it should not go unnoticed that the Report gives relatively uncritical ventilation to a large number of criticisms of the FTA by special interest groups (particularly, although not exclusively, from the trade union movement), together with disappointingly unscholarly ideological polemics by certain academics claiming for themselves an expertise which they plainly lacked, without making the obvious point that those criticisms were answered comprehensively and in detail by those who possessed genuine expertise and detailed knowledge about the working of the Agreement, in particular the Chief Negotiator, Mr. Stephen Deady, and his team, who gave the Committee an abundance of their time, and were able to answer such criticisms painstakingly, thoroughly and in detail. Government Senators refer, in particular, to that evidence during the long sessions on 21 June and 6 July, when those witnesses were taken carefully through each of the contentious areas.

8. Most of the concerns raised about the agreement, when scrutinized, amount to nothing more than a failure to understand the language of the FTA (or, in the case of some witnesses, it must be said, failure even to read the relevant sections before essaying criticisms, or a stubborn refusal to allow the technical meaning of the language to be explained to them). The FTA is a long and complex legal document, proper understanding of which requires a level of knowledge of international trade law and the law of treaties. Informed debate about it is inevitably of a somewhat technical character. Nevertheless, if the task of the Committee is to assess the document, it must first understand it. In reaching that understanding, heated emotional polemics, reflexive anti-Americanism, ideological rants and fanciful conspiracy theories are of absolutely no assistance, and bear little weight beside the dry, methodical, erudite technical explanations of Mr. Deady and his team. When those responses are considered, it will be perfectly apparent that the concerns raised by various critics are not based on an understanding of what the Agreement actually says. In our discussion of the effect of the agreement on generic pharmaceuticals which follows, we draw extensively upon Mr. Deady's evidence, the clarity and authority of which speaks for itself.
9. The Joint Standing Committee on Treaties reviewed the Agreement in Report No. 61, tabled in the Senate on 23 June 2004. Government Senators adopt the conclusions expressed by JSCOT, whose Report, it must be said, has reflected a more analytical approach to the Treaty than the Chairman's Report of this Committee.
10. Government Senators are clearly satisfied that the FTA is overwhelmingly in the national interest; a view they share with all of the State Premiers and virtually the entirety of the Australian business community. They welcome the decision of the Opposition to support the FTA. The Agreement may not be perfect – and it was never represented to be – but it will, we are satisfied, be viewed by future generations as an historic foundation of our nation's growing economic prosperity in the 21<sup>st</sup> century.

## **Part 2 - GENERIC PHARMACEUTICALS**

1. At the time these remarks were prepared, there remained one outstanding issue between the Government and the Opposition delaying passage of the enabling legislation through the Senate, i.e. the possible effect upon the market for generic pharmaceuticals in Australia of Art. 17.10.4, which is given effect to by Schedule 7 of the *US Free Trade Implementation Bill* ("the *FTA Bill*"). Government Senators are satisfied that those concerns are misplaced, for the reasons set out below.

2. Labor Senators argue that the effect of the FTA will be to delay the entry of generic drugs onto the market. In doing so, they rely upon the evidence summarized at paragraphs 4.75 – 4.108 of the Chairman's Report. Government Senators consider that the position of Labor Senators is based on a misunderstanding of the effect of Art. 17.10.4 and of Schedule 7 of the *FTA Bill*.
3. Generic drugs are pharmaceuticals which are no longer patent-protected. Evidence given to the Committee estimated that the price of such drugs is on average about 30% below that of patent-protected medicines. Patent protection of pharmaceuticals lasts for 20 years. The Committee heard evidence that the patent protection of a significant number of pharmaceuticals will expire within the next 5 years, including important anti-cholesterol drugs and antidepressants. Any delay in the opportunity for generic drugs to be marketed in Australia would, so the argument goes, prevent access to the cheaper generic drugs at an earlier time, so maintaining higher pharmaceutical prices.
4. The Committee heard evidence that in the United States and Canada, pharmaceutical companies have sought to extend the life of their patents (and thus their monopoly on the particular drug) by lodging applications to extend patents, shortly before their expiry, on insubstantial grounds, or by patenting allegedly "new" drugs which are not materially different from the existing drug (and thereby not properly patentable) and, on the basis of the newly-patented drug, challenging the generic drug as an infringement of the new patent. Under the American legislation, the *Hatch-Waxman Act*, there is an automatic 30 month injunction against the generic drug (and under Canadian law, 24 months) when this happens. During that period (or any longer time during which its claim is litigated), the original patent-holder can continue to enjoy monopoly profits as the sole supplier of the drug; if its challenge is unsuccessful, the costs of the litigation are likely to be minute in comparison to the profits earned in the meantime. Further, it can then file a further patent, triggering the statutory injunction for a new period, and repeat the process. These practices – which are in truth an abuse of process - are colloquially called "evergreening". The evidence was conflicting as to just how extensive the practice of evergreening in the United States is. One witness, Dr. Thomas Faunce, asserted that the practice affects some 53% of American pharmaceuticals coming off patent, although Mr. Deady was of the view that the figure was closer to 6%.<sup>1</sup> In any event there is no doubt that the practice exists.
5. Labor Senators claim that Article 17.10.4 of the FTA (to which effect is given by Schedule 7 of the *FTA Implementation Bill*, which amends s. 26 of the *Therapeutic Goods Act*), is an evergreening provision, and for the reasons explained above, will place upward pressure on Australian

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1 Hansard 21 June 2004 pp. 25 & 48 respectively.

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pharmaceuticals by giving the manufacturers a legal device to prevent generics coming onto the market (or at least delay the effect of downward price pressures resulting from the introduction of the cheaper generics).

6. That argument is wrong, for several reasons:
  - (a) The proposed amendments *do not* provide for a statutory injunction, unlike American and Canadian law. Labor's claims that the FTA would introduce American-style registration procedures into Australian law are untrue. In fact, as Mr Deady, said in his evidence to the Committee on 21 June, Art. 17.10.4 was the outcome of successful negotiation by the Australian negotiators to achieve the *very outcome* that Australian pharmaceutical process would not be affected by any process similar to the American one: *Hansard* pp. 33-34, which we set out at length in paragraph 7 below. He specifically and emphatically rejected the characterisation of Art. 17.10.4 as an evergreening provision.
  - (b) The amendments to Australian domestic law do not alter the existing rights of patent-holders. If the owner of a patent decides to sue the manufacturer of a generic drug for infringement of its patent, then there is nothing to stop it doing so. The material difference between Australian & US law is, as explained above, there is no automatic right to a statutory injunction, nor a minimum period if an injunction were to be granted. In short, *Australian patent law, and the Australian law governing the principles on which injunctions are granted, do not change.*
  - (c) Art. 17.10.4 and Schedule 7 of the *FTA Bill* are not laws which extend the intellectual property rights of patent holders. They are laws about the approval procedure for the listing of generic pharmaceuticals by the Therapeutic Goods Administration under the *Therapeutic Goods Act*. They effect one change to the procedure for the granting of TGA approval. This is to introduce a requirement that an applicant for approval of a generic drug certify to the TGA *either* (a) that it does not propose to market the generic drug in a manner which would infringe an existing patent. [s. 26B(1)(a)] *or*, if it does propose to market the generic drug before the patent term expires, it has given the patent holder notice of that fact [s. 26B(1)(b)]. However, this is merely a *procedural step in the approval process*: it merely requires the certification of something. It does not give the TGA the right to delay the application, nor does it introduce any additional criterion for the TGA to consider in determining the application. The amendments to the *Therapeutic Goods Act* make that perfectly clear, because by the *FTA Bill* the *Therapeutic Goods Act* is also amended to say that, if the certificate is supplied under s. 26B(1), "the Secretary *must* list the medicine

under subsection (1) without inquiring into the correctness of the certificate" (emphasis added).

- (d) The lodgement of the certificate neither involves delay (it is just one additional piece of paper), nor does it give the TGA any power to delay the listing (if the other existing criteria are satisfied). The only difference is that the patent holder is notified. The patent holder could then bring patent infringement proceedings, *but it has that right already*. The only practical change is that a patentee which has received a notice under s. 26B(1)(b)(iii) and decides to bring proceedings for an injunction to restrain infringement of its patent, is likely to bring those proceedings at an earlier time. Yet that in fact benefits the supplier of the generic pharmaceutical: if its right to market the drug is to be challenged on the basis of patent infringement, then better that dispute be had early, before the costs of manufacturing, distributing and marketing the generic drug have been incurred than afterwards. That is not to say that the patent holder might not seek to enforce an unmeritorious claim by one of the evergreening devices. But it can already do that under the existing law; as we have already pointed out, the amendments to the *Therapeutic Goods Act* do not alter the substantive law of patents. In particular, they do not introduce the statutory injunction procedure provided for by American law.

7. Mr. Deady's evidence on these matters was unambiguous and emphatic:

"Claims ... that these changes will delay generics entering the market, therefore pushing up the price of the PBS – again, I will say this as clearly as I can – are not true. There is no change to patent terms in article 17.10.4, or anywhere in the IP chapter.

...

"There is nothing that affects the patent terms or any possibility of extension of test data. There is one change, as I said, to the TGA, which people will see tomorrow [*scil.* Schedule 7 of the *FTA Bill*], to give effect to the commitments on 17.10.4. These measures that are part of these commitments that we have given relate to introducing measures in the marketing approval process which will prevent the marketing of drugs that are currently under patent. That is the existing law in Australia: drugs that are under patent cannot be marketed on the Australian market. So there will be some changes there to give effect to the measures in the marketing approval process but they will not delay generic drugs onto the market."<sup>2</sup>

"We are not importing the Hatch-Waxman legislation into Australian law as a result of the free trade agreement. So I really do think that comments about

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30-month stays or 24-month stays are not relevant to the commitments we have made to the United States and how we are going to give those effect in legislation. On the specifics of provision 17.10.4, I say again that that was a very tough negotiation. ... we did speak long and hard to the generics industry.

"We understood their concerns in this area and we have negotiated an outcome which we believe meets those concerns. It does provide the ongoing balance between the interests of the generic medicines industry and the legitimate rights of patent holders in these areas. That is what we have negotiated. That is what the language reflects. It says that we will provide measures in the marketing approval process to prevent persons from marketing their product where the product is claimed under a patent. That is what we have given effect to, and that is what we will be giving effect to in legislation. We believe that does not give any new rights to patent holders, but it does establish an addition step in the TGA in the marketing approval process.

...

The TGA will be required, as part of the marketing approval process, to establish an additional step to ensure that the generic seeking marketing approval is not intending to market that drug during the patent term. That is the additional procedural step that will be required. It does not add an additional patent right to the patent holder, but it does establish an additional step in that marketing approval process. That is what we are committed to under 17.10.4

**Senator BRANDIS** – When you say 'an additional step', is there a minimum time for compliance with that additional step? Because it is being said against you here by Dr. Lokuge and Dr Faunce that this will spin things out for 24 months, or at least for a prolonged period of time. As I understand it, you said that that is just wrong. Why does the additional step not involve any delay?

**Mr. Deady** – It certainly does not involve any delay. It is an additional administrative question, or certification, that will be asked of the generics when they are seeking marketing approval. It will not in any way delay the normal marketing approval processes. There is no timing issue.

**Senator BRANDIS** – No timing issue at all?

**Mr. Deady** – No. ... It will not extend the time of the marketing approval process, and it does not add or provide any additional rights to the patent holders in that process. ... That is the basis on which we negotiated this language.

**Senator BRANDIS** – And that is why you negotiated this language, to ensure that that did not happen?

**Mr. Deady** – To ensure there would not and could not be such a delay.

...

**Senator BRANDIS** – So 17.10.4, in the form which it now takes in its ultimate expression in the final draft, was in fact – do I understand you to be saying – the product of the Australian side successfully negotiating to avoid the very thing which Dr Lokuge has expressed concern about?

**Mr. Deady** – Yes, to ensure that there would not be any way through any aspect of the FTA, including the IP area, where the fundamentals of the PBS could be impacted. That was what we were negotiating about, and that is what we achieved through that language.<sup>3</sup>

8. Dr. Ruth Lopert, the witness from the Pharmaceutical Benefits Branch of the Department of Health and Ageing, agreed with Mr. Deady:

"Dr. Faunce ... suggested that article 17.10 part 4 was a provision that would allow evergreening of patents. I would strongly argue that the evergreening of patents is something which is not either provided for or supported by any of the provisions of this agreement. The evergreening of patents is something that will be pursued where pharmaceutical companies believe it is in their interests to do so. There is nothing in this text which either supports or impedes that. There is nothing in 17.10.4 that promotes the evergreening of patents."<sup>4</sup>

According to Mr. Deady, Art. 17.10.4 actually represented a *win* for the Australian negotiators, by keeping the Australian listing procedures unaffected by the American system:

[T]hese are things that the United States pressed us about. These are things that they did want as part of these negotiations. We had a lot of discussion with the generic industry leading into the process and right through the process. They were areas of concern. Those concerns have been fully addressed. ... We specifically did not agree to have 30-month or 24-month stays. Again, this is something I think the American would certainly have liked us to have agreed to as part of these negotiations. We did not agree with those points."<sup>5</sup>

9. Indeed, even the principal witness criticizing the operation of Art. 17.10.4, Dr. Lokuge (whose testimony, in Government Senators' view, was considered and dispassionate), conceded that if Mr. Deady's explanation was correct, his concerns were unfounded:

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3 Hansard 21 June 2004 pp. 31-4

4 Hansard 21 June 2004 p. 18

5 Hansard 21 June 2004 p. 16

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**Senator BRANDIS** – Dr. Lokuge, I listend to what you said ... I heard you calling our attention to the criticisms of the Generic Medicines Association as to the possible impact of 17.10.4. We have also heard from Mr. Deady. It's as simple as this, Dr. Lokuge: if Mr. Deady is right about what 17.10.4 means and you are wrong about it, then your argument completely collapses, and you do not have a complaint?

**Dr. Lokuge** – That is right.<sup>6</sup>

The reliability of the evidence of Dr. Faunce, the other principal critic of Art. 17.10.4, as well as his entitlement to be regarded as an objective expert, must be judged in light of the evident motive which underlay his "analysis", which was eventually exposed as his testimony before the Committee degenerated into an ideological rant:

**Dr. Faunce** – If Australia stands up at this moment in its history and makes a decision that it is not going to go down the path of signing this unbalanced agreement which trades off its unique public health and social justice imperatives, it will deserve to become a republic. It will deserve to have a strong and independent voice on the international stage. If we do not do that and we roll over and become the poodle of the United States on this, as we are on so many other human rights initiatives, then we do not deserve to become a republic.<sup>7</sup>

10. In light of the foregoing analysis, and the considered and reassuring expert evidence given to the Committee by Mr. Deady which we have set out, Government Senators consider concerns about the effect of article 17.10.4 of the FTA and the implementing legislation to be without substance. They certainly provide no justification for refusal to take advantage of such an overwhelmingly beneficial agreement.

**Senator George Brandis**  
**Deputy Chairman**

**Senator Jeannie Ferris**

**Senator Ron Boswell**

**4 August 2004**

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6 Hansard 21 June 2004 p. 32

7 Hansard 21 June 2004 p. 57



# Australian Democrats Dissenting Report

## 1. INTRODUCTION

The Australian Democrats support fair trade that is in the national interest. In our opinion, the Free Trade Agreement the Government has negotiated with the USA does not fit this description. Keen to try and cash in on their support for the Bush administration's policies in other areas, the Howard Government has accepted a substandard deal that will do more harm to Australia's future than good.

The 'national interest' is about more than the economic bottom line. It includes our social and labour standards, the preservation and improvement of our environment and our national cultural identity, and these factors must also be taken into account in any trade decisions. It is critical that the terms of the agreement do not affect our ability to regulate freely in the national interest in future.

Wide-ranging trade agreements such as this FTA will have an impact on every facet of our economic, social, cultural and environmental future and must be assessed in these terms.

The Australian Democrats believe Parliament should have a critical role to play in the trade agreement-making process – that is, to scrutinise, debate and vote on any such agreements that can so significantly affect our future.

### 1.1 The Inquiry

The Democrats supported the establishment of this Select Committee into the Australia-US Free Trade Agreement. Given that the Executive Government has the power to enter into this Agreement without the involvement of the Parliament, it is important that the Senate, as the house of review, carefully scrutinise and analyse the terms of the deal to determine whether it is in Australia's interest.

This Inquiry has conducted extensive hearings around the country, and has received over five hundred submissions from individuals and organisations keen to share their views about the impact of this Agreement. The Committee Secretariat staff are to be commended for their incredible hard work and diligence throughout this process.

They are also to be commended for a very high quality Final Report. The major issues of the Agreement that have emerged through this Inquiry have been outlined and discussed in a thorough and reasoned manner. It comprehensively covers the detail of the Agreement, and the divergent views about the more controversial aspects of the deal. The discussion in each chapter is very detailed, outlining the arguments of witnesses and comparing these to the DFAT and Government responses.

In the Democrats' opinion, however, the conclusions reached by this Report do not go far enough. Based on the evidence we have seen over recent months and after thoroughly analysing this deal, we believe that it is not in Australia's interest.

In this Minority Report, the Democrats will explain our response to this Inquiry. It is not our intention to restate the discussion of each issue and the evidence provided to the Inquiry contained in the majority Report, but we believe the Report's conclusions should be stronger, and an overall recommendation should be made against support for the deal.

## **1.2 Parliamentary Involvement in the Treaty-Making Process**

Parliamentary approval of treaties has been an important part of Australian Democrat policy for some time. Former NSW Senator Vicki Bourne introduced the *Parliamentary Approval of Treaties Bill* in 1995, which we continue to pursue. Throughout this year, we have emphasised the importance of this issue, and have continually called for agreements such as this USFTA to be brought before the Parliament for scrutiny and debate.

We would like to make one distinction, however, between our policy in this regard and the approach taken in the Committee's Report. The Democrats appreciate that a distinguishing feature of modern international trade agreements is that unlike other types of international treaties, trade agreements are strictly enforceable, and impose binding justiciable constraints on government.

The Committee Report argues that this therefore establishes greater justification for Parliamentary approval of trade agreements, as opposed to 'conventional' treaties. We understand that the focus of the Committee in this Inquiry is on the impact of trade agreements specifically, and can therefore appreciate why Parliamentary approval of trade agreements is the main concern of the Report. However, it is our strong belief that Parliamentary approval of treaties should not be restricted to trade agreements alone.

As a matter of principle, we believe Australia should consider itself strictly bound by all international agreements it enters into, irrespective of the nature of dispute settlement procedures contained within each treaty. The mere fact that one treaty is not as 'enforceable' as another is not, in our opinion, sufficient reason to consider it exempt from the need for Parliamentary consideration. The Democrats will continue to support the need for parliamentary approval of all international agreements.

Having said this, the recommendations of the Report in relation to the Parliamentary approval of trade agreements propose a useful process to ensure that there is greater democratic legitimacy in seeking to bind Australia to major trade agreements.

This process, which is outlined in the Report, would ensure that the elected representatives of the people of Australia have an opportunity to have a voice in the process of entering into binding international commitments. The Parliament would have a role in approving the Government's priorities for trade negotiations, which would give the Government a greater democratic mandate in negotiations. A

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concluded trade agreement that conformed to already agreed objectives would be more likely to receive final Parliamentary approval.

This process is similar to the one that operates in the United States, where Congress has an opportunity to accept or reject any major agreement entered into by the Executive Government. It is time that Australia embraced a similar arrangement. The current system, where commitments are made by our Executive without consultation that have a significant impact on every facet of Australia's economic and social structure and bind us long into the future, is inappropriate and lacks democratic legitimacy.

## 2. ECONOMIC BENEFIT?

The Government has based most of its sales pitch relating to this FTA on the assumption that it will bring a significant economic benefit to Australia. While the Democrats believe that wide-ranging trade agreements of this nature should be assessed according to a broader set of criteria than mere economics, it is useful to look at the vastly divergent views about whether the Government's loudly proclaimed benefit is ever likely to eventuate. We recognise that economic modelling is an inexact science, and that there are a range of different assumptions that can be used to produce remarkably different results. However, we believe that the Government has deliberately misled the Australian people with respect to the benefit of this deal, and they have done so according to results from their own economic modelling study. It is useful, therefore, to consider the report that the Government is basing its projections on, and outline the shortcomings of this analysis.

Characteristic of the debate on the FTA thus far is the fact that the economists just can't agree on the benefits of this deal, or lack thereof. The Government commissioned the Centre for International Economics to model the impact of the FTA – the same organisation that predicted the FTA would be worth \$4 billion a year if it got rid of *all trade restrictions* between the two nations. This time, the CIE told the Government exactly what it wanted to hear – and in fact, decided that even though the deal left many trade barriers in place, the projected benefits of the deal had ballooned out to more than \$6 billion a year.

The CIE report has been criticised for using grossly overstated estimates and unrealistic assumptions. Dr Philippa Dee of the Australian National University was commissioned by the Committee to conduct alternative economic modelling of her own and came up with a far more realistic figure of \$53 million a year. As Dr Dee herself describes it, this is "a tiny harvest from a major political and bureaucratic endeavour."

Dr Dee's report also demonstrated how this agreement sets a precedent in a couple of significant ways.

- Firstly, Australia has accepted this Agreement (even though it didn't contain any access to the US sugar market), but rejected the EU/US proposal on agriculture at

the World Trade Organisation meeting in Cancun, which (while not ideal) could have provided greater benefits for Australian farmers because the proposals started to address the problematic question of US domestic agricultural subsidies.

- This FTA sets precedents with respect to tailoring rules of origin based on tariff classification. In the past, all rules of origin were based on a relatively simple rule for regional value content of goods. These tailor-made rules have been criticised as being the result of protectionist lobbying by producer interests, and Australia can be now said to be condoning such an approach.
- The fact that we have accepted such wide-ranging safeguard measures (especially for beef and textiles) is a step backward from WTO practice.
- Our extensive IP commitments will set a precedent for Australia's approach to IP regulation in the future.

One of the key examples made by Dr Dee about the overinflated assumptions used by CIE in their analysis related to government procurement provisions of the Agreement. The benefit to be gained from these opportunities depends on the whether Australian businesses are able to take advantage of them.

The CIE study considers that Australia might be able to achieve 30% as much market penetration as Canada. However, Dr Dee argues that this is doubtful – Canada is a much bigger country, and much closer to the US than Australia (90% of the Canadian population live within 160 km of the US border, which stretches for over 6400km).

Geography and economy size play a significant role in trade. Trade volumes tend to increase with the size of the importing and exporting countries, and decrease with the distance between them. The Canadian economy is almost 70% larger than the Australian economy, and the Australian economy is almost 30 times further away from the US.

Therefore, Australia's trade with the US in government procurement could be expected to be 4% as large as that of Canada.

Dr Dee's report also takes into account the fact that tight 'rules of origin' can dilute the benefits of goods market opening by disqualifying some goods for preferential tariff treatment. It is possible that many Australian products could have difficulty meeting the rules of origin, and thus not be eligible for preferential tariff treatment.

Dr Dee reports that empirical evidence suggests that the proportion of trade that takes place at preferential tariff rates in preferential agreements is typically remarkably low. That is, even though there is the scope for preferential tariff rates, many companies don't take advantage of them. There are two contributing factors to explain this:

1. Production processes are becoming increasingly geographically fragmented, and rules of origin are becoming harder to meet, and
2. The costs of complying with rules of origin, especially for small and medium-sized businesses, are high. In some respects, it is easier for businesses to just

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accept the tariff rather than have to go through the difficult and expensive process of proving their eligibility for special treatment.

Further, rules of origin can have a trade diverting effect, as they can affect the import sourcing choices of producers.

Dr Dee's revised projection of the benefit likely to be achieved through this deal reflects adjustments taking into account rules of origin, trade diversion, and costs such as additional royalty payments resulting from the extension of the copyright term, the costs of administering the Agreement, and the long-term cost of the sugar package.

There has also been a great deal of disagreement about the potential benefit of the Investment chapter of the FTA – with economists unable to agree on the effect the deal will have on Australia's equity risk premium and the various dynamic impacts the Agreement is likely to have. A particularly interesting point that is made in the Majority Report is that Treasury is usually very sceptical of using dynamic productivity gains (DPGs) as a basis for policy decisions and does not seek to estimate them in costings. The CIE study, however, uses DPGs as the major contributor to the projected \$6.1bn benefit Australia will derive from this Agreement.

The Democrats believe that this evidence demonstrates further that the gains cited by the CIE report are flawed and overstated, especially given that the figures have been based on assumptions the Treasury itself refuses to use in normal policy advice.

In our view, Government rhetoric about the benefits of the deal cannot be taken seriously. Given the magnitude of the costs in areas of key social, cultural and environmental policy, it is difficult to find any benefit for Australia in this deal at all.

### **3.0 KEY AREAS OF MAJOR COMPROMISE**

The following discussion will outline some of the key areas of concern to the Australian Democrats. While this is by no means an exhaustive discussion (which could potentially be longer than the text of the Agreement itself), this is not to say at all that the impact on other sectors is less important, or that they are less affected. In fact, it is when the FTA is taken as a whole that the extent of the damage it will cause is properly revealed.

#### **3.1 Pharmaceuticals and Health**

As the Majority Report suggests, the PBS is integral to Australia's health care system, is core social policy and should never have been included in any debate or negotiations on trade.

Furthermore, the report acknowledges that the Government misled Australians, saying the PBS system would not be traded away in the FTA negotiations, it was not 'on the table' and that US negotiators were 'in no way going after the PBS'.

Once it became clear that the PBS was indeed on the table, the Government downplayed its importance, in contrast to the enthusiasm shown by US negotiator, Bob Zoellick who said in his response to US Congress questions, that it was a 'breakthrough' for US pharmaceutical interests.

The Democrats therefore find it extraordinary and regrettable that the report should merely find it 'unfortunate' that the government included the PBS in the FTA and conclude that;

"... now this has occurred, our task is to examine closely the relevant provisions and assess the possible impact and implication for the PBS into the future."

The Democrats strongly disagree that the Senate should simply assess the impact for the PBS sometime in the future. We consider that, based on the evidence, it is entirely appropriate for the Senate to reject the PBS provisions in the FTA and implementing legislation.

The PBS can and will be impacted by the FTA. The Majority Report sets out the proposed changes in some detail and presents evidence that the FTA will be detrimental to the PBS. The Democrats accept that medicine prices will not automatically rise under this Agreement, but there is ample evidence that this is highly probable. It would therefore be irresponsible to support the Agreement and hope that these negative results will not occur, as the Majority Report recommends.

### *Background*

Australia's PBS has been attacked consistently by US pharmaceutical companies and their Australian subsidiaries, because it delivers some of the lowest patented drug prices in the developed world – according to the Productivity Commission, three to four times lower than those in the US. It does this through pharmacoeconomic analysis and reference pricing that determines the benefits of new drugs and its national bargaining power. It is not surprising therefore that the pharmaceutical industry, both here and in the US, has been calling for changes to the FTA that would strengthen the capacity of the industry to increase those prices.

However, the pharmacy sector is already the most profitable and influential industry in the US and has been for the past 10 years. In the fiscal year 2003-2004 it has been reported that the industry spent US\$150 million to influence public policy. There are 675 pharmaceutical lobbyists in Washington alone. In the 1999/2000 US election cycle the pharmaceutical industry spent \$20 million on campaigns contributions of which \$15 million was provided to the Republican Party.<sup>1</sup>

In October 2003 it was reported that President Bush told our Prime Minister that raising Australian prices for US pharmaceuticals was important to ensuring that

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<sup>1</sup> Public Citizen "The Other Drug War 2003: Drug Companies Deploy an Army of 675 Lobbyists to Protect Profits" *Congress Watch*, June 2003

consumers in all countries, not just the US, paid for high research and development costs.<sup>2</sup>

*Is research & development cost really the issue?*

The US Administration has argued that Australia has not borne its share of the research and development costs of new medicines, making US consumers pay the bill. However, over the last few years, the Australian Department of Industry, Tourism & Resources has provided \$300 million in grants for pharmaceutical manufacturers undertaking research and development in Australia and from 2004/05 to 2009/10 a further \$150 million. In any case, US pharmaceutical companies spend 2 to 3 times more on marketing, administration and lobbying than they do on R&D and their profits are twice the cost of their R&D expenditure.<sup>3</sup>

The Australian Productivity Commission established that the largest price differences between Australia and the US are for aggressively marketed new drugs involving small molecular variations and minor additional patient benefit – the so-called 'me-too' drugs - and that PBS prices for new drugs providing genuine benefit are much closer to the US prices.

*Principles of equity and affordability missing*

As has been pointed out by Dr Ken Harvey and others, the FTA emphasises the need to reward manufacturers of "innovative" new pharmaceuticals in Annex 2-C but does not include any principles on the need of consumers for equitable and affordable access to necessary medicines (the first principle of our National Medicines Policy).<sup>4</sup>

It also leaves out the hard won principle of the Doha Declaration on the Trade Related Intellectual Property Rights (TRIPS) Agreement in Public Health, viz:

"Trade agreements should be interpreted and implemented to protect public health and promote universal access to medicines."

The dispute resolution process will rely on the principles in the FTA when determining Australia's compliance with its obligations. Therefore the rights of the drug company will be favoured over the rights of Australians to access drugs under the Agreement.

Again, the Majority Report acknowledges this issue but does not suggest a remedy. If the FTA is to include any reference to any element of Australia's health system, a position strongly rejected by the Democrats, then there should be an overriding provision that places public health concerns, including the right to affordable medicines, as the fundamental principle of all decisions, over and above the rights of pharmaceutical companies.

<sup>2</sup> Colebatch T, "Bush wants end to medicine subsidies", *The Age* 24 October 2003

<sup>3</sup> Families US Foundation "Profiting from Pain Where Prescription Drug Dollars Go" *Families USA* Publication No. 02-10-2002

<sup>4</sup> Harvey, K et al, "For Debate: Will the Australia-United States Free Trade Agreement undermine the Pharmaceutical Benefits Scheme", *MJA* August 2004

### *Review Process*

The establishment of a review process in cases where decisions are made to not list a drug is also an area of substantial concern. While the FTA does not specify that the review process is to be binding, it provides yet another opportunity for the pharmaceutical industry to have input into, and bring pressure on, the operations of the PBS.

A consultation paper has been released on the proposed workings of this review process, but decisions regarding its final operation will be completed subsequent to the consideration of the FTA legislation and the paper suggests that the review will be conducted in secret. While the DoHA have argued that the proposed review process cannot overturn PBAC decisions, it begs the question; what is the point of the review? It is noteworthy that Medicines Australia, an industry body, has applauded the introduction of an 'appeals mechanism'.

### *Transparency*

The pharmaceutical industry has made much of the need for greater transparency within the PBS process. However, as many commentators have noted, the 'commercial-in-confidence' rights of pharmaceutical companies are guaranteed within the FTA, yet the public are denied access to drug company data, despite evidence that drug companies withhold information that could impact on decisions about the use of drugs.

This is yet another example of the rights of pharmaceutical companies being prioritised over and above that of the health of the Australian public. Another element of transparency ignored by the FTA relates to the financial relationship between drug companies and researchers and policy makers. Again these serious concerns have been acknowledged within the Majority Report, but not reflected in its recommendations.

There is also no information available regarding how transparency will apply to the proposed Medicines Working Group. This special group, which will contain health officials from the U.S. as well as Australia, does not specify any role for consumers or public health organisations. It is essentially a closed group, which allows another country to play a role in the design and implementation of Australia's medicines policy. No details are available on the terms of reference for this group nor on the process that will guide its operation.

Yet the Majority Report suggests we should have faith that this group will work for the benefit of Australians, despite the fact that the agenda of the US negotiators, pressed by the American pharmaceutical industry, is focused on different outcomes.

### *Generic Drugs*

The impact of the intellectual property provisions of FTA on the entrance of generic drugs into the marketplace will have several, significant impacts for Australia's medicines policy and the PBS.

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As Dr Harvey and colleagues have noted:

"Several intellectual property provisions of AUSFTA are likely to delay the introduction of cost-effective generic drugs. Others prevent our generic drugs industry from alleviating public health crises in neighbouring countries (Article 17.9.6). Article 17.9.8 of AUSFTA locks in the preferential patent term extensions accorded to pharmaceuticals. Article 17.10.4 takes the radical step of linking and indefinitely "preventing" market approval by the Therapeutic Goods Administration if any type of patent has been "claimed" over the relevant drug. This facilitates litigation replacing innovation in Australia, as it has in the US and Canada. Original patent owners will seek to "evergreen" their exclusive rights over "blockbuster" (high sales volume) pharmaceuticals, with speculative and ultimately spurious "claims" over the process or capsule rather than the active ingredient." <sup>5</sup>

The Majority Report details the important role that generic versions of drugs play in keeping down drug prices, and consequently costs to the PBS. Research at the Australia Institute in Canberra has estimated that if such changes succeed in delaying by 24 months market entry of generic versions of just the top five PBS expenditure drugs due to come off patent, this could increase the cost of the PBS by \$1.5 billion over 2006–2009.

The FTA requires that Australia maintain a five-year "data exclusivity" period for pharmaceutical test data. While this is consistent with current Australian law, it limits Australia's ability to reduce this data exclusivity period in the future. The longer this data exclusivity period the longer the delay of the introduction of generic drugs. This will limit the ability of future governments to pursue changes in this area to reduce costs to the PBS.

Any delay to the move to generic drugs will add costs to the PBS and is a further compelling reason to reject the Agreement.

### *Parallel Imports*

The Majority Report also recognises that the FTA will have the effect of permanently banning parallel imports of pharmaceuticals as an option for encouraging competition in the pharmaceutical sector in the future. While recognising that this practice is not currently permitted within Australia, the report concurs with the position offered by the parliamentary library paper that suggests that:

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<sup>5</sup> Harvey, K et al, "For Debate: Will the Australia-United States Free Trade Agreement undermine the Pharmaceutical Benefits Scheme", *MJA* August 2004

"Over the last two decades Parliament has been progressively allowing parallel importing of other forms of IP, such as copyright over music, books and computer software. Similarly, Australian patent law now provides that patent-holders cannot place certain anti-competitive restrictions on the sale of products.

Given these trends, combined with escalating PBS costs and the competitive advantages that parallel importing may provide, it is reasonable to assume that future parliaments would have considered changes to patent law that would void restrictions on parallel importing. AUSFTA would remove this as an option for pharmaceutical reform."<sup>6</sup>

### *Advertising*

There are provisions within the FTA to allow pharmaceutical manufactures to disseminate pharmaceutical information via the Internet. This appears to be a "toehold" strategy to eventually bring in direct-to-consumer advertising (DTCA) in Australia. DTCA is legal in the US but not in Australia. It has been associated with a substantial increase in patient demand for and use of products often not in accord with best clinical practice.<sup>7</sup>

### *Medicare*

In the view of economist, John Quiggin, Medicare can also be threatened under the provisions of the FTA.

"The private insurance lobby in Australia has opposed Medicare since its inception, and would be strengthened immeasurably by a much larger and stronger US industry. The single-payer and bulk-billing provisions of Medicare, already under severe strain, could be rendered unworkable by legal challenges under the FTA."<sup>8</sup>

## **3.2 Australian Culture and Local Media Content**

Australia has a system of controls in place to ensure that a basic minimum level of Australian content is broadcast in our media. Our cultural policy exists to ensure a diverse range of local voices is heard, and uniquely Australian stories continue to be told.

The Democrats strongly support the Australian cultural sector, and will resist any attempts to weaken our strong and vibrant national cultural identity.

In previous Agreements, such as the Australia-Singapore Free Trade Agreement, the Government secured a total exemption for all cultural industries from the Agreement.

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<sup>6</sup> Dr Kate Burton and Jacob Varghese, *The PBS and the Australia-US Free Trade Agreement*, Parliamentary Library Research Note No. 3, 21 July 2004

<sup>7</sup> Harvey, K et al, "For Debate: Will the Australia-United States Free Trade Agreement undermine the Pharmaceutical Benefits Scheme", *MJA* August 2004

<sup>8</sup> John Quiggin, *A completely misleading description*, Evatt Foundation Paper, 16 June 2004

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In this AUSFTA, in the face of pressure from the largest film and television market in the world, the Government has sold out the Australian cultural sector.

The Majority Report explains the changes that have been agreed to in the FTA and the criticisms of these changes by Australia's cultural industries, in particular the Media, Entertainment and Arts Alliance. It covers the inflexibility of 'ratchet' mechanisms that prevent future governments from increasing levels of Australian content in our media once they have been lowered, as well as the impact on multichannelling, advertising, pay-TV, public broadcasting and 'interactive audio and/or visual services', which DFAT asserts will adequately cover new media.

The conclusions to this Chapter in the Majority Report are disappointing, in that they barely exist. DFAT has the last word on each of the issues, and the report reads as if the Committee accepts DFAT's assurances on these matters. The Democrats do not agree with this position, and believe that there is a significant danger for the future of Australian cultural industries. There should have been a blanket exemption for all cultural industries (such as was included in the Singapore FTA).

The Democrats note that the FTA does include provisions for quotas of Australian content on television. However, these quotas are locked at specific levels, and can never be increased. If quota levels are lowered by a future government, they can never be returned to their current levels.

Further, the FTA provides that the US can challenge any regulation for Australian content in new media, which will severely limit future government regulatory options that may be required to deal with new technologies and new modes of delivery of audiovisual content.

Specifically, the Government may not impose local content requirements on most pay television channels. Of those pay television channels where the Government may act to impose local content rules the level of local content is set at very low levels, in no way similar to the current free to air television rules. Further, the Government will never be able to regulate existing media (unless currently regulated) for local content. This means cinema (including e-cinema) may never be regulated. Also, the Government may not begin to act to introduce rules for interactive media until the level of access for Australian audiences to local production is already found to be at unacceptably low levels. There is no ability to take pre-emptive action.

As Ms Megan Elliott of the Media, Entertainment and Arts Alliance explained in her testimony before the Senate Inquiry:

"The agreement will severely constrain the ability of this and future Australian governments to determine cultural policy, giving to the government of the United States a much stronger role in the determination of that policy. We will be moving from a position of being solely in charge of our own cultural policy to one where we must

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consult with the largest cultural producer in the world, and our dominant trade partner, on how we determine our future."<sup>9</sup>

The Democrats believe that we should not grant the US a role and voice in determining our cultural policy.

### *Investment in Films*

In the Investment chapter of the Free Trade Agreement, Australia has agreed to 'national treatment' rules, which prohibit each Party from discriminating against investors of the other country in any way.

Most of the financial support provided to the development and production of Australian feature films, TV programs and other projects in this country is provided through government assistance by way of 'investment' rather than grants or subsidy. Agencies such as the Film Finance Corporation acquire copyright interests and earn returns on their investment.

The Democrats are particularly concerned that this FTA may mean that these agencies cannot exclusively invest in Australian films, which will cripple the Australian film industry. When asked a question about this issue in the Parliament, the Minister was unable to give a clear answer. The Democrats made it clear that we understood that direct grants and tax rebates were exempted from the FTA, but the Minister was unable to prove to the Senate that public *investment* in domestic film production would be protected from the deal.<sup>10</sup>

Further, in answer to a question from Senator Ridgeway on this matter, the following evidence was given before the Committee:

**Mr Herd** – The way in which the agreement is currently framed, the way in which it is drafted, imposes performance requirements on governments. For example, currently a condition for the Film Finance Corporation to invest in a project is that it contains significant Australian content and is made by Australians. That is a performance requirement. The agreement, as it is currently drafted, would allow the US to say: 'That's a non-conforming measure. The Australian government can't do that any longer.' One of the big problems that we see with the current drafting is that for some reason the negotiators saw fit not to reserve the Film Finance Corporation, the Australian Film Commission, the Australian Broadcasting Corporation and SBS—all those cultural institutions which invest in Australian content—from the application of the agreement, with regard to not only the services chapter but the investment chapter.

**Mr Harris**—When this issue of investment was raised with the negotiators, they said that they had taken it on board and were going to address it and find out whether it was an issue. They simply have not

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<sup>9</sup> See *Transcript of Evidence*, Tuesday 4 May 2004 (Elliott)

<sup>10</sup> See *Senate Hansard*, 30 March 2004

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got back to us. We are essentially on notice that they are going to address it. That was not the intention of the agreement. All we are saying is that, as the text exists now, we see that as the result.<sup>11</sup>

### *Public Broadcasting*

A final point is that the Democrats remain very concerned that the FTA may have an impact on Australian public broadcasting through the ABC and SBS. Funding arrangements for our national broadcasters will not be affected, because Commonwealth subsidies and grants are specifically excluded from the Agreement. However, as will be discussed later in this section, the definition of 'public services' in the FTA is ambiguous and untested, and excludes services provided on a commercial basis or in competition with other service providers. Given that SBS advertising and ABC product marketing operate in a competitive commercial environment, any regulation to do with these services may not be covered by the 'public services' exemption. This may mean that the US could challenge some regulation of public broadcasting, claiming it is inconsistent with the USFTA.

The Democrats believe that the terms of the FTA that will have such a marked impact on Australian culture are very dangerous to our future national identity, and therefore cannot be supported. We agree, once again, with the words of Ms Megan Elliott:

"The cultural policies of the Australian government have brought enormous benefit to Australia through the music, literature, theatre, film and other art forms they have helped nurture and support. Australia has a generally open and transparent cultural economy. It is open to trading cultural goods and services from other countries, and the economy in general benefits from Australian creators' ability to export. What is at stake in this agreement is whether Australia will continue to have the ability to determine its own cultural policy or whether that freedom is to be constrained by or sacrificed to the pursuit of a larger free trade agenda. All through this negotiation the cultural sector have been clear in the position we put to government: we do not believe that the Australian government should give up the flexibility to act that it currently enjoys. Cultural policy should not be made subservient to trade liberalisation."<sup>12</sup>

### **3.3 Intellectual Property**

Both Chapter 3 of the Committee Report and the complementary Parliamentary Library paper provide a very detailed outline of the changes that have been agreed in Chapter 17 of the FTA, and the concerns that have been raised about these by various sectors. A central point of both the Report chapter and the DPL paper is how significantly this Agreement either pre-empts or directly contradicts current Australian debate about appropriate reform to our copyright law. The DPL paper also analyses

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<sup>11</sup> See *Transcript of Evidence*, Tuesday 4 May 2004 (Herd/Harris)

<sup>12</sup> See *Transcript of Evidence*, Tuesday 4 May 2004 (Elliott)

where proposed changes to Australian law go further than the FTA, and further than current US copyright law.

This chapter of the Agreement is potentially one of the most significant – with the most far-reaching reforms which will have a direct and serious impact on Australian innovative industries. Some of these changes, such as the ratification of the WIPO treaty, are positive reforms. However, aspects of the chapter relating to extension of the copyright term, provisions relating to anti-circumvention devices, and liability of ISPs relating to copyright infringement are very dangerous developments.

### *Copyright Term Extension*

The question of the extension of the copyright term has been dealt with extensively elsewhere in this report. Even if we are to disregard for a moment arguments pertaining to the advisability of enacting such a policy in direct contradiction of the recommendations of recent domestic reviews into the operation of Australia's copyright regime, the mere cost of this move is sufficient to give rise to concern. Given that we are making this change at the behest of the world's largest single exporter of intellectual property, it is useful to consider the calculations done by Dr Dee in her modelling of the impacts of the Agreement that prove just how much this move is going to cost Australia.

Dr Dee has concluded that extending the term of copyright by an extra 20 years will create a cost to Australia, because as a net importer of copyright material, we will have to pay additional royalties to copyright holders for existing works. According to Dr Dee's calculations, Australia's net royalty payments could be up to \$88 million higher per year as a result of extending the term of copyright. The discounted present value of the cost to Australia of extending the copyright term is about \$700m. This is an extremely significant amount of money, and these extra costs will have a severe impact on our cultural industries.

### *Chapter 17 and the IT Sector*

The Department of Foreign Affairs and Trade has described the Intellectual Property outcomes of the FTA as 'harmonising [Australia's] intellectual property laws more closely with the largest intellectual property market in the world.' Given the amount of power wielded by US corporations in the field of copyright and patent protection, this prospect gives rise to some concern.

The Democrats have warned against allowing the Free Trade Agreement to go down the American route of giving extraordinary power and privilege to giant software companies, which can then be used to stifle competition.

Aspects of the US Digital Millennium Copyright Act (DMCA) have seen the major software companies in that country frustrate and block smaller companies and IT research teams, by using the law to threaten and financially exhaust any competition. The prospect under this FTA of expanded software patents, rigorously enforced anti-circumvention provisions, and increased liability for internet service providers are a matter of considerable concern.

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The Australian Democrats strongly support the development and use of open source software, and a diverse and competitive IT environment in Australia. We believe that we must retain our sovereignty in this area, and resist any efforts to sell out Australia's successful proliferation of small and medium-sized companies to US multinational giants, while stepping on civil liberties in the process.

The Electronic Frontier Foundation has conducted an investigation of the operation of the DMCA, and the impact it has had on the independent software industry in the US.

This investigation has found that since they were enacted in 1998, the “anti-circumvention” provisions of the DMCA, codified in section 1201 of the Copyright Act, have not been used as Congress envisioned. Congress meant to stop copyright pirates from defeating anti-piracy protections added to copyrighted works, and to ban “black box” devices intended for that purpose. In practice, the anti-circumvention provisions have been used to stifle a wide array of legitimate activities, rather than to stop copyright piracy. As a result, the DMCA has developed into a serious threat to several important public policy priorities. Experience with section 1201 has demonstrated that it is being used to stifle free speech and scientific research, impedes competition and innovation, and has been misused as a new general-purpose prohibition on computer network access.<sup>13</sup>

Critics of the DMCA in the US are becoming more vocal, and there is increasing pressure on the US government to amend these provisions that are not operating as originally intended. It seems inconceivable, therefore, that the Australian government would agree to introduce them into Australian law through this FTA. As IT law expert Mr Brendan Scott has written in his submission to the Senate Inquiry:

"These are prohibitions on accessing data which has been protected by a technological measure. The explicit purpose of these provisions is to prohibit data interoperability. If open source vendors are not permitted to implement data interoperability, they will face substantial barriers to entry in many important submarkets. In essence, a vendor will be locked out of competition merely because the current incumbent uses a protected format for customers to store their data in. These prohibitions were initially created to protect a small minority of content producers from competition from new technologies, particularly in respect of audio and video content. However these provisions have already been subject of much broader implementation in the United States. In particular they have been used to inappropriately attempt to suppress competition in respect of printer cartridges and garage doors. Even pressing the shift key can be a breach of the US version of these laws. They can be used to anti-competitive effect on any article to which a computer chip can be attached - and there is every reason to suspect that if this category does not already encompass all manufactures, it will do so in the not too distant future.

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<sup>13</sup> Submission 165 Appendix 2, Mr R Russell, p.1

While they have been characterised as applying to prevent unauthorised copying of music, it would be a grave mistake to think they will be restricted to this area in the future. The anti-circumvention provisions are a legislative imprimatur to the reduction of competition across the whole breadth of the economy. No analysis of the economic impacts of the FTA that I am aware of takes into account this extensive anti-competitive effect. At its worst it will shave percentage points off Australia's GDP. "<sup>14</sup>

If there were any doubts as to the seriousness of the potential impact of these changes on the open source sector, one only needs to consider the words of Mr Rusty Russell, a member of Australia's open source community who appeared before the Senate Inquiry:

"Let me make this clear: people in the Open Source industry feel directly threatened by the laws required by the FTA. We have seen threats issued against Open Source developers in the United States, and we fear the same thing here. This kind of fear, and this kind of uncertainty, as I have already noted, is toxic. It drives people from the industry, and it drives people from engaging in innovative activities. And that is a real shame; because currently in Australia we have some of the most talented, and innovative, Open Source developers of any country in the world."<sup>15</sup>

The Democrats oppose the introduction these measures into Australian law. This is a dangerous move that will stifle competition and innovation in our IT sector, and it cannot be supported.

### **3.4 Sanitary and Phytosanitary Measures**

It seems clear that as a result of the FTA, the US will now have the capacity to have considerable influence over our quarantine measures.

The FTA will establish two committees and a series of procedures that are designed to provide a forum for the negotiated resolution of quarantine issues 'with a view to facilitating trade'.

Through this process, either party can force a review of the other party's quarantine measures. The review is carried out by Standing Technical Working Group on Animal and Plant Health Measures, which can carry out a risk assessment on quarantine measures, identify mutually agreeable mitigation measures and even refer matters to an 'independent scientific peer review'. The FTA states clearly that both parties have an obligation to seek to resolve issues by mutual consent.

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<sup>14</sup> Submission 297, Mr B Scott, p.1

<sup>15</sup> Submission 165a, Mr R Russell, p.13

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The Democrats have always maintained that quarantine issues should be resolved solely on the basis of the best available science, where the primary objective is to protect animal and plant health and the environment. Compromising Australia's natural environment and biodiversity should not be a matter for negotiation.

Chapter 5 of the Committee Report outlines the concerns that have been raised about the new consultative committee on SPS issues that has been agreed through the FTA, especially pertaining to the apparently different interpretations of what the role of this Committee will be according to USTR and DFAT published material and statements. While the Government maintains that there is no evidence to suggest that this deal will make Australia's quarantine system vulnerable to US pressure, concerns have been raised (which are echoed by the Committee in this Chapter) that the mere existence of a forum that will be used by the US to try to advance its trading interests at the expense of Australian environmental protection.

Once again, while this Report outlines the concerns relating to this chapter of the FTA, it stops short of recommending that the Senate not endorse the deal, urging "constant vigilance" instead. The Democrats believe that making quarantine decisions on any criteria other than the best available science is unacceptable, as is granting a voice to US trade interests in the development of Australian environmental policy.

As Professor Weiss and Dr Thurbon pointed out to the Senate Inquiry:

"Under the agreement, we will trade our scientifically-based quarantine system for one based on a political calculus, already strongly foreshadowed in the [recent] disgracefully anti-Australian conduct of Biosecurity Australia. In other words, we will trade away our enviable status as one of the world's leading disease-free agricultural producers, a status upon which the future of our industry depends."<sup>16</sup>

### *GE Food Labelling*

The US does not have labelling of genetically engineered foods, and is currently pursuing an action through the WTO against the European Union to challenge EU labelling laws, which the US regards as a 'barrier to trade'. The Agreement places a positive obligation on Australia to accept US technical regulations as equivalent to our own. Further, Article 8.7 of the Agreement states that Australia must allow the US to participate in the development of standards and technical regulations, 'on terms no less favourable than those accorded to [Australia's] own persons.'

As the Australian Fair Trade and Investment Network has stated:

"These changes to processes and procedures for the regulation of quarantine and GE regulation give the US a formal role in Australia's policy. It ensures that trade obligations to the US will be high on the list of priorities when regulations are being made."<sup>17</sup>

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<sup>16</sup> Submission 307, Professor Weiss and Dr Thurbon, p.2

<sup>17</sup> Submission 416, AFTINET, p.19

The Democrats find it completely unacceptable that the United States will now have a direct role in the determination of Australian public policy with respect to areas such as genetically engineered crops. These are matters which are still the focus of community debate in Australia, and must be resolved with regard to our own national interest, not those of our trading partners.

### **3.5 Trade in Services**

As the discussion in the Majority Report explains, the FTA uses a 'negative list' approach to services, which means that all services are included in the agreement unless they have been specifically exempted. The text of the FTA includes an exemption for 'services supplied in the exercise of Governmental authority'. The Agreement uses the same definition as the WTO General Agreement on Trade in Services: that is, 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.'

This is clearly ambiguous, given that so many essential public services have either been privatised or are in the process of becoming so and many are supplied in a competitive environment.

There is a very general reservation in the Agreement for Australia to 'adopt or maintain' any measure with respect to a number of services, including public education, health and child care. However, other essential public services such as water, energy services and waste disposal are not included in this reservation, and are therefore not protected.

As the Australian Fair Trade and Investment Network submission argued:

"Water has not been excluded through any reservations, so any Commonwealth regulation of water services will have to comply with the USFTA. State and local government water services regulation are permitted at 'standstill', but if they are changed the US could challenge them. The agreement assumes that public water services will be protected, but many water services are already delivered on a commercial basis, so the protection is highly doubtful.

There may be circumstances in which governments believe that it is in the public interest to limit foreign ownership or management of water resources. For example, in the current discussion of the establishments of markets in water rights for the Murray-Darling Basin, it may be thought appropriate to give some priority to local landholders, or to place some limits on foreign investment in water rights. Because water services have not been reserved from the USFTA such regulation would be inconsistent with the agreement and could be challenged by the US government on the grounds that it did not give 'national treatment' to US investors."<sup>18</sup>

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<sup>18</sup> Submission 416, AFTINET, p.16

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The Democrats are committed to ensuring that this FTA does not compromise the ability of governments at all levels in Australia to deliver essential public services to their communities.

### 3.6 Agriculture

The Majority Report chapter on Agriculture outlines the provisions that have been agreed in the FTA, as well as the concerns about the long lead-in times for market access in the beef sector, the omission of sugar, and the long-term impact of this deal on Australia's ability to maintain a strong negotiating position when seeking an ambitious reform package for agriculture through the WTO.

The Democrats have been particularly critical of the approach taken by the Government in relation to the agricultural aspects of this deal. The deal was sold for a long time on the basis that it would achieve an excellent result for our farmers. However, we have been presented with an Agreement that does no such thing. Comments made by US Trade Representative, Robert Zoellick, reported at the time the deal was concluded, speak volumes about exactly what sort of deal we've got here. Mr Zoellick spoke proudly about what a great deal this was for America, and how they had resisted Australia's pleas for even just a little more access. He stated,

"And we have an 18-year phase-out that Prime Minister Howard personally was pushing to get lowered, which we didn't lower. And it actually should work well with our industry, because we only increased the quota for manufactured beef." <sup>19</sup>

An article in *The Australian* at the time reported the following comments:

"On dairy products, Mr Zoellick sounded especially pleased, using irony to call the Australian increase "huge" and trumpeting the fact that Canberra had been unable to end the tariff protection for US dairy farmers. "And, frankly, in terms of dairy, I think we've increased our quota -- didn't touch the tariffs one bit -- the huge amount of about maybe \$30 or \$40 million a year." <sup>20</sup>

These remarks are extraordinarily boastful. The fact that John Howard made a personal appeal, and was rejected, and the Americans boasted about it, is particularly humiliating.

It is particularly disappointing that no 'Most Favoured Nation' clause has been included in this FTA, which would ensure that the US would have to extend to Australia trade terms no less favourable than those agreed by the US in the proposed 'Free Trade Area of the Americas'. The Government has accepted a substandard deal on agriculture, which is a source of great disappointment, given that the Government had promised huge gains for this sector. The Democrats have been critical of the fact

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<sup>19</sup> Eccleston, Roy "US Trade Supremo Boasts of 'Con Job'", *The Australian* 11 March 2003, p.8

<sup>20</sup> Eccleston, Roy "US Trade Supremo Boasts of 'Con Job'", *The Australian* 11 March 2003, p.8

that a bilateral deal was pursued at all, given that much greater advantage for our farmers can be obtained through the WTO process, which is the only forum where the vexed question of US agricultural subsidies can be dealt with.

#### 4.0 CONCLUSION

The Democrats have closely monitored the progress of this FTA, and have been consistently critical of both the secretive nature of the negotiation process and the terms of the deal.

After carefully considering the detail of the Agreement, the Democrats have decided that on balance, this FTA does more harm than good to our national interest. For this reason, we will not support this legislation when it arrives in Parliament.

We believe it should never have been negotiated in the first place. While the Democrats support fair trade that is in our national interest, we believe that 'fair trade' means any trade liberalisation commitments are made in line with those of our trading partners and that we are not unduly disadvantaged as a result of any trade deal. It also means recognising that trade has a global impact, and that we have a duty to consider what would be best for the whole world.

In this regard, we believe that the multilateral approach to trade negotiations should be pursued with more energy by our Government. The Australian Democrats believe that we do need some form of comprehensive rules based system for international trade: a world system with clearly established rules and processes and with all countries being able to negotiate in good faith and abide by the agreed terms. As British commentator George Monbiot recently wrote with respect to global trade negotiations, the developing world is 'beginning to shake itself awake' and 'the proposals for global justice that relied on solidarity for their implementation can [now begin to] spring into life'.<sup>21</sup> The Democrats believe that we must do whatever we can to facilitate this development, for our own sake and the good of the entire world.

The Democrats sincerely thank the Committee Secretariat Staff, the Parliamentary Library, Dr Patricia Ranald, Ms Louise Southalan, Ms Megan Elliott, Mr Richard Harris and Mr Simon Whipp, Mr Dan Shearer, Mr Brendan Scott, Mr Rusty Russell, and Dr Matthew Rimmer for their assistance on this issue over the past two years and through this Inquiry.

**Recommendation: That the Senate opposes the Australia-US Free Trade Agreement and implementing legislation, because on balance, they do more harm than good to Australia's long term national interest.**

**Senator Aden Ridgeway**

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<sup>21</sup> George Monbiot, *The Guardian*, September 2003.

## **Recommendations of One Nation**

1. One Nation is determined to protect Australian jobs, industry, agriculture, manufacturing, our culture and our natural heritage. We therefore strongly reaffirm the principle of national economic sovereignty and reject any attempts to usurp or undermine it.
2. Free trade has caused massive and catastrophic dislocations throughout the industrialised and developing world. As an industrialised country, Australia must consider the problems that free trade has brought upon other developed nations and take all steps necessary to protect our citizens from similar events.
3. We seek to place the needs and interests of our citizens, not multinational corporations, or foreign countries at the heart of our democracy.
4. We recognise the particular vulnerability of agriculture and manufacturing in the global economy. We are committed to protecting them.
5. In this context, tariffs, export quotas, rules that favour our own industries and the right of self determination are critical for our national advancement.
6. We believe that the treaty making process should rest with elected representatives, who determine what is in our national interest by way of a vote on the text of the agreement and enabling legislation. Executive and cabinet must not have the final say on the text of treaties and trade agreements.
7. We stress our concern with transparency of free trade agreements, particularly negotiating strategies, the views of interested parties and the relationship between political party donations.
8. We reaffirm the right of the Australian parliament to regulate, legislate and protect exclusively Australian interests.
9. We note with particular concern the issues raised by witnesses that appeared before this Committee.
10. In view of these considerations and having an understanding of the damage wrecked by previous free trade agreements such as the North American Free Trade Agreement (NAFTA). One Nation is opposed to the United States Free Trade Agreement and makes the following assessment and recommendations.

**Len Harris**  
**Senator for Queensland**

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## **ASSESSMENT OF AUSTRALIA- US FREE TRADE AGREEMENT**

One Nation, based on the overwhelming body of evidence before the Select Committee on the Free Trade Agreement between Australia and the United States of America is opposed to this Free Trade Agreement.

One Nation opposes the philosophy, opposes to the process and opposes the policy of free trade.

Our opposition does not mean we are Anti- American or Un-Australian. Rather, our opposition is based upon the fact that through this agreement, Australia loses its economic sovereignty.

- The right to protect our own
- The freedom to grow our own industries
- The right to foster our own culture
- And the ability to help Australians first

The FTA severely restricts and confines the role of our democratic government. In many cases, the final say in many cases is given to dispute resolution bodies – a panel of three people - not to our elected decision makers in this Parliament. The final say is out of our control.

### **NAFTA**

One Nation is concerned by the similarities between the Australia-US FTA and the North American Free Trade Agreement between the US, Canada and Mexico.

Key sections of the US- Australia FTA are exact copies – word for word – from NAFTA. Under this agreement, Australians will be competing in the US with the Canadians and Mexicans and anyone else that the US has a free trade deal with.

NAFTA has been a huge success for big business. But not for the family farmer, workers and manufacturers. It's been nothing more than a seven year economic war.

The U.S. website of the US Department of Labor, in the NAFTA Transitional Adjustment Assistance Cases section, tells a chilling story.

In thousands and thousands of cases, across all US States, and many, many industries, the Department of Labor concludes there has been a “Shift in production to Mexico or Canada”. The effects are so bad that the US Labor department even maintains a web page titled “mass layoff statistics.”

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Our Australian government and the ALP have now endorsed this free trade process, which is proven to cause massive job losses in the US itself. It is nothing more than planned, deliberate, suicidal destruction to go down this path.

## **HISTORY OF FREE TRADE**

Free trade is not the utopia its proponents claim.

The history of Free Trade is not new; there are many historical examples to demonstrate that free trade, particularly in agriculture, does not work.

The book, 'Grain through the Ages', published by Quaker Oats company, describes this debate in the first and second century B.C. in the Roman Empire.

It states:

"One reason for the decline of grain farming in Italy was the importation of grain into Rome from the rich grain lands of Sicily and Egypt, In Sicily, these grain lands had been appropriated by rich men and scheming politicians who farmed them with slave labor.

As a result the markets of Rome were flooded with cheap grain. Grain became so cheap that the farmers who still owned small pieces of land could not get enough money for the grain to support their families and pay their taxes.

They were forced to turn their farms over to rich landowners. On the land of Italy slave gangs working under the overseers took the place of the old Roman farmers, the very backbone of the state.

The farmers, after their land had been lost, went into the city walls, leaving the scythe and the plough. They worked now and then at a small wage. They ate mostly bread made of wheat which was distributed to them by any politician who wanted their votes at an election.

They lived in great lodging houses three or four stories high. The land itself became poor... The use of slaves meant that the land was badly worked because usually the slaves did as little as they possibly could unless they were under the eye of the overseer.... In the end, the land itself was destroyed by this economic process."

## **RISING IMPORTS**

Imports into Australia have just risen for the fourth consecutive month. The latest trade figures show that we are importing more than we export. This is the worst financial year for trade in the twenty year history of the statistical record. The trade deficit is \$24 billion up from \$18.6 billion the previous year. The ratio for export credits, this year was minus 17. The only worse year in history was in 1986 when it was minus 21 that was the year of Paul Keating's banana republic.

So trade has got little to do with Australia's supposedly robust economy. No member of the government can claim that the economy is going gangbusters – due free trade policies – not when we are importing more than we export.

## **COMPETITION**

Over the last 15 years almost a quarter of Australian family farmers have gone out of business.

Official figures from the Australian Bureau of Statistics indicate that the number of farming families in Australia decreased by 22% between 1986 and 2001. If this trend continues at the present rate, more than half of Australia's family farms will be lost within the next 15 years. With this FTA, the trend of small family farm closures will only accelerate.

In the U.S., 33,000 farms with under \$100,000 annual income have disappeared during the first seven years of NAFTA. This is a rate six times higher than the pre-NAFTA period. While Canada's NAFTA agricultural exports grew by C\$6 billion between 1993 and 1999, net farm income declined by C\$600 million over the same period instead of rising by \$1.4 billion as Agri-Food Canada had predicted.

Since NAFTA, the rate of Canadian farm bankruptcies and delinquent loans is five times that before NAFTA, even as Canadian agricultural exports doubled. Dropping prices meant that in Canada, farmers' net incomes declined 19% between 1989 and 1999, although Canadian agricultural exports doubled during that period.

On the Atherton Tableland and Far North Queensland, we have witnessed, first hand, the destructive forces of free trade. Tobacco, Sugar, Dairy, Prawn Trawling, bananas, apples, pork are all either going to the wall or are under threat.

Under this agreement, all US agricultural imports into Australia - many of them grown on corporate farms which are heavily subsidised by the US government - will gain "immediate duty-free access".

The US can automatically access our dairy and beef market, but there is an 18 year gradual phasing in for us to access theirs. Based on empirical evidence from NAFTA it is likely that over the 18 year 'phasing in period' Australia's dairy and beef will be virtually annihilated. They won't need access to the US because there will very few of them left. It is likely that only a few big agribusiness companies will control the market between Australia and the US with a few niche exporters. Then, due to large agribusiness making large donations to the Liberals, Nationals and Labor, the government of the day will decide to subsidise agribusiness. Our own local producers will be competing with increased imports of subsidised US beef, dairy products, almonds, tomatoes, cherries, olives, fresh grapes, corn, frozen strawberries, and walnuts to name just a few. Our cheese market, which is currently quite well

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protected via tariffs will be opened up to US competitors. Others products such as potatoes and raisins, will have their existing 5% tariff removed.

## **MANUFACTURING**

During the debate on the FTA legislation in Parliament, One Nation received petitions from nearly 1000 workers in the manufacturing industries, pleading with us to stop this agreement. Under the FTA, more than 99 percent of U.S. manufactured exports to Australia will become duty-free immediately upon entry into force of the Agreement. U.S. manufacturers estimate that this elimination of tariffs could result in US\$2 billion per year in increased U.S. exports of manufactured goods.

The FTA makes it extremely difficult, if not impossible, to implement the kind of national economic and industrial development policies that are necessary to build up a strong national economic base.

One Nation is well aware and shares the concerns expressed by the Australian Manufacturing Workers Union. A recent media release states:

"Our 15% tariff will go down to zero when the Free Trade Agreement takes effect. This is likely to produce huge job losses in our industry as American Auto parts will flood the Australian market."

With the stroke of a pen, this FTA will destroy what's left of our manufacturing industries. Anyone that doubts this need only examine the US Department of Labor Statistics. One sector of our economy is being played off against the other.

## **SERVICES SECTOR – GOVERNMENT PROCUREMENT**

At present, the US has access to Australian government procurement but Australia does not have access to the US market. That is because we didn't sign up under the WTO to this section of GATS, which is on a reciprocal basis, and Australia wanted most favoured nation status. In other words, under GATS, we gave the US access and we got nothing. Now finally, we get access to US government procurement, but at great cost to many other sectors of our economy.

## **INVESTMENT**

One of the many problems with the FTA is the investment chapter which prohibits any imposition of terms and conditions on foreign investors. It requires our Federal, State and Local governments to treat domestic and foreign-owned corporations on an equal basis, and to grant US companies most favoured nation status. We will now have to favour US multinationals as much as our own Australian companies at all levels of government procurement.

**PBS**

On Tuesday 3 August 2004, Senator Hill, representing the Trade Minister responded to One Nation's question on the PBS in relation to the FTA. One Nation notes with great concern that the US can apply for a review in the cost of prescription drugs here in Australia, but in the letters of exchange, Australia has no such right in terms of access to the US market. The US can apply for adjustments in the prices of our prescription drugs. That's it. Cut and dried, in the Agreement.

**COMMITTEES OF THE AGREEMENT**

One Nation has significant concerns about the Committees that operate within the parameters of this Agreement the problems with the PBS committee are well documented, most recently by the ABC's 4 Corners program. The Agriculture Committee, established under Article 3.2. is only established in very broad and generalised terms. Australians don't know when it will be established, what its terms of reference are, what its powers are, or whether the resolutions of the committee will be binding. There is a lot that will be decided behind closed doors.

**CORPORATE LOBBYING**

Multinational companies and peak business bodies in Australia want the free trade agreement and have lobbied for it. In Australia, they are represented by the Australia/US Free Trade Agreement (AUSTA) Business Group. It represents big business interests. News Corporation, Caterpillar, IBM, Southcorp, Visy Industries and Kellogs.

At the US end there is the American-Australian free Trade Agreement Coalition.

With 351 companies including: News Corporation, Caterpillar, IBM, Visy Industries USA and Westfield. Some of the same companies are lobbying the US and Australian governments at both ends of the spectrum.

Is there any overlap between the companies lobbying for the FTA and political donations past and present? A search of corporate donations on the AEC's website, shows there is. This is a worrying aspect. Has there been any undue political influence from donors in relation to FTA negotiations?

**DFAT'S LOBBYISTS**

The government appointed Bergner, Bockorney, Castagnetti, Hawkins and Brian firm to assist in preparations for negotiations of the FTA. The other company that was appointed was Mayer, Brown, Rowe and Maw, which serves 65 of the Fortune 100 companies, one out of every three U.S. banks.

Clients include Bank of America, Dow Chemical, General Electric, ICI, Morgan Stanley, Nestlé, Pfizer, Unilever and United Air Lines.

So, some of the biggest US companies are represented by these consultancy firms, and our government contracted them and paid them A\$614, 000 to help negotiate this agreement. Did the taxpayer get value for money?

## **MEDIA**

Australians wonder why there has been little negative comment about the FTA from the commercial media, you have to wonder when News Corporation is a member of the business groups lobbying for the FTA at both ends.

A biased media is abuse of your human rights. People are up in arms when they see the human rights atrocities in Sudan, Rwanda and other parts of the world. I say to you today, there is little difference between the physical abuse being perpetrated in Africa than the psychological abuse of the Australian people by a biased media.

## **PRECAUTIONARY APPROACH**

The Australian government takes great precautions to protect the lives of our citizens. We have greater domestic security – as a precaution. Airline marshals - as a precaution. Parliament has more security – as a precaution. but it takes no precautions to protect their livelihoods.

The precautionary approach does not apply to Free Trade. With Free Trade we throw caution to the wind. There isn't even a sunset clause in this Agreement. It's boots and all, regardless of the consequences. An agreement that is about exports - exporting Australian jobs and industry overseas.

An agreement for the US at the cost of Australian jobs, our cultural identity, our pharmaceutical benefits system, our family farms our manufacturing industry and our small businesses. An agreement inspired by big business, put together by big business, administered by big business for the benefit of big business.

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## RECOMMENDATIONS BY ONE NATION RELATING TO THE AUSTRALIA- US FREE TRADE AGREEMENT

### Chapter 1 Establishment of Free Trade Area

One Nation has considered this chapter and is particularly concerned by Article 1.2 : General Definitions which states in part:

For the purposes of this Agreement, unless otherwise specified:

10. **GATS** means the *General Agreement on Trade in Services*, contained in Annex 1B to the WTO Agreement;

11. **GATT 1994** means the *General Agreement on Tariffs and Trade 1994*, contained in Annex 1A to the WTO Agreement;

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

Article 1.2 General Definitions (22.) is identical to the definition in GATS. This definition in strictly legal terminology can possibly be enforced by the US enabling access to our hospitals, education (including teaching staff) , water, railways, law enforcement agencies (police), ownership of our national highways as all of these fall within the definition of not being exclusively provided by a government authority. Therefore, services provided by the Australian governments such as hospitals, education, transport are not excluded from this Agreement.

#### Recommendation 1.1

One Nation recommends that all services which are supplied in the exercise of a governmental authority

- (i) central, regional or local governments and authorities; and
- (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

are excluded from the Australia- US Free Trade Agreement.

### Chapter 2 National Treatment and Market Access for Goods

National treatment is a fundamental principle of free trade. It requires that imports be afforded 'no less favourable' treatment than domestic goods.

#### Recommendation 2.1

One Nation calls for specific exclusion of water from the National Treatment clause.

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**Recommendation 2.2**

One Nation recommends that National Treatment and Most Favoured Nation status only apply for US companies that pay Company Tax in Australia.

**Recommendation 2.3**

Regarding Chapter 2, Article 2.3 Elimination of Customs Duties, One Nation recommends that no tariff reduction shall apply until a public consultative and evaluation process is initiated to evaluate the economic, social, cultural and environmental impacts of tariff reductions, including the financial impacts on government appropriations and receipts due to loss of employment and the cost shifting from taxpayers to social welfare recipients.

**Recommendation 2.4**

One Nation recommends that Article 2.3 (2) of the FTA will not apply where the public consultative and evaluation process in Recommendation 2.3 finds that the wellbeing of Australia's social, economic, cultural or environmental status would be jeopardised unless a protection tariff is introduced.

**Recommendation 2.5**

Regarding Annex 2-C – Pharmaceuticals 1. Agreed Principles, One Nation recommends that the following text be inserted:

(e) Nothing in this Agreement will preclude Australia from continuing, expanding, or altering measures necessary to ensure the continuance of Australia's pharmaceutical benefits scheme in its current form including improved access to generic pharmaceuticals.

**Chapter 3 Agriculture**

Under this agreement, all US agricultural imports into Australia - many of them grown on corporate farms which are heavily subsidised by the US government - will gain immediate duty-free access.

**Recommendation 3.1**

Regarding Article 3.1 : Multilateral Cooperation, One Nation recommends that the following text be inserted

3.1.(3) Nothing in this Agreement will preclude Australia from taking such actions or measures necessary to ensure the viability of rural and regional economies and the viability of the family farm.

**Recommendation 3.2**

One Nation recommends that tariff rate quotas should be structured to provide more protections for import-sensitive products.

**Recommendation 3.3**

One Nation recommends a request-and-offer tariff negotiating approach, as opposed to across-the-board zero-to-zero initiatives to ensure special protections for import-sensitive Australian products.

**Recommendation 3.4**

One Nation recommends exemptions from tariff phase-out should be negotiated for the most highly sensitive Australian agricultural products.

**Recommendation 3.5**

One Nation recommends improved Safeguard Measures to deliver temporary relief to injured, import-sensitive Australian Industries and improved safeguard provisions to provide relief against import surges. These provisions must allow only a specified quantity of a selected product to enter at zero duty rates. Higher tariffs should be automatically triggered when imports reach a specified level or volume.

**Recommendation 3.6**

One Nation recommends that Australia must have the ability to restrict imports for temporary periods if, after investigations carried out by competent authorities, it is established that imports are taking place in such increased quantities (either absolute or in relation to domestic production so as to cause serious injury to the domestic industry that produces like or directly competitive products.

**Recommendation 3.7**

One Nation recommends the implementation of a mechanism to cushion the effects of currency devaluation.

**Recommendation 3.8**

The FTA fails to establish a system for the prompt and effective resolution of private commercial disputes in agricultural trade. The absence of a formal system will become a problem for Australian producers, who will need a viable commercial dispute settlement mechanism to handle the unique marketing characteristics of perishable crops, particularly tropical fruits.

The Agriculture Committee, established under Article 3.2 is only established in very broad and generalised terms.

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One Nation recommends that the Government clarify:

The membership of the committee and that the committee comprises at least two:

- Representatives from family farming
- Small business (businesses with less than ten employees) and
- Non government Consumers representatives
- Non government Environmental experts including one in Genetic Modification

And that the Government confirms:

- when the Committee will it be established
- Its terms of reference
- Its powers
- Whether resolutions of the committee will be binding

## **Chapter 4 Textiles and Apparel**

### **Recommendation 4.1**

One Nation recommends that nothing in this Agreement will preclude Australia from taking such actions or measures necessary to ensure the viability of the Australian textile, footwear, apparel and leather industries.

### **Recommendation 4.2**

One Nation recommends that Australia retains the right to vary the rules of origin subject to consultation.

### **Recommendation 4.3**

One Nation recommends that emergency action taken by Australia in relation to TCF industries may be maintained by Australia for more than two years with extensions and there be no limit after the commencement of the agreement under which emergency action can commence.

## **Chapter 5 – Rules of Origin**

### **Recommendation 5.1**

One Nation recommends that Australia retains the right to vary the rules of origin subject to consultation.

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## **Chapter 7 Sanitary and Phytosanitary Measures**

### **Recommendation 7.1**

Regarding article Article 7.2 : Scope and Coverage One Nation recommends that the following text be inserted:

7.2 (3) Nothing in this Agreement will preclude Australia from taking such actions or measures necessary to ensure the protection of the environment, including assessing by public consultation the economic, social, cultural and environmental impacts of the adverse effects to the Australian environment or an imported product or produce.

## **Chapter 10 Cross-Border Trade in Services**

### **Recommendation 10.1**

Regarding Article 10.1 : Scope and Coverage, One Nation recommends that the following text be added:

4 (f) All services which are supplied in the exercise of a governmental authority

- (i) central, regional or local governments and authorities; and
- (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

are excluded from the Australia- US Free Trade Agreement.

## **Chapter 11 Investment**

### **Recommendation 11.1**

One Nation recommends that nothing in this Agreement will preclude Australia from requiring the senior management of an enterprise or a majority of a board of directors be of a particular nationality.

### **Recommendation 11.2**

One Nation recommends that nothing in this Agreement will preclude Australia from maintaining its national telecommunications body as a statutory body.

## **Chapter 14 Competition-Related Matters**

### **Recommendation 14.1**

One Nation recommends that nothing in this Agreement will preclude Australia from designating a monopoly or establishing, maintaining or allow a monopoly including a government monopoly enterprise.

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## **Chapter 15 - Government Procurement**

### **Recommendation 15.1**

One Nation recommends that nothing in this Agreement will preclude Australian governments

- (i) central, regional or local governments and authorities; and
- (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

from positive discrimination in favour of a local provider.

## **Chapter 16 - Electronic Commerce**

### **Recommendation 16.1**

One Nation recommends that nothing in this Agreement will preclude Australia from affording more favourable treatment on the basis of the nationality of the author, performer, producer, developer, or distributor of the products that are created, stored, transmitted within Australia's territory.

## **Chapter 17 - Intellectual Property Rights**

### **Recommendation 17.1**

One Nation recommends that nothing in this Agreement will preclude Australia from legislating to ensure that no additional financial burden or other restrictions as may be applicable to intellectual property rights is experienced by any person or entity embarking upon scientific development, research or experimentation.

### **Recommendation 17.2**

Regarding Article 17.3 copyright, nothing in this Agreement will preclude Australia from ensuring its sovereign right to install all of those measures that are appropriate for the protection, preservation of our culture.

### **Recommendation 17.4**

One Nation recommends that nothing in this agreement will preclude ownership and decision-making concerning cultural life being majority controlled by Australian interests.

## **Chapter 19 – Environment**

### **Recommendation 19.1**

One Nation recommends that nothing in this Agreement will require Australia to enter in, embark upon or be forced to participate in any activity, material or otherwise, detrimental to the Australian environment.

## **Chapter 21 - Institutional Arrangements and Dispute Settlement**

### **Recommendation 20.1**

One Nation recommends that the dispute settlement panel may, not to the detriment of Australia, suspend any benefit under the Agreement.

## **Chapter 22 - General Provisions and Exceptions**

### **Recommendation 22.1**

One Nation recommends that the Agreement shall not afford to any entity Australian or US, a general exception in taxation that is less than the burden of the equivalent Australian entity or person.

## **Chapter 23 - Final Provisions**

### **Recommendation 23.1**

One Nation recommends that nothing in this Agreement will preclude Australia from withdrawing from any or all provisions of the Agreement upon resolution of 50% plus 1 of the Australian population eligible to participate in a referendum.

### **Recommendation 23.2**

One Nation recommends the inclusion of a sunset clause in the Text of the FTA and in all related enabling legislation relating to the FTA that is passed by the Federal Parliament, state or local governments.

### **Recommendation 23.3**

One Nation recommends that the Senate be granted a conscience vote on all enabling legislation pertaining to the FTA.

### **Recommendation 23.4**

One Nation recommends adoption of the Senate Foreign Affairs, Defence and Trade Committee recommendations, *Voting on trade The General Agreement on Trade in*

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*Services and an Australia-US Free Trade Agreement* in relation to the process for parliamentary scrutiny and endorsement of proposed trade treaties:

- (a) Prior to making offers for further market liberalisation under any WTO Agreements, or commencing negotiations for bilateral or regional free trade agreements, the government shall table in both Houses of parliament a document setting out its priorities and objectives, including comprehensive information about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.
- (b) These documents shall be referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for examination by public hearing and report to the parliament within 90 days.
- (c) Both Houses of parliament will then consider the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, and vote on whether to endorse the government's proposal or not.
- (d) Once parliament has endorsed the proposal, negotiations may begin.
- (e) Once the negotiation process is complete, the government shall then table in parliament a package including the proposed treaty together with any legislation required to implement the treaty domestically.
- (f) The treaty and the implementing legislation are then voted on as a package, in an up or down vote, i.e., on the basis that the package is either accepted or rejected in its entirety.



# Appendix 1

## Submissions, tabled documents and additional information

### Submissions

<b>No.</b>	<b>Submitter</b>
1	Ms A Bastock
2	Mr J Brown
3	Mr H Thompson
4	Mr A James
5	Mr B Dodd & Ms Lolo Houbein
6	Ms W Gooding
7	Mr M Brereton
8	Mr J Cook
9	Mr M Stone
10	Mr T Johnson
11	Ms M McKern
12	Ms J Brownrigg
13	Mr N Zihrul
14	Mr R Finucane
15	C A Roberts
16	National Civic Council of ( WA )
17	Mr & Mrs Hindell
18	Mr & Mrs M Jusuf
19	A Better Compassionate Australia Movement
20	Handgun Buyback Project
21	Mr R Langfield
22	Mr M Daley
23	Mr K Styles
24	Ms E Jay
25	Dr V Yule
26	Professor M Geist
27	Ms F Myers
28	Mr M Evans
29	Mr & Mrs Waddington
30	Mr G Date
31	Ms L White
32	Mr J & Ms M Hale

- 33 Mr D Prosser
- 34 Ms A Marshall
- 35 Friends of the ABC (Central Coast Branch)
- 36 Mr J Graham
- 37 Ms D Sawang
- 38 Ms K Martin
- 39 Social Developers Network & NED Foundation
- 40 Winemakers Federation of Australia
- 41 A J Doherty
- 42 V La Piana
- 43 E Ziegenhorn
- 44 Mr D Allen
- 45 Mr G Sont
- 46 Photon VFX
- 47 Catholics in Coalition for Justice and Peace
- 48 Mr R Downey
- 49 Mr J Gross
- 50 Ms A Nielsen and Mr P Bradley
- 51 Mr J Massam
- 52 Mr M Willis
- 53 Mr P Towler and Ms M Navarro
- 54 Queensland Nurses' Union
- 55 Mr B Kirkham
- 56 Mudgee District Environment Group
- 57 Ms L Jeffs
- 58 Mr S Roberts
- 59 Ms S Payne
- 60 Ms A Warren
- 61 Mr B Campbell
- 62 Ms A Bonnici and Mr M Hanratty
- 63 Dr M Slaytor and Ms P Slaytor
- 64 Rainforest Information Centre
- 65 Mr G Sanders
- 66 Victorian Department of Premier and Cabinet
- 67 Mr C Mackenzie and Ms J Sipkema
- 68 Australian Network of Environmental Defender's Office
- 69 The Cabinet Office New South Wales
- 70 Ms J Ferguson
- 71 Mr Z Harkness
- 72 Mr Z Sawko
- 73 Dr K Kendall

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74	ANOU and UPU WA Inc
75	Generic Medicines Industry Association Pty Ltd
76	Mr A Gaines
77	Dr G C J Lomas and Ms A T Lomas
78	Ms H Lapin
79	Dr C J Dahl and Mrs C V Dahl
80	Dr K Harvey
80a	Dr K Harvey
81	Alcoa World Alumina Australia
82	Unfolding Futures
83	Mr J Morris
84	Ms M G Gaede
85	Media Entertainment and Arts Alliance (VIC)
85a	Media Entertainment and Arts Alliance (VIC)
85b	Media Entertainment and Arts Alliance (VIC)
86	Ms N Loney
87	Mr J Gehrman
88	Professor B G Rolfe
89	Mr S Smith
90	Mr J Carthew
91	Shu Ning Bian
92	Mr K Clancy
93	Mr T Larsen
94	Mr P Caldon
95	Macquarie University
96	Mr B Codling
97	Mr B McKenzie
98	R Binning
99	Mr M Egan
100	Progressive Labour Party
101	Mr M Foley
102	Mr M Jackson
103	Professor R Garnaut and Mr B Carmichael
103a	Professor R Garnaut and Mr B Carmichael
104	Professor J Quiggan
105	AMA Therapeutics Committee
106	J OBrien
107	Mr G McCafferty
108	Australian Chicken Meat Federation Inc
109	R Dixon
110	Mrs E Kelly

111	M and J Vanstone
112	G Waugh
113	M Yen
114	B Cliff
115	G and J Windsor
116	M Enders
117	R Stafford
118	V Raymer
119	K Baxter
120	A Taylor
121	R Clifton
122	Ms K Brady
123	A Baker
124	S Warne
125	D Roney
126	G Spindler
127	I Higgins
128	J Lewis
129	Basell Polyolefins
130	Australian Broadcasting Authority
131	A Waterford
132	D O'Mara
133	S Peach
134	J Wright
135	Ford Motor Company of Australia
136	W D and M K Hamill
137	R Cox
138	N Olive and V McKinnon
139	Solon Foundation
140	Medicines Australia
141	CPSU
142	Western Australian Government
143	Australian Red Cross
144	Horticulture Australia
145	Genseric Corporation
146	Mr C Schroeder
147	Australian Nursing Federation
148	Bathurst CPSA
149	Australian Dairy Industry Council Inc
150	Mr K Harris
151	School of International Business

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- 152** Arts Industry Council (Vic)
  - 153** National Farmers Federation
  - 154** Australian Vinyls Corporation
  - 155** Melkonian & Company
  - 156** Australian Food and Grocery Council
  - 157** Australian Services Union
  - 158** United Trades and Labour Council
  - 159** Dr Thomas Faunce
  - 160** Australian Conservation Foundation
  - 161** Minister for Trade
  - 161a** Minister for Trade
  - 161b** Minister for Trade - Response to Dr Dee's Report
  - 162** Australian Seafood Council
  - 163** Screen Producers Association of Australia
  - 163a** Screen Producers Association of Australia
  - 164** Linux Australia
  - 165** Mr R Russell Attachment1 Attachment 2
  - 165a** Mr R Russell
  - 166** Ms A Goddard
  - 167** Dr Anthony Place
  - 168** CPSU-SPSF
  - 169** Edmund Rice Centre
  - 170** picoSpace Pty Ltd
  - 171** The Australia Institute
  - 171a** The Australia Institute
  - 171b** The Australia Institute
  - 171c** The Australia Institute
  - 172** Mr Denis Bright
  - 173** Mrs G O'Connor
  - 174** ACT Government
  - 174a** ACT Government
  - 175** NAPWA and AFAO Attachment 1
  - 176** Newcastle Greens
  - 177** Mr Jason Weathered
  - 178** Business Software Association of Australia (BSAA)
  - 179** FES Firton
  - 180** Mr Paul Gardner-Stephen
  - 181** Ms Megan Booker
  - 182** The Committee to Re-plan Australia
  - 183** Dr Matthew Rimmer
  - 184** Mr & Ms Ormerod and signatures

- 185 Dr Genevieve Mortiss
- 186 Qenos
- 187 Mr David Bruderlin
- 188 SEARCH Foundation
- 189 Rail Tram & Bus Union National Office
- 190 Greek Workers Educational Association of SA "Platon" Inc
- 191 Dr Derek Walter
- 192 Mr Barry Payne
- 193 Mr Oliver and Mrs Theresa Baudert
- 194 Ms Frances Meredith
- 195 Mr Keith Luhrs
- 196 Mr Ben Hughes
- 197 Ms Luci Temple
- 198 Mr Reginald J Wilding
- 199 Mr Bruce and Mrs Pat Toms
- 200 AWD Aboriginal Justice Support Group
- 201 Mrs Betty Murphy
- 202 Mr Tim Nelson
- 203 Ms Jane Seymour
- 204 Mr Gerry Kitchner
- 205 Mr Graham J Brammer, OAM
- 206 Mr Mark Enders
- 207 Mr James L O Tedder
- 208 Ms Bette Guy
- 209 Mr John Biggs
- 210 Confidential
- 211 Mr Jock Given
- 212 Ms Rosie Wagstaff
- 213 Murray Goulburn Co-Operative Co Limited
- 214 Mr Rex Kinder
- 215 Mr Peter Stratford
- 216 Ms Jane O'Sullivan
- 217 Mr Darren Collins
- 218 Ms Deborah Pickett
- 219 Ms Nizza Siano
- 220 Music Council of Australia
- 221 Ms June Wilson
- 222 Ms June Owen
- 223 Mr Vic Brill
- 224 Mr Joseph Tan
- 225 Ms Jessica Morrison

- 
- 226 Ms Carol J Elliott  
227 Mr Kenneth D Ritchie  
228 Ms Ellen Hill  
229 Marschall Acoustics Instruments Pty Limited  
230 Mr Thomas Moynihan  
231 Mr Harry Johnson  
232 Gymea Sub-Branch of the Australian Manufacturing Workers Union Retired Members  
233 Claire Mortimer  
234 Jon and Gillian White  
235 Mr Douglas Brook  
236 Mr Charlie Aarons  
237 Mr Jordan Nanni  
238 Mr Andrea Heinrichs  
239 Ms Jane O'Grady  
240 Virginia, Mark and Wren  
241 Ms Sandy Curtis  
242 Mr Peter Hannan  
243 Mr Rob Smetak  
244 Ms Zena Kells  
245 Mr Ross Mortimer  
246 Mr Norm Barnwell  
247 Mr & Mrs N Wilson  
248 Mrs Hemi Hill  
249 Mr Alan Stanford  
250 Mr Patrick Hansen  
251 Australian Pensioners and Superannuants League Qld Inc  
252 Mr Mark Westcott  
253 Mr Michael Hall  
254 Mr Alan Griffiths  
255 Ms Cheryl Mainard  
256 Mr Lorien Vecellio  
257 Mr Nicolas Rasmussen  
258 Sr Valda Finlay  
259 Ms Margaret Henry  
260 Mr Ray Humphriss  
261 Mr Selwyn Johnston  
262 Mr Ken Goodwin  
263 Ms Susan McMichael  
264 Mr Peter Cook  
265 Ms Lisa Yeates

266	Mr Luis Araya
267	Mr Dorin Hart
268	Mr Bill McClurg
269	Mr John Rutherford
270	Ms Audrey Tremain
271	Mr Andrew Lenart
272	Uniting Care NSW.ACT
273	Mr Ben Briedis
274	Mr and Mrs Morrison
275	Mr Arnold and Mavis Rowlands
276	Mr Bob Phillips
277	Mr Darryl Nelson
278	Ms Morag Hollway, Mr Alan Miller, Mr Andrew Miller
279	Doctors for the Environment of Australia
280	Mr John Dalton
281	Ms Fiona Harris
282	Electronic Frontiers Australia Inc
283	Australian Political Ministry Network Ltd (PolMin )
284	Ms Sherryl Williams
285	Victorian Committee Australian Screen Editor's Guild
286	Ms Sally Kingsland
287	Mr Gerhard Weissmann
288	Ms Gail Podberscek
289	R C Brown
290	Mr Michael Davies
291	Australian Pork Limited
292	WTOwatchACT
293	Mr Roger Clarke
294	Kimberlee Weatherall
294a	Kimberlee Weatherall Attachment 1
295	Australian Library and Information Association
296	Council of Australian University Librarians
297	Mr Brendan Scott
298	Australian Libraries' Copyright Committee
299	Australian Digital Alliance
300	Australian Film Industry Coalition
301	IEAA
302	AIIA
303	Mr Greg Standen
304	Mr Anthony McIntosh
305	Music Managers' Forum (Aust)

- 
- 306 Screen Services Association of Victoria  
307 Prof. Linda Weiss & Dr Elizabeth Thurbon  
308 Ms Gwen Arger  
309 Copyright Agency Limited  
309a Copyright Agency Limited  
310 Mr Michael Bentley and Ms Christine Caleidin  
311 Ms Vesselin Kastadinov  
312 Jens Porup  
313 Mr Nathan Bailey  
314 Colin and Julie Imrie  
315 Ms Judy Hardy-Holden  
316 Ms Glenys North  
317 Ms Erica Jolly  
318 Ms Rosemary Davies  
319 Ms Whillhemina Wahlin  
320 Ms Diana Rickard  
321 Ms Diana Beaumont  
322 Mr Clive Williams  
323 Ms Betty Russell  
324 Ms Meredith Dart  
325 Mr Warwick John Saunders  
326 Mr David Winderlich  
327 Ms Hedda Ransan-Elliott  
328 Ms Samantha Sowerwine  
329 Mr David Clayfield  
330 Retired Union Members' Association of SA Inc  
331 Mr Philip Crouch  
332 Mr Peter Youll  
333 Professor Peter Lloyd  
334 Mr Martin Pool  
335 Ms Julia Osborne  
336 Australian Vice-Chancellors' Committee  
337 Mr Dick Clifford  
338 Mr Corr Piccone  
339 Chris Pudney  
340 Allen and Mary Dorste  
341 Select Audio-Visual Distribution Company Pty Ltd  
342 ALP Gulgong Branch  
343 Dr Brian T Carey  
344 Mrs J Tendys  
345 Ms Jenni Salkavich

- 346 Mr John Adam
- 347 Mr Paul Schulz
- 348 Baxter Healthcare Pty Ltd
- 349 Australasian Society for HIV Medicine
- 350 CPSA/NSW
- 351 Mr Yahya Abdal-Aziz
- 352 ASU/TAS
- 353 ASU/VIC
- 354 Mr Alex Serrurier
- 355 ASU/NT
- 356 ASU/NQ
- 357 ASU/ACT
- 358 ASU/QLD
- 359 USU/NSW
- 360 Mrs Betty Trinick
- 361 Name Withheld
- 362 Ms Heather Graham
- 363 Mr J R Short
- 364 Mrs M Gluyas
- 365 Gippslanders Against Gatts
- 366 Professor Peter Drysdale
- 367 Ms Susan Meredith
- 368 Australian Music Industry Network
- 369 Public Health Association of Australia Inc
- 370 Aboriginal Heritage Support Group
- 371 Federal Chamber of Automotive Industries
- 372 ABC
- 373 Post Office Agents Association Limited
- 374 Glenda Gartell
- 375 Fluffy Spider Technologies
- 376 Friends of the ABC (ACT & Region) Inc
- 377 SA & MA Ward
- 378 Mr Dean Kelly
- 379 J Wood & I Fina
- 380 Muriel Milne
- 381 Central Australian Aboriginal Congress Inc
- 382 Australian Coalition for Economic Justice
- 383 R Wilkinson
- 384 Mr Jack Harriss
- 385 Adelaide Justice Coalition
- 386 Australian Stock Exchange

- 
- 387 Tremayne Consulting Group Pty Ltd  
388 The Adelaide Day Centre for Homeless Persons Inc  
389 Chey Policies  
390 Mr Daniel Connell  
391 Open Interchange Consortium XZIG  
391a Open Interchange Consortium XZIG  
392 Australian Council for Trade Unions  
393 Mr Andrew Oliver  
394 Australian Society of Authors  
395 Leanne Perdriau  
396 Dr Grant McBurnie & Mr Christopher Ziguras  
397 Jonathan Schultz  
398 AUSTA Business Group  
399 AusTradeUS Pty Ltd FTA  
400 Mr Joe Bryant  
401 Dr Daphne Elliott  
402 Jequerity Pty Ltd  
403 AWU  
404 Additional Information  
405 Catholic Health Australia  
406 Cattle Council of Australia  
407 Doctors Reform Society  
408 Tony Healy  
408a Tony Healy  
409 Bruce Miller & Meg Paul  
410 Linda Brainwood and Jeannine Baker  
411 Sven Svenson  
412 Michelle Lord  
413 Stephen D'Aprano  
414 Victorian Film and Television Industry Working Party  
415 Consumer Association of WA  
416 AFTINET  
417 Friends of the Earth  
418 Terrence Mackaness  
419 Barbara Mummery  
420 Michael Fensom and family  
421 Michael James McNally  
422 Catherine Raffaele  
423 Catherine Errey  
424 Martyn Goddard: Professor Peter Drahos: Dr Thomas Faunce: Professor David Henry

- 425 Geeta Kumria
- 426 The Newcastle University Student's Association
- 427 Brett Mansfield
- 428 The Institute for Open Systems Technologies
- 429 Slobodan Nikic
- 430 Hinkler Burnett Greens
- 431 Daniel Milne
- 432 Murray Black
- 433 Holden Ltd
- 434 Chris Foote
- 435 Andrew Pam
- 436 Rodd Clarkson
- 437 Barbara Little
- 438 Andrew Braund
- 439 Gustav Lanyi
- 440 Minerals Council of Australia
- 441 Greg Chapman
- 442 Jennifer Herron
- 443 Mrs Mary Grieve
- 444 Aust Red Meat Industry
- 445 National Centre for Epidemiology and Population Health
- 446 Glen Turner
- 447 Professor Sinclair Davidson and Jonathan Boymal
- 448 Dr. Brett G Williams
- 449 Geoff Edwards
- 450 Brian Marr
- 451 James Kilby
- 451(a) James Kilby
- 452 Brenten Ireland
- 453 Victorian Greens
- 454 WTO Watch Qld
- 455 Andrew Mark Johnston
- 456 R.R. Traill
- 457 Richard Kinder
- 458 Mr Kevin Bracken
- 459 CREATE Australia
- 460 Inquit Pty Ltd
- 461 The Hills Greens
- 462 Australian Copyright Council
- 462(a) Australian Copyright Council
- 463 AMWU Attachment 1 Attachment 2

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464	Nishan Disanayake
465	QLD Government
466	Terrie Wells
467	Healthy Skepticism Inc
468	Engineers Australia
469	Dr Chris Kang AccOT
470	Colin Lewis
471	Mr Chris Waters
472	Dr Bill Lloyd-Smith
473	Cybersource Pty Ltd
474	Margaret Opie
475	Peter Martin
476	Craig John Matthew Turner
477	Gillian Blair
478	Australian Milk Producers Association Ltd
479	Melbourne Symphony Orchestra
480	Julie Short
481	RMIT Business RMIT University of Technology
482	MURDOCH University
483	South West Trades & Labour Council of Victoria
484	Peter Youll
485	Geoffrey D.Bennett
486	Dr James Sherring
487	Peter Eckersley
488	John Hyde MLA MEMBER FOR PERTH
489	Geoffrey Heard
490	Pauline Stirzaker
491	Michael Frankel & Company Solicitors
492	Global Justice Network of The Grail in Australia
493	University of Melbourne
494	Confidential
495	Anna Smith
496	NSW Teachers Federation
497	Professor Chris Nyland
498	J M Shannon
499	ASU/NSW
500	Ms Rosemary Langford and Signatories
501	Alex Sansom
502	Mrs B Errey
503	Mr M Houston
504	ATSIC

- 505 Geoff
- 506 Ana Penteadó
- 507 Elizabeth Ann Thompson
- 508 Queensland Government
- 509 Distilled Spirits Industry Council of Australia Inc
- 510 Willoughby/Castlecrag Branch of the Australian Labor Party
- 511 Liberty Victoria – Victorian Council for Civil Liberties Inc
- 512 Ms Margaret Paul
- 513 Northern Territory Government
- 514 Ms Juliette McAleer
- 515 STOPMAI (WA) Coalition
- 516 L.M. & P.C. Webb
- 517 Mr Stephen West
- 518 Mr Andrew Buckeridge
- 519 Business Council of Australia
- 520 Viscopy
- 521 Constellation Wines
- 522 Australian Consumers' Association
- 523 Mr Neil Russell-Taylor
- 524 Dr Waseem Kamleh
- 525 Internet Industry Association
- 526 Mr Michael Baume AO
- 527 Community and Public Sector Union , Civil Service Association of WA Inc
- 528 Federation of Australian Scientific and Technological Societies (FASTS)
- 529 Mr Paul Reid
- 530 Sierra Club
- 531 The Australian Council of Social Service (ACOSS)
- 532 Consumers' Health Forum of Australia
- 533 Pastoralists and Graziers Association of WA (Inc) and Generic Agricultural Chemical Association
- 534 Tuna Boat Owners Association
- 535 Screenrights
- 536 ALP - New Lambton South Branch
- 537 Mr Keith McKenna
- 538 UNIONSWA
- 539 Ms Daina Reid
- 540 Daniel & Michele Vieira
- 541 Leichhardt Council
- 542 Dylan D'silva
- 543 Australian Subscription Television and Radio Association
- 544 Mr Geoff Taylor

- 544(a) Mr Geoff Taylor  
 545 APRA/AMCOS  
 546 Name withheld  
 547 Mr & Mrs Sheridan-Smith  
 548 Mr Ray Birch

### **Form Letters**

In addition to submissions the Committee received 20 form letters criticising the Free Trade Agreement and the Australian Manufacturing Workers' Union had an AMWU Anti Free Trade Petition signed by 366 people.

### **Tabled Documents**

#### *17 May Canberra*

Rusty Russell – Presentation papers

#### *7 June Melbourne*

Anne O'Rouke – One Hundred Eighth Congress of the US  
 Anne O'Rouke – NAFTA Chapter 11 – Investor State Disputes

#### *8 June Canberra*

Mr Jorg Speck – Summary of ISP Customer Terms and Conditions  
 Mr Andrew Stoller - Read the FTA Yourself  
 Mr Andrew Stoller – Article in Financial Review – "The FTA Pandering to Rome".  
 Mr Stephen Gould – Letter to Chair  
 Mr Stephen Gould – Electronic Industry Alliance – EIA  
 Mr Stephen Gould – Question received on FTA by Interests Groups  
 Mr Stephen Gould – Robert B Zoellick Remarks – EIA – Industry Dinner May 25  
 Mr Stephen Gould – Letters showing credentials  
 Mr Stephen Gould – Electronic Commerce Discussions Paper November 2003

#### *21 June 2004 Canberra*

Dr Thomas Faunce – Priority Watch Country – Canada -Intellectual Property Protection  
 Dr Thomas Faunce – Presentation Notes by Thomas Alured Faunce  
 Dr Thomas Faunce – Collusion and Other Anticompetitive Practices  
 Dr Buddhima Lokuge – Notes for presentation.

#### *24 June 2004 Canberra*

Dr Jeff Fairbrother – Presentation to Senate Select Committee Australia/USA FTA  
 Senator Ferris – Transcript – Press Conference with Dr Dee  
 Austrade – New Policy Funding for New Opportunities – New Exporters Initiative  
 Austrade – Opening Statement  
 Austrade – Senate Select Committee on the Free Trade Agreement between Australia and the United States of America  
 Mr Peter Upton (FAPM) – Total Australian Trade (Imports/Exports)  
 Mr Peter Upton (FAPM) – Media Release  
 Mr Peter Upton (FAPM) – Submission to DFAT on Issues and Implications for Australia's Automotive Components Industry – January 2003

**Additional Information**

*The Australia-US Free Trade Agreement An Assessment* by Dr Philippa Dee.

*A backdoor to higher medicine prices? Intellectual property and the Australia-US Free Trade Agreement* by Dr Buddhima Lokuge

*Submission to the Department of Foreign Affairs and Trade on Negotiations for a Free Trade Agreement between Australia and the United States of America – Issues and implications for Australia's Automotive Components Industry January 2003* from Federation of Automotive Products Manufacturers

Extracts from Senate Hansard dated 10 February 2004, p. 19554

Extracts from Senate Hansard dated 23 March 2004, p.21680

Copy of a submission to the United States Senate Finance Committee

Submission from Mr David Prosser plus editorial dated 18 December 2003

## Appendix 2

### Public Hearings

#### Sydney 4 May 2004

Mr Geoff Brown, Executive Director, Screen Producers Association of Australia  
 Ms Megan Elliott, Executive Director, Australian Writers Guild  
 Mr Michael Fraser, Chief Executive Officer, Copyright Agency Ltd  
 Ms Lynn Gailey, Federal Policy Officer, Media, Entertainment and Arts Alliance  
 Mr Richard Harris, Executive Director, Australian Screen Directors Association  
 Dr Ken Harvey, (Private capacity)  
 Mr David Herd, Screen Producers Association of Australia  
 Ms Claudia Karavan, Member, Media, Entertainment and Arts Alliance  
 Ms Caroline Morgan, Chief Executive Officer, Copyright Agency Ltd  
 Dr Patricia Randal, Convenor, Australian Fair Trade and Investment Network  
 Ms Lynne Spender, Acting Executive Director, Australian Society of Authors  
 Ms Alison Terry, Executive Director Corporate Affairs, Holden Ltd  
 Dr Elizabeth Thurbon, (Private capacity)  
 Professor Linda Weiss, (Private capacity)  
 Mr Simon Whipp, National Director, Media, Entertainment and Arts Alliance

#### Canberra 5 May 2004

Mr Stephen Brown, Manager, Economic Modelling, ACIL Tasman Pty Ltd  
 Professor Ross Buckley, Tim Fischer Centre for Global Trade and Finance  
 Mr Allan Burgess, Chairman, Australian Dairy Industry Council  
 Mr Peter Corish, President, National Farmers Federation  
 Mr Gregory Cutbush, Principal Analyst, ACIL Tasman Pty Ltd  
 Mr Lee Davis, Senior Economist, Centre for International Economics  
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## **Appendix 3**

### **Copyright and Patent Law Changes**

**Parliamentary Library Research Paper**



Current Issues Brief  
No. 2004–05

Guide to copyright and patent law changes in  
the US Free Trade Agreement  
Implementation Bill 2004

Jacob Varghese  
Law and Bills Digests Section  
2 August 2004

ISSN 1449-8472

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## **Acknowledgements**

The author would like to acknowledge the very generous assistance of Ms Kimberlee Weatherall, Associate Director (Law) at the Intellectual Property Research Institute of Australia who read and contributed to earlier drafts of this Brief. The author also thanks Thomas John, Sarah Miskin and Jane Grace of the Parliamentary Library for their editing assistance.

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## **Acronyms**

AUSFTA	Australia—United States Free Trade Agreement
BDD	Broadcast Decoding Device
CLRC	Copyright Law Review Committee
CSP	Carriage Service Provider
DFAT	Department of Foreign Affairs and Trade
DMCA	Digital Millennium Copyright Act of 1998 (US)
ERMI	Electronic Rights Management Information
JSCOT	Joint Standing Committee on Treaties
SAFTA	Singapore—Australia Free Trade Agreement
TPM	Technological Protection Measure
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty

## Executive summary

The US Free Trade Agreement Implementation Bill 2004 contains the substantive amendments necessary to implement the Australia–United States Free Trade Agreement (AUSFTA).<sup>1</sup> A large part of this Bill contains proposed changes to the *Copyright Act 1968* and the *Patents Act 1990*.

This Brief is intended to supplement the forthcoming Bills Digest and serve as a detailed guide to these changes and their effects. It examines both the substance of AUSFTA's requirements in these areas and the approach to implementation proposed by the Bill. Although the intellectual property requirements of AUSFTA are highly prescriptive, they do offer some room for interpretation. As a result, implementation is not merely a technical issue—it requires substantive policy choices as well.

The copyright changes 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 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.

The patent law changes are minor. They should assuage some earlier concerns that AUSFTA would require changes that would expand the scope of patentable inventions, especially those relating to software patentability.

## Introduction

The US Free Trade Agreement Implementation Bill 2004, as its name suggests, contains the substantive amendments necessary to implement the Australia–United States Free Trade Agreement (AUSFTA).<sup>2</sup> A large part of this Bill contains proposed changes to the *Copyright Act 1968*. A lesser part deals with changes to the *Patents Act 1990*.

This Brief is intended to supplement the forthcoming Bills Digest and serve as a detailed guide to these changes and their effects. It examines the proposed changes and considers:

- how they change current Australian law and what that change might mean in practice
- some assessment of the law that AUSFTA requires
- whether they adequately implement AUSFTA requirements, and
- whether they go beyond AUSFTA requirements.

Consideration is also given to the issue of laws relating to technological protection measures, a copyright related change that has not appeared in this Bill but is required by AUSFTA within two years of the agreement coming into force.

## Copyright Act changes

The Copyright Act amendments contained in Schedule 9 of the Bill propose some important, and in some cases radical, changes to the nature of copyright and copyright-like protections in Australia. In some instances, their effects and interactions with other aspects of copyright law are complex and unpredictable.

Although the changes deal with several disparate areas of the Copyright Act, certain themes can be observed. They include:

- more generous protection of copyright, most notably an increase in the duration of copyright
- greater use of criminal law, in addition to civil remedies, to enforce copyright
- increased prohibitions on acts preparatory to copyright infringements, rather than the infringements themselves, such as distribution of devices that assist infringement
- increasing prohibitions, or effective barriers, to the non-commercial use of infringing material
- increased liability for end-users and consumers, and
- new laws to increase the protection of copyright in electronic material.

Altogether, the changes would introduce a regime that is more protective of copyright and more punitive toward infringement.

### **Patent Act changes**

The changes proposed to the Patent Act are not particularly significant. If anything, they are remarkable for what they *do not* include. As a result, the Bill should assuage some of the concerns about changes to patent law raised earlier in the AUSFTA debate. The significant changes that AUSFTA requires that affect certain patented products are included in Schedules 2 and 7, dealing with agricultural and veterinary chemicals and pharmaceutical products respectively. These schedules are not dealt with in this Brief, but will be discussed in the Bills Digest.

## **Schedule 9—Amendments to *Copyright Act 1968***

### **Parts 1–4: Performers’ rights**

#### **Performers’ rights**

The changes proposed by Parts 1–4 extend performers’ rights over sound recordings of their performances.

#### **Why are these changes necessary?**

AUSFTA requires Australia to accede to the [\*WIPO Performances and Phonograms Treaty\*](#) (1996) (WPPT) (Article 17.1.3). Most of the provisions of these Parts give effect to obligations under the WPPT. AUSFTA also requires the extension of rights to performers in its own text, principally Article 17.4.1–3 and Article 17.6. The WPPT only requires new rules for the protection of sound recordings of performances, not audio-visual recordings. This is reflected in the amendments that these Parts propose.

It is important to note that Australia is already bound to accede to the WPPT through its free trade agreement with Singapore (SAFTA).<sup>3</sup> Article 2 of Chapter 13 of that agreement requires accession within four years of its entry into force; that is, by 23 July 2007.

Interestingly, the United States, which is also a signatory to the WPPT, has not adopted protection of performers’ rights to the standard recommended by this Bill. Instead, US law more closely resembles current Australian law, providing neither rights in authorised recordings nor moral rights.<sup>4</sup> Accordingly, these changes would give Australia a more protective performers’ rights regime than that of the United States.

## **Current protection of performers' rights in Australian law: 'non-copyright' rights**

Under current Australian law, performers do not own copyright in recordings of their performances. They are entitled to some non-copyright rights, provided by Part XIA of the Copyright Act. These are known as 'performers' rights' and are limited to the following:

- the right to authorise recording and broadcasting of the performance, and
- the right to prevent the knowing copy, sale, distribution or importation of unauthorised recordings.

Under this law, performers have no rights to control copy and distribution of the performances that they have *authorised*.

The period of protection for these performers' rights is normally 20 years from the year of the performance. For the purposes of *sound* recordings of performances, in certain circumstances the period of protection is 50 years from the year of the performance.

Criminal offences apply to unauthorised recording, the possession of recording equipment that is to be used for unauthorised recording or for unauthorised copying, sale, distribution or importation of an unauthorised recording. For the purposes of the copying, sale, distribution or importation offence, the period of protection is 50 years from the year of the performance.

## **History of this issue in Australia**

The current regime for protection of performers' rights was enacted in the *Copyright Amendment Act 1989*. This followed a report on the issue by the [Copyright Law Review Committee](#) (CLRC) in 1987.<sup>5</sup> The majority recommended against the granting of copyright, or like property rights, to performers although they did favour the 'non-copyright' rights described above. Their view was that the interests supporting performers' rights actually were looking for a more effective tool for collective bargaining for remuneration from producers, not protection of the originality of their performance, and that copyright was not the appropriate instrument for this purpose. Further, the majority considered that performers' copyright would create many practical problems and be disruptive to those industries, such as television and radio, where recorded performances are used, creating a disincentive in those industries to use Australian performances.<sup>6</sup> A minority of the committee took the opposite view, favouring the extension of copyright or similar property rights to performers. The government of the day accepted the majority view and this was reflected in the legislation.<sup>7</sup> With some differences, the scheme proposed by Part 1 of the current Bill is similar to that recommended by the minority.<sup>8</sup>

In 1997, the year after the WPPT had been agreed, the Attorney-General's Department and the then Department of Communications and the Arts released a discussion paper

proposing that Australia accede to the WPPT and make the necessary changes to provide the protection of performers' rights.<sup>9</sup> No legislative action came from the paper, although the Department of Communications, Information Technology and the Arts web site notes:

A number of responses were received reflecting a diversity of views about how Australia should proceed ...

Not surprisingly, increased statutory protection for performers' rights tends to be supported by the performers, union and copyright interests, while it tends to be opposed by producer interests such as broadcasters, film makers and record companies.<sup>10</sup>

The paper remains the most thorough discussion of the issue by the government. In its platform for the 2001 election, the Coalition committed to enacting performers' rights laws to the extent necessary to accede to WPPT.<sup>11</sup> To this extent, the changes proposed in the current Bill reflect the Government's policy as well as implementation of AUSFTA.

## Key changes

### Part 1. Performers' rights in sound recordings

**Part 1** proposes that performers be granted ownership of the copyright in the sound recordings of their performances (**item 2** through interaction with s. 97 of the Copyright Act). Currently, the owner of the media on which the recording is made is the sole owner of copyright in the recording. These changes would make that person and the performer *co-owners* of the copyright in equal shares (**item 7**).

Granting performers actual copyright in the sound recordings of their performance is a significant extension to their rights.

However, **Item 9** provides certain 'safeguards' that balance the rights of performers against the right of other owners of copyright in the same recording. In particular:

- **proposed s. 113A** provides that an agent can be appointed to act for a group of performers
- **proposed s. 113B** provides that a performer's permission to use a recording for a particular purpose is taken to be granted where the performer gave his or her consent to the recording for that purpose. For example, a recording studio may publish a recording if the performer allowed the recording to be made on the understanding that it would be published; consent is not necessary for both steps (an 'implicit license')
- **proposed s. 113C** provides that an owner of copyright in a sound recording of a performance is taken to have received permission to exploit or use the recording from any co-owner in the event that the co-owner cannot be located after reasonable inquiries are made. If this occurs, the owner exploiting the recording must keep the co-owner's share of the profits received in trust for the co-owner for a period of four years.

**Item 2** provides that a performance by an employee is taken to have been made by the employer, unless a contrary agreement has been reached between the performer and the employer.

The creation of performers' copyright would be *retrospective*, affecting all sound recordings not currently in the public domain. This is a requirement of the WPPT. However, provisions are also included to ensure that existing owners of copyright in sound recordings can continue to exercise their rights as before, or that they receive compensation (**items 8 and 10**).

## Part 2. Performers' moral rights

**Part 2** proposes the changes necessary for performers to enjoy moral rights in their performances. Australian law currently recognises moral rights for literary, dramatic, musical or artistic works and films. Moral rights are certain non-economic rights provided to authors in addition to copyright. They include the right to attribution of authorship, the right not to have authorship falsely attributed and the right of integrity of authorship. These provisions would extend moral rights to live and recorded performances as well, as far as these performances consist of sounds.

For the most part, these provisions would simply replicate the existing provisions of Part IX of the Copyright Act with the necessary changes to protect performers as well as authors. For practical purposes, this would mean that the same rights, remedies and exceptions that apply to works and films will also apply to sound recordings of performances.

## Part 3. Performers' protection

**Part 3** proposes changes to the existing provisions for 'non-copyright' rights of performers under Part XIA of the Copyright Act.

The changes are:

- reduction of the exemptions from protection for sound recordings of performances to simply 'fair dealing' for the purpose of research or study, criticism or review or news reportage (**Items 60–67, 71, 72, 73, 74, 75**). Currently, exemptions exist for recordings made solely for the purpose of the private domestic use of the maker and for indirect sound recordings made for certain purposes. Arguably, this goes further than the WPPT requires. Some countries have accepted that the WPPT allows private and domestic use on the basis of the 'three step test' for exceptions.<sup>12</sup> These exemptions will no longer apply to sound recordings, but will continue to apply to audio-visual recordings, which are not covered by the WPPT. Also, recordings made solely for the maker's private and domestic use will remain exempted from the criminal offence of unauthorised recording (**item 80**)

- extension of performers' protection to the exclusive right to authorise communication of their (unrecorded) performances to the public (**items 68, 76, 77, 79, 81**). Currently, this right is limited to broadcasts
- expansion of the definition of *performance*, and therefore the subject-matter of protection, to include performances of an expression of folklore (item 69), and
- provision to prevent performers from 'double dipping' by receiving compensation for infringement of copyright in a sound recording and for infringement of performers' protection arising from the same events (item 78).

#### Part 4. Copying and communicating broadcasts of performances

**Part 4** proposes changes that would allow educational institutions and institutions assisting people with disabilities to reproduce broadcast performances without authorisation from the performer, under certain conditions. This would extend to broadcast performances the current statutory license scheme which exists for reproduction of copyright protected broadcasts by these institutions (in Part VA of the Copyright Act).<sup>13</sup>

This change is necessary because Part 3 (item 61) proposes to remove the blanket exemption for the indirect sound recording of performances for the purposes of education or the assistance of people with disabilities. Unlike the existing blanket exemption, the statutory license scheme requires the institution to pay equitable remuneration to a collecting society, which will then distribute the money to the relevant performers.

#### **Comment**

The issue of performers' rights and accession to the WPPT has received little attention in the public debate on AUSFTA and has been addressed by few submissions to the Senate Select Committee on the Free Trade Agreement between Australia and the United States (hereafter, the Senate Select Committee). This possibly reflects the fact that Australia is already bound to accede to the WPPT as a result of SAFTA. It is also possible that the lack of debate reflects a general failure to anticipate the Bill's extensive treatment of this issue.

The benefits of extending copyright in sound recordings to performers are:

- that it provides performers with a simple and effective means of demanding and receiving remuneration for their performances
- that it provides recognition of the creative and original aspects of performance, and
- that the ability, thanks to technology, to permanently 'fix' a performance by recording is analogous to the process of committing a literary or artistic idea to material form through the publication of a work. Accordingly, it is appropriate that performance should receive analogous rights.<sup>14</sup>

The main disadvantage of greater protection of performers' rights is the greater compliance costs for users of sound recordings, who will be forced to obtain consent from, and potentially pay, a greater number of owners before making copies or broadcasts. These compliance costs may be significant, as the Bill proposes a complex scheme of overlapping rights, especially with respect to performances recorded before the commencement date. In relation to performers' copyright in sound recordings, it is important to note that the proposed changes do not extend the scope of copyright to new media. Instead, they merely redistribute the ownership of copyright that already subsists in sound recordings. It was for this reason that the CLRC majority thought that performers' copyright was more an industrial matter relating to negotiations between performers and producers rather than a matter for copyright law. In economic terms, it is difficult to see any incentive benefit arising from performers' copyright as no new rights are created, they are merely reallocated. Conversely, new compliance costs will arise for producers and users of sound recordings.

Given that a new global standard is emerging through the WPPT, the argument used by the majority of the CLRC that providing these protections through Australian law would be a disincentive to use Australian performances no longer carries as much weight as it did in 1987. On the other hand, despite the WPPT, the protection of performers' rights remains uneven across the world. It has already been noted that the United States does not afford performers the level of protection proposed. Canada, New Zealand and the United Kingdom do not provide performers' moral rights.

Another possible disadvantage of the Bill's approach to performers' rights is that the Bill's limitation to sound recordings, not audio-visual records of a performance, compromises the principle of technology neutrality. This principle requires that regulation establishes rules and principles that apply in a similar way across differing technological platforms. The lack of technology neutrality here would create anomalous scenarios, such as the protection of the sounds of a performer on a record from degrading treatment, but not the protection of their image in a television appearance. On the other hand, it would have gone well beyond implementation of AUSFTA if the Bill had proposed protection of audio-visual records of performances. The lack of technology neutrality merely reflects the situation in international copyright law, in which the WPPT protects sound recordings but consensus remains elusive on the protection of audio-visual performances.

Commercial Television Australia (CTVA), while not indicating opposition to performers' copyright in sound recordings, submitted to the Joint Standing Committee on Treaties (JSCOT) that the legislation implementing such a change should be drafted in a way that does not cause disruption to their members.<sup>15</sup> In particular, they argued that the legislation should:

- contain deeming provisions to ensure that performers have no right to challenge the rights of record companies to licence and the right of commercial television broadcasters to use, recordings authorised under current industry arrangements;

- contain a reasonable transition period before makers of recordings are required to obtain express consent from performers in relation to secondary uses of recordings;
- ensure it is possible to assign performers' rights in relation to performances that are not yet in existence; and
- enable performers to give broad consents in relation to use of their performances, to a reasonable extent, to avoid the need to obtain individual releases.<sup>16</sup>

The Bill has met some of these concerns. The use of copyright as the template for performers' rights in sound recordings means that the last two concerns should have been met.<sup>17</sup> As to the first concern, the safeguards proposed by **item 9** go some way to minimising inconvenience to users of copyright. An alternative approach would have been to provide a 'compulsory license' to the other copyright owner (for example, the record company) to use and authorise use of the recording without the performer's permission. The provision of an implicit license, to allow the other owner to use the recording for the purposes for which it was recorded, as proposed by item 9, seems to achieve a balance between providing completely equal rights to authorise use and the compulsory license approach.

## **Part 5: Duration of copyright in photographs**

### **Changes to the law**

Currently, the duration of copyright in photographs is 50 years after the year in which the photograph was first published (s. 33(6), Copyright Act). This is much less than the duration of protection afforded to authors of other works, which is the life of the author plus 50 years.

**Part 5** makes the amendments necessary to provide that photographs receive the same period of protection as other artistic works (**items 107–113**).

**Item 114** proposes to alter the presumption provided by s. 127 relating to the authorship of photographs. This presumption is that the person who took the photograph is the owner of the material (for example, film) or apparatus (for example, the camera) on which the photograph was taken. Currently, this presumption has the effect that the owner of the film or camera is taken to be the author of, and therefore the owner of copyright in, the photograph, unless it can be proved otherwise.<sup>18</sup> Item 114 would amend this so that, in the case where the owner of the apparatus or material is a body corporate, the presumption would only apply to questions of ownership of copyright, not questions of the duration of copyright. As s. 127 may provide a presumption in favour of a body corporate as the author—where it owned the material on which the photograph was taken—a rule of duration based on the life of the author would create problems, as a body corporate does not 'die'. Item 114 resolves this by providing that, in effect, in such circumstances the

duration of copyright will be determined from the life of the actual human photographer, not the owner of the materials.

**Item 115** has a similar effect in respect of photographs taken prior to the commencement of the Copyright Act in 1969. Rather than merely a presumption in favour of the owner of the materials, the law prior to 1969 provided that the author of a photograph *was* the owner of the materials.

**Item 117** provides that these amendments apply to all photographs in which copyright subsists on or after the day on which this item commences. In other words, there is an element of retrospectivity to these changes, in that they will apply to photographs taken before the commencement of the Bill if copyright has not yet expired. For example, a photograph published 49 years ago whose author has not yet died will receive a very significant extension of copyright. However, no photographs that are currently in the public domain will revert to copyright.

**Items 118 and 119** establish a compensation scheme for agreements reached prior to Royal Assent to make (infringing) use of photographs whose copyright would have expired but for the intervention of the Bill. Under this scheme, the owner of the copyright may be required to pay reasonable compensation to a person who suffers a loss as a result of the copyright owner's refusal to allow the use of the photograph in accordance with the agreement. Item 118 also provides that, where the owner of copyright has neither notified a person who had made such an agreement that they must not use the photograph nor agreed to reasonable compensation, the person is not liable, civilly or criminally, for using the photograph.

### **Why are these changes necessary?**

These changes are required by Article 17.4.4 of AUSFTA, which specifically requires that photographs receive the same duration of copyright as other works. This article actually requires that duration of copyright be 70 years from the death of the author or first publication. The changes to increase the duration from 50 years to 70 years are made by the next Part of the Bill.

The element of retrospectivity is required by Article 17.4.5 of AUSFTA which provides that Article 18 of the Berne Convention applies.<sup>19</sup> This article provides that changes to copyright required by the agreement must apply to all works that have not entered the public domain at the time the agreement comes into force.

### **Comment**

Comments on the general extensions to the duration of copyright are contained in the discussion of the next Part.

With respect to the issue of the duration of copyright in photographs, the following particular comments could be made:

- treating photographs the same as other artistic works, such as paintings, conforms with the principle of technology neutrality. It is clearly not neutral to grant painted visual art more generous copyright protection than photographed visual art
- the extension of the duration of copyright in photographs involves a much greater retrospective extension than is involved for other works under AUSFTA, largely because it is coming from a lower base level. This is well illustrated by the case of Max Dupain, one of Australia's most famous photographers. Assuming passage of this Bill and Assent by the end of 2004, any photos published by Dupain in 1955 and later will maintain their copyright until 2062, 70 years from Dupain's death in 1992. Without passage of the Bill, photographs published in 1955 would become available next year. The photographs published before 1955 are already in the public domain and this will not change. For these photographs, this Bill will provide effectively prolong their copyright by 57 years. Under the general extension to copyright, no work or other matter would have its copyright prolonged by more than 20 years.

## **Part 6: Duration of copyright in works and other subject-matter**

### **Changes to the law**

This Part contains the necessary amendments to change the current term of copyright protection from 50 years to 70 years from the death of the author (or from the first publication or performance in certain cases).

**Item 131** provides that these changes apply with the same element of retrospectivity as the changes in Part 5: that is, works and other subject-matter currently under copyright will have their copyright term extended by 20 years. As with Part 5, **items 132 and 133** provide a compensation scheme for those who have reached agreements before Royal Assent with respect to the exploitation of material which, but for this Bill, would not be subject to copyright. Item 132 also provides a similar immunity from criminal or civil liability as that provided by item 118 (discussed above).

### **Why are these changes necessary?**

The extension of the duration of copyright is required by Article 17.4.4. The element of retrospectivity is required by Article 17.5.5.

These provisions clearly implement Australia's obligations under these Articles.

## Comment

The issue of the duration of copyright has been widely canvassed in the AUSFTA debate. In general, it seems that representatives of some owners of copyright (such as the ARIA, the Business Software Association and Copyright Agency Limited) favoured an extension and users of copyright (such as the Australian Libraries and Information Association and the Australian Vice-Chancellors Committee) were opposed. The position of creators' representatives (such as the Media, Entertainment and Arts Alliance, the Australian Screen Directors Association, the Australian Writers Guild and Linux Australia) was either mixed or opposed, reflecting the fact that creators would receive the benefit of longer protection, but also suffer the loss of public domain material from which they can draw for their creative purposes.

Those in favour of longer copyright protection tend to argue that greater protection provides a greater incentive to create and produce works and other material. Another argument advanced in favour of the change is that it will 'harmonise' Australia's law with that of its major trading partners, such as the United States and European Union. Those against longer protection have tended to argue that the extension would provide a minimal additional incentive to produce, while increasing costs for purchasers and users of the material. They have also argued that even with this change, Australian law on the duration of copyright will not be harmonised with that of the United States, which provides a variety of different rules for calculating duration. The most significant difference is that where copyright is authored by a corporation (as the employer of the actual author), copyright lasts for 95 years from the date of publication or 120 years from the creation of the material. In Australia, although such a corporation would be owner of copyright, the human author would (normally) be considered the author for the purposes of calculating the copyright duration; that is, the life of the actual author plus 70 years. In some cases Australian copyright will last longer; in some cases US copyright will last longer. As a result, harmonisation is not achieved.

Two major economic studies of AUSFTA—one prepared for the Department of Foreign Affairs and Trade (DFAT) and one for the Senate Select Committee—did not view the extension of the copyright term as a significant additional incentive to create. The Centre for International Economics (for DFAT) said:

Although the extended period of copyright provides an additional opportunity for creators of new works to receive revenue, this revenue will unlikely be a significant incentive to create new works because it accrues so far in the future. Therefore, the copyright extension in the agreement will, at most, provide a minor additional incentive for the creation of new works.<sup>20</sup>

On the other hand, an extension to copyright would carry economic costs. Dr Philippa Dee, in her report for the Senate Select Committee, estimated that Australia's net royalties payments could increase by up to \$88 million per year as a result of the extension.<sup>21</sup>

Even accepting the argument that the extension of protection creates additional incentive to create material, it seems hard to justify the element of retrospective action on works already created but still within copyright. No incentive can be provided for works already created.

Nonetheless, this element of retrospectivity is a clear requirement of AUSFTA, rather than a decision of the drafters of this Bill. The drafters have included a compensation scheme for those who had already entered into agreements to use the material once copyright expires, which will mitigate the loss caused by the retrospective action for at least some of those adversely affected by the change.

#### Orphaned material

The Bill does not propose any system to reduce compliance costs associated with finding copyright owners for ‘orphaned material’. Orphaned material is material still under copyright whose copyright owners are difficult to trace as the author has died or lost interest or an owning company has been wound-up. In these circumstances, obtaining permission to use the material can be impossible, which can mean that the value of the work is lost until the copyright expires. An extension to copyright will increase the amount of orphaned material.

One system to deal with orphaned material would be to allow use after reasonable efforts at finding the owner have been fruitless. Reasonable proceeds of the use could then be kept in trust for a period in case the owner subsequently is found.<sup>22</sup> A similar system is proposed by this Bill in relation to joint copyright owners in sound recordings. Another approach is that proposed by the Public Domain Enhancement Act currently before the US Congress. That Act would allow the free use of material 50 years after the death of the author, unless the owner had registered their continuing interest in the material. It is at least arguable that these approaches would comply with AUSFTA and other international copyright agreements to which Australia is a party.

#### Unpublished works

Article 17.4.4 would allow Australia to introduce a rule that works and other subject-matter not published or performed within 50 years of their creation be free from copyright 70 years after the creation. The current Bill has not proposed this change.

Under the current law, copyright lasts *indefinitely* for unpublished works and other material. The only exception is that 50 years after the death of the author, unpublished works can be used for certain research and preservation purposes and, in some circumstances, publication (under ss. 51–52, Copyright Act). Both this rule and its exception will remain under the current Bill.

## Part 7: Electronic rights management information

### Changes to the law

#### Current law

Electronic rights management information (ERMI) is information that is attached or connected to copyright protected media. This information identifies the media, the author and/or the copyright owner. It may also explain the terms and conditions the copyright owner has imposed on the use of the material.

ERMI already receives some protection under the Copyright Act. Civil and criminal remedies may apply where the following activities are undertaken knowing<sup>23</sup> that they would induce, enable, facilitate or conceal infringement of copyright:

- the removal or alteration of ERMI
- the distribution or importation, with a commercial purpose, of material which is known to have had ERMI removed or altered, or
- the communication to the public of material which is known to have had ERMI removed or altered.

#### Proposed changes

The proposed changes to the law are:

- a new definition of ERMI that
  - explicitly requires ERMI to be ‘electronic’
  - extends the coverage of ERMI protection to information that ‘appears or appeared in connection with a communication, or making available, of the work’ (item 134 and, consequentially, items 135, 138 and 14124)
- removal of the element of commercial motivation from the civil action for distribution or importation of material whose ERMI has been removed or altered. That is, distribution or importation of such material would attract civil liability regardless of the motivation (**items 136 and 137**)
- creation of a civil action and a criminal offence for the distribution or importation of ERMI that has been removed and/or altered. Current actions and offences deal only with conduct relating to copyright material from which ERMI has been removed or altered, not with conduct relating to dealings with ERMI itself when it has been detached from the material. The criminal offence would require an element of

commercial or profit-making motivation (**item 139 and item 141**<sup>25</sup>), but the civil action would not, and

- provision of a defence against ERMI offences for not-for-profit libraries, public archives, educational institutions and non-commercial broadcasters (**item 142**).

### **Why are these changes necessary?**

Article 17.4.8 of AUSFTA provides certain requirements regarding the protection of ERMI. Australian law already complies with most of these requirements. The changes outlined above would achieve compliance with the remainder.

### **Comment**

The following comments can be made about these provisions:

- the removal of the element of commercial motivation from the civil actions relating to ERMI will significantly expand the scope of these actions and the number of potential defendants. Currently, distribution to the public free of charge or importation for personal use would not attract civil liability. This change will create a higher standard of protection for EMRI and EMRI-connected material than exists for copyright material itself or for non-electronic information regarding authorship or ownership of copyright. Accordingly, it could be used to take action against people involved in the private, non-commercial distribution of infringing products where no copyright infringement has occurred, simply because those products have had ERMI altered or removed. A similar remedy would not be available where the product involved was non-electronic, such as a book. In practice, this would compromise the principle of technology neutrality
- the extension of the regime to cover ERMI that ‘appears or appeared in connection with the communication or making available’ of copyright material seems to improve technology neutrality over the current requirement that ERMI be ‘attached’ to the material. Electronic media delivered in non-text forms (such as music) may have difficulty devising ERMI that fit within the current definition. The expanded definition would provide more flexibility
- the provision of new civil and criminal remedies for distribution and importation of ERMI that has been detached from the copyright material might, among other things, provide remedies against the removal of ERMI in order to attach them to copyright infringing material. The Copyright Agency Limited (CAL) proposes a similar change in their submission to the law firm Phillips Fox in its review of the *Copyright Amendment (Digital Agenda) Act 2000* (‘the Digital Agenda Act’)<sup>26</sup>
- the Bill does not propose to take advantage of a limitation to the civil liability of certain public institutions.<sup>27</sup> AUSFTA specifically allows Australia to provide that damages cannot be awarded against these institutions where they can show that they were not

aware, or had no reason to believe, that their acts were unlawful (Article 17.11.13(b)). The Bill makes use of a similar immunity with respect to criminal ERMI offences, but makes no provision to apply the limitation to civil liability.

## **Part 8: Criminal offences**

### **Changes to the law**

**Part 8** proposes several changes that AUSFTA requires to the nature of criminal offences under the Copyright Act.

**Items 146–153** add the element of ‘intention of obtaining a commercial advantage or profit’ to several crimes relating to the unauthorised use of copyrighted material. Notably, this is proposed as an additional, rather than alternative, element in establishing these crimes. Theoretically, this could make prosecutions *more difficult*, as prosecutors will be required to prove an additional element of intent to gain commercial advantage or profit.

**Item 158** defines ‘profit’ to exclude private or domestic use, so personal use of infringing material would not constitute the relevant crimes.

**Item 154** creates a new offence of ‘significant infringement of copyright’. This makes it a crime to engage in conduct that *results in* copyright infringement in such a way that it causes *substantial prejudicial impact* on the owner of the copyright and is on a *commercial scale*. In determining ‘commercial scale’ a court must take into account the volume and value of the infringing articles as well as any other relevant matter.

### **Why are these changes necessary?**

Article 17.11.26(a) requires Australia to provide criminal sanctions for ‘wilful copyright piracy on a commercial scale’ that are to include:

- significant wilful infringements of copyright that have no direct or indirect motivation of financial gain, and
- wilful infringements for the purposes of commercial advantage or financial gain.

Items 146–153 are drafted to meet the second of these. Arguably, a cleaner and more direct way to implement it would have been to provide the ‘intention to obtain commercial advantage or profit’ instead of, rather than as well as, the existing elements such as ‘by way of trade’ or ‘for the purposes of trade’. In practice, however, these are all overlapping concepts with only minor technical differences between them.

Item 154 is drafted to meet the first. In effect, it will criminalise a broader range of ‘non-commercial’ infringing conduct. Currently, non-commercial conduct is criminal only when it involves:

- distribution of infringing copies for the purpose of trade or ‘for any other purpose to an extent that affects prejudicially the owner of the copyright’ (s. 132 (2)), or
- possession of infringing copies for the purpose of such distribution (s. 132 (2A)).

The crime proposed by item 154 goes further. It would apply to any infringing conduct, not simply distribution. For example, it could be used to prosecute a tourist returning overseas with a large volume of pirated material, even where no evidence could be found that he or she intended to use the material for anything other than personal use.

Further, and more significantly, it applies not only to infringing conduct but also to conduct that ‘*results in* one or more infringements’. Read with clause 5.6 of the *Criminal Code Act 1995* (Cth), a prosecution would have to show that the conduct was performed *intentionally*, but only that the accused was *reckless* as to the infringement that resulted. Recklessness requires that the person be aware of a substantial risk of the result (infringement) and that it would be unjustifiable to take that risk. As Melbourne University academic Kimberlee Weatherall has pointed out, this could mean that a person could be guilty of the offence merely for distributing software that has both an infringing and a non-infringing purpose, where there is a substantial risk that it will be put to its infringing use.<sup>28</sup> Such a person may not actually have infringed copyright, or even authorised or been complicit in the infringement of copyright, but might nonetheless be guilty of a criminal offence under the Bill. The only protection from such an application is the test of whether the risk is ‘unjustified’, but this will rely on the development of case law before ‘justification’ in these circumstances develops any conceptual certainty. Even then, access to material for non-infringing purposes could become difficult if distributors are required to protect against substantial risks of infringing use resulting from their distribution. Fair dealing exceptions to copyright become ineffective if the source of material is blocked by criminal law.

## Comment

The following comments can be made of these provisions:

- the criminalisation of more non-commercial infringement is a significant extension of the role of the state in copyright enforcement. The activities covered by the crime proposed by item 154 would, in most cases, already be subject to civil action initiated by the copyright holder. Criminalisation involves state costs and effort in the investigation and prosecution of offences, whereas civil action requires these costs and efforts to be borne by the plaintiff. In addition, criminalisation can lead to imprisonment of offenders, where civil action leads only to compensation, confiscation and/or injunction against further infringement. The central issue is whether this type of infringement is considered a wrong against society, in which case criminalisation may be appropriate, or a wrong only against a private person, in which case provision of a civil remedy would be appropriate. Of course, some copyright infringements are

already criminal. The policy choice is whether or not this extended criminalisation, and the increased state intervention this involves, is warranted

- the Bill provides no definition of ‘commercial scale’, only vague direction on the factors to be considered, being the volume and value of the material. Until courts start to try cases, there will be uncertainty as to what volume or value will be enough to establish the offence. People may find they have committed the offence without realising they have done so. A different approach is taken with similar offences relating to the possession of drugs, in which either legislation or regulation tends to set the quantities that will be taken to be commercial in scale. Such an approach would provide far more certainty and an unambiguous statement of what constitutes criminal conduct
- the application to conduct that ‘results in’ infringement significantly broadens the offence in item 154, to the extent that it may have adverse flow-on effects for fair dealing with material, as discussed above. This could have been avoided by requiring that the conduct *be* an infringement rather than *cause* an infringement. Alternatively, if the goal is to catch preparatory acts to infringement as well as infringement, the drafting could have required that the person *intends* that the conduct result in infringement, rather than merely be *reckless* as to that result. Both of these approaches would have complied with AUSFTA, which merely requires criminalisation of infringement, not conduct resulting in infringement. In this way, item 154 goes beyond what is required by AUSFTA
- the Bill does not take the opportunity to introduce a broader ‘fair use’ exception to copyright infringement, instead maintaining the current, more limited ‘fair dealing’ approach. As discussed above, JSCOT recommended that, in order to balance the tighter copyright restrictions required by AUSFTA, a ‘fair use’ approach consistent with AUSFTA should be adopted.<sup>29</sup> Currently, criminal copyright liability is much narrower in Australia than the United States, mostly applying only for infringements for the purposes of trade. However, with the extension of criminal liability to non-commercial infringement, the absence of a ‘fair use’ exemption would mean that more conduct will be criminal in Australia than in the United States.

## Part 9: Encoded broadcasts

### Changes to the law

**Part 9** proposes certain changes to the protection of encoded broadcasts (pay TV). The key changes are:

- providing civil and criminal liability for *exporters* of broadcast decoding devices (BDDs) (**item 164 (civil) and 175 (criminal)**)<sup>30</sup>
- expanding the number of parties who may bring actions under these provisions to include channel providers and anyone with an interest in the copyright in the broadcast

or its content, rather than simply the broadcaster as is currently the case (**items 165 and 170**)<sup>31</sup>

- removing the element of commercial purpose to the civil action against users of BDDs (**item 168**); currently, an action will lie against a user of a BDD if the device is used ‘for the purpose of, or in connection with, a trade or business’. This will make personal and other non-commercial use of a BDD actionable—for example, using a decoder in one’s own home
- creating a new action against wilful distributors and receivers of broadcasts that have been accessed without authorisation using a BDD (**item 169**)
- criminalising the *use* of BDDs to gain unauthorised access to an encoded broadcast for a *commercial purpose* (**item 181**)
- criminalising the *distribution* of broadcasts received without authorisation using a BDD, where that distribution *prejudicially affects* the channel provider or a person who has an interest in the copyright in the broadcast or its content (**item 181**)
- addition of the element of ‘intention of obtaining a commercial advantage or profit’ to various crimes involving commercial distribution of BDDs (**items 174–179**) (see discussion above under Part 8).

### What does AUSFTA require?

Article 17.7 of AUSFTA makes certain requirements regarding the protection of encoded program-carrying satellite signals. Specifically, it requires that criminal and civil liability attach to those who:

- manufacture, assemble, modify, import, export, sell, lease or otherwise distribute a device or system knowing, or having reason to know, that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite signal without authorisation (‘device liability’), and
- wilfully receive and make use of or further distribute a program-carrying signal knowing that it has been decoded without authorisation (‘use liability’).

In terms of civil liability, the proposed changes appear to give effect to AUSFTA’s requirements. The only change to Australian law necessary to align the civil device liability requirement is to add exporting to the grounds for action, which is proposed by item 164. Australian law currently provides use liability only where the use is for a commercial purpose. Item 168 removes this limitation and item 169 provides a specific action against wilful recipients and distributors of unauthorised broadcasts. AUSFTA also requires that civil action be available to any person injured by the contravention of any person with an interest in the broadcast: this is implemented by items 165 and 170.

With respect to criminal liability, it is not clear that the Bill adequately implements AUSFTA's requirements. In terms of device liability, item 175 provides the necessary changes to add exporting to BDD offences under s. 135AS of the Copyright Act. However, AUSFTA requires a slightly lower standard of knowledge to establish the crime. Current law requires actual knowledge or recklessness as to whether the device will be used to decode encrypted broadcasts without authorisation (s. 135AS(1)), whereas AUSFTA requires that 'having reason to know' be sufficient. Recklessness requires a subjective consideration of the person's state of mind, whereas 'having reason to know' is an objective element of fact.<sup>32</sup> An amendment with the words 'the person knows, or ought reasonably know' to replace the current 'the person knows, or is reckless as to whether', would have been a more accurate implementation of AUSFTA.<sup>33</sup>

Further, the proposed implementation of criminal use liability does not seem to implement AUSFTA accurately. The versions of criminal use liability contained in item 181 contain elements not found in the agreement. It proposes that:

- use be an offence only where it is done with the intention of obtaining a commercial advantage or profit, and
- distribution of a broadcast obtained through a BDD be an offence only where it *affects prejudicially* a copyright holder.

Although these elements reflect the traditional reluctance of Australian law to criminalise low-level personal use, they may not be consistent with the text of Article 17.7.

### **Comment**

AUSFTA requires only protection of encoded satellite broadcasting, but the Bill proposes an extension that will apply to all broadcasting. This goes beyond implementation of AUSFTA. On the other hand, there is a powerful rationale for treating terrestrial broadcasting in the same way as satellite broadcasting in the interests of technology neutrality.

Australian law has tended not to criminalise the use of BDDs and other technological protection circumvention devices. Instead it has criminalised the sale, importation and trafficking in the devices themselves and, sometimes, provided only civil remedies against end-users.

Phillips Fox, in its review of the Digital Agenda reforms, explained the rationale for Australia's reliance on device liability rather than use liability as follows:

The Government took this approach as it saw the most significant threat to copyright owners' rights as lying in preparatory acts for circumvention, such as manufacture, importation, making available online and sale of devices, rather than individual acts of circumvention.<sup>34</sup>

Another rationale is that some uses of circumvention devices might not infringe copyright; for example, where they are covered by a ‘fair dealing’ exception. Accordingly, prohibition on use of BDDs would prohibit some otherwise non-infringing activities.

Phillips Fox recommended that civil use liability should be provided. However it also proposed a blanket exception for use of a BDD for a ‘permitted purpose’ being a purpose that involves fair dealing.<sup>35</sup> The Bill does not propose a blanket exemption for permitted purposes and to do would probably contravene AUSFTA.

Phillips Fox did not recommend the adoption of criminal use liability. The issues involved in the criminalisation of these infringements are similar to those discussed in relation to Part 8.

## Part 10: Reproductions

### Changes to the law

#### Description of changes

**Item 186** proposes a new definition of the term *material form* for the purposes of the Copyright Act. Material form is an important concept in copyright, as copyright only attaches to works that have been reduced to material form. More importantly, for present purposes, the right to reproduce a work in material form is one of the key rights subsisting in copyright (s. 31, Copyright Act).

Currently, material form is defined to include forms of storage from which reproductions can be made. This definition was introduced in 1984 so that digital ‘copies’ of works would receive copyright protection even though they were not ‘material’ in the traditional sense.<sup>36</sup> The limiting criterion is that reproductions can be made from the digital copy; for example, by printing a hard copy of the document or making another digital copy.

The proposed definition would remove this criterion so as to include *all* forms of storage of the work, whether or not they allow further reproductions.

Like item 186, **item 187** proposes an addendum with a similar effect on the definition of *copy* for the purposes of film and sound recordings. This addendum would provide that forms of storage of film and sound recordings are copies, with the copyright protection that entails, regardless of whether or not reproductions are available from that form of storage.

**Item 188** proposes a new exception to copyright infringement of works where a reproduction is made as part of a *technical process of use*. **Item 189** proposes a similar exception for reproduction of subject-matter other than works (for example, films and sound recordings).

## Effect of the changes

These changes must be read together. Items 186 and 187 *expand* copyright protection to non-reproducible forms of storage.

The current law on this issue was considered in the Federal Court case, *Kabushiki Kaisha Sony Computer Entertainment & Ors v Eddy Stevens* (the *Playstation case*).<sup>37</sup> Based on the current definition of material form, that case held that a reproduction to a form of storage which is ‘ephemeral or volatile’ and not capable, with existing technology, of further reproduction to a more stable form, is not a copyright violation. The relevant issue in that case was whether copying of data from a CD-ROM onto the RAM (working memory) of a games console constituted reproduction in material form. The same issue could potentially apply to DVD players—which make temporary copies of the data on the disc before processing the data into a TV-readable signal—as well a variety of other existing and future technologies.<sup>38</sup>

The definition proposed by items 186 and 187 would make these temporary copies subject to copyright. However, the effect of items 188 to 189 is to ensure that temporary copies made for the purpose of accessing CD-ROMs or DVDs and the like (‘incidental reproductions’) would continue to be non-infringing *as long as these copies are not made from infringing copies*.

In effect, items 186 and 187 extend copyright protection, but items 188 and 189 claw some of it back. Further limitation to items 186 and 187 would be provided by the existing ss. 48A and 111A of the Copyright Act, which provide an exception for infringement where temporary copies are made in the process of communication.

In the abstract, it is difficult to hypothesise about what currently lawful conduct would become unlawful under these proposed amendments. The most obvious is that temporary reproductions made for the purpose of accessing pirated material would become a copyright infringement. This could mean that playing pirated DVDs could be an infringement, even when it is for non-commercial use in one’s own home, as could browsing or playing infringing material on the Internet (although some of this material would already be covered by the definition of ‘material form’). The change may also have flow-on effects for other copyright areas such as anti-circumvention device laws.<sup>39</sup>

### **Why are these changes necessary?**

AUSFTA requires that copyright apply to ‘all reproductions, in any manner or form, permanent or temporary (including temporary storage in material form)’ (Article 17.4.1). Given the *Playstation case* and similar court decisions, Australian copyright law as it currently stands does not protect *all* temporary reproductions so scenarios could emerge that conflict with AUSFTA. The Bill’s approach to this issue is to establish a general rule that temporary, non-reproducible reproductions are covered by copyright, with limited exceptions.

## Comment

The Bill's approach has merit as it clarifies the position of temporary reproductions. The current definition's reliance on the concept of reproducibility is far more difficult to grasp than exceptions for communications and incidental reproductions.

However, the fact that the incidental reproductions exception does not apply where infringing material is involved warrants closer examination. One effect of this 'exception to the exception' might be that end-users of infringing materials become infringers in their own right. This would be a significant extension of the reach of copyright law. Copyright law normally acts on those who produce, reproduce, sell, distribute, exhibit to the public or make other commercial use of unauthorised copies, not on those who make final, personal use of those copies. These end-users of pirate material are not normally liable.

Given that ever increasing media are delivered through digital means, the exception to the exception could create a creeping 'end-use infringement'. Not only would this be a significant change to the nature of copyright, it also compromises technology neutrality. Merely reading an infringing copy of a book, viewing a counterfeit painting, or listening to an (analogue) sound recording would remain a non-infringing activity. Yet playing an infringing DVD or an infringing computer game would be infringements, simply because the nature of these media technically involves 'reproduction'. Similarly, a blind person who uses a text-to-speech computer to have an infringing copy of a book read aloud might be infringing copyright, where a sighted person reading the same book would not.

Phillips Fox did not recommend the exception to the exception, instead recommending that:

irrespective of whether or not the version from which that reproduction is made is itself an infringement, ... [an] act of reproduction as part of a technical process, with nothing more, should not expose the user in Australia to any liability. If all that happens is that person accesses the work, and does nothing more, then the exception should apply.<sup>40</sup>

This problem could be avoided by the removal of **proposed sub-sections 43B(2) and 111B(2)**.

Would the removal of these sub-sections retain consistency with AUSFTA? According to the Bill's *Explanatory Memorandum*, the exception for incidental reproductions is justified by Article 17.4.10, which allows exceptions to copyright rights according to the 'Berne three step test'.<sup>41</sup> Under this test, limitations or exceptions to the exclusive rights of copyright-holders are allowed in '*special cases* [step 1] that do *not conflict with the normal exploitation of the work* [step 2]... and *do not unreasonably prejudice the legitimate interests of the right-holder* [step 3]'.<sup>42</sup>

The three step test clearly applies to, and therefore permits, an exception for reproductions made as part of an incidental technical process. But there seems no reason that the

exception would be permitted only when limited to incidental reproductions of non-infringing copies. The exception for incidental reproductions is an exception to the exclusive right to authorise reproduction, which AUSFTA requires and Australian copyright law provides. AUSFTA does not require that Australia provide copyright owners an exclusive right to authorise personal use of works, so there is no need to limit any exception in order to preserve such a right. Yet this is the effect of the exception to the exception. If the exception is permitted for incidental reproductions of non-infringing works, it must also be permitted for incidental reproductions of infringing works.

## **Part 11: Limitations on remedies available against carriage service providers**

### **Changes to the law**

The current regime

Following the passage of the Digital Agenda Act in 2000, the present Australian law on carriage service providers (CSPs) liability for copyright infringements by third parties using their systems of networks can be summarised as follows:

- CSPs are not liable merely because a person uses their facilities to infringe copyright (ss. 39B and 112E, Copyright Act)
- CSPs may be liable when they have *authorised* a person to infringe copyright using their facilities (ss. 36 and 101, Copyright Act)
- the courts have held that a person ‘authorises’ an infringement when they ‘sanction’, ‘approve’ or ‘countenance’ infringement. There is no liability for authorisation if a person did not know, and had no reason to know, that infringements were occurring
- in determining whether or not the CSP has authorised the infringement, the following factors are to be taken into account (‘the authorisation test’) (ss. 36 and 111, Copyright Act):
  - the extent of the CSP’s power to prevent the doing of the act concerned
  - the nature of the relationship between the CSP and the subscriber
  - whether the CSP took reasonable steps to prevent or avoid the doing of the act, including whether they complied with any relevant industry codes of practice [According to a recent newspaper report, attempts to develop a CSP industry code of practice on copyright protection are ‘in limbo, due to uncertainty over the impact of the free-trade agreement’.<sup>42</sup>]

- CSPs are not liable for temporary or incidental copies of copyrighted work that may be formed on their computers as a result of the technical process of transferring data from the source computer to the subscriber's computer (ss. 43 and 111A, Copyright Act).

#### Proposed changes

**Item 191** proposes a new regime that will act *in addition* to that outlined above. This would have the following key features:

- CSPs would be immune from any monetary remedy against them for copyright infringements that occur through the course of carrying out *relevant activities*, as long as they comply with *relevant conditions*
- the relevant activities are:
  - transmission etc of copyright material (Category A activity)
  - caching copyright material through an automatic process (Category B activity)<sup>43</sup>
  - storage of copyright material at the direction of a user (Category C activity), and
  - referring or linking users to an online location (Category D activity).
- even if they have complied with the relevant conditions, courts may order:
  - that the CSP disable access to an online location outside Australia, if an infringement has occurred in the course of a Category A activity
  - that the CSP terminate a specified account, if an infringement has occurred in any relevant activity
  - that the CSP remove or disable access to copyright material, if an infringement has occurred in a Category B, C or D activity, and
  - any other non-monetary order that would be less burdensome but comparably effective, if an infringement has occurred in a Category B, C or D activity
- the *relevant conditions* are set out in the table under **proposed s. 116**. The key conditions are that the CSP:
  - adopt and implement a policy for termination of repeat infringers' accounts (although there is no requirement for monitoring of infringing activity across their service)
  - comply with relevant industry codes of practice

- with respect to caching, expeditiously remove or disable access to cached material upon receipt of a notice that the material has been removed or blocked at the originating site
  - with respect to Category C and D activities, expeditiously remove or block material or a reference residing on its network upon notice that the material has been found to be infringing by a court, and
  - with respect to Category C and D activities, comply with the prescribed procedure in relation to removing or blocking material or a reference residing on its network.
- provision for regulations to provide civil remedies and criminal offences for conduct in relation to conditions, and to provide immunity from civil remedies as a result of action taken by a CSP to comply with a condition.

### **Why are these changes necessary?**

Article 17.11.29 requires a very prescriptive scheme in this area. That scheme is clearly modelled on the United States’ Digital Millennium Copyright Act of 1998 (DMCA).<sup>44</sup> The Bill, on the whole, implements this scheme.

However, a key part of that scheme that has not been spelt out in the Bill is the ‘take down notice’ procedure. Article 17.11.29 (v) requires that a relevant condition for Category C and D activities be:

expeditiously removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement or become aware of facts or circumstances from which the infringement was apparent, such as through effective notifications of claimed infringement in accordance with clause (ix).

Clause (ix), in turn, provides that Australia establish an appropriate procedure for notifications (‘take down notices’) and counter-notifications. Monetary remedies are to be available against people who cause injury to others by providing false information in notifications or counter-notifications. Clause (x) further provides that CSPs must restore material online once they receive a counter-notification unless the complainant seeks judicial relief within a reasonable time.

Trade Minister Mark Vaile has exchanged a side-letter on this issue with his US counterpart.<sup>45</sup> This outlines in detail the specific procedures that are required to meet the above requirements.

The Bill does not contain provisions detailing ‘take down notice’ procedures, except where notice is given that a court has found material to be infringing. This is far short of AUSFTA’s requirements. Instead, the Bill provides that the take down notice procedures will be prescribed in regulations. Compliance with AUSFTA will presumably be achieved through these regulations.

## Comment

Depending on how it is prescribed in the regulations, the ‘take down notice’ process could be open to abuse. For example, people could issue notices to disrupt a competitor’s business or to censor material on the Internet with which they disagree. AUSFTA provides some protection against this with the counter-notice provision and the requirement that penalties apply against knowingly false or misleading ‘take down notices’. But in practice, this relies on the alleged offender having the resources and inclination to pursue these remedies. Also, there will be an inevitable delay between the CSP taking down the material and the restoration of the material once the CSP accepts a counter-notification. In certain political (for example, elections) or business (for example, annual general meetings, e-commerce) contexts, a short delay could be critical. If the complainant ‘seeks judicial relief within a reasonable time’, the material could be brought down for a much longer period. These are among the several problems of a system that effectively assumes infringement until the alleged infringer shows otherwise.

In response to criticism of these provisions of AUSFTA, the then Communications Minister Darryl Williams, said “The FTA’s provisions will also allow Australia sufficient flexibility to introduce a notice and take down system that incorporates procedural fairness.”<sup>46</sup> The Internet Industry Association found these comments ‘significant and reassuring’.<sup>47</sup>

In failing to provide the ‘take down notice’ procedure in the Bill, or even draft regulations, the Government has not demonstrated how it will incorporate procedural fairness and other protections against abuse. Indeed, it is difficult to imagine how such protections could be enacted in a manner that complies with AUSFTA. The agreement requires that material be taken down when the CSP obtains ‘actual knowledge of infringement’ or becomes ‘aware of facts or circumstances from which infringement was apparent’. The last of these is a low standard of knowledge. In effect, a mere claim of copyright infringement requires removal of the material. The agreement does not seem to leave any room for Australia to introduce a process, such as a court or tribunal hearing or independent arbitration, to settle the question of infringement before the material is taken down. Even though the counter-notification process may allow material to be placed back on line, AUSFTA requires that the material stay off line if the complainant seeks judicial relief. In effect, this means material that is merely alleged to infringe copyright could stay off line for some time.

In their review of the Digital Agenda, Phillips Fox recommended the development of a similar ‘take down notice’ procedure.<sup>48</sup> However, its model has several key differences:

- material would be taken down only if the alleged infringer had not supplied a counter-notice within a certain time, rather than taken down immediately on receipt of the ‘take down notice’ as required by AUSFTA

- on receipt of a take down notice, the CSP's core responsibility would be to provide the notice to the alleged infringer, or notify the complainant that it is unable to determine the identity and contact details of the alleged infringer
- if a counter-notice is received, the CSP would only be required to forward that notice to the complainant
- there would be no requirement for the CSP to take material down while awaiting judicial determination of the dispute, and
- take-down notices would need to be accompanied by a statutory declaration affirming the accuracy of the information in the notice. This would prevent the use of computer-generated automatic notices, a problem that has reportedly arisen under the DMCA provisions in the United States. Automated notices costs almost nothing to generate but create substantial compliance costs for the CSP. Sarah Deutsch, from Verizon, a major American CSP, told a recent symposium:

The copyright owners are doing no due diligence whatsoever. The robots automatically scour the Internet and they automatically generate these notices and tell the service provider to take them down. The problem is that these materials are not on our system of network, they are on the users' hard drive.

So just to give you an example last year one small ISP in the US received over 20,000 notices of all these automated peer to peer notices that [were] asking us not only to take the material down but effectively to terminate the subscriber and since the ISP has no idea what is on the users' hard drive in this case we just pipe, it's a very egregious remedy. Another US ISP received from January to today over 30,000 notices, only two of them actually related to materials that were on its system of network. So these were all non-compliant notices and in the past 12 months the same ISP received over 90,000 notices.

Each of these automated notices requires human intervention to track and see if it is on your network and when the ISP tries to reply for example to one of these robot notices from Paramount pictures they getting email bounce back that says the destination domain name specified in this address doesn't exists or is incapable of accepting mail.<sup>49</sup>

This scheme which Phillips Fox proposes is much more generous to the alleged infringer and the CSP, but would not be possible under AUSFTA.

## **Technological protection measures**

An important area of copyright change that AUSTFA requires that is not included in the Bill concerns protection of technological protection measures (TPMs), otherwise known as anti-circumvention device law. AUSFTA allows Australia a period of two years from the entry into force of the agreement to enact these laws, which is why they have not appeared in the present Bill.

Under AUSFTA, TPMs are ‘any technology, device or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other subject matter’ (Article 17.4.7). Classic examples of TPMs include region coding for DVDs, anti-copying music CDs that will not play in a PC, encrypted software requiring entry of a registration code before being installable, passwords and encryption used to prevent unauthorised access to online databases, and so on.

Article 17.4.7 of AUSFTA requires Australia to provide civil and criminal liability for the following conduct related to TPMs:

- circumvention of any TPM (this would include circumvention by an end-user), and
- ‘trafficking’ in devices that are designed or promoted as enabling or facilitating TPMs to be circumvented or have only limited commercial purpose other than circumvention of TPMs [Note that this is a summary; see Article 17.4.7 (a) (ii) for the complete description of the conduct].

Importantly, these are to apply as ‘a separate civil or criminal offence and independent of any infringement that might occur under the Party’s law on copyright’ (Article 17.4.7 (d)). This means that circumvention of TPMs, or devices (including software) that allow TPMs to be circumvented are crimes *even if no copyright infringement results from the circumvention*.

AUSFTA allows Australia to provide certain exemptions or defences to these actions and offences, which are listed in Article 17.4.7 (e).

### **Current Australian law**

Under current law, making and trafficking in devices whose purpose is the circumvention of TPMs is prohibited, but not circumvention itself (s. 116A, Copyright Act, for civil liability and s. 132 (5A) and (5B) for criminal liability).

However, under current Australian law the definition of TPMs is restricted to devices, products or components designed, in the ordinary course of operation, to *prevent or inhibit copyright infringement* (s. 10, Copyright Act). AUSFTA contains a much broader definition that includes any devices that *control access* to copyright material. This is a significant distinction, as it means that the laws required by AUSFTA would protect TPMs that may do more (or less) than prevent copyright infringement, such as protection from parallel importation or competition for accessories, which are discussed below.

### **Comment**

Two concerns might be raised about TPM protection through copyright law:

- it effectively bans otherwise legitimate, non-infringing uses of copyrighted material, and

- it may give monopoly rights to copyright holders beyond those rights normally subsisting in copyright.

#### Banning legitimate, non-infringing uses

The rationale for the protection of TPMs is that it gives state backing to measures that copyright owners take to protect their own rights. In a sense, it attempts to stop pirating by criminalising the equipment the pirates use.

However, the problem is that TPM circumvention may be done for legitimate, non-infringing purposes, not simply piracy. Examples include:

- accessing media purchased legitimately overseas, such as playing on an Australian-bought machine DVDs bought overseas
- other uses that would be considered ‘fair dealing’, such as clips from films for the purposes of criticism or review or to report news, and
- other uses that would be non-infringing in copyright law, such as educational copying, making back-ups or making interoperable products.

A ban on TPM circumvention, while possibly helping to cut off piracy at the source, may also prevent these legitimate uses and severely circumscribe consumers’ rights to do as they wish with the property they have legally bought.

In respect of current Australian law on TPMs, the Phillips Fox review recently recommended that the Copyright Act be amended so that:

- the definition of ‘permitted purpose’ for use and sale of TPM circumvention devices be expanded so that fair dealing and access to legitimately acquired non-pirated product are added, and
- under these circumstances, making end use an infringement unless for a permitted purpose.<sup>50</sup>

AUSFTA does not allow a blanket exemption for non-infringing uses, so it would not permit the Phillips Fox recommendations to be enacted.

However, AUSFTA does allow Australia to provide an exemption for:

non-infringing uses of a work, performance or phonogram in a particular class of works, performances or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding’ (Article 17.4.7 (e) (viii)).

In other words, Australia may make certain classes of copyrighted work (for example, films on DVD, music, video games) exempt from the normal TPM circumvention prohibitions on use where the circumvention is for a non-infringing use and such use is adversely affected by TPM protection.

However, the decision to exempt these classes, which may be made by parliament or delegated to a minister, public servant or government agency, must be reviewed every four years. This is similar to the process used under the DMCA in the United States in which the Librarian of Congress may determine that certain users or uses of TPM circumvention devices are legitimate.<sup>51</sup> Notably, AUSFTA does not require the adoption of certain criteria for determining whether or not a use should or should not be allowed, as does the DMCA. This leaves parliament with some freedom to choose which criteria should be relevant, beyond the adverse effects that non-infringing users suffer.

On one hand, this exemption allows that certain fair dealing and other non-infringing uses may be allowed. On the other hand, AUSFTA requires that a non-infringing use be illegal until 'an actual or likely adverse impact on those non-infringing uses is credibly demonstrated'. In the absence of well-resourced or organised lobbies representing consumer interests, it is foreseeable that these processes could be dominated by those representing copyright owners. A blanket exemption for non-infringing uses would avoid this problem, but this is not allowed under AUSFTA.

A more significant practical problem is that exemptions provided under this process would only apply to 'use' liability, not liability for trafficking in circumvention devices (as a result of Article 17.4.7 (f)). Therefore, although an exception may be allowed for non-infringing uses of TPMs, it may be illegal to sell the devices allowing such use, potentially nullifying the effect of the exemption. When asked about this at the Senate Select Committee, DFAT did not refute this reading of AUSFTA. Instead, it pointed out that not all circumvention devices or services would be banned from trafficking, only those within the ambit of Article 17.4.7 (a)(ii).<sup>52</sup> How this will apply in practice remains an open question. It is at least a possibility, if not a probability, that the provisions of AUSFTA are too restrictive to develop a regime that allows the lawful sale of TPMs that allow circumvention for non-infringing, exempted uses.

#### Extension of monopoly rights

Copyright is a system that grants certain monopoly (or exclusive) rights to authors and producers of creative material: to reproduce the material, publish the material, perform the material in public, communicate the material to the public, make adaptations of the material and to enter into commercial rental agreements in respect of the material.

However, copyright holders who are in the position to use TPMs can potentially create their own additional *de facto* monopoly rights by restricting access on their own terms. This could lead to significant anti-competitive results, with increased costs and/or decreased choice for consumers. State sanctions against circumvention of TPMs

substantially increase this risk. This is especially the case where the definition of TPM, for the purposes of the protection of the law, includes any measure which *controls access* to material, as AUSFTA requires, rather than merely preventing or inhibiting infringement, which is the current Australian position.

Two types of monopoly right extensions are likely:

- copyright holder imposed bans on parallel importing

Parallel importing is the legitimate purchase of protected material in one country in order to export it to another country, normally where that material is cheaper in the first country than in the second. A ban on parallel importing allows a copyright holder to segment the world into various markets and charge different prices depending on demand and supply in each market, rather than on a single world market. In Australia, the policy trend in recent decades has been to relax legislative restrictions on parallel importing, with major changes in 1991, 1998 and 2003. The result is that today, subject to some limitations, parallel importing of books, sound recordings, computer programmes and electronic literary or musical items is allowed.

TPMs, by controlling access to electronic works on the copyright holder's terms, can be used by copyright holders to circumvent this policy trend. Important examples are regional coding of DVDs and computer games so that these media can only be accessed on machines bought and sold within a relevant region. A ban on devices that circumvent TPMs significantly strengthens the copyright holder's ability to prevent parallel importing, by making it illegal to circumvent the region-coding, and thus play a DVD or computer game purchased in another country on an Australian-bought machine.

It does seem incongruous that a 'free trade' agreement, purportedly intended to liberalise trade, should assist copyright holders to establish their own trade barriers, a point that David Richardson made in a recent Parliamentary Library *Research Paper*.<sup>53</sup>

- use of TPMs to create 'serial monopolies'

Some commentators have suggested that the TPMs can also be used to create 'serial monopolies', controlling the markets for accessories associated with a primary product. This is done by using encryption technology to ensure that media, accessories or peripherals to a primary product must be purchased from the maker of the primary product (or another manufacturer under license). This already occurs frequently in the computer and computer games industries. Information technology lawyer and commentator Brendan Scott explains the potential reach of the problem:

We are already in a position where it is possible to embed microprocessors onto most manufactured items. Manufacturers in the US have already embedded such processors into garage doors and printers allowing them to control after markets for these products. For example, a printer interrogates the consumable cartridges to determine their origin and if they are from a competitor refuse to operate or, worse, will operate to

a lower standard without alerting the consumer. The anti-circumvention provisions will prevent competitors from making functional accessories. You don't need to be too bright to realize that this will become an increasingly common practice for manufactured items—if you can do it for garage doors, why not tractors?

Over time we will see the emergence of the kinds of serial monopolies (and the attendant price gouging) for product areas that we have seen in the software world. In an attempt to protect the US music industry from market competition what will emerge is a reduction in competition across broad swathes of the economy—whether it's the farmer who wants a combine harvester to work with their tractor, or the IT [information technology] manager who wants their PDA [personal digital assistant] to interface with their GPS [global positioning system] devices.

Economics tells us we will get increased prices and lower quality in these circumstances.<sup>54</sup>

Do the exemptions that AUSFTA allow provide enough scope for Australia to prevent these extensions of monopoly rights?

The 'serial monopoly' problem might be avoided by use of the first exemption which allows for non-infringing reverse engineering of a computer program, in 'good faith', 'for the sole purpose of achieving interoperability of an independently created computer program with other programs' (Article 17.4.7 (e)(i)). This is clearly intended to ensure that software manufacturers cannot use TPMs to prevent competitors from selling applications compatible with their software. Whether it can apply to Scott's printer cartridge example depends on how broad 'computer program' is read—given that all TPMs are effectively computer programs, there is a strong argument for a broad reading.

The problem remains that a competitor may have the onus of proving that their purpose was to achieve interoperability. Given the presumption that even non-infringing uses of TPM circumvention devices are illegal unless they fit within a prescribed exception, the AUSFTA model of TPM protection could provide a powerful disincentive to innovate. Where, for example, a programmer 'cracks' a TPM for the purpose of making an interoperable program, they run the risk of not being able to show that their activities were conducted in 'good faith'. In many cases, potential competitors might decide that innovation is not worth the risk. This is another problem that would be avoided by a blanket exemption for non-infringing uses.

## **Schedule 8—Amendments to the *Patents Act 1990***

### **Changes to the law**

Grounds to oppose the grant of patents

**Items 1 and 2** amend s. 59 of the Patents Act which provides the grounds on which standard patent grants may be opposed. By deleting specific grounds, it effectively

provides that patent grants can be opposed on the general ground that it is not a ‘patentable invention’ (as defined by s. 18).

These changes *expand* the grounds on which patents can be opposed. Currently, a patent can be opposed on the basis that the invention:

- is not a manner of manufacture (s. 18(1)(a), Patents Act)
- is not novel or does not involve an inventive step (s18(1)(b)), or
- is a human being or a biological process for human generation (s. 18(2)).

Items 1 and 2 will expand these grounds to include that the invention:

- is not useful (s. 18(c)), or
- has been secretly used by the patentee prior to the priority date of the claim (s. 18(d)).

Conditions on patents

**Items 4 and 5** delete ss. 104(3) and 138(3)(c) of the Patents Act to remove references to conditions on patents. Currently, s. 104(3) allows amendments to patents to be made ‘subject to conditions’, subject to the regulations. Section 138(3)(c) provides that failure to comply with a condition on the patent is a ground for revocation.

### **Why are these changes necessary?**

AUSFTA does not provide for patents to be made on a conditional basis, so removal of condition-setting powers is required.

AUSFTA requires that the grounds for revocation match the grounds on which a patent can be refused (Article 17.9.5). Australia’s grounds for revocation are broader than the grounds to oppose a patent, so the latter must be expanded.

### **What is not in the Bill?**

Some of the concerns expressed about the patent provisions of AUSFTA might be assuaged by what has *not* appeared in the Bill.

In particular, there is no change to the conditions of patentability (s. 18). Concern had been expressed, by the open source software movement in particular, that AUSFTA may require a more permissive approach to the patentability of software. This concern was expressed in the Senate Select Committee’s Interim Report, which noted:

Regarding software patents, the AUSFTA extends patents to ‘all fields of technology’. This is arguably very damaging to the software industry, as well as consumers, as it limits development opportunities and decreases competition.<sup>55</sup>

The drafters of the Bill seem to have felt that the current law already reflects the ‘all fields of technology’ element. This is an appropriate view, as that element is substantively congruent to Australia’s ‘manner of manufacture’ test, as expressed, for example, in *CCOM v Jeijing*.<sup>56</sup> Certainly, Australia has not received any complaint that its law on patentability does not comply with the TRIPs requirements, which uses very similar terms to AUSFTA including the phrase ‘all fields of technology’.<sup>57</sup>

Similarly, no change is made to the definition of ‘use’. A group of Australian National University academics had suggested that Article 17.9.11 would require Australia to adopt the US standard of utility, a ‘specific, substantial and credible utility’.<sup>58</sup> Clearly the drafters of the Bill believe that current Australian law on the definition of ‘use’ is sufficiently similar not to require any change.

### **Comment**

These are minor changes to the Patent Act. The changes to the grounds for opposition to patents actually expand the grounds for opposition. Unlike most of the other changes in the intellectual property chapter, this change reduces the rights of patent applicants in favour of competitors or consumers.

## **Concluding comments**

### **Intellectual property changes as a requirement of AUSFTA**

Parliament’s consideration of the US Free Trade Implementation Bill 2004 inevitably will involve consideration of the merits and demerits of AUSFTA as a whole package. As intellectual property laws, particularly copyright, are a large part of the package, it is appropriate that the changes AUSFTA requires be considered carefully. To this end, this Brief has attempted to outline and provide some assessment of the copyright policies that must be adopted if AUSFTA is to be ratified, including those areas not fully covered in the Bill (CSP liability and TPMs).

### **Implementation of AUSFTA**

Parliament must also consider whether the Bill proposes changes that are the best *means* to fulfil Australia’s AUSFTA obligations. Although the copyright requirements of AUSFTA are highly prescriptive, they do offer some room for interpretation. As a result, implementation is not a merely technical issue—it requires substantive policy choices as well.

With respect to encoded broadcasts, it seems that the Bill does not meet AUSFTA's requirements. Should Parliament support the ratification of AUSFTA, it may want to consider either amending the Bill appropriately or seeking advice from the Government on the United States' attitude to the implementation as proposed. The Australian Subscription Television and Radio Association has indicated that it is not satisfied with the model proposed.<sup>59</sup>

In several other areas, the Bill might either go further than required or fail to take advantage of allowed exceptions or limitations. These include:

- narrowing exemptions for sound recordings of performances made solely for the private and domestic use of the recorder (see above, page 7)
- failure to provide a new rule for the duration of copyright in unpublished works (see above, page 14)
- failure to provide a system for allowing use of orphaned material (see above, page 14)
- failure to take advantage of a limitation to the civil liability of certain public institutions in ERMI-related actions (see above, page 16)
- provision of an offence for conduct that *results in* significant copyright infringement, where AUSFTA requires only an offence for conduct that *is* a significant copyright infringement (see above, page 19)
- provision of the 'exception to the exception' for technical, incidental reproductions, which could make use of infringing material an infringement where it otherwise would not be (see above, page 24).

In addition to these, there could be several other areas where the 'three step test' might allow other specific exceptions that have not been explored here or in the Bill.

Wherever the Bill goes further than AUSFTA requires, substantive policy decisions are involved. These decisions may be justified on their own merits, but they need to be understood as policies rather than merely technical amendments consequential to ratification of AUSFTA.

### **Copyright balance**

In addition to the specific areas where the Bill does not take advantage of limitations or exceptions available under AUSFTA, the Bill does not take advantage of general methods that would be allowed to ensure 'copyright balance'.

The central policy issue in copyright is traditionally understood to involve achieving a balance between competing goals and interests, or 'copyright balance'. At one end of the scales sit the moral and economic rights of creators and other copyright owners and the

public interest in creating incentives to create. At the other end sit the rights of creators to build on previous creative work, the right of media outlets, schools and libraries (among others) to use material, the right of consumers to cheap prices for copyright material and the public interest in promoting competition and allowing the free flow of information. This is a simplification of the rights and interests involved in copyright, but it serves to illustrate the balance involved.

In current Australian law, a balance of these rights is met by providing a generally protective regime for copyright, limited in two ways:

- the provision of certain exceptions from copyright obligations for specified ‘non-infringing uses’ and ‘fair dealing’ uses of copyright material, and
- a focus on enforcement and remedies against commercial infringement, which has direct and serious impact on the interests of copyright holders, rather than targeting end-users and consumers of copyright material.

In contrast, the United States tends to have somewhat more protective general rules and a broader enforcement and remedial focus that includes non-commercial conduct. Against this stronger protective regime are two important counter-balances limiting copyright: the ‘fair use’ doctrine and competition law.<sup>60</sup>

The fair use doctrine is much broader than the specific and narrow ‘fair dealing’ and ‘non-infringement’ concepts in Australian law. Rather than statutorily enumerating the uses that are allowed, as in Australia, the US approach allows courts to consider case-by-case whether uses should be allowed considering the following criteria:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>61</sup>

This is a broader and more flexible system for providing exceptions to copyright. The result is that some conduct that is an infringement in Australia may be a fair use in the United States.

Competition, or anti-trust, law has been another important limit on copyright where it is used to anti-competitive effect. Although competition remedies under the *Trade Practices Act 1974* can be used in Australia to similar effect, the practice has not developed here as extensively as it has in the United States and Europe.

Schedule 9 of the Bill could be said to be adopting US standards on protection and enforcement of copyright without the broad limitations in the United States to guard against the excessive or stifling effects of copyright. In this sense, it could upset the copyright balance in Australia. The evidence suggest that in some areas this Bill would make Australia more protective of copyright than the United States, indeed probably more protective than any other English-speaking country. With this in mind, JSCOT recommended the adoption of a ‘fair use’ doctrine in Australian law.<sup>62</sup> The Government has not taken up this proposal in the preparation of this Bill.

Given the high standards of protection that the Bill proposes, it could also be argued that there would be merit in reconsidering the interaction between competition law and copyright. In order for competition law to be an effective counter-balance to strong copyright protection, changes to the Trade Practices Act and/or the Copyright Act might be warranted. It might also be appropriate to increase the resources of the Australian Competition and Consumer Commission to regulate this interaction. The Bill does not address these issues.

### **Consultation**

Intellectual property and copyright are, by their nature, very complex areas of law. As a result, Australia has relied on special standing and *ad hoc* mechanisms to review and reform copyright, including the Copyright Law Review Committee, the Intellectual Property and Competition Review Committee and the Digital Agenda Review by the law firm Philips Fox, to cite some important contemporary examples.

Schedule 9 represents one of the most, if not *the* most, comprehensive proposals for reform of copyright law in recent decades. Comparable changes were made last by the Digital Agenda Act in 2000, following a lengthy process of consultation with stakeholders and experts lasting three years. Those changes were followed by more consultation on the effect of those changes (the Phillips Fox review, which reported in January 2004). It is notable that in the Digital Agenda Act, the Government made certain policy decisions that the US Free Trade Agreement Implementation Bill reverses. It is also notable that Phillips Fox made many recommendations contrary to those that this Bill proposes.

This history of careful and wide consideration on copyright reform has led to the development of a uniquely Australian system adapted to Australia’s specific needs. Given this history, it would be unfortunate if the significant changes that this Bill proposes, in many cases rejecting previous copyright policy, should be adopted without an open process of consultation and consideration. It is true that the Joint Standing Committee on Treaties and the Senate Select Committee have taken submissions on AUSFTA. However, the submissions on copyright issues were, for the most part, made before the current Bill was introduced. Except for private consultation undertaken by government departments, there is no evidence that any significant stakeholder or expert consultation has been undertaken in the drafting of Schedule 9.

The apparent limited consultation may explain the Bill's failure to propose US-style copyright exceptions and limitations to balance US-style protection and enforcement standards. It might also explain those areas where the Bill appears to implement AUSFTA inadequately, fails to take advantage of exceptions allowed by AUSFTA or goes further than AUSFTA requires in protecting copyright.

More importantly, a longer process of consultation and consideration may more effectively predict and deal with the unexpected consequences of this Bill, which are likely to be numerous as the new legal concepts interact with existing concepts. There remain many uncertainties about how these changes will work in practice.

Given the minimal public consultation so far, the scope of the Bill and the complexity of the subject area, an inquiry specifically into Schedule 9 would be warranted. If Parliament chooses to support ratification of AUSFTA, advice from stakeholders and experts—and reasonable time for analysis—will be crucial to crafting a copyright law that both meets Australia's obligations under that agreement and, as much as possible, meets Australia's own copyright needs.

## Endnotes

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1. *Australia–United States Free Trade Agreement*, Washington, 18 May 2004 [2004] Australian Treaties Not yet In Force 6.
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4. *Survey on Implementation of WCT and WPPT*, Standing Committee on Copyright and Related Rights, World Intellectual Property Organisation, Geneva, 25 April 2003, pp. 882–83.
5. Attorney-General's Department, *Report on Performers' Protection*, Copyright Law Review Committee, Canberra, 1989 (hereafter CLRC).
6. These arguments are summarised in J. Lahore and W. Rothnie, *Copyright and Designs: Volume 1—Commentary*, 3<sup>rd</sup> revised edition, Butterworths, Australia, 2003, p. 54,044 [54,035].
7. Lionel Bowen, Attorney-General, 'Second Reading Speech: Copyright Amendment Bill 1988', House of Representatives, *Debates*, 3 November 1988, p. 2392.
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9. Attorney-General's Department and Department of Communications, Information Technology and the Arts, *Discussion Paper: Performers' Intellectual Property Rights*, Canberra, December 1997.

10. Department of Communications, Information Technology and the Arts, *Performers' Rights*, [http://www.dcita.gov.au/Article/0,,0\\_1-2\\_12-3\\_470-4\\_106178,00.html](http://www.dcita.gov.au/Article/0,,0_1-2_12-3_470-4_106178,00.html), accessed on 28 July 2004.
11. Liberal Party of Australia and National Party of Australia, *Arts for All*, Melbourne, October 2001. pp. 20–21, <http://www.liberal.org.au/documents/arts.pdf>.
12. See page 24 for an explanation of the 'three step test'.
13. See Lahore and Rothnie, *op. cit.*, pp. 28,402–28,454 [28,455–28,560E] for a detailed description of this scheme.
14. *ibid.*
15. Commercial Television Australia, *Submission to the Joint Standing Committee on Treaties Australia—United States Free Trade Agreement Inquiry*, Sydney, 20 April 2004, p. 8.
16. *ibid.*
17. Sections 196–197, Copyright Act.
18. See definition of 'author' in s. 10, Copyright Act.
19. *Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (as subsequently revised)*, Stockholm, 14 July 1967 [1972] Australian Treaty Series 13.
20. Centre for International Economics, *Economic Analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, prepared for the Department of Foreign Affairs and Trade, Canberra and Sydney, April 2004, p. 37.
21. Dr Philippa Dee, *Australia—United States Free Trade Agreement: An Assessment*, Paper prepared for the Senate Select Committee on the Free Trade Agreement between Australia and United States, Canberra, June 2004, pp. 23–25.
22. See K. Weatherall, *Supplementary Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States*, Melbourne, 2004, p. 14.
23. In the criminal offence, recklessness as to knowledge is sufficient. In the civil action, knowledge can be implied if the person ought reasonably to have known that they would induce, enable, facilitate or conceal infringement of copyright.
24. Item 141 is consequential to the extended definition of ERMI only insofar as its proposed sub-sections 132(5C) and (5D) are concerned. These proposed sub-sections would not make any other significant substantive change to the offences.
25. Proposed subsection 132(5DA).
26. Phillips Fox, *Digital Agenda Review, Report and Recommendations*, Report commissioned by the Attorney-General's Department, Sydney, January 2004, p. 115.
27. The public institutions include non-profit libraries, archives, educational institutions and public non-commercial broadcasting entities.
28. See K. Weatherall, *Weatherall's Law*, website, <http://weatherall.blogspot.com>, accessed 28 July 2004.

29. Joint Standing Committee on Treaties, *Report 61: Australia—United States Free Trade Agreement*, Parliament House, Canberra, June 2004, p. 238 (hereafter JSCOT).
30. A broadcast decoding device is a device designed to enable a person to obtain unauthorised access to pay TV content.
31. A ‘channel provider’ packages a channel for broadcast by a broadcaster over an encoded service.
32. From s. 5.4, *Criminal Code Act 1995*:
 

“A person is reckless with respect to a result if:

  - (a) he or she is aware of a substantial risk that the result will occur; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.”
33. Notably, very similar words are currently used in relation to civil device liability (s. 135ANA(1)(d)) which says ‘the person knew, or ought reasonably to have known, that the broadcaster had not authorised the person to gain access to the broadcast by so using, or authorising the use of, the device’.
34. Phillips Fox, *op. cit.*, p. 54.
35. *ibid.*, p. 111.
36. For a discussion of this issue see W. P. Knight, ‘Chapter 23.1: Copyright’ in Law Book Company, *The Laws of Australia*, Law Book Company, 2003, [23.1.46].
37. (2002) FCA para 173 (per Lingred J with whom French J agreed).
38. See *Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd* (2001) 114 FCR 324.
39. See *Kabushiki Kaisha Sony Computer Entertainment & Ors v Eddy Stevens*, *op. cit.*, for an example of this interaction.
40. Phillips Fox, *op. cit.*, p. 94.
41. Named from Article 13 of the *Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (as subsequently revised)*, Stockholm, 14 July 1967 [1972] Australian Treaty Series 13. See Parliament of the Commonwealth of Australia, *US Free Trade Agreement Implementation Bill 2004: Explanatory Memorandum*, Canberra, 2004, p.148.
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43. *Caching* is defined as ‘the reproduction of copyright material on a system or network controlled or operated by or for a carriage service provider in response to an action by a user in order to facilitate efficient access to that material by that user or other users’.
44. See US Copyright Office, *The Digital Millennium Copyright Act of 1998: US Copyright Office Summary*, <http://www.copyright.gov/legislation/dmca.pdf>, accessed on 27 July 2004.

45. Trade Minister Mark Vaile to Mr Robert Zoellick, *Side letter on ISP liability*, 18 May 2004 [http://www.dfat.gov.au/trade/negotiations/us\\_fta/final-text/letters/17\\_isp\\_liability.pdf](http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/letters/17_isp_liability.pdf), accessed on 27 July 2004.
46. Darryl Williams, 'The Year Past and the Year Ahead for the Internet: the Government's perspective', Speech to Internet Industry Association (IIA) annual gala dinner, 12 February 2004, [http://www.dcita.gov.au/Article/0,,0\\_7-2\\_4011-4\\_117825,00.html](http://www.dcita.gov.au/Article/0,,0_7-2_4011-4_117825,00.html), accessed on 27 July 2004.
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48. Phillips Fox, *op. cit.*, pp. 85-86.
49. Sarah Deutsch, comments at 'The US-Australia Free Trade Agreement and Intellectual Property – A Symposium' Baker and MacKenzie Cyberspace Law and Policy Centre, University of New South Wales, Sydney, 28 April 2004. [http://www.bakercyberlawcentre.org/fta/transcript.htm#\\_Toc72223223](http://www.bakercyberlawcentre.org/fta/transcript.htm#_Toc72223223), accessed on 28 July 2004.
50. Phillips Fox, *op. cit.*, p. 54.
51. 17 United States Code §1201 (a)(1)(B) (Copyright Act (US).)
52. Department of Foreign Affairs and Trade, *Answers to questions on notice from the Senate Select Committee on the Free Trade Agreement between Australia and the United States*, Canberra, 6 July 2004, p. 11. [http://www.apf.gov.au/Senate/committee/freetrade\\_ctte/qon/060704.pdf](http://www.apf.gov.au/Senate/committee/freetrade_ctte/qon/060704.pdf), accessed on 28 July 2004.
53. D Richardson, 'Intellectual Property Rights and the Australia—US Free Trade Agreement', *Research Paper*, no. 14, Parliamentary Library, Canberra, 2003–04.
54. Linux Australia, *US-Australia Free Trade Agreement and Open Source*, Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States, p. 9.
55. Senate Select Committee on the Free Trade Agreement between Australia and the United States, *Interim Report*, Parliament House, Canberra, 24 June 2004, p. 27.
56. (1994) 122 ALR 417.
57. *Agreement on Trade-Related Aspects of Intellectual Property*, Marrakesh, 14 April 1994 [1995] Australian Treaty Series 38, Article 27 (entry into force, 1 January 1995).
58. P. Drahos, T. Faunce, M. Goddard and D. Henry, *The FTA and the PBS*, Submission to Senate Select Committee on the Free Trade Agreement between Australia and the United States, Canberra, 2004, p. 13.
59. Australian Subscription Television and Radio Association, *Position Statement: Australia—US Free Trade Agreement*, Senate Select Committee on the Free Trade Agreement between Australia and the United States, Canberra, 2004.

60. See K.Weatherall, *op.cit.* (Submission) for further discussion of this issue.
61. 17 United States Code §107 (Copyright Act (US))
62. JSCOT, *op. cit.*, 233–238.

## **Appendix 4**

### **The PBS and the Australia-US Free Trade Agreement**

**Parliamentary Library Research Note**



## The PBS and the Australia–US Free Trade Agreement

Much of the debate over the Australia–US Free Trade Agreement (AUSFTA) centres on whether and how it will affect the Pharmaceutical Benefits Scheme (PBS).

This Research Note examines the parts of AUSFTA that have caused the most concern and assesses their likely impact on the PBS.

### Changes to the PBS

One of the concerns about AUSFTA is that proposed changes to the PBS could lead to higher drug prices in Australia—a cost that would be borne by the government, at least initially, but perhaps also by consumers.

PBS costs, already high, are still growing. Since the early 1990s, the PBS has been growing at an average annual rate of 12.7 per cent<sup>1</sup>. According to the 2004–05 Budget, average annual growth will fall to about 4 per cent over the next few years, but even at this rate the PBS is the fastest-growing area of Commonwealth health expenditure.<sup>2</sup>

So what aspects of AUSFTA could lead to further pressure on PBS costs? Before answering this question it is helpful to consider how the PBS currently works.

### Listing new drugs

The current arrangements for listing a drug in the PBS are as follows (see figure 1):

- registration with the Therapeutic Goods Administration (TGA), which assesses drugs for quality, safety and efficacy
- assessment by the Pharmaceutical Benefits Advisory Committee (PBAC) for listing on the PBS.<sup>3</sup> The Committee evaluates whether a drug is more therapeutically effective and/or cost-effective

than existing treatments. The evaluations are based partly on submissions by the drug's manufacturers, which include the price they would like to be paid

- once approved for PBS listing, the Pharmaceutical Benefits Pricing Authority recommends to the Department of Health what price to offer the drug's manufacturer. In doing so it relies on the Committee's advice
- if the drug's sponsor agrees on the government's price, the drug is added to the PBS. If not, the sponsor can return to the Committee or the Authority with further information, or introduce/keep the drug on the market without PBS listing.<sup>4</sup>

### PBS listing and AUSFTA

AUSFTA introduces procedural changes to this system that give drug manufacturers more opportunities to press for their drugs to be listed on the PBS (see figure 1). The most controversial of these changes has been the review mechanism for decisions not to list a drug.<sup>5</sup>

Some fear the review process will reduce or remove Australia's control over the PBS listing process by overturning decisions made by the Committee.<sup>6</sup>

However, the text of AUSFTA only dictates that Australia institutes a review process; it does not specify that the review process be binding. In addition, AUSFTA does not change the Committee's legislative requirement to make decisions on the basis of therapeutic effectiveness and cost-effectiveness. So whatever form the review process takes, the Committee remains bound to these criteria. *If* new drugs are listed on the PBS as a result, it could be argued that consumers will be better off

because they will pay less for these medicines and have access to more effective drugs.<sup>7</sup>

Another concern is that, in addition to the review process, the increased advocacy opportunities AUSFTA affords drug companies—for example, through 'more frequent revisions' of the PBS 'where possible'<sup>8</sup>—will result in pressure on the Committee to list drugs, sometimes inappropriately.

A decision not to list a drug already places the Committee under pressure from a range of interests, including drug companies, medical specialists, patient support groups and the media.<sup>9</sup> In the case of Celebrex, an arthritis drug, even the Health Minister entered the debate.<sup>10</sup> Peter Drahos and colleagues, two of whom are former Committee members, argue that AUSFTA will make it more difficult for the Committee to resist these pressures and to continue to make decisions in the public's interest:

The PBAC members, although unable to publicly defend themselves, have had the advantage that they are the only independent authority that has fully examined the data. Now it will have another authority (the review panel) that has power (officially appointed) but no responsibility (it cannot legally list a drug on the PBS), which presumably will be unfettered in terms of the secrecy of its considerations and advice ... when its advice differs from the committee, this will be seized on by all of the vested interests, who will use the media to undermine integrity of the committee. The confidentiality provisions of the *National Health Act* will effectively prevent the committee from defending itself ...<sup>11</sup>

There are transparency provisions in AUSFTA, but these are unlikely to assist the Committee to defend its decisions.<sup>12</sup> These provisions indicate that commercial-in-confidence considerations will continue to limit what the public is entitled to know about a decision, while the Committee is expected to continue providing applicants with ‘detailed’ information regarding its decisions.

### A radical change?

AUSFTA does not directly undermine the rationale of the PBS, which is to ensure access to drugs based on their clinical effectiveness, safety and cost-effectiveness compared with other treatments.

Both countries agree to recognise the value of innovative pharmaceuticals *either* through competitive markets *or* through procedures that value their therapeutic significance.<sup>13</sup>

This second option affirms the current principles guiding PBS listing in Australia.

AUSFTA does give drug companies more opportunities to exert influence at different points in the PBS listing process. It is not clear whether this will result in more drugs being listed on the PBS, or drugs being listed at a higher price, than would otherwise be the case.<sup>14</sup>

In Addition, it is not the case that either of these would result in a *direct* flow-on to prices for consumers—though increasing PBS costs are often used to justify increased co-payments.<sup>15</sup>

It could be argued that the danger in AUSFTA is the Committee’s independence and integrity could be undermined through the increased pressure to which it is likely to be subjected. The result might be poor policy decisions that further undermine the body and leave the government, taxpayers and, ultimately, consumers worse off.

### Intellectual property changes and the PBS

Some commentators have been concerned that aspects of the intellectual property (IP) chapter of AUSFTA would lead to increased PBS costs.<sup>16</sup> The concern is that provisions relating to patent law, principally Articles 17.9 and 17.10,

would delay the entry of generic drugs: those drugs made without the approval of the patent holder once the patent has reached its expiry date.

In a paper, produced before the text of AUSFTA had been agreed, the Australia Institute claimed that even a small delay in the entry of generic

drugs to market would create significant cost increases to the PBS.<sup>17</sup> This is because the entry of a generic version of a drug significantly lowers the price the patent holder can demand for their version of the drug.

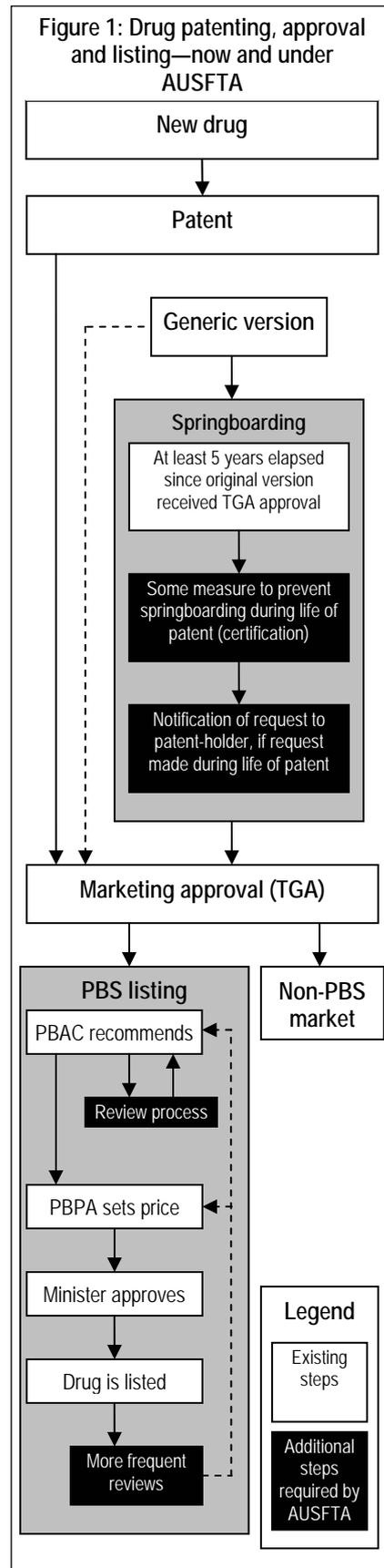
### ‘Springboarding’

AUSFTA requires Australia to make two subtle changes that will affect the practice of ‘springboarding’ generics.

Springboarding is a process that allows a generic drug to obtain approval from the TGA on the basis of test data proving the drug’s safety and efficacy already submitted by the patent holder. This allows the generic drug manufacturer to avoid duplicating much of the costly and time-consuming process of drug testing, resulting in a faster entry to market and cheaper drug prices. Under current rules, generics may not springboard during the first five years that the original drug has had marketing approval. This is known as the ‘data exclusivity’ period.

Currently, as long as the data exclusivity period has elapsed, the TGA is not concerned about intellectual property issues. This means that manufacturers of generic drugs may seek TGA approval even where a patent is still active. Once the TGA has approved the drug, it is up to the generic manufacturer to decide whether or not to enter the market while a patent is still alive. In most circumstances, generic manufacturers will have obtained TGA approval, organised production and distribution and be ready to enter the market as soon as the patent expires. In other circumstances, though, they might intend to dispute the validity of the patent or argue that theirs is a non-infringing use, in which case they might release the product and wait until the patent holder takes action. The ball is then in the patent holder’s court—it is up to them to sue the generic manufacturer for infringement.

The first change that AUSFTA requires is the introduction of some measure in the marketing approval process to prevent springboarding generics from entering the market during the life of a patent.<sup>18</sup> The second change is that, if generic drug makers are allowed to request



approval to enter the market during the life of the patent, the patent holder must be notified of this and told the identity of the putative generic manufacturer (see figure 1).<sup>19</sup>

This requires the TGA to adopt a policing role, vetting applications on patent grounds rather than purely on safety and efficacy grounds. The US Free Trade Agreement Implementation Bill 2004 proposes that this be done through a certification scheme. Under this scheme, generic manufacturers would be required to certify to the TGA that they do not propose to market the drug in infringement of a patent or that they have notified the patent holder of their TGA application.<sup>20</sup>

One difficulty is that 'infringement' is not always clear. For example, a patent may have expired on one use of the drug but not another, as new patents are filed for newly discovered uses. Similarly an active patent may not be valid because it does not fulfil one of the requirements for patentability, such as novelty or inventiveness. These are complex legal issues that only the courts can resolve.

Under the certification scheme, generic manufacturers would have three options before applying to springboard. They could:

- certify that they will not infringe, if they believe that to be the case
- apply for a court declaration to settle the uncertainty before certifying, or
- notify the patent holder of the application and certify to that effect.

Taking first option would risk a fine if the certification is later found to be false or misleading. However, it might be a safe option where the patent clearly has expired, or where other generics are on the market already.

Where the issue is particularly complex, the last two may be the only options. The second option involves the commencement of litigation. The third option allows the patent holder to consider litigation. In either case, litigation of these matters would happen

before rather than after the generic has entered the market. Currently, generic manufacturers have much more control over when any litigation takes place, with the option to enter the market first.

It is not clear that this shift, on its own, would make a significant difference in practice. A reduction in control over timing may have adverse consequences for generic manufacturers' litigation and business tactics. It may also increase the likelihood of early injunctions being ordered against generic manufacturers that delay their initial entry to market. The complexity of the scheme, costs of litigation and risk of penalties for false and misleading certification might theoretically deter generic manufacturers from entering a generic drug on the market. On the other hand, the regulatory and IP environment for generics is already complex, so the new scheme might be accepted as a relatively small technical change in an uncertain business. Overall, the effect of these subtle technical changes on the time it takes for generics to enter the market are difficult to predict.

### 'Evergreening'

A related concern is that these processes might encourage 'evergreening' as a tactic to delay generic entry.<sup>21</sup> Evergreening involves filing 'new use' patents toward the end of the patent. When this happens, the patent on the old use expires as usual, but the patent for the new use arises and continues until its own expiry. This creates a complex situation in which generics may be sold for some uses of a drug but not for others.

Evergreening is already available under Australian law. But, given that new use patents can make determining infringement more difficult, thereby reducing the options available to generic manufacturers under the certification scheme, evergreening might become a more common practice used to deter generics from entering even the 'old use' market. Whether this occurs, and whether it is successful, will depend on whether the certification scheme significantly affects or constrains generic manufacturers in practice.

### 'Locking in' current law

A feature of the IP chapter that has not been much discussed in the debate on AUSFTA is the extent to which it confirms current law. As far as pharmaceutical patents are concerned, the IP chapter would, among other things, require Australia to keep its current laws regarding the data exclusivity period of five years, patent extensions to compensate for delays in TGA approval and the right to restrict parallel importing. In effect, AUSFTA 'locks in' these laws.

Thus, even where the chapter requires no changes to current law, it does constrain the ability of parliament to make changes in the future. Given the increasing operating costs of the PBS, these areas might have been reform options for future legislators.

The requirement to provide a right to restrict parallel importing is probably the most significant of these constraints.<sup>22</sup> These rights allow patent holders to prevent products they have sold in one country being exported to another. For example, if parallel importing is allowed and drugs are sold wholesale cheaper in, say, China than in Australia, importers are able to import (legitimately purchased) drugs to Australia from China, resulting in a lower price of the drug for the PBS. Restrictions on parallel importing, on the other hand, allow drug companies and other IP holders to divide the world into several markets and sell their product at the most favourable price in each. As David Richardson of the Parliamentary Library has noted, effectively this is privatised protectionism.<sup>23</sup>

Globally, parallel importing has developed into a significant issue. Least-developed countries have argued that restrictions on parallel importing make life-saving drugs too expensive for public health authorities to afford.<sup>24</sup> In the US itself, where drugs are sold at higher prices than in Canada, consumers in northern states are reported to be crossing the border in significant numbers to purchase drugs, performing their own small scale and illegal parallel importing.<sup>25</sup> There have been increasing calls in the US to reduce the exclusive rights of patent holders so that this

can be done legally and in commercial quantities.<sup>26</sup>

AUSFTA requires that Australia maintain either:

- a system of ‘national exhaustion’, in which exclusive importation rights of the patent holder continue even after the product has been sold abroad, or
- (at least) the current system in which the patent holder may impose restrictions on the exportation of the product to Australia when it is sold in foreign countries.

Over the last two decades, parliament has been progressively allowing parallel importing of other forms of IP, such as copyright over music, books and computer software. Similarly, Australian patent law now provides that patent holders cannot place certain anti-competitive restrictions on the sale of products.<sup>27</sup>

Given these trends, as well as escalating PBS costs and the competitive advantages that parallel importing may provide, it is reasonable to assume that future parliaments would consider changes to patent law that would void restrictions on parallel importing. AUSFTA would remove this as an option for pharmaceutical reform.

## Endnotes

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2. *Budget Strategy and Outlook 2004–05*, 6–11. For the reasons behind this likely growth see M. Rickard, ‘[The Pharmaceutical Benefits Scheme: options for cost control](#)’, *Current Issues Brief*, no. 2, Department of the Parliamentary Library, Canberra, 2001–02.
3. The Committee is appointed by the Minister for Health, its members are medical practitioners, pharmacists and health economists. Membership details can be found on the Department’s web site.
4. It is in most sponsors’ interests to successfully negotiate a price with the PBPA. That is because without government subsidy the drug will cost a lot more than its

listed counterparts. While this means higher profits to the manufacturer for each sale, it also probably means a lower volume of sales.

5. Department of Foreign Affairs and Trade, *Australia–United States Free Trade agreement*, Final text of the Australia–United States free trade agreement signed in 2004, Department of Foreign Affairs and Trade, Canberra, 2004, Annex 2-C.2(f).
6. P. Drahos, T. Faunce, M. Goddard and D. Henry, ‘[The FTA and the PBS: a submission to the Senate Select Committee on the US–Australia Free Trade Agreement](#)’, 2004.
7. Unless this results in such high PBS costs that it is unsustainable. See below for further qualification.
8. ‘*Exchange of letters on the PBS*’ 3(b), *Australia–United States Free Trade agreement*; see also Annex 2-C.2(c) for another provision aimed at securing more access.
9. See R. Moynihan et. al, ‘Selling sickness’, *British Medical Journal*, vol. 324, April 2002, pp. 886–891.
10. ‘Drug’s listing cost taxpayers millions’, *The Age*, 2 February 2001.
11. Drahos et al., op. cit., p. 42.
12. See Annex 2-C.2 (d) and (e), *AUSFTA*.
13. Annex 2-C.1(d), *AUSFTA*.
14. As noted above, this is not necessarily a bad thing, at least for consumers.
15. A 28 per cent co-payment rise was proposed in the 2002–03 Federal Budget. On 25 June 2004 a rise of about 21 per cent was passed in the Senate.
16. For example, Drahos et al., op. cit.
17. B. Lokuge, T. Faunce, R. Dennis, *A backdoor to higher medicine prices: Intellectual property and the Australia–US Free Trade Agreement*, Australia Institute, Canberra, 2003.
18. Article 17.10.4(a), *AUSFTA*.
19. Article 17.10.4(b), *AUSFTA*.
20. US Free Trade Agreement Implementation Bill 2004, Schedule 7, Item 6.
21. See D. Ford, ‘Submission to Joint Standing Committee on Treaties’ Generic Medicines Industry Association Pty Ltd, 8 April 2004 <http://www.aph.gov.au/house/committee/jsct/usafat/subs/SUB83.pdf>.

22. Article 17.9.4, *AUSFTA* and s. 13 definition of ‘exploit’ in Schedule 1, *Patent Act 1990*.
23. D. Richardson, ‘Intellectual Property and the Australia–US Free Trade Agreement’, *Research Paper*, no. 14, Parliamentary Library, Canberra, 2003–2004, p. 12. <http://www.aph.gov.au/library/pubs/rp/2003-04/04rp14.pdf>.
24. See Surya Subedi, ‘The Road from Doha: the Issues for the Development Round of the WTO and the Future of International Trade’, *International and Comparative Law Quarterly*, vol. 52, no. 2, 2003, p. 436.
25. ‘Canada, Ho!’, *The Economist*, 16 October 2003.
26. For example the Pharmaceutical Market Access Act of 2003, which was passed by the US House of Representatives and is now before the US Senate, would relax current restrictions on parallel importing of pharmaceuticals. In fact, according to newspaper reports from the United States, restrictions on parallel importing of drugs required by AUSFTA were cited as a key problem by members and senators who voted against the agreement in the US Congress: see E. Becker and R. Pear ‘Trade Pact May Undercut Expensive Drug Imports’ *New York Times*, 11 July 2004.
27. Section 144, *Patents Act*.

### Dr Kate Burton Social Policy Section and Jacob Varghese Law and Bills Digest Section Information and Research Services

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ISSN 1449-8456