

Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States

From
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As outlined below, I have deep reservations about the proposed Free Trade Agreement between Australia and the United States (USFTA) and believe that if it is implemented, it will have significant negative effects on our economy, society and polity.

Unclear Economic Benefits of the USFTA

There is considerable doubt about whether the USFTA will result in any benefits for the Australian economy. Econometric studies have predicted either very small or negative impacts, largely because both the US and Australia have relatively few trade barriers and are already significant trading partners. This raises the question of whether the USFTA is necessary.

The original CIE economic consultants study commissioned by the government assumed totally free trade in agriculture yet predicted gains for the Australian economy of only 0.3% (\$US 2 billion) after 10 years. The results of this study were heavily dependent on the assumption that the USFTA would result in the removal of key US barriers to trade in agriculture, especially in the sugar, dairy and beef industries. As we know, this did not happen.

A second economic study by ACIL Consultants argued that claims of an increase in GDP were unfounded and that a USFTA would actually reduce GDP by about 0.2% and the Productivity Commission found that in the majority of cases, preferential trade deals actually depressed rather than expanded trade.

Even the Government now admits that the original CIE study is not longer valid but have now commissioned the same body to conduct another study, As Allan Wood notes in *The Australian* on March 9, 'The modelling work commissioned by the government is not going to convince anyone if it simply confirms Howard's view. It certainly won't dispel the suspicion that the government has something to hide.'

The USFTA imposes limits on democracy

The USFTA dispute process enables a government to claim that a law or policy of the other country is in breach of the USFTA, or is preventing it from getting the benefits expected from the agreement (Article 21.2). This process requires initial consultations, referral to a Joint Committee of US and Australian government officials and finally, if not resolved, to a dispute panel of three agreed trade law experts. Hearings may or may not be public, and the panel may or may not invite non-government representatives to make written submissions. The panel's initial decision can be revised after comments from the governments, before final decision. The panel can order that a law be changed or compensation be paid. The decision may or may not be made public and cannot be appealed. (Articles 21.5 – 21.11).

This process is based on trade law and can be used to challenge social regulation judged to be inconsistent with the agreement, like policies on medicines or the regulation of essential services. It is a clear restriction on the democratic right of governments to regulate in the public interest.

The USFTA could lead to Australians paying more for their medicines

The USFTA makes a number of changes to the processes of the Pharmaceutical Benefits Scheme (PBS). The effect of these changes is to increase the influence that US drug companies can wield over the scheme by allowing them to seek reviews of PBS decisions.

In particular, it gives drug companies more opportunities to influence the Pharmaceutical Benefits Advisory Committee before it decides whether to list drugs for subsidy and also provides for an independent review of decisions not to list their drugs on the PBS. The Side Letter on Pharmaceuticals also allows drug companies to apply for price adjustments after drugs have been listed on the PBS.

Despite government assertions to the contrary, it is likely that the cost of the PBS to Australian taxpayers will rise. Drug companies will certainly argue for higher priced drugs to be listed and for price rises after drugs are listed. The one person who has no doubts that Australians will pay more for their medicines is US Trade Representative Robert Zoellick. He reported to the US Senate that under the USFTA Australia's drug prices would rise. (*Sydney Morning Herald* 'Drug costs will rise with deal: US official', 11 March 2004)

In addition to the changes to the PBS, there are two other aspects of the USFTA that affect access to affordable medicines by Australians.

The first is the establishment of a **joint medicines working group** based on the same commercial principles that contribute to the high cost of medicines in the

US. The principles do **not** include the Australian public health goal of affordable access to medicines for all, which is completely unbalanced. The inclusion of this committee in the USFTA ensures that the US government can influence future policy and challenge it on trade grounds.

The second is **changes to patent laws** that could delay access to cheaper generic medicines. These include extensions of patent periods in some circumstances, and changes that make it easier for drug companies to raise legal objections and delay the production of generic drugs. (Article 17.10). In the US, drug companies have used such legal tactics aggressively. Since the PBS price control system relies on comparisons with cheaper generic drugs, delays in the production of generic drugs will contribute to price rises.

The USFTA severely limits the ability of governments to regulate in the areas of investment and services

Restrictions on Regulation of Investment and Services

The USFTA is a 'negative list' agreement for two key areas, investment and services. All of Australia's laws and policies on investment and services at all levels of government are affected by the agreement unless they are listed as reservations. There are two annexes that list reservations:

Annex I 'Stand-still' is a list of areas where laws that do not conform to the USFTA will be allowed to remain. However, these laws are 'bound' at current levels, like tariffs, and cannot be changed, except to make them less regulatory. The US government can challenge new regulation on the grounds it is trade restrictive or too burdensome for business. This is a significant restriction on democracy.

Annex II 'Carve-out': lists reserved areas for which governments can make new laws without restrictions. However, some of these are limited. For example, health, education and welfare services are listed, but only to the extent that they are 'established or maintained for a public purpose.'

New services or areas of investment are automatically subject to the agreement, and cannot be reserved by future governments. This restricts the ability of governments to respond to new developments.

Less rights to review foreign investment

US investment in Australia must be given 'national treatment', meaning it must be treated in the same way as local investment (Article 11.3). US investors cannot be required to use local products, transfer technology or contribute to exports (Article 11.9).

Although existing limits on foreign investment are maintained in some areas and the Foreign Investment Review Board (FIRB) retains the power to review investments of over \$50 million in a limited range of industries, the effect of the USFTA is a massive reduction in review powers.

The threshold for FIRB review of all other investment in existing businesses has been lifted from \$50 million to \$800 million and all U.S. investment in new businesses in areas not listed as reservations will be exempted from screening. The US government estimates that if these rules had applied over the last three years, nearly 90% of US investment in Australia would not have been reviewed (US Trade Representative, 'Summary of the US-Australia Free Trade Agreement', Trade Facts, p 1, 8 February 2004). The Australian government is also proposing to extend these changes to investors from other countries.

Under the USFTA, almost all US investment will now be exempt from scrutiny by FIRB, meaning that the government loses the right to regulate investment for national interest criteria.

Potential investor-state complaints process could develop

The Australian government has claimed that there is no process that allows corporations to challenge laws or sue governments in the USFTA. The US wanted this process, based on the notorious Chapter 11 of the North American Free Trade Agreement, which has enabled corporations to challenge environment laws and sue governments for millions of dollars.

However the USFTA **does** provide a foot in the door for such a process. If there is a 'change in circumstances' an investor can request consultations with the other government to make a complaint. The other government is then obliged to 'promptly enter consultations with a view towards allowing such a claim and establishing such procedures' (Article 11.16.1).

Less rights to regulate essential services

'Services' is a very broad category and includes such important areas as health, education, water, postal, energy and environmental services. The USFTA applies to all levels of government – federal, state and local.

The text states that the services chapter does not apply to public services (Article 10.1). These are defined as services **not** supplied 'on a commercial basis, nor in competition with one or more service suppliers'. This is the same flawed definition that has been used in other agreements, such as the WTO Services Agreement (GATS). In Australia many public services are supplied on a commercial basis or in competition with other service suppliers, including health, education, water, energy and post. Such services could be covered by the

agreement, unless they are listed as reservations. Any trade agreement should clearly exclude public services, particularly essential services.

Australia must treat US companies as if they were Australian companies (Article 10.2). Australia must also give full 'market access', which means no requirements to have joint ventures with local firms, no limits on the number of service providers, and no requirements on staffing numbers for particular services (Article 10.4).

Even blood services are treated as traded goods. In 2001 the Parliamentary Committee chaired by Sir Ninian Stephen recommended that Australia's blood products continue to be supplied by a central entity, the Commonwealth Serum Laboratory, for national security and health reasons. Now a USFTA side letter promises another review and commits the government to supporting US firms to be allowed to tender to provide this service.

Australia's qualifications, licensing and technical standards for services cannot be 'more burdensome than necessary to ensure the quality of the service' (Article 10.7). The US government on these grounds could challenge regulations.

These obligations apply to all services unless they have been specifically reserved.

Services reservations

Annex I - 'Stand-still': Existing laws and policies of state and local governments are listed as reservations but are 'bound' at current levels, cannot be made more regulatory, and are subject to the 'ratchet' effect if they are reduced, which means they cannot be restored to previous levels.

Annex II – 'Carve-out': Social welfare, public education, public training, health and childcare are reserved, but only 'to the extent that they are established or maintained for a public purpose', which is not defined. If the US challenged a childcare regulation, for example, it is unclear what Australia would have to do to prove that the childcare services were 'established or maintained for a public purpose'.

Water, energy and public broadcasting services are not listed as reservations, and are therefore fully included in the agreement.

Water services

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.

Telstra Privatization Side Letter

This letter outlines the government's policy to sell the rest of Telstra. The US insisted on this letter. This issue is still being debated by the Australian parliament as a matter of public policy, and should not be part of a trade agreement

The USFTA could cripple Australia's cultural sector

The government claims that the USFTA protects Australian content and culture. In reality, there are strict limits on future governments' ability to ensure that Australian voices continue to be heard.

Under Annex I, Australia's existing local content quotas are 'bound', and if they are reduced in the future they cannot later be restored to existing levels. Under Annex II, future Australian governments are limited in the laws they can introduce for new media

For multichannelled free-to-air commercial TV Australian content is capped at 55% on no more than 2 channels, or 20% of the total number of channels made available by a broadcaster, up to only three channels. **For free-to-air commercial radio broadcasting** Australian content is capped at 25%. The expenditure requirement on Australian content for **subscription television** is limited to 10% (which can rise to 20% for drama channels, but again, only on conditions which allow the US to challenge).

There are more restrictions on **interactive audio and/or video services**, since the Australian government must first prove that Australian content is not readily available. Any rules must be applied transparently and be no more trade restrictive than necessary, and can be challenged by the US. These restrictions severely limit the capacity of future governments to respond to new circumstances and new forms of media.

Public broadcasting

Because public broadcasting is not listed in either of the Annexes, it is not excluded from the agreement. The funding of public broadcasting is protected by the general exclusion of subsidies and grants (Article 10.1). However the regulation of public broadcasting could be affected by the agreement because the definition of public services excludes services provided on a commercial basis or in competition with other service providers. SBS advertising or ABC product marketing may not be excluded by this definition. This ambiguity may mean that the US could challenge some regulation of public broadcasting, claiming it is inconsistent with the USFTA.

Changes to copyright law

Further negative impacts on Australian cultural life could also result from the changes to copyright law incorporated in the agreement. The USFTA extends the period for which copyright payments must be made from 50 years after the death of the author to 70 years, in line with US law (article 17.4). This will be costly for libraries and educational bodies, as Australia has adopted the US copyright standard without the US's more generous rules for copying for research and education purposes.

Copyright law is supposed to provide a balance between fair rewards for authors and excessive protection which raises prices. Increased copyright protections traditionally benefit large corporations and at the same time stifle creativity, discriminating against new and small artists who are further restricted in their ability to use material which would otherwise be in the public domain. In fact, the Australian Intellectual Property and Competition Review Committee recommended that copyright not be extended without a public inquiry. The USFTA denies us this public debate (Henry Ergas 'Patent Protection an FTA complication', *Australian Financial Review*, 24 February 2004, p. 63).

The USFTA has not delivered on agriculture and could threaten Australia's environment

The agricultural benefits of a Free Trade Agreement were supposed to be one of the main reasons for agreement. Trade Minister Mark Vaile even conceded that without serious concessions from the US in agriculture, the deal would not be worth doing (interview with Mark Vaile, AM, ABC Radio, 2 April 2003)

In fact, the USFTA delivers almost no new export markets to farmers. Quotas for Australian beef exports to the US will remain for the next 18 years, until 2022, when free trade will finally be instituted. According to the US, Australian dairy exports will increase to a tiny 2% of US imports. Sugar is excluded from the deal, with consequent costs of the Australian taxpayer of \$444 million from the

government's recent 'sugar industry rescue package'. Even the National Farmers Federation has gone so far as to declare that 'this is not a free trade agreement' (media release, 9 February 2004)

At the same time, the USFTA threatens local markets by giving all US agricultural imports into Australia (many of them subsidised by the US government) "immediate duty-free access", and by making changes to quarantine standards to allow more US produce in. Local produce which will be threatened with increased imports of subsidised US produce includes processed foods, soups and bakery products, fruits and vegetables, dried onions, fruit and vegetable juices, dried plums, potatoes, almonds, tomatoes, cherries, raisins, olives, fresh grapes, sweet corn, frozen strawberries, and walnuts.

Quarantine

Our stringent quarantine laws, designed to protect both our lucrative agricultural sector and our priceless and fragile natural environment are also under threat from the USFTA.

Two new committees have been established with representatives from both countries. The first, called the Committee on Sanitary and Phytosanitary Matters, deals with quarantine policy and processes. However, one of its objectives is 'to facilitate trade' between Australia and the US. Its functions include 'resolving through mutual consent' matters that may arise between the Parties (Article 7.4). The second committee is a technical working group, which is also established with the objective of facilitating trade (Annex 7-A, para 1).

Australia's quarantine regulations should be made on a scientific basis in the interests of Australia, not as part of a trade dialogue with a much more powerful country. The promotion of trade and the quarantine protection of Australia's environment, crops and livestock are separate roles which should not be combined. If, as a result of the USFTA, the government agrees to changes to Australia's quarantine system that has previously blocked imports of certain products, then Australian farms and environments will be under threat.

Genetically Engineered Food Labelling Laws and Crop Regulation

The US does not have labelling of GE food, has challenged EU labelling laws through the WTO and identified Australian labelling laws as a barrier to trade. The USFTA requires Australia and the US to give 'positive consideration' to accepting the other party's technical regulations as equivalent to their own, and to give reasons if they do not (Article 8.5).

Australia must give US representatives the same rights as Australians to participate in the development of Australia's standards and technical regulations. The USFTA even states that the Australian government will recommend that Australian non-governmental bodies should also let US government representatives have the same rights as Australian citizens to participate in

Australian NGO processes for developing standards for Australia (Article 8.7).

These changes to processes and procedures for regulation of 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.

The USFTA could lead to significant job losses due to tariff cuts and loss of local purchasing rules

Tariff cuts

Australia's remaining tariffs are on textiles, clothing and footwear (15-25%) and on motor vehicles and parts (5-15%). Tariffs on motor vehicle parts will fall from 15% to zero when the USFTA comes into force, which will mean immediate job losses. Tariffs on assembled motor vehicles will be phased out by 2010 and on clothing by 2015 (Annex 2b).

Both of these industries employ over 130,000 people and provide significant employment in regional areas of high unemployment where there are few alternatives. The effect of a USFTA on these communities could be devastating!

Government Purchasing

There are some government purchasing schemes that give preference to local products or require foreign contractors to form links with local firms to support local employment. These will not be permitted under the USFTA. This is an unreasonable restriction on the right of governments to have local and regional development policies.

Recommendation

The Committee should recommend that the Senate should not pass legislation enabling the Free Trade Agreement between Australia and the USA to come into force, as it is contrary to the national interest.