The Hon Mark Vaile MP
Minister for Trade

Parliament House, Canberra
ACT 2600, Australia

15 March 2004

Dear Mr Vaile

I'm writing to thank you for your reply of 27 Feb 2004 to our joint letter concerning the Australia-United States Free Trade Agreement. Having subsequently read the summary and analysis of the agreement produced by AFTINET, it appears there are some inconsistencies between your claims of the benefits Australia can expect and the reality contained in the text of the agreement.

In your letter you state (italics) that the agreement includes:

- *Immediate, free and open access to the US market for Australian exporters of almost all manufactured goods and services.*
- *Substantial access for Australia's agricultural sector including for our beef and dairy producers….*

Whereas in fact, the US sugar market is excluded and beef and dairy tariff reductions are to be phased in over 18 years. The National Farmers' Federation has declared "This is not a free trade agreement" ('US disappoints on agriculture in trade deal' media release, 9 February 2004).

- *Full access for Australian goods and services to the AU$200 billion market for federal procurement in the United States.*

Some of our state governments have purchasing schemes which require foreign contractors to form links with local firms to support local employment. These will not be permitted under the USFTA. State governments are still considering whether they will agree to the government procurement chapter of the agreement.

- *Enhanced legal protections that guarantee market access and non-discriminatory treatment for Australian service providers in the US market;*

But it will be years before we can determine how effective that access will be. Large markets are not known for the speed with which they respond to small ones. You also fail to mention the immediate US gains in return. According to the text:

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).

- *The right to examine significant foreign investment proposals in all sectors to ensure they do not raise issues contrary to the national interest…*

Existing limits on foreign investment are retained for newspapers and broadcasting, Telstra, Qantas, Commonwealth Serum Laboratories, urban leased airports and coastal shipping. However, these limits are subject to "standstill" and cannot be increased.

The threshold for FIRB review of all other foreign investment in existing businesses has been lifted from $50 million to $800 million. US investment in new businesses in areas not listed as reservations will not be reviewed at all.

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).

- *The USFTA does not include any dispute settlement provisions allowing investors to challenge government laws or decisions.*

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).

Also

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 which list reservations:

Annex I 'Stand-still' I 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. New regulation can be challenged by the US government 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'

- *The Pharmaceutical Benefits Scheme (PBS), in particular the price and listing arrangements that ensure Australian's access to quality, affordable medicines, remains intact.*

But the USFTA does give drug companies more opportunities to influence the Committee before its decisions, and also provides for an independent review of decisions not to list their drugs on the PBS. There is also an opportunity for companies to apply for price adjustments after drugs have been listed. (Side Letter on Pharmaceuticals).

The government says that these changes will not mean higher prices to consumers, but has been less clear about whether the cost of the PBS to taxpayers will rise. There is no doubt that drug companies will use their huge resources to argue for higher priced drugs to be listed, and for price rises after drugs are listed.

US Trade Representative Robert Zoellick has reported to the US Senate that under the USFTA Australia's drug prices will rise (Sydney Morning Herald, 'Drug costs will rise with deal: US official' March 11, 2004).

The USFTA will set up a joint medicines working group based on the same commercial principles which contribute to the high cost of medicines in the US (Annex 2c). These principles include the "need to recognise the value" of "innovative pharmaceutical products" through strict intellectual property rights protection. The principles do not include the Australian public health goal of affordable access to medicines for all.

- *The systems we have in place to ensure that our health and our environment are protected, such as our quarantine regime, are not affected.*

New processes have been established under the USFTA which will give the US government and US companies direct input into Australian laws and policies on quarantine and technical standards, including labelling of GE food.

Two new committees have been established with representatives from both sides. 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).

Trade and quarantine do not mix.

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).

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 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.

You also wish to assure us that;

- *Our right to ensure local content in Australian Broadcasting and audiovisual services including in new media, is retained.*

In reality, there are now 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

Multichannell 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. 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. 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 is not listed in either of the Annexes, therefore not excluded from the agreement. The ambiguity of the definition of 'public services' may mean that the US could challenge some regulation of public broadcasting, claiming it is inconsistent with the USFTA.

While I appreciate that you and the current Liberal government may believe that many of the concessions you have made to the US in the USFTA *'will further integrate the Australian economy with the largest and most dynamic economy in the world, delivering lasting benefits to generations of Australians'.*

It actually appears that we have already lost out on this *'good deal'* and that you have been less than candid about the degree to which yourself and the Australian negotiators allowed themselves to steamrolled by Mr Zoellick and his team which has been one of the major concerns of people like ourselves opposed to the agreement from the beginning.

Unless you and Mr Howard wish to be remembered as the government that not only supported the US in an illegal war but then sold Australia's economic autonomy down the river to them for some illusory economic advantage there had better be an abrupt policy U-turn and soon.

It's not too late, the government can put off ratification of the agreement indefinitely (a typical US tactic for avoiding the terms of agreements they are not happy with) or simply repudiate the entire agreement as not in the Australian public interest in it's current form. Then we can all go home knowing we did the right thing even if it meant not being friends with the school bully. Otherwise you and the Howard government will have to admit that your mate Bob saw you coming a long way off and as he sat across from you at the negotiating table all that was in his mind was that old American expression *'Never give a sucker an even break'*

Regards,