Submission to the Senate Select Committee on the Australia US Free Trade Agreement (USFTA)

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Committee's terms of reference:

Examine the impacts of the agreement on Australia's economic, trade, investment and social and environment policies, including, but not limited to, agriculture, health, education and the media.

Summary

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 85 organisations supporting fair regulation of trade consistent with human rights and environmental protection. AFTINET welcomes this opportunity to make a submission to the Senate Select Committee on the US Free Trade Agreement (USFTA).

There is extensive public interest in this agreement because of its wide scope. Unfortunately it was impossible for public debate about the implications of the agreement to be sufficiently informed during the negotiation process because the government did not make sufficient information public.

We note that the government's public consultation processes have improved during the course of these negotiations. However we remain concerned that, given the great impact of the agreement on regulation in important areas of social policy, the public consultation process has still been inadequate. On nearly every point of concern in the text the public was not permitted to know what was proposed or had been agreed to until after the text was published. This meant that the process of public consultation had much less meaning than it should.

Furthermore, documents produced by DFAT since the text publication do not adequately explain or even mention a number of the regulatory, policy and other impacts. This limits the capacity for informed debate of this agreement during the current review period. This is discussed further below.

This submission is divided into the following sections, to respond to the Committee's terms of reference:

1. Economic impacts

2. Impact of the USFTA on the ability of governments to regulate

3. Impacts on specific social policy areas

(a) Pharmaceuticals and blood plasma

(b) Changes to copyright laws

(c) Restrictions on regulation of services and investment

(d) Audiovisual and new media

(e) Quarantine, GE regulation and Environment

(f) Manufacturing and Government Procurement

4. Inadequate information regarding the impact of the agreement.

Conclusion

1. **Economic impacts**

There is considerable doubt about whether the USFTA will result in any benefits for the economy as a whole, since econometric studies have predicted very small impacts, some being negative. This is in part because both the US and Australia have relatively few trade barriers and are already significant trading partners. This raises the question of whether such an agreement is needed at all.

Econometric studies are limited by the assumptions built into the models they use. Most models include the assumption of perfect labour mobility. This assumes that those displaced by increased imports will be perfectly mobile and able to be retrained to take advantage of growth elsewhere in the economy, which is not generally the case in practice. The omission of unemployment effects means that such studies generally overstate economic benefits (Quiggin, J., 1996, *Great Expectations: Microeconomic Reform and Government in Australia*, Allen and Unwin, Sydney).

It is therefore significant that econometric studies on the USFTA have predicted either very small gains or losses to the Australian economy, even without full inclusion of unemployment effects.

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 (Australian APEC Study Centre, *An Australia-US Free Trade Agreement: Issues and implications* Canberra, 2001).

A study by ACIL consultants predicted slight losses to the Australian economy, partly because of trade lost to other trading partners in the Asia Pacific area. (ACIL Consultants, *A Bridge too Far?* Canberra, 2003, www.rirdc.gov.au/reports/GLC/ACIL-ABridgeTooFar.pdf.).

Many trade economists argue that bilateral trade agreements tend to increase trade between the bilateral partners but divert trade from other trading partners, so reducing overall economic gains. For this reason, such agreements are often called Preferential Trade Agreements (PTAs) rather than Free Trade Agreements. A working paper prepared by staff at the Productivity Commission examined 18 PTAs and found that '12 had diverted more trade from non-members than they have created amongst members'. It also found that 'many of the provisions needed in preferential

arrangements to underpin and enforce their preferential nature- such as rules of origin- are in practice quite trade restricting' (Adams, R., Dee, P., Gali., J and McGuire, G., 2003, *The Trade and Investment Effects of Preferential Trade Arrangements-Old and New Evidence*, Productivity Commission Staff Working Paper, Canberra, p. xii).

Similar points were made by the authors of an International Monetary Fund Working Paper. This econometric study found in relation to the USFTA that 'slightly negative effects on Australia are related to trade diversion from Japan, Asia, and the European Union in machinery and equipment, basic manufactured goods and textiles' (Hilaire, A., and Yang, Y., The United States and the New Regionalism/Bilateralism, IMF Working Paper, 2003, p.16).

The government has admitted that the original CIE study is no longer valid, because the access to US agricultural markets is much less than it assumed. Sugar has been totally excluded and access to beef and dairy markets is phased in over much longer periods. The government announced it would conduct a competitive tendering process for another study, then announced a week later that CIE consultants had again been selected. This has been greeted with understandable scepticism by trade economists. For example, Allan Wood wrote 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.'

Despite the limited changes in the sensitive agricultural areas of sugar, beef and dairy, the Australian government has sought to portray the USFTA as a great win for Australian farmers. This conclusion is challenged by analysis produced by the American Farm Bureau Federation (AFBF), however, which found that 'Agreement-related changes in United States agricultural imports and exports would essentially cancel each other out and leave the sector unaffected' (April 2004, American Farm Bureau Federation, Economic Analysis and Trade Teams, 'Implications of an Australian Free Trade Agreement on US Agriculture', www.fb.org). Critically, the AFBF report points out the importance of future US influence over Australia's quarantine practices, and identifies this as an area where US farmers are likely to gain in the future. These potential negative outcomes for Australian agriculture have not been acknowledged by the government. This is discussed further below.

2. Impact of the USFTA on the ability of governments to regulate

(a) Government-to-Government Dispute process limits democracy

The 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). The dispute 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 based on trade law 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 danger is that social policies will be determined by a process which gives priority to trade law. Recently a World Trade Organisation disputes panel found that US restrictions on internet gambling designed to prevent social harm from excessive gambling were a barrier to trade. This shows that trade law has difficulty recognising the right of governments to regulate against social harm (Nicholas, K., 'Online bets on cards with WTO', *Australian Financial Review*, March 300, 2003, p.3). The particular example of internet gambling has been excluded from the USFTA, as both governments agree on the need to regulate in this area. However, the application of a disputes process based on trade law may well over rule other areas of social regulation.

The decision by an Australian government of whether to institute a complaint or resist a complaint instituted by the US will, of course, occur in a political and economic context in which Australia has vastly less power than the US.

(b) No immediate investor-state complaints process but could develop later

The government has claimed that there is no process in the USFTA which allows corporations to challenge laws or sue governments. The US wanted to have a process modelled on that of the North American Free Trade Agreement, expressly included in the USFTA. The NAFTA mechanism has enabled corporations to challenge environment laws and sue governments for millions of dollars (Public Citizen 2001, 'NAFTA Chapter 11 Investor-to-State cases: Bankrupting Democracy', Public Citizen, Washington, www.citizen.org).

However the USFTA **does** provide a foot in the door for such a process. It there is a 'change in circumstances affecting the settlement of disputes' 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).

This clause, and the explanation of it offered by DFAT in its 'Guide to the AUSFTA', provide little guidance as to the nature of the 'change in circumstances' required to trigger the operation of the clause. The ambiguity raises a number of important questions. As Madeleine Chiam has noted, these questions include the degree of change required, whether such a change must affect governance structures or simply one investor, and whether it is necessary to show that such change has resulted in harm to an investor (M Chaim, Submission to JSCOT inquiry, April 2004).

Australia should not enter into an agreement with this level of ambiguity in an area which has proved so problematic in other international agreements.

(c) Increased US influence in Australian policy and law making

The USFTA establishes a series of committees that give the US increased influence over Australian law and policy making, and prioritise US trade interests over other social policy criteria. The agreement establishes committees on medicines and health policy, on quarantine issues and on technical standards like food labelling, including labelling of GE food. These are all areas where the US has identified Australian health and environmental policies as barriers to trade. In all cases the

terms of reference of the committees give priority to US concerns about trade issues and not to Australian health or environmental policy.

(d) Negative list for services and investment

The USFTA has a negative list structure for both services and investment. This means that all laws and policies are affected by the agreement unless they are specifically listed as reservations. This differs from WTO multilateral agreements like the General Agreement on Trade in Services (GATS), which is a 'positive list' agreement, meaning that it only applies to those services which each government actually lists in the agreement. The negative list is therefore a significantly greater restriction on the right of governments to regulate services than the WTO GATS agreement.

There are two sets of reservations for 'non-conforming measures' which may not be consistent with full national treatment and market access for US firms, or which may be considered 'too burdensome' or a barrier to trade by the US government .

Annex A or 'standstill' reservations mean that existing laws and policies can remain, but they are 'bound' at current levels and cannot be made more regulatory without being subject to challenge by the US government under the disputes process. There is a 'ratchet effect' which means that if an existing law or policy is made less regulatory, it must remain at that lower level and cannot be changed back by a future government. For example, if the current government reduced Australian content rules in film and television, a future government would be unable to restore them to current levels. This is a significant restriction on democracy.

Annex B contains reservations which enable governments to make new laws, but some of these also contain restrictions. For example, the Australian content rules for new media contain strict limits.

New services or areas not specifically named in the agreement are automatically covered by the terms of the agreement. Again this restricts the right of future governments to respond to new developments.

Impacts on specific social policy areas

(a) Pharmaceuticals and blood plasma

The Pharmaceutical Benefits Scheme (PBS)

The US negotiators and pharmaceutical lobby groups clearly identified the price control mechanism of the PBS as a target from the outset of the negotiations and throughout the negotiation process. In the US, the wholesale prices of common prescription medicines are three to ten times the prices paid in Australia (The Australia Institute (2003) 'Trading in our Health System?' Canberra www.tai.org.au). Pharmaceutical companies have argued consistently that Australia's price control system through the PBS is an unfair barrier to trade. They have been successful in achieving changes to the PBS process in the USFTA. The Australian government's assurances that the USFTA 'does not impair Australia's ability to deliver fundamental policy objectives in health care and does not change the fundamental architecture of the PBS' are unconvincing (DFAT 2004 RIS p 3).

The changes set out in the side letter on pharmaceuticals give pharmaceutical companies more opportunities to influence the Pharmaceutical Benefits Advisory Committee before its decisions, and provide for an independent review of decisions not to list certain drugs on the PBS. The decisions of the committee to list new drugs are made on both health and value for money grounds. The value for money component is based on comparisons with cheaper generic drugs. Review of decisions could therefore result in more highly priced drugs being listed. Australia is also required to provide companies an opportunity to apply for price adjustments after drugs have been listed.

The changes will alter the PBS in several important ways. Firstly, the procedural changes prioritise the commercial interests of US pharmaceutical manufacturers above the social policy objective of providing affordable access to medicines to Australians. Locking these changes into the framework of a trade treaty limits the ability of future governments to regulate the PBS with the public policy objective of providing accessible drugs at the forefront. The operation of the PBS involves balancing a number of important objectives, which include rewarding innovation for new and useful drugs, as well as ensuring that Australians have affordable access to important medicines. The USFTA emphasises one of these objectives, the promotion of commercial investment in the health sector, to the benefit of pharmaceutical companies, and enshrines it within a trade treaty without

granting the public policy objectives the same status. This is a dangerous direction in which to take Australian social policy and should be rejected.

The importance of having policy flexibility in this area has been recognised within the US Congress itself. In October 2003 a bi-partisan group of US Congress members wrote to the US President urging him to quarantine pharmaceuticals from the USFTA altogether because including them would place a dangerous restriction on public health policy-making. These Congress members recognised that changing Australia's PBS would not only impact on Australia's health policy but on the ability of future US governments to introduce changes in the US to make drugs more affordable (Walker, T 'Support from US to leave drugs out of trade talks', *Australian Financial Review* 23 October 2003).

The detail of the changes has still to be developed, and the US has signalled its intention to be involved in this process. US Senator Jon Kyl is quoted as stating that the USFTA is 'only the beginning of negotiations over Australia's pharmaceutical system' and that 'there is much more work that needs to be done in further discussions with the Australians' in relation to pharmaceuticals (Garnaut, J (2004) 'Drug costs will rise with deal: US official', *Sydney Morning Herald* 11 March 2004).

A second important implication is the likelihood of the changes resulting in cost increases for the PBS. Robert Zoellick himself has stated that the USFTA changes to the PBS will change the prices of pharmaceuticals in Australia (Garnaut, J (2004) 'Drug costs will rise with deal: US official', *Sydney Morning Herald* 11 March 2004). There seems little doubt that drug companies will use their great resources to argue for higher priced drugs to be listed, and for price rises after drugs are listed, through the new procedures that Australia must adopt. Professor David Henry of Newcastle University has predicted that the review process 'pushes towards higher, not lower, prices' (ABC Radio National *PM*, March 4, 2004). Even the distributors of generic medicines in Australia believe that this is the likely outcome, and have argued that the USFTA will also allow companies to manipulate the system and maintain higher costs for the PBS, and consumers, by extending the effective life of pharmaceutical patents (Generic Medicines Industry Association, submission to Joint Standing Committee on Treaties, 8 April 2004 pp 2-3).

A cost blowout for the PBS would destroy its capacity to make essential medicines accessible at affordable prices, which is the essential purpose of the scheme. These changes will most severely

affect marginalised groups in Australia, particularly indigenous people, the disabled, pensioners and poor families with children.

Medicines working group

A related change in the USFTA is the setting up of 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. Again, the principles do **not** include the Australian public health goal of affordable access to medicines for all, which is completely unbalanced. In fact, the agreement plainly ignores the key principle of the Doha Declaration adopted by the WTO Ministerial Conference in 2001, that trade agreements should be interpreted so as to protect public health and promote universal access to medicines.

The inclusion of this committee in the USFTA ensures that the US government can influence future policy and challenge it on trade grounds. It is important for Australia to be able to maintain an independent position on the development of health policy, and not be required to base policy on the trade interests of another country. Such matters should not be included in a trade treaty.

Supply of Blood Services and Products

The USFTA imposes restrictions on future policy making and regulation of blood fractionation supply services. In 2001 the Parliamentary Committee chaired by Sir Ninian Stephen recommended that Australia's blood products continue to be supplied by a central entity, CSL, for national security and health reasons, to ensure that there was continued national capacity to supply these products. This report followed a lengthy inquiry, including submissions and hearings (www.nba.gov.au/pdf/report.pdf). However the USFTA now imposes requirements on future Australian governments which are directly contrary to the findings of the Stephen report.

The USFTA requires contracts with a central government entity for blood fractionation services to conclude no later that 31 December 2009 or earlier. It not only requires a future government to review these services, but dictates the policy position that this future government must take. Under the USFTA a future government 'will recommend to Australia's States and Territories that future arrangements for the supply of such services be done through tender processes consistent with Chapter 15 (government procurement)'. It is unacceptable for a trade agreement to dictate the health

policies of a future government, and more so when it requires a future government to act contrary to the findings of its own inquiry.

Further, the USFTA imposes a trade test even on the safety and quality requirements that Australia may place on suppliers of blood plasma products or fractionation services. These requirements 'shall not be prepared, adopted or applied with a view to **or with the effect of** creating unnecessary obstacles to trade'. This trade criteria will now apply to displace other legitimate policy grounds when regulation of blood products is being developed. As discussed above, by inserting such a commitment into a trade treaty it becomes subject to the dispute settlement provisions, which means any regulation in the future in this area can be challenged for 'having the effect of creating an unnecessary obstacle to trade'. Such a question would be decided by trade experts, not by experts in the safety of blood products, or in public health policy. This is an unacceptable restriction on Australia's ability to determine policy in critical areas.

It is worth noting that in its submission to the Joint Standing Committee on Treaties, Baxter Healthcare (the Australian subsidiary of America's Baxter Health Corporation) states: 'Baxter referred its concern [regarding the blood plasma arrangements between CSL and the Australian government] to the United States Government which then added the issue to its agenda, and in 2003 the topic was discussed at length in the FTA negotiations. The Side Letter describes the results of those negotiations' (Baxter Healthcare submission to Joint Standing Committee on Treaties, 14 April 2004, p 3). If these claims are correct, it is a worrying indictment on the power which US companies have asserted over the development of the USFTA, and sets a worrying precedent for the future. This influence could have implications for health policy generally. Given the ambiguities surrounding the term 'health services established or maintained for a public purpose', Baxter's success could lead to other developments which impede the ability of the Australian government to guarantee the integrity of Australia's blood services, particularly blood collection. If these become the target of US healthcare companies in the future, it is unclear whether the protections afforded to public healthcare services in the agreement will be adequate. See our discussion of services below for more detail.

Changes to Patent Laws could delay access to cheaper medicines

The USFTA contains changes to patent laws that could delay access to cheaper generic medicines. These include extensions of patent periods in some circumstances, and changes which make it easier for drug companies to raise legal objections and delay the production of generic drugs.

(Article 17.10). For example, Article 17.10.5(a) requires the Australian government to refuse marketing approval to any company where the product in question is 'claimed' in a patent. This mechanism imposes an extra bureaucratic burden on an issue which would otherwise be decided directly by the courts. This is likely to increase the costs for generic manufacturers to have their products approved for marketing, leading to delays in the introduction of cheaper generic medicines. 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.

Direct advertising to consumers may lead to higher demand for more expensive brand-name pharmaceutical products

The USFTA effectively provides that companies will be able to market pharmaceutical products directly to consumers over the internet. This activity may lead to greater patient demand for products which are heavily marketed over equally effective, and cheaper, generic products. This will lead to overall cost increases for consumers. Enshrining this in the framework of the USFTA means the government will be restricted from freely regulating these activities in the future.

(b) Extension of copyright means higher costs for libraries and education bodies

Copyright law is supposed to provide a balance between fair rewards for authors and excessive protection which raises prices. 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). 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).

These changes 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. US educational bodies pay no or only nominal royalties to use copyrighted material. In effect, the USFTA will result in Australia providing more stringent protection for American copyright owners than they are afforded in their own country.

Clearly, as Australia is a net importer of copyright materials, our educational institutions, students and consumers will pay substantially more to access and use copyrighted materials. As educational services are become increasingly based on online materials, the increased duration of copyright will restrict the amount of material that institutions can make available. These effects are likely to disproportionately be felt by distance-education students and people living in regional areas who do not have ready access to hard copy materials.

(c) 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 which list reservations:

Annex I 'Stand-still': this 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'

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.

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).

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 Foreign Investment Review Board (FIRB) retains the power to review investments of over $50 million in these areas, and in military equipment, and security systems, the uranium and nuclear industries (Annex 1).

Regulation of foreign investment can only be increased for urban residential land, maritime transport, airports, media co- production, tobacco, alcohol and firearms (Annex 2).

However the threshold for FIRB review of all other investment in existing businesses has been lifted from $50 million to $800 million. The vast majority of companies listed on the Australian stock exchange have market capitalisation of less than $800 million. Further, US investment in new businesses in areas not listed as reservations will not be reviewed at all. 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. This is a massive reduction in the ability of the Australian government to review whether particular investment is in the national interest.

Services: the USFTA and public 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.

Any trade agreement should clearly exclude public services, particularly essential services. 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. USFTA rules do not apply to subsidies or grants (Article 10.1), which does protect public funding of public services from being challenged.

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). 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). Regulations could be challenged by the US government on these grounds. These obligations apply to all services unless they have been specifically reserved.

Services reservations

Annex I - 'Stand-still': Existing laws and polices 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 child care 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'.

It is important to note that this list of reservations leaves out two areas that were included in a similar list of reservations in the Australia- Singapore Free Trade Agreement, public utilities and public transport.

The failure to reserve public utilities (water and energy services) and public transport means that future governments will not have unrestricted rights to make new law or policy in these areas, and that any such regulation could be challenged by the US government.

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 Privatisation 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

(d) Audiovisual and new media

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.

(e) Quarantine, GE regulation and Environment

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.

Quarantine

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).

As discussed above, the American Farm Bureau Federation (AFBF) has explicitly identified these changes to Australian quarantine processes as an avenue by which it expects US farmers to be able to increase their exports to Australia (April 2004, American Farm Bureau Federation, Economic Analysis and Trade Teams, 'Implications of an Australian Free Trade Agreement on US Agriculture', www.fb.org).

Several Australian farming groups have expressed concern about increased disease risk that may arise from the proposed changes. The changes to quarantine processes have been described, for example, as significant 'back door' concessions, which appear to involve Australia 'trading off' quarantine (Australia Pork Limited submission to JSCOT, April 2004).

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.

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 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.

Environment

There is a general clause stating that Australia and the US will be able to make laws that are necessary to protect human, animal or plant life or health. However, these laws must not be a 'disguised restriction on trade in services' (Article 22.1 incorporating GATS Article XIV).

Both Australia and the US have committed to encouraging the development of 'flexible, voluntary and market-based mechanisms' for environmental protection (Article 19.4). Since much

environmental regulation is not and cannot be voluntary or market based, this is an extraordinary statement to have in a trade agreement. Fortunately the statement cannot be enforced through the disputes process, which only applies to environment laws if a government fails to enforce its own laws (Article 19.7.5).

(f) Manufacturing and Government Procurement

Manufacturing

Australia's remaining tariffs are on textiles, clothing and footwear (15-25%) and on motor vehicles and parts (5-15%). Both of these industries employ thousands of workers of non-English speaking background in regional areas of high unemployment. 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).

The Australian Productivity Commission reports that 78,000 people work in the textile, clothing and footwear industry. Most of these workers are women of non-English speaking background. The car industry employs almost 54,000 people, mostly men over 35, of whom 26% are of non-English speaking background. Both industries provides significant employment in regional areas where there is little alternative, including Northern Adelaide, Mt Gambier, Bordertown, Geelong, Albury, Ballarat, Burnie, Devonport, Launceston, Wollongong, Taree, Ipswich and Toowomba (Productivity Commission reports on the Auto Industry, 2002 and the Textile Clothing and Footwear Industry, 2003, www.pc.gov.au). Newcastle is familiar with those impacts having lived through the closure of the steel works.

Regional studies are required to assess the employment impacts of these changes. These studies should have been undertaken before these changes were agreed. The Australian Manufacturing Workers' Union is conducting such a study.

Government Procurement

There are some government purchasing schemes which 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. At the time of writing, state governments were still

considering whether to agree to be included in the government procurement chapter of the agreement, and only about half of US state governments had agreed to be included in the agreement.

4. Inadequate information regarding the impact of the agreement

DFAT has produced several documents about the USFTA, including a Guide to the USFTA, the National Interest Analysis (NIA) and Regulatory Impact Statement (RIS) supplied to JSCOT, and a recent brochure entitled 'Advancing Australia's Economic Future'. These documents are at best incomplete, and at worst misleading.

In general, they omit some significant disadvantages of the agreement. They also omit many details in the agreement about review processes and joint US-Australian committees in the areas of medicines and public health, quarantine, and technical standards. These processes, which give the US government direct input into Australian policy, need to be carefully examined for their impacts.

The DFAT statements do not explain that in the areas of services and investment, there will be significant regulatory restrictions on Australian governments at all levels. They also fail to mention the ambiguity regarding the coverage of public services under this agreement. Where they mention the disputes processes at all, they claim that there is no current investor-state complaints process. They fail to mention that the agreement has provision for a future investor-state complaints process if it is requested by a corporation. The statements also fail to give details of the government-to-government disputes process, which could have a significant effect on the ability of governments to regulate.

These serious omissions mean that the statements are not a credible evaluation of the impact of the USFTA. Given the fact that most of these important proposed changes were not the subject of a public debate before the agreement was signed, it should be incumbent on the government to ensure that the public is properly informed of the impact of this agreement during the current review process. This has failed to occur.

Conclusion

Many trade economists question whether the USFTA will result in benefits to the Australian economy. There are few existing trade barriers, access to sensitive US agricultural markets is limited and a preferential agreement may divert trade from other trading partners. In any case, the price paid would be too high. The Australian economy is only 4% of the size of the US economy, so economic integration means that Australia is likely to adopt US models of regulation, rather than

vice versa. Despite assurances, the USFTA weakens Australian price controls on medicines and limits the regulation of Australian content in new forms of media. It adopts US copyright laws, which will cost consumers more. It sets up joint US-Australian committees to review policies on medicines, quarantine and food labelling. It treats social regulation of essential services as if they were tariffs, 'bound' or frozen at current levels and subject to challenge if increased. Such challenges would be judged under the rules of trade law, without regard to their social impacts. It restricts governments' rights to use purchasing to support local development. In short, the USFTA removes many options for policies to safeguard the public interest without democratic debate or decision.

Recommendation

The Committee should recommend to the Senate that this agreement not be supported as it is contrary to the national interest.