

**The Political Impact of the Australia –US Free Trade Agreement
(AUSFTA): Perceptions of the agreement in Australia**

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In this paper I will discuss the AUSFTA agenda, the reasons for community opposition to it, the outcomes of the agreement and the impacts they have had on social policy decisions.

The AUSFTA was negotiated under the Howard Government when there was less public debate about neoliberal policies. However the market failures exposed by the global financial crisis and climate change have led to increasing skepticism about neoliberalism, and call for a greater regulatory role from government, including from the present Prime Minister (Rudd, 2009).

The significant public opposition to the AUSFTA resulted from the pursuit by US government and negotiators of a neoliberal agenda based on the NAFTA template.

Over the last two decades a suite of policies known as neoliberalism or the Washington Consensus has been promoted vigorously by US governments through International Financial Institutions and trade agreements (Stiglitz, 2005: 2). The trade agreements support US-style legal frameworks that increase the legal rights of corporations and reduce the rights of governments to regulate corporate activity. The agenda includes greater protection of corporate intellectual property rights to charge high prices for medicines, removal of restrictions on levels of foreign investment, elimination of industry and procurement policies that favour local firms, reduction of government rights to regulate services, including the reduction or abolition of local content laws in audio-visual services, and challenges to food regulation and quarantine law where they are seen to harm US agribusiness interests. It also included an investor state complaints process which enables corporations to sue governments if their investments are harmed by government policy or regulation. (Ranald, 2004).

This agenda also raises questions about democracy, because the US targeted social policies which are normally decided through the democratic process by national or state governments, not through trade negotiations conducted behind closed doors. A

letter from the US Trade Representative to the US Congress, and publications of the US pharmaceutical industry, alerted community organizations that price controls on medicines through the Pharmaceutical Benefits Scheme, Australian content laws for audio-visual services, quarantine laws, labelling of genetically engineered food and the Foreign Investment Review Board were all seen by the US as barriers to trade (Zoellick, 2002, Pharmaceutical Research and Manufacturers of America, 2003).

Community groups feared that the unequal bargaining power between the US and Australian governments would result in changes to these policies. Public health groups, churches, unions, pensioner, environment and other community organisations linked through the Australian Fair Trade and Investment Network (AFTINET) and other community networks campaigned against all of these aspects of the agreement (Ranald and Southalan, 2003, 2004). The investor-state complaints process was a major target of community campaigning, on the grounds that it would be a dangerous weakening of governments' ability to regulate for social and environmental goals. This received widespread media coverage (ABC Radio National 2003, Henry, 2003, Ranald and Southalan, 2003).

AUSFTA prompted the biggest critical public debate ever held in Australia about a trade agreement. There were hundreds of community meetings, public rallies in many cities, many articles in community, union, local and specialised media, over 700 submissions to parliamentary inquiries in 2004 and thousands of letters, postcards and emails sent to politicians. Two books critical of the agreement were subsequently published (Capling, 2004, Weiss, Thurbon and Matthews, 2004). This assertion of community interests influenced public opinion.

The claimed economic benefits of the agreement were contested fiercely by mainstream economists, ranging from Australian National University Professor Ross Garnaut and other prominent academics, to economic writers in *Sydney Morning Herald*, *The Age* and *The Australian*. (Gittens, 2004, Colebatch 2004, Davidson 2004, Wood, 2004). There was widespread media coverage about the impact of AUSFTA on the price of medicines, including an episode of the prestigious ABC National *Four Corners* television program featuring health experts. (Australia Institute 2003, Drahos and Henry *et al*, 2004, ABC 2004). There was also much debate about the impact of

changes to Australian content rules for audio-visual media, with prominent actors and producers challenging the agreement at public events like the Logie television awards and the Australian Film Institute awards (Morello, 2004, Krein and Byrnes 2004).

Polls conducted by Hawker Britton showed a steady decline in support for the AUSFTA, from 65% before negotiations started early in 2003 to 35% in February 2004 when the deal was concluded. This lack of support was confirmed by a Lowy Institute poll in February 2005 showing only 34% supported the agreement (Hawker Britton, 2004, Cook, 2005: 20).

The public debate and decline in support prompted the Opposition Australian Labor Party (ALP), and the Democrats and Greens to adopt policies critical of the AUSFTA by the end of 2003. These parties had a majority in the Senate and so had the possibility of blocking the implementing legislation presented in parliament after the ratification of the Agreement. The Leader of the Opposition announced in February 2004 that the ALP would refer AUSFTA to a Senate Committee and would not support the AUSFTA implementing legislation if the agreement did not meet specific national interest criteria. This was the first time the parliamentary ALP had decided that it might oppose a particular trade agreement (Latham, 2004a). The Senate Committee in fact found that the AUSFTA did not meet many of the criteria (Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, 2004). After a fierce internal debate, the ALP parliamentary caucus finally decided to endorse the AUSFTA implementing legislation with some amendments. Community concerns about the cost of medicines and Australian media content rules were reflected in the amendments, which sought to protect current levels of Australian content in film and television and to prevent pharmaceutical companies from making spurious legal claims to extend patents (Latham, 2004b). This was also the first time the ALP had amended the implementing legislation for any trade agreement.

I will now discuss the outcomes and implementation of the agreement. Briefly, the US negotiators did not achieve all that they wanted, and it can be argued that the exposure of the negotiating process to public debate and lobbying by community interest groups prevented the government from making further concessions. The impact of

oppositional campaigns can be seen in the lack of an investor-state complaints process, the limited changes to the PBS, and the regulation of genetically engineered food.

Although pharmaceutical lobby groups and US negotiators clearly identified the price control mechanism of the PBS as a target from the outset of the negotiations, they were not entirely successful. In the US, the wholesale prices of common prescription medicines were three to ten times the prices paid in Australia (The Australia Institute, 2003). Under the PBS, the Australian government controls the wholesale prices of medicines by using a panel of experts on the Pharmaceutical Benefits Advisory Committee to compare the price and effectiveness of new medicines with the prices of comparable but cheaper generic medicines whose patents have expired. This is known as reference pricing. The listed medicines are then made available for sale at regulated subsidised retail prices. The difference between the wholesale price and the subsidised price is the cost of the PBS to taxpayers.

Pharmaceutical companies argued that Australia's system prevented them from enjoying the full benefits of their intellectual property rights by comparing the price of new drugs with cheaper generic drugs (Pharmaceutical Research and Manufacturers of America, 2003, p. 6).

The PBS reference pricing system remains in part. However AUSFTA resulted in changes that could undermine the effectiveness of the system over time and lead to higher prices.

The AUSFTA set up a joint Medicines Working Group based on the commercial principles that contribute to the high cost of medicines in the US. These principles give priority to the 'need to recognise the value of innovative pharmaceutical products' through strict intellectual property rights protection (AUSFTA Annex 2c). The principles effectively reduce the importance of the Australian public health goal of affordable access to medicines for all.

The inclusion of this working group in AUSFTA ensures that the US government can continue to influence future policy and challenge policy decisions on trade grounds.

US Senator Jon Kyl, a strong supporter of the US pharmaceutical industry, commented that the AUSFTA 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, 2004).

Following the signing of the AUSFTA, the Howard Government made specific changes to medicines policy that enable pharmaceutical companies to receive higher wholesale prices for some medicines.

The first example concerns a change made to the policy on prices for medicines whose patents had expired. Before the 2004 election, the Howard government announced that it would implement cost savings in the PBS through a mandatory cut of 12.5% in the price of a number of commonly prescribed PBS medicines on which patents were due to expire in the coming year. Similar price reductions for generics have occurred in a number of countries. This was estimated to reduce PBS costs by over one billion dollars over four years (Department of Health and Ageing, 2006:2).

Pharmaceutical companies strongly opposed this policy and the US government announced that it believed the policy could be inconsistent with the AUSFTA (Maher, 2004). After the election, the government responded by announcing that it would delay legislation of the election pledge and instead negotiate the policy with the pharmaceutical companies (Metherell, 2004).

Four pharmaceutical companies, Eli-Lilly, Janssen-Cilag, UCB Pharma and Lundbeck refused to charge the lower prices. The medicines affected were Topamax (anti-epileptic) Keppra, (anti-epileptic) Lexapro (antidepressant) and Alint (anti-cancer). Pfizer also sought and obtained an exemption for the drug Lipitor, used to treat heart disease. The government estimated that the exemption of Lipitor cost \$237 million over four years, and reduced the total savings from over \$1 billion to just under \$800 million (Department of Health and Ageing, 2006: 1-2).

In the first four cases, where the government and the company could not agree on the price, the government allowed a higher price. However, the government intended that

cost of this was not to be solely borne by the government, but was to be paid partly by consumers. A retail charge known as the “Special Patient Contribution” was to be paid by patients to make up the difference between the government’s preferred price and what the companies were willing to pay. Following protests from the Australian Medical Association that many patients could not afford the extra charge, the government agreed that, in cases where there was no alternative treatment, doctors could obtain special exemptions for patients from the charge (Mitchell, 2005). It is not yet clear how often doctors are seeking the exemption and how many patients are actually paying the extra charge.

However, it is clear that the concept of the Special Patient Contribution undermines the principle of universal affordable consumer prices under the PBS. It also contradicts guarantees given by government that the AUSFTA would not result in higher costs to consumers.

While the first change to the PBS concerned prices for medicines with expired patents, the second change concerns prices for new patented medicines. The government announced in February 2007 that it would develop different categories for different types of medicines to be listed under the PBS. These changes were legislated in 2007. The F1 category applies to single brand medicines that are judged to have unique health benefits and not to be interchangeable in their health effects with other medicines. These medicines are not subject to reference pricing and higher prices will be paid for them. The F2 category includes single brand medicines that are judged to be interchangeable in their health effects with other medicines, and generic medicines. These are subject to reference pricing to obtain the best value for money. The legislation also included mandatory price reductions as patents expired. The government claimed that savings from the large number of medicines coming off patent will offset higher prices for the medicines in F1, resulting in net savings to the PBS overall (Department of Health and Ageing, 2007).

These proposed changes to the PBS were discussed at the AUSFTA Medicines Working Party held in January 2006, well before the government’s public announcement about the changes. Documents distributed at the meeting obtained under Freedom of Information legislation include an editorial opinion article written

by a government Member of Parliament that outlined the F1/F2 changes as a desirable model (Laming, 2006).

These changes clearly open the way for the PBS to allow higher wholesale prices for some new medicines, which was a major goal for US pharmaceutical companies and the US government. The discussion of the changes at the AUSFTA Medicines Working Party again shows that this body is continuing to influence Australian medicines policy as predicted by key pharmaceutical industry supporters like Senator Kyle quoted above. The impacts of these changes on prices will be discussed in detail in later session.

The third example of impacts on health policy deals with the impact of AUSFTA's government procurement rules on the processing of blood products supplied to the health system in Australia. AUSFTA sought to change government policy on the supply and regulation of blood products. In Australia, blood is donated by individuals through a national voluntary scheme run by the Australian Red Cross and is processed into blood products by an Australian company, CSL. The scheme is regulated through the National Blood Agreement, a joint agreement between the Federal and State Governments, as the hospital system that uses most of the blood products is run by state governments. All blood and blood products are supplied free of charge to patients.

In 2001 the National Blood Authority Committee of Inquiry recommended that Australia's blood products continue to be processed by CSL, for both health and national security reasons, to ensure that there was continued national capacity to ensure timely and continuous supplies. This report followed a lengthy inquiry, including public submissions and hearings (National Blood Authority, 2001).

The government procurement chapter of AUSFTA exempted blood products from being opened up for competitive tendering by US firms. However, during the negotiations a side letter was added that required the Australian government to conduct a review and to recommend to state governments that the rules of the AUSFTA procurement chapter be applied to blood products. This would open up the

supply of blood products to tendering by US firms, directly contrary to the findings of the 2001 Report.

This side letter was the result of lobbying by Baxter Healthcare (the Australian subsidiary of US Baxter Health Corporation). Baxter's submission to the Joint Standing Committee on Treaties stated: 'Baxter referred its concern ...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 2004: 3).

The USFTA side letter required a review of Australia's blood processing arrangements in 2006, but also specified that the Federal 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 the government procurement chapter of AUSTFTA'. However, the wording of the Side Letter did not bind the States and Territories to agree with the Federal Government's recommendation.

The review was conducted in 2006. Health and community organizations, health academics, and the Australian Red Cross, made submissions to the review, urging retention of the current system, and there was a public media debate (Australian Red Cross, 2006, Bambrick et al, 2006). The Australian Health Ministers' Conference also made a public statement in April 2006 re-asserting the national policy principle of self-sufficiency in blood products." (Australian Health Ministers' Conference, 2006).

The review report recommended against tendering, concluding that the voluntary collection of blood in Australia and self sufficiency in blood products should remain key objectives of Australian policy. Tendering could involve substantial additional costs for transport and return of Australian blood plasma, and substantial safety compliance and risk management costs. It would also increase the lead time between the collection of blood plasma and its clinical use, and increase the risk of interruption to supply. (Flood *et al*, 2006, pp 6-8).

Despite these recommendations, Federal Health Minister Tony Abbott announced that the terms of AUSFTA obliged him to recommend the application of AUSFTA tendering rules and to open provision of blood products and services to competitive tendering by US firms. He then forwarded the Review to the States and Territories for consideration (Abbott, 2006).

A meeting in March 2007 of all State and Territory Health Ministers rejected the Federal Government recommendation for tendering. The Federal Health Minister then announced that, since there was no consensus for change, the current arrangements would continue without competitive tendering (Abbott, 2007).

The then Trade Minister Warren Truss appeared publicly to accept the right of state and territory governments to refuse to accept the Federal Government recommendation. He was quoted in the media as saying “We’ve met our commitment under the FTA. The commitment was to conduct a review, and we have asked the states, we have done everything we can do within our sovereign powers. We’re quite satisfied we’ve met the obligations. I’m not saying the US won’t continue to raise the issue with us” (Breusch and Sutherland, 2007).

The US Embassy did indeed criticise the findings of the review (Breusch and Sutherland, 2007). It remains to be seen whether the US will use the disputes process to argue that Australia has not met its AUSFTA obligations.

This issue is a clear example of the way in which trade agreements can undermine the democratic process of policy making. The Federal government was bound by AUSTFTA to conduct a review by health policy experts and was then bound to ignore its findings. Because of a prior Commonwealth-State Agreement, the state governments remained free to decide the issues on the basis of health policy as indicated in the review findings, and refused to accept tendering. The Federal Government then declared that it had met its AUSFTA obligations. However, it is still open the US government to use the dispute process to challenge the outcome.

The last example of AUSFTA influence on public policy is in the 2009 debate on public procurement.

Australia has not signed the WTO voluntary plurilateral agreement on government procurement. Apart from the CER agreement with New Zealand, which has a unique relationship with Australia, the only trade agreements that Australia has signed which include government procurement are the US-Australia Free Trade Agreement (AUSFTA), and most recently the Chile Australia Free Trade Agreement, which is based on and specifically refers to the AUSFTA procurement chapter.

The AUSFTA procurement chapter states that “each Party and its procuring entities shall accord unconditionally to the goods and services of the other Party and to the suppliers of the other party offering the goods or services of that Party, treatment no less favourable than the most favourable treatment the Party or the procuring entity accords to domestic goods, services and suppliers”. The chapter contains a very long list of exceptions for the US. Half of US state governments are excluded, as are many federal departments and specific products like steel. The Australian list of exceptions is much shorter, but includes small and medium enterprises with 200 employees or less, all Defence procurement, and specific exceptions for particular state and federal departments, and for products like motor vehicles.

The Rudd Government announced in the 2009 budget expenditure of \$42 billion on public infrastructure intended to address real economic and social needs and to create demand and employment in the local economy. But at the time the expenditure was announced, there was no government policy to ensure that, while tendering processes must be transparent and deliver value for money, tenderers should also address outcomes in terms of local employment. This meant that contracts for goods and services could use overseas suppliers with no positive impact on local employment.

Prior to the ALP conference, the ACTU lobbied the government for changes to its no preference policy in the light of the economic crisis and the specific policy objective of creating local employment through infrastructure expenditure.

The Trade Minister claimed that the Australian government could not give any preference to local suppliers because of Australia’s trade agreement obligations to treat foreign suppliers as if they were local suppliers. He also criticised a NSW

Government policy to give price preference to tenderers using NSW suppliers and argued against this being implemented at the federal level. (Crean, 2009 and McKenzie, 2009).

In the event, the unions negotiated directly with the Prime Minister to achieve a policy outcome for Federal Government procurement which has specific initiatives to improve local content but which the government claims is consistent with its AUSFTA treaty obligations. This policy states that government agencies are not simply obliged to choose lowest cost suppliers on a short term basis, but can also take into account the “long term cost to the taxpayer... when that choice would have detrimental social or environmental effects” (Australian Government, 2009: 2)

The policy also obliges tenderers to demonstrate how they will consider the use of domestic suppliers in fulfilling the contract, and provides information and coordination resources to assist both government agencies and local tenderers to maximize local content. The policy also obliges tenderers to demonstrate employment practices consistent with the new Fair Work Australia Act other government law and policy (Australian Government, 2009 6-8).

It remains to be seen whether the US government will use the AUSFTA to challenge the NSW government policy or the Federal Government policy. However the point remains that the AUSFTA had a significant influence on the policy debate.

I conclude that the loss of credibility of neoliberal policies, combined with these examples of the impact of the AUSFTA on public policy debate and implementation since the agreement came into force in 2005, show that there are grounds for ongoing public skepticism about the AUSFTA. Although the US negotiators did not achieve all of their agenda precisely because of the strong public opposition, implementation of the agreement has resulted in changes to the PBS, has had impacts on the debate about policy on blood products, and most recently has influenced public procurement policies. This shows that there is a basis for ongoing public concern about the agreement, especially in the current context when most governments are facing the damaging realities of market failure and the need for increased social regulation of markets.

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