

Ten Devils in the Detail



Summary of the text of the Australia US Free Trade Agreement (USFTA)

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www.aftinet.org.au

A bad deal that can still be stopped

The USFTA was supposed to remove trade barriers between the US and Australia and lead to economic growth. Australian farmers were supposed to gain from removal of US agricultural tariffs (taxes on imports) and quotas (limits on amounts). But community organisations became concerned when US negotiators identified regulation like price controls on medicines and Australian content rules in film and television as barriers to trade. The 800 page text of the agreement with side letters is at www.dfat.gov.au.

The text justifies our concerns, as it is completely lopsided. The US sugar market is excluded and beef and dairy tariff reductions are phased in over 18 years. The National Farmers' Federation has declared 'This is not a free trade agreement' (media release, 9 February 2004).

This summary of the text shows that, despite assurances, the agreement 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 and enables many policies to be challenged by the US government. It treats social regulation of essential services like tariffs, 'bound' or frozen at current levels and subject to challenge if increased. In short, it weakens governments' right to regulate and locks in moves towards US-style policies without democratic debate or decision.

The USFTA can still be debated and rejected. A Senate Select Committee and the Joint Standing Committee on Treaties will hold public inquiries over the next three months and report in June. Although Parliament cannot vote on the whole agreement, it will vote on some legislation required for implementation, which can be blocked in the Senate. This summary helps you to take part in the public debate and tell Senators and members of parliament to reject the agreement if you believe it is not in the public interest.



Economic benefits unclear

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% after 10 years. Other economic studies by ACIL consultants and the Productivity Commission predicted losses (Australian APEC Study Centre, *An Australia-US Free Trade Agreement: Issues and implications*, Canberra, 2001, and ACIL Consultants, *A Bridge too Far?* Canberra www.rirdc.gov.au/reports/GLC/ACIL-ABridgeTooFar.pdf).

The government has admitted that the CIE study is no longer valid, because the gains in agriculture are much less than predicted. The government said it would conduct a competitive tender process for another study, then announced a week later that CIE consultants had again been selected. After noting reports that the Australian negotiators had advised the government to reject the USFTA, 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.'



USFTA 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 declare that a law should 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 uses trade law to challenge social regulation judged to be inconsistent with the agreement, like the pricing of medicines or the regulation of essential services. It is a clear restriction on the democratic right of governments to regulate in the public interest.



Higher costs for medicines

a) Review of Decisions of the Pharmaceutical Benefits Scheme means higher costs

The USFTA changes the PBS process to allow drug companies to seek reviews of PBS decisions.



Drug companies can charge high prices for new medicines because they have the exclusive patent rights to produce them for 20 years. In the US, common prescription medicines cost three to ten times the price paid in Australia, and many people cannot afford them. Australian prices are affordable because the government uses the PBS to buy medicines at low wholesale prices by comparing the price and effectiveness of new medicines with the prices of similar generic medicines whose patents have expired. The government then makes them available at subsidised prices, \$20-30 for wage earners and less for pensioners. The difference between the wholesale price and the subsidised price is the cost of the PBS to taxpayers. This cost is very low per person compared with the US and other countries (The Australia Institute (2003) 'Trading in our Health System' Canberra www.tai.org.au).

The Pharmaceutical Benefits Advisory Committee only lists new drugs for subsidy if they offer real health benefits, **and** offer value for money. US drug companies say this is unfair, and that they want higher wholesale prices.

The USFTA gives 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 (USFTA 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.



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)

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).

b) Joint US-Australia Medicines Working Group based on commercial principles

The USFTA sets 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. This 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.

c) 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). 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.



Extension of copyright means higher costs for libraries and education bodies

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. 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).



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:

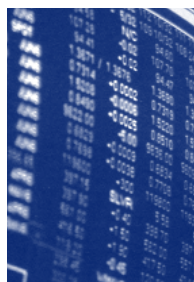
Annex I – 'Stand-still': I is a list of areas where laws that do not conform to the USFTA will be allowed to remain. However, these laws are 'bound' at current levels, like tariffs, and cannot be changed, except to make them less regulatory. New regulation can be challenged by the US government on the 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. 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.'



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).



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, 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. 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 review powers.

No Investor-state Complaints now but could develop later

The government has claimed that there is no process which allows corporations to challenge laws or sue governments in the USFTA. The US wanted this process, based on the North American Free Trade Agreement model 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' include 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.

USFTA rules do not apply to subsidies or grants (Article 10.1). This protects 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).

Even blood services are treated as traded goods. A 2001 review by Sir Ninian Steven said that blood products should be supplied by Australian company CSL for health and national security reasons (www.nba.gov.au/pdf/report.pdf). But 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). 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 policies of state and local governments are listed as reservations but are 'bound' at current levels, and cannot be made more regulatory.

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'.

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

Water services at risk



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 will be kept at 'standstill', so if they are changed the US could challenge them. Public water services may not be protected because many are delivered on a commercial basis.

US backs Telstra Privatisation

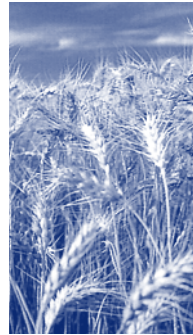
A side letter outlines the government's policy to sell the rest of Telstra. The US insisted on this letter. This issue is still being debated by the Australian

parliament as a matter of public policy, and should not be part of a trade agreement.



US influence on quarantine, food labelling

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



(a) 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).

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.

(b) 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.

(c) 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).



Restrictions on Australian content rules in new media

The government claims that 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, 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.



Job losses from tariff cuts and changes to government purchasing rules

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). Some state governments also have purchasing schemes which require foreign contractors to give preference to local products or to form links with local firms to support local employment. These will not be permitted under the USFTA. State governments are still considering whether they will agree to the government procurement chapter of the agreement. Regional employment studies are needed to assess these impacts.



What we can do about it

The Australian Fair Trade and Investment Network is a national network of 85 organisations supporting fair regulation of trade consistent with human rights and the environment. Our community campaign has resulted in public inquiries by the Senate Select Committee on the Australia US free Trade Agreement and the Joint Standing Committee on Treaties to examine the USFTA which will report in June. The ALP, Democrats and Greens have said they will vote against the implementing legislation in the Senate in June if it is not in the public interest. We must voice our concerns so they will keep this commitment:

- **Distribute this summary and discuss it with friends, family and workmates**
- **Join AFTINET through our web site www.aftinet.org.au for regular campaign updates**
- **See our website for resolutions and letters you can send to politicians**
- **Use this summary and the information on our web site to make submissions to the Senate Inquiry and the Joint standing Committee on Treaties (see www.aph.gov.au for details)**
- **Attend the public meetings, public inquiry hearings and rallies being organised in your area**

Researched and written by Dr Patricia Ranald and Louise Southalan, Public Interest Advocacy Centre.
Thanks to Uniting Care NSW.ACT for funding support.

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