ACTU Submission To The Joint Standing Committee On Treaties Re. The Singapore - Australia Free Trade Agreement

General Remarks

1 The Australian Council of Trade Unions welcomes the opportunity to present its views on the Singapore - Australia Free Trade Agreement to the Committee. Our first recommendation is that no enabling legislation, such as amendments to tariff schedules, should be introduced before the tabling of the Committee's report on SAFTA.

2 It is difficult to assess the economic impact on Australia of SAFTA. A low rate of tariff applies already to the vast majority of Singaporean imports into Australia and only beer and stout Australian exports to Singapore attract duty. The balance between trade diversion and creation effects is also unclear. What is known is, firstly, the revenue loss associated with the removal of tariffs on imports from Singapore and, secondly, that the Department of Foreign Affairs and Trade expects gains to Australia from trade in services.

3 However, the anticipated gains are difficult to quantify, as has been conceded by DFAT negotiators and by Access Economics. Further, Singapore has a long list of services Reservations under Annex 4- I(B) and 4- II(B) of the Agreement. That is the first qualification to the general picture of Singapore gains in goods, Australia in services. The second qualification is that DFAT in its National Interest Analysis and Regulation Impact Statement has not made clear the actual gains that have occurred as a result of the SAFTA negotiations, as distinct from the binding of liberalisation of the Singapore services market already achieved before SAFTA. According to Australia's Chief Negotiator, Mr Deady, in testimony to the Committee recorded in the uncorrected Hansard proof of the hearing on 24 March this year, many of Singapore's services commitments fall into the latter category:

" But then it comes down to the specific commitments that Singapore has made in the Singapore-Australia FTA compared with the commitments it made in Geneva. Those obligations go well beyond the commitments Singapore made as part of the Uruguay Round commitments on services. A lot of that reflects the liberalisation that has occurred in the Singapore market since the end of the Uruguay Round in 1993" (Ref TR 6)

The ACTU recommends that the Committee seek advice from DFAT and report on the services liberalisation actually achieved as a result of the SAFTA negotiations.

4 The remainder of this submission will focus on particular provisions of SAFTA. The ACTU notes that the uncorrected Hansard proof of the 24 March hearing records at TR 5 Mr Deady's assessment of SAFTA as a " very good template for further bilateral free trade agreements that may be negotiated between Australia and other countries in the Asia-Pacific region". We disagree with that assessment.

5 The ACTU's recommendations to the Committee outlined in this submission may be expressed generally with reference to bilateral agreements, and at times also multilateral agreements. Our intention is to suggest that the Committee report on

desirable amendments to SAFTA, to other agreements to which Australia is a party, and on a new framework for agreements that are currently under negotiation, or may be proposed in future.

Rules of Origin

6 Our first concern in this regard pertains to the Rules of Origin contained in the Agreement. SAFTA goes beyond the CER provisions by allowing Rules of Origin that specify 30%, rather than 50 %, Singaporean content for 100 specified product items and for goods currently subject to tariff concession orders. We do not believe this precedent should have been set for tariff free imports of goods from a country with Observer status at the OECD. The ACTU notes in this context that the goods of many Singaporean companies are manufactured in part in Indonesia, and other offshore processing zones, where labour is cheap and adherence to labour standards questionable.

7 It is argued by DFAT that the offshore processing cannot be taken into account in determining Singaporean content. This observation pertains to the allowable cost of manufacture that is calculated as a proportion of the total cost of manufacture. As set out in Article 9, Chapter 3 of SAFTA, overseas processing is taken into account with respect to the total cost of manufacture. The danger here is that the 30 % or even 50% Singaporean content requirement can be met even though much of the manufacturing activity occurs offshore. This danger arises because of the difference in respective market values between the overheads, transport, labour, and material costs for the processing that occurs in Singapore, and the cost of processing in Indonesia. The ACTU recommends that the Committee find that the 50% content rule should be at least maintained in bilateral agreements to which Australia is a party, subject to a review of its adequacy in the context of significant use of offshore processing in cheap labour countries.

Negative Lists

8 The Services and Investment Chapters are based on a negative list approach. According to Mr Deady's testimony, this was at Australia's instigation; indeed, Singapore took some time to agree to it. The advantage claimed for this approach is that it promotes greater liberalisation than the positive list approach embodied, apparently despite Australia's preferences at the time, in the General Agreement on Trade in Services. In the ACTU's view, the negative list approach should not be supported.

9 A negative list approach has two significant drawbacks. First, it requires an extraordinary level of assessment and foresight with respect to existing services on the part of the government and DFAT negotiators at the time of the negotiation of the agreement, because there is effectively only one chance for the Commonwealth to get the list of reservations right. Second, all future yet to be developed services are automatically covered by the liberalisation disciplines of a negative list agreement. Mr Deady has conceded this point in discussions with the ACTU and it also evident from the definition of services in SAFTA. Article 1 (n) of Chapter 7 defines services as " all services including new and variant services in any sector except services in the exercise of governmental authority".

10 The ACTU does not believe future governments should be circumscribed from using market access restrictions or preference for domestic providers to regulate new services. Similarly, the ability of future governments to set a specific limit on foreign investment for a yet to exist sector or firm should not be impaired. The ACTU recommends that the Committee find against the negative list approach for bilateral or multilateral free trade agreements.

Services

11 The Services Chapter of SAFTA reproduces the GATS exemption of services in the exercise of governmental authority. But it also reproduces the problematic definition in Article 1.3 of GATS of such services as a service supplied neither on a commercial basis nor in competition with one or more service supplier. Few public sector service suppliers in Australia appear to meet that definition.

12 The problem is that there are different interpretations of 'on a commercial basis ' and 'in competition with one or more service suppliers'. Some papers from the WTO Secretariat to the Council for Trade in Services acknowledge that there is such a problem. Paragraph 53 in the 6 July 1998 Background Note by the WTO Secretariat on Environmental Services, which considers the effect of Article 1.3, contains the following observation

"A key issue is whether sales are made on a commercial basis. To begin with, it is not completely clear what the term 'commercial basis' means"

13 Critics of GATS point to the range of services, including education and health, where there are public and private providers offering the same service, and conclude from this that even if the public providers were judged to be supplying on a non-commercial basis, they are still competing with other service suppliers. Some supporters of GATS question this on the grounds that though the same type of service may be supplied, the purpose of supply differs. For example, the public suppliers may have certain universal access obligations. This argument, however, can be dangerously close to saying that unless the public providers operate on a commercial basis, they are not in competition with private providers of the same service that do operate on such a basis. The wording of Article 1 3 (c) does not conflate the two, but refers to commercial basis and in competition with other suppliers as distinct cases.

14 The WTO has not adopted an Interpretative Understanding to resolve these matters. It should be noted that in 1994 the Australian government did not rely upon the optimistic interpretation of Article I when it included education services in its schedule of GATS commitments. Instead it limited the effect of the education services commitments by the use of a qualifying description of two of the sub-sectors for which the commitments were given as private higher education and private secondary education.

15 The ACTU therefore recommends that the Committee should conclude that the GATS Article 1.3 definition should be omitted from bilateral FTAs. It would be preferable to have no definition, or one that defines a service in the exercise of

governmental authority as one that is supplied by a government or by a public sector agency.

16 It should be noted that the limitation on Australia's GATS commitments with respect to school-level and higher education services to private education services has not been fully reproduced in our Reservations under SAFTA. Instead our Reservations are for Market Access and National Treatment for primary education, for National Treatment by Mode 3 (commercial presence) for education services other than primary education, and for Market Access and National Treatment generally for public education and public training " to the extent that they are social services established for a public purpose." This less comprehensive Reservation introduces an element of ambiguity as to which activities of public education and training insitutions are covered by the Reservation.

17 This problem is not confined to public education and training. The test cited above also applies to income security or insurance, social security or insurance, social welfare, public utilities, public transport, and child care. This SAFTA Reservation appears to have broadened considerably the commitments given by Australia under GATS in 1994. For example, GATS commitments were not given for urban bus services, for passenger rail services, or for health services other than particular services such as dentistry (which is not classified as a health service by the WTO), chiropody, and podiatry. In the last two cases, it was made clear that such services where delivered in hospitals were excluded. The GATS commitments also contain no equivalent to the broad SAFTA reference to public utilities.

18 The comments and recommendation earlier in this submission re Article 1.3 of GATS about avoiding problematic definitions apply equally to this 'social services for a public purpose' test. The ACTU also recommends that the Committee obtain and ensure the public release of DFAT advice as to what activities of the service areas in question are and are not covered by this Reservation.

19 Notwithstanding the testimony of Mr Deady at TR 2 of the uncorrected Proof of the 24 March hearing that there was " a high level of consultation right through the process with Australian industry and other stakeholders" the ACTU was not consulted on the broadening of our GATS commitments in the SAFTA context. To our knowledge, nor were the unions in service areas affected by the ' social service for a public purpose' test. There was one consultation with the ACTU about SAFTA, and that was at the start of the negotiations. The ACTU requests that the Committee recommend that a regular schedule of consultations between the Office of Trade Negotiations and the ACTU be established over the negotiations for FTAs with the US and Thailand and any future bilateral FTAs.

20 In the 1994 GATS schedule of commitments Australia made no commitments for audiovisual services and also qualified the commitments given under Advertising Services by expressly excluding " production or broadcast/ screening of advertisements for radio, television, or cinema". There is a SAFTA Reservation for broadcasting and audiovisual services but no SAFTA equivalent of the qualification for advertising services. The risk here is that the SAFTA Reservation is not as comprehensive as the GATS one, particularly because entries under Sector and Sub-Sector are likely to be interpreted on the basis of the UN Provisional Central Product

Classification underlying the WTO agreements. The ACTU recommends that detailed advice from DFAT be sought and released about this matter.

Competitive Neutrality

21 SAFTA specifies in Article 4, Competitive Neutrality, of Chapter 12, Competition Policy, that reasonable measures be taken to ensure that governments provide no competitive advantage to government –owned businesses in their business activities. The ACTU recommends that advice be sought and released form DFAT as to whether this extends to the lower borrowing costs available to government-owned businesses.

Investment Issues

22 SAFTA contains a specific dispute resolution procedure for disputes under the Investments Chapter. The procedures allow for investors to initiate disputes before international dispute resolution bodies, whereas for other disputes under SAFTA only the national governments of the two parties are able to activate dispute resolution. The ACTU recommends that the Investments procedure of bilateral FTAs should be on a party to party basis.

23 Disputes can be taken by investors not only over nationalisation or expropriation but also, under Article 9 1 of the Investment Chapter, over " measures having effect equivalent to nationalisation or expropriation" unless such a measure was taken on a non-discriminatory basis, for a public purpose, in accordance with due process of law, and compensation is paid in accordance with Article 9. Such a dispute is not confined to the formal or effective expropriation of a subsidiary in Australia of a Singaporean company. Disputes may be over " the investments of investors of the other Party". Investments are defined in Article 1 (c) of Chapter 8 as " every kind of asset, owned or controlled, directly or indirectly, by an investor, including but not limited to" a list of examples. The list includes movable and immovable property, and property rights such as mortgages, liens, or pledges; stocks, shares, bonds, and debentures; claims to money and contractual performance; intellectual property rights and goodwill; business concessions or similar rights, including those pertaining to searching for, cultivating, extracting or exploiting natural resources. Only actions pertaining to intellectual property rights taken in accordance with the WTO TRIPS agreement or Chapter 13 of SAFTA are outside the scope of Article 9.

24 The issue here is the ability of corporations to demand compensation for the impact of regulatory changes on products, particular activities, licenses, the valuation of goodwill etc. There have been a number of such cases pursuant to the Investment provisions of other bilateral and plurilateral agreements. Even measures taken to protect human, animal, or plant life or health are not beyond the scope of disputation. While measures for these purposes are listed under Article 19,General Exceptions, of the Investment Chapter, such measures must be "necessary", which may not be the same as necessary in the view of the government adopting the measure. WTO dispute bodies have offered a different interpretation of " necessary".

25 The 11 December 2000 ruling of the WTO Appellate Body in Korea-Measures Affecting Imports of Fresh Chilled and Frozen Beef, is noteworthy. At paragraphs 164 and 165, the Appellate Body, in considering a 'necessity' reference in the General Agreement on Tariffs and Trade, observed as follows:

"164 There are other aspects of the enforcement measure to be considered in evaluating that measure as 'necessary'. One is the extent to which the measure contributes to the realisation of the end pursued, the securing of compliance to the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be 'necessary'. Another aspect is the extent to which the compliance measure produces restrictive effects on imported goods. A measure with a relatively slight impact upon imported goods might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects.

165 In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX (d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."

26 The ACTU submits that the combination of wide-ranging definitions of investments, the notion of measures having an effect equivalent to expropriation, the use of " necessary" in connection with exceptions to protect human and other life or health, and investor-activated dispute resolution is not a suitable basis for investment provisions of bilateral or multilateral agreements.

State And Territory Reservations

27 SAFTA allows for a 12 month period for consideration of additional Reservations in respect of the States and Territories of Australia and this is welcome provided there is extensive information and consultation with State and Territory Governments over the implications of SAFTA's provisions. The ACTU believes that clarification is needed as to whether additional Reservations can be scheduled in a way that, in areas that encompass State responsibilities for which the Commonwealth has already scheduled a partial Reservation, would broaden the effect of that Reservation. Earlier in this submission we have mentioned partial Reservations in areas such as education, health, public utilities, and public transport. Secondly, we seek advice as to whether the States and Territories can list a Reservation under Annex 4-II if the relevant sector or sub-sector is covered by a Reservation listed by the Commonwealth, but only under Annex 4-I. We note that at page 15 of the Regulation Impact Statement it is stated that the rights of States and Territories to list Reservations of the broader kind allowed under Annex 4-II is somewhat circumscribed because Singapore expects, and WTO rules require, that "a relatively high percentage of trade –restrictive measures would be bound at existing levels".

Labour And Environmental Standards

28 SAFTA contains no clauses regarding labour and environment standards, appropriate levels of transparency of dispute resolution, and third party rights to intervene in disputes. The ACTU understands that the Singapore-US FTA does have some provisions in these areas, albeit not necessarily of the standard that the ACTU believes is appropriate. We recommend that the Committee review the Singapore –US FTA with a view to raising the standard for bilateral FTAs to which Australia is a party.