9

Technical Barriers to Trade

Introduction

9.1 Chapter 8 of the Agreement builds on the existing rights and regulations under the WTO Agreement on Technical Barriers to Trade (TBT). The Chapter applies to 'all standards, technical regulations, and conformity assessment procedures of the central government that may, directly or indirectly, affect trade in any product between the parties.'[1]

9.2 The Chapter establishes a mechanism for the Parties to address issues relating to the development, adoption, application or enforcement of standards, technical regulations or conformity assessment procedures.[2] DFAT has stated that

> a better understanding of respective technical regulations and standards should lead to reduced production costs for exports of food and manufacturers.[3]

9.3 The Committee heard from several witnesses regarding the TBT Chapter, notably the representatives from the National Association of

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1 AUSFTA, Article 8.1.

2 DFAT Fact Sheet 18 Technical Regulations and Standards, http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/18_tech_regs_standards.html viewed on 2 June 2004.

3 DFAT Fact Sheet 18 Technical Regulations and Standards, http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/18_tech_regs_standards.html viewed on 2 June 2004.

Testing Authorities (NATA), the Winemaker's Federation of Australia, Holden Australia and the Western Australian Government. Witnesses at the public hearings did not challenge the Chapter, although concerns were raised over the possible implications of harmonisation of standards for the current Australian system. A number of individuals and community groups made submissions to the Committee in regard to Chapter 8.

9.4 A submission to the Committee from Holden Australia summarised the provisions of Chapter 8.

> The intent of the text is that positive consideration be given to regulations applying in either country but that each country may apply its local regulations where it considers them to be more appropriate. Both countries have agreed to facilitate the acceptance of each other's conformity assessment procedures (Article 8.6). Both Australia and the US have affirmed their existing rights and obligations to each other under the WTO Technical Barriers to Trade (TBT) Agreement (Article 8.2) and have agreed to use, to the maximum extent possible, international standards (Article 8.4). In addition, both parties have agreed to establish a mechanism to address issues raised by either party relating to the development, adoption, application or enforcement of standards, technical regulations or conformity assessment procedures (Article 8.9).[4]

9.5 Chapter 8 does not apply to 'technical specifications prepared by government bodies for the production or consumption requirements of such bodies'.[5] Sanitary and phytosanitary measures under Annex A of the SPS Agreement do not fall within the ambit of Chapter 8.[6]

9.6 Among the measures outlined below, the Federal Government must provide information to State and Territory Governments and relevant bodies in order to encourage them to adhere to obligations under Chapter 8.[7]

4 Holden, *Submission 148*, p. 8.

5 AUSFTA, Article 8.1(a).

6 AUSFTA, Article 8.1(b).

7 AUSFTA, Article 8.3.

Concerns about the US system and implications for Australian system

9.7 Several parties have raised concerns about the nature of the US regime and the implications of this for Australian testing authorities and exporters.

9.8 In Australia, the Commonwealth and State and Territory Governments coordinate on technical regulations for food and goods. In contrast, the US has numerous government and non-government standard-setting bodies operating at both the federal and sub-federal levels.[8] DFAT has acknowledged the contrast between the Parties' standards regimes.

> The United States has a very complicated standards regime. Certainly Australia has and Australia presents a much more uniform market such that a saleable good in one state is a saleable good in another state by virtue of the mutual recognition arrangements that are in place. The United States market is much more complicated because they have standards and technical regulations. Standards are normally voluntary but technical regulations that need to be met are mandatory—and they operate quite often at the federal and the subfederal level; sometimes they even go down to the city and the county level. Then there are those that are developed by private bodies as well as government bodies. So it is a very complex market to work in.[9]

9.9 The Committee heard evidence from NATA, outlining its support for the current Australian system. NATA stated that it wished to draw to the Committee's attention the fact that the regimes are not equivalent, and that the Australian accreditation system for conformity assessment is well-recognised, as well as the oldest and most extensive in the world.

> Our accreditation covers a larger number of fields and areas than any other in the world, and we believe we have something rather strong and robust which, through what is being proposed—unless some of these points of detail can be clarified—could well be undermined, making it rather more

8 DFAT Fact Sheet 18 Technical Regulations and Standards, http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/18_tech_regs_standards.html viewed on 2 June 2004.

9 Mr Remo Moretta, *Committee Briefing*, 2 April 2004, p. 73.

> difficult for good test results to be recognised and accepted and easier for poor ones to be accepted instead.[10]

9.10 The Committee was interested to hear evidence of NATA's opinion on the US regime. NATA advised the Committee that the standards framework in the US is

> less structured and there is less acceptance in the entire country that accreditation is the best option for determining competence in laboratories … There are a very large number of accreditation bodies in the United States … However, only three of them actually have come through the International Laboratory Accreditation Cooperation MRA process. Many, many more are being formed as we speak—often very specifically related to sectors …Often they are not related to the international standard for laboratories, which is ISO 17025 … It is not necessarily going to be in Australia's interests to not query these points with the United States, because we will end up with a lower standard of testing coming into this country.[11]

9.11 The Committee notes the concerns of Uniting Care in relation to the threat of the Agreement undermining current Australian standards practice, including that the Chapter 'does not acknowledge that there are different values underpinning policy differences'.[12]

9.12 Whilst acknowledging these concerns, the Committee is satisfied with statements from DFAT that harmonising or accepting technical standards and regulations is in the interests of Australian exporters

> We have pursued with the United States an agreement that positive consideration will be given by both parties to regarding each other's technical regulations as equivalent if they meet the same objectives even though they are different. That was the most favourable way to proceed. We also pursued the concept of equivalence with respect to conformity assessment procedures, because a lot of our manufacturers were complaining that once they had a product tested for this market it was not entering into the US market unless it was tested all over again, and these duplicative testing procedures can inflate the costs associated

10 Ms Regina Robertson, *Transcript of Evidence*, 19 April 2004, p. 91.

11 Ms Regina Robertson, *Transcript of Evidence*, 19 April 2004, p. 92.

12 Uniting Care (NSW / ACT), *Submission 169*, p. 3.

> with getting product to market. So again we pursued with the United States the concept of regarding as equivalent conformity assessment procedures and avoiding those duplicative tests [13]

and

> it is fair to say that the major problems in market access for Australian industry relate to standards, technical regulations and conformity assessment procedures and the requirement to meet all those in a very complex market like the United States.[14]

9.13 Concerns were raised by witnesses and in submissions that the adoption of the provisions of Chapter 8 may require change to Australia's current procedures. However the Committee notes that, according to the NIA, no legislative or regulatory change is required to implement the Chapter, and is thus satisfied that there will be no formal change to Australia's current practice.[15] The Committee is satisfied with DFAT's statement that the Agreement facilitates a recognition, rather than adoption, of US procedures.[16]

Cooperation between the Parties

Recognition and acceptance of assessment procedures

9.14 Articles 8.5 and 8.6 of the Agreement encourage the Parties to accept each other's assessment procedures for technical regulations. There has been some concern over how these provisions will operate in practice and whether they will require Australia to change its current system. There has also been significant support for the provisions, particularly from industries which will benefit from a mechanism to facilitate recognition of standards and regulations.

9.15 The Committee was interested to hear evidence from DFAT regarding the way in which the Agreement will assist Australian exporters experiencing difficulties in market access, namely the ability of each Party to draw market access problems to each other's attention, 'and

13 Mr Remo Moretta, *Committee Briefing*, 2 April 2004, pp. 73-74.

14 Mr Remo Moretta, *Committee Briefing*, 2 April 2004, p. 72.

15 NIA, Annex 8.

16 Mr Stephen Deady, *Committee Briefing*, 2 April 2004, p. 30.

to have those followed through hopefully with a viable solution enabling market access to go ahead as a result.'[17]

9.16 However, Dr Patricia Ranald, representing the Australian Fair Trade and Investment Network (AFTINET), asserted that pressure would be placed on Australia to adopt US standards under the provisions of Chapter 8.[18] This was a view raised by other groups who presented issues in a similar vein to AFTINET.

9.17 The Committee was assured by DFAT the chapter would only facilitate recognition, rather than adoption, of US standards.

> We do have in the standards and technical barriers to trade outcomes a process established under the agreement to encourage that where there are these sorts of barriers, where it can be easier to facilitate trade and where we can streamline mutually recognised standards—not adopt US standards but recognise US standards—if they do meet ours and vice versa. We certainly see this as very much more an offensive interest of ours in the United States. It is much simpler really. Our standards-setting bodies are much more transparent and there are not nearly as many as there are in the United States, so we do see that as a very substantial outcome to the agreement. It is one that does and will and can only evolve over time.[19]

Article 8.5: Technical Regulations

9.18 The provisions of Article 8.5 promote the removal of non-tariff barriers to trade by recognising that although the Parties may have different technical regulations, they may, in practice, achieve the same result. [20]

9.19 Article 8.5.1 establishes that the US and Australia are obliged to 'give positive consideration to accepting as equivalent technical regulations of the other Party', even where the regulations of the other Party differ from its own, provided that the regulations 'adequately fulfil the objectives of its regulations.'[21] Article 8.5.2 states that where a Party does not accept the regulation of the other Party as equivalent

17 Mr Remo Moretta, *Committee Briefing*, 2 April 2004, p. 74.

18 Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 32.

19 Mr Stephen Deady, *Committee Briefing*, 2 April 2004, p. 30.

20 DFAT, *Guide to the Agreement*, p. 39.

21 AUSFTA, Article 8.5.1.

to its own, it must, at the request of the other Party, explain its reasons for not doing so. Further consideration of the matter may take place through the establishment of an *ad hoc* working group under Article 8.9.3, if the Parties both agree to this occurring.[22]

9.20 Article 8.5.3 provides that the dispute settlement provisions of the Agreement do not apply to matters arising under Article 8.5.[23]

9.21 The Western Australian Government supports mechanisms under Article 8.5.1 which

> address the development, adoption, application or enforcement of standards, technical regulations or conformity of standards, technical regulations or conformity assessment procedures.[24]

9.22 However, it was noted that 'this process does not deliver immediate gains and there is no means to assess the rate of progress'.[25]

9.23 NATA raised several concerns regarding Article 8.5 in its submission to the Committee.

> We would prefer to see some specificity on the means for being satisfied that technical regulations adequately 'fulfil the objectives of their own regulations'. Are there objective criteria to be applied, and is the objective to have equivalent outcomes? Will confidence enhancing practices be involved, such as independent assessment of the technical competence of bodies determining compliance with technical regulations, through processes such as accreditation?
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> How will disputes or differences be resolved without a settlement process? Could not the adhoc group referred to in 8.5.2 be one such mechanism?[26]

9.24 The Committee notes a submission received from Uniting Care which also raises concerns with Article 8.5

> given the differences in US and Australian economic power, interests and values. There are a number of areas where Australians want something different from what is acceptable in the USA. The question is how will Australia ensure that

22 AUSFTA, Article 8.5.2.
23 AUSFTA, Article 8.5.3.
24 WA Government, *Submission 128*, p. 4.
25 WA Government, *Submission 128*, p. 4.
26 NATA, *Submission 23*, p. 2.

> high Australian design standards and consumer safeguards are maintained.[27]

9.25 The Committee took evidence from the wine industry which detailed the difficulties faced by Australian producers in exporting to the US, which are addressed under the Agreement. The different standards for labelling in the US increase costs to Australian exporters and cause logistical difficulty. Blending conditions in the US also contribute to this problem, and the Australian industry had sought to have the US accept Australian blending conditions and labelling of those conditions under the Agreement.[28]

9.26 Mr Henry Steingiesser, from the Western Australian Government, advised the Committee that because of US regulation standards for vintages and blending, Australian producers have to change usual blending and labelling practice in order to export to the US. This then entails an additional cost as a separate production line is required for exports to the US, resulting in particular difficulty in for smaller wine producers seeking to export to the US.[29] Mr Steingiesser expressed that these, and other issues relating to exportation, should have been resolved under the Agreement.

9.27 Although disappointed that there was no resolution on labelling issues, the Winemakers Federation of Australia strongly supported the provisions as an opportunity to address issues through the working groups.[30]

9.28 The Australian Wine and Brandy Corporation advised Article 8.5.1 was of particular interest for the Australian wine industry because 'gives it a clear formal avenue in which to raise issues surrounding wine technical regulations and standards with the US (including wine labelling).'[31]

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27 Uniting Care (NSW / ACT), *Submission 169,* p. 12.

28 Mr Stephen Strachan, *Transcript of Evidence*, 22 April 2004, pp. 3-4.

29 Mr Henry Steingiesser, *Transcript of Evidence*, 23 April 2004, pp. 5-6.

30 Mr Stephen Strachan, *Transcript of Evidence,* 22 April 2004, p. 5.

31 Australian Wine and Brandy Corporation, *Submission 152,* p. 3.

Recommendation 9

The Committee recommends that the Australian Government, in consultation with the wine industry, actively pursues the issue of blending and labelling through the Chapter Coordinators or other working groups.

Article 8.6: Conformity Assessment Procedures

9.29 Under Article 8.6, Parties agree to facilitate the acceptance of each other's procedures to determine whether products fulfil relevant standards and technical regulations. Where a Party rejects the other Party's procedures, it must explain the reason for refusal in detail, and upon agreement by the parties, working groups may be established to resolve the problem.[32]

9.30 The Committee heard that NATA's largest concern under Chapter 8 was Article 8.6.1, which states that 'a broad range of mechanisms exist to facilitate the acceptance of conformity assessment results', and subsequently lists examples of such mechanisms.[33] NATA's concerns centre around its assertion that the Article does not recognise international memoranda of understanding in relation to conformity assessment, to which Australia is a party.[34] Ms Regina Robertson from NATA told the Committee about Mutual Recognition Agreements currently in place on International Laboratory Accreditation Cooperation and Asia-Pacific Laboratory Cooperation, which

> cover the competence of accreditation bodies such as NATA all around the world, and certainly in the Asia-Pacific region in the case of APLAC. This actually ensures that bodies such as NATA do our job effectively and that the laboratories and facilities that we accredit are actually competent and capable of producing reliable results. There is no mention made of knowledge about this … [35]

9.31 Ms Robertson agreed that the range of mechanisms in Article 6.1 reflected current practice in the US, but stated that

32 DFAT, *Guide to the Agreement*, p. 40.

33 AUSFTA, Article 8.6.1(a) – (f).

34 Ms Regina Robertson, *Transcript of Evidence*, 19 April 2004, p. 90.

35 Ms Regina Robertson, *Transcript of Evidence*, 19 April 2004, p. 90.

> It is not very coherent—in fact, it is not coherent at all—whereas in Australia we have what we are calling the national measurement infrastructure. We believe that that is well described, that it provides reliable results from conformity assessment bodies. We are not as convinced of that from the United States.[36]

9.32 NATA also raised concerns about Article 8.6.1(a) which lists reliance on a supplier's declaration of conformity as a mechanism to facilitate acceptance. In their submission to the Committee, NATA noted that

> while listed as one mechanism that exists, [reliance on a supplier's declaration of conformity] does have inherent risks if such declarations are not subjected to market surveillance in the importing country and are not subject to, any recourse or sanctions for non-compliance of the products with the importing party's technical regulations. Additionally, the risk of such acceptances are ameliorated if there is independent evaluation (through accreditation etc), of the competence of the supplier's laboratories etc, to meet the technical regulations of the importing party.[37]

9.33 In their submission and during the public hearing on 19 April 2004, NATA outlined further concerns relating to conformity assessments but the Committee understands that these concerns have subsequently been resolved through discussions between NATA and DFAT.

GM Labelling

9.34 The Committee received submissions from individuals and community groups, concerned that under Article 8.5 Australia would be forced to give 'positive consideration' to accepting the US' technical regulations, including their standards for the labelling of food containing genetically modified organisms (GMOs).[38] Further, it was argued that Article 8.7 would allow for the US to have input on Australian policy formation. The Committee noted concerns that these provisions would result in a lowering of Australia's labelling standards.[39]

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36 Ms Regina Robertson, *Transcript of Evidence*, 19 April 2004, p. 92.

37 NATA, *Submission 23*, p. 2.

38 Uniting Care (NSW / ACT), *Submission 169*, p. 12.

39 See particularly AFTINET, *Submission 68*, p. 16, and also *Submissions 6, 13, 44, 46, 48, 57, 58, 68, 74, 86, 89, 90, 102* and *137*.

9.35 Whilst mindful of these concerns, and grateful to the groups and individuals that brought them to the attention of the Committee, the Committee is satisfied with information available from DFAT that Australian labelling requirements for GM foods are not affected by the AUSFTA.[40]

Trade Facilitation

Article 8.7 Transparency

9.36 Under this Article, Parties are obliged to allow persons of the other Party to participate in the development of standards, technical regulations and conformity assessment procedures. Parties also agree to measures to ensure transparency in processes.[41]

9.37 NATA informed the Committee of its concern that the provision for cooperation may interfere with the current national system for preparing standards. Uniting Care expressed in its submission that the provisions of Article 8.7 were too broad and far-reaching.

> The provision to include the other party in the development of standards and regulations is unacceptable, as it does not serve local consumer interests and confuses the rights of foreign companies with the rights of citizens. Also, it undermines democracy by intruding one government's interests into another government's work.
>
> The provision for parties to recommend that non-government organisations allow representatives of the other party in their deliberations on standards is unacceptable, intruding government into the work of civil society.[42]

9.38 The Committee acknowledges these concerns, but notes that Article 8.7.2 requires a recommendation only, and as such is not enforceable against non-government organisations. The Committee is again satisfied with DFAT's assurance that there will be no change required to the current Australian system.

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40 DFAT, Australia-United States Free Trade Agreement: Frequently Asked Questions, http://www.dfat.gov.au/trade/negotiations/us_fta/faqs.html, viewed 4 June 2004.

41 DFAT, *Guide to the Agreement*, p. 40.

42 Uniting Care (NSW/ACT), *Submission 169*, p. 3.

Chapter Coordinators

9.39 Article 8.9 establishes a mechanism whereby Parties may address issues relating to the 'development, adoption, application or enforcement of standards, technical regulations or conformity assessment procedures'.[43]

9.40 Established to facilitate implantation of Chapter 8, Chapter Coordinators are 'responsible for coordinating with interested persons in the Party's territory and communicating with the other Party's Coordinator' in relation to matters pertaining to the Chapter.[44] Under Annex 8-A, Australia's Chapter Coordinator will be the Department of Industry, Tourism and Resources (or its successor).[45]

9.41 Where matters are unable to be resolved through the Chapter Coordinators, an *ad hoc* technical working group, comprised of representatives from both parties, may be established in order to identify a 'workable and practical solution that would facilitate trade'.[46]

9.42 Mr Remo Moretta from DFAT explained the role of the Chapter Coordinator as facilitating, with their US counterpart, viable solutions to particular problems with market access that may be experienced by stakeholders in relation to standards and technical regulations.

> If that means putting practitioners in contact with practitioners or regulators in contact with regulators or standards developers in contact with standards developers, that is how it will work. We felt there was great utility in having such a mechanism, because it is very costly and very difficult for our industries to navigate their way through a very complex US market.[47]

Consultations

9.43 The Government undertook consultations with stakeholders and with State and Territory Governments prior to the negotiation of the Agreement. NATA, Holden, the Australian Wine and Brandy

43 DFAT, *Guide to the Agreement*, p. 40.

44 AUSFTA, Article 8.9.1.

45 AUSFTA, Annex 8-A (a).

46 AUSFTA, Article 8.9.3.

47 Mr Remo Moretta, *Committee Briefing*, 2 April 2004, p. 74.

Corporation, the Winemaker's Federation of Australia, the Business Council of Australia, and AFTINET were all consulted by the Government either before or during the negotiations.[48]

Benefits of the removal of technical barriers to trade

9.44 The Committee received substantial evidence in support of the inclusion of the TBT chapter in the AUSFTA. The Committee appreciated the involvement of the Western Australian Government, which stated that although it did not foresee immediate gains to Australia resulting from the provisions Chapter 8, and noted that there was no means to assess the rate of progress

> the establishment of a mechanism to address the development, adoption, application or enforcement of standards, technical regulations or conformity of standards, technical regulations or conformity assessment procedures is welcome.[49]

9.45 Mr Andrew Stoler supported the inclusion of the Chapter in the Agreement by noting that the area of technical standards and regulations affecting trade in products

> will be a very important area where this agreement can change the situation in the future. I am personally familiar, for example, with the operation of a mutual recognition agreement that exists between the United States and the European Community for medical devices that has made a tremendous amount of trade possible that would have been very difficult to conduct otherwise.[50]

9.46 The Committee heard that non-tariff barriers can impede market access, demonstrating the necessity of the TBT Chapter. Mr Moretta stated that

> it is fair to say that the major problems in market access for Australian industry relate to standards, technical regulations and conformity assessment procedures and the requirement

48 NIA, Annex 1.

49 WA Government, *Submission 128,* p. 5.

50 Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 13.

> to meet all those in a very complex market like the United States.[51]

9.47 Ms Freya Marsden, from the Business Council of Australia supported the role played by Chapter 8 provisions in the removal of non-tariff barriers to trade.

> … as we bring tariffs down it becomes clearer that there is a whole range of technical standards and regulations that block our companies doing well in the US. These are just as effective blockers of trade as tariffs are. We now have a system where we can move forward. For these reasons the BCA supports this agreement.[52]

Concluding observations

9.48 Whilst acknowledging concerns raised, the Committee is satisfied with DFAT's assurances that the provisions of this Chapter will not require Australia to adopt US standards. Parties have agreed to use international standards as a basis for their technical regulations, to the maximum extent possible.[53]

9.49 The Committee accepts that, under current practice, Australian exports face difficulty and financial expense in complying with the different standards and technical regulations which operate across the United States. The use of international standards where possible will therefore benefit Australian exporters.[54]

51 Mr Remo Moretta, *Committee Briefing*, 2 April 2004, p. 72.

52 Ms Freya Marsden, *Transcript of Evidence*, 20 April 2004, p. 99.

53 AUSFTA, Article 8.4(1).

54 DFAT, *Guide to the Agreement*, p. 39.