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AUSTFA Submission No: 66

THE CABINET OFFICE
NEW SOUTH WALES

RECEIVED
13 APR 2004

BY: 13 APR 2004

Dr Andrew Southcott MP
Chair, Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Dr Southcott

I refer to your recent letter inviting New South Wales comment on the proposed Australia-United States Free Trade Agreement.

The NSW submission is attached. Should you have any queries, The Cabinet Office contact for this matter is Mr Chris Walker, Policy Manager, Intergovernmental and Regulatory Reform Branch. Mr Walker can be contacted on 02 9228 4324.

Yours sincerely

A large, stylized handwritten signature in black ink, appearing to be 'R. Wilkins'.

Roger B Wilkins
Director-General

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**AUSTRALIA - UNITED STATES FREE TRADE AGREEMENT:
NEW SOUTH WALES GOVERNMENT SUBMISSION TO
FEDERAL PARLIAMENTARY COMMITTEES**

INTRODUCTION

The United States (US) is Australia's most important market for services and investment, and second most important trade partner after Japan. In 2002-03, NSW exports to the US were valued at A\$1.965 billion, compared to total Australian exports to the US of A\$10.365 billion.

The NSW Government supports the intent of the proposed Australia-United States Free Trade Agreement (AUSFTA) to enhance our trading relationship with the US and remove protectionist barriers that have inhibited Australian exports to the US.

The NSW Government is disappointed, however, that the original objectives for our agricultural markets have not been realised and that the Commonwealth Government has negotiated a deal that does not give Australian farmers the same benefits as those won by Chile and other South American countries in their free trade agreements with the US.

Furthermore, the NSW Government is concerned that the gains of the Agreement will be made with some restrictions imposed on our capacity to independently regulate and set the national agenda in areas, such as Australian media content, economic and environmental policies. Some of these concerns are expanded in this submission.

KEY ISSUES*Audio-visual*

The NSW Government recognises that the proposed Agreement retains the current local content regulations for media. The NSW Government is concerned, however, that the proposed Agreement does not provide for similar local content regulation in relation to new and emerging media.

Once the proposed Agreement comes into effect, the Commonwealth Government will have a restricted capacity to further regulate for local content in media. This will impact on the ability to regulate for the maintenance of Australian cultural identity, and could negatively affect Australia's film and television production industry.

The combined value of the film, television and video industries in NSW is now worth \$4 billion to the State's economy, a 54 per cent jump over the past five years. The industry accounts for 55,000 direct and indirect jobs, proving to be one of the fastest growing sources of employment in NSW. In addition, the industry

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has injected \$10 million into regional economies over the past five years and directly employed almost 3,000 local people on local productions.

There is already a major importing of US culture into Australia. Around 70 per cent of the 250 feature films released in Australian cinemas in any year are from the US and between 60 to 70 per cent of Australian prime-time television comes from the US.

Intellectual property

The NSW Government recognises the benefits for trade of more closely aligning the intellectual property regimes in both countries. The NSW Government is concerned, however, that the proposed extension of the period of copyright protection from 50 to 70 years from the death of the author, will have a significant financial impact on libraries, universities and schools.

The proposed extension is inconsistent with the Review of Intellectual Property Legislation conducted under the Competition Principles Agreement (2000), which concluded that there was no economic benefit to copyright owners of extending the term of copyright protection.

The legal and economic basis of copyright is that creators should be protected and rewarded for a set period and then protection should be lifted to allow that information to flow into public use, to stimulate innovation.

The extension of the copyright term would delay the entry of works into the public domain and restrict the flow of creativity and knowledge into the public domain. It will impose greater limits on access to information, which is a fundamental principle of library services.

Pharmaceuticals

The NSW Government does not support the inclusion of the Pharmaceutical Benefit Scheme (PBS) in the proposed AUSFTA and seeks its exemption from the final Agreement.

Despite Commonwealth Government statements to the contrary, the NSW Government is concerned that the proposed changes to the PBS will lead to increased costs for consumers and the State public health systems.

Under the terms of the proposed AUSFTA, the Commonwealth Government has agreed that Australia will:

- allow drug companies to consult relevant officials prior to making an application and allow drug companies to comment on expert evaluations of their proposals made for the Pharmaceutical Benefits Advisory Committee (PBAC);
- establish an independent appeals mechanism for pharmaceutical companies whose drugs are not recommended for listing on the PBS; and
- allow for adjustments to PBS prices after listing.

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These changes appear to provide an opportunity to lobby the PBAC, and to delay and frustrate the PBS process, thereby conferring more leverage on drug companies in the price negotiation process.

Changes to Australia's patent laws arising from the AUSFTA will:

- prevent a person from entering the market with a generic version of a patented medicine before a patent covering that product has expired; and
- require a drug company that intends to manufacture a generic drug similar to a drug whose patent is nearing expiry to notify the original pharmaceutical manufacturer.

These changes will delay the production and availability of generic drugs, have significant implications for the operation of the 'Therapeutic Group Pricing' system, and lead to increased prices under the PBS. These changes will have a significant impact on the costs and availability of drugs for Australian citizens, particularly for people on low incomes.

Plasma Fractionation Services

The NSW Government welcomes the exclusion of plasma fractionation supply services from the proposed Agreement but is concerned over commitments to review the provision of these services.

Australia has an enviable record in the provision of safe, high quality blood transfusion services and a long standing national policy of self-sufficiency in the supply of blood and blood products. As the provision of blood is a joint Commonwealth/State responsibility, the NSW Government is committed to maintaining the current high standard and is concerned that undertakings given by the Commonwealth Government in the AUSFTA negotiations may jeopardise this position.

In March 2001, a review of the Australian Blood Banking and Plasma Product Sector found that Australia's blood needs were best provided through the national plasma fractionation provider, CSL (formerly the Commonwealth Serum Laboratories).

While the proposed AUSFTA exempts plasma fractionation services from the Government Procurement chapter (Annex 15-E), in an exchange of side letters to the proposed Agreement, the Commonwealth Government has agreed to undertake a review of blood fractionation services by 1 January 2007, and to recommend to the States that future arrangements for the supply of blood be made by tender in accordance with the Government Procurement chapter.

The implications of tendering for the supply of blood and blood products could lead to the Commonwealth Government losing its strong control and oversight role in this area, jeopardising the quality and high standard of Australia's blood supplies.

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Environment

The NSW Government is concerned that the proposed AUSFTA provides no effective protection to legitimate environmental protection measures, and exposes governments to risk of litigation and the need to pay compensation for environmental regulation.

The expropriation provisions (Article 11.7) may result in compensation being provided to a US-based firm as a result of some environmental regulation, even where there has been no discrimination, and no compensation would be payable to Australian or other investors under domestic law.

Further, the Environment Chapter (Chapter 19) recognises the right of each Party to establish its own level of domestic environmental protection and establish laws that provide for environment protection. The provision, however, stating that 'neither Party shall fail to effectively enforce its environmental laws... in a manner affecting trade between the Parties' has the potential to trigger a dispute and a risk of damages.

The Commonwealth Government has not made available any analysis of the potential environmental impacts of the AUSFTA, such as the impact of increased agricultural output on scarce water resources, soil erosion, salinity and greenhouse emissions.

US law requires that a full environmental impact analysis be undertaken prior to signing the proposed AUSFTA. NSW urges the Commonwealth to ensure that rigorous environmental analysis is also undertaken in Australia.

Investment

The NSW Government is concerned that the proposed AUSFTA will effectively prevent the Foreign Investment Review Board reviewing most proposed US investments in Australia, and does not rule out the future introduction of an Investor-State Dispute Settlement mechanism.

In 2002-03, the Foreign Investment Review Board (FIRB) approved 361 investment proposals by US firms, at an average value of \$85 million per investment. Although only seven per cent of all proposals reviewed by the FIRB involve US firms, they represent 33 per cent of the total value of proposals.

Under the terms of the proposed AUSFTA, however, the ability of the FIRB to examine proposals for US investments in Australia will be significantly reduced by increasing the screening threshold for US investments in existing Australian companies in non-sensitive sectors from \$50 million to \$800 million, and by precluding the examination of investments in new businesses.

Of the 1472 companies listed on the Australian Stock Exchange, around 90 per cent have market capitalisations below \$800 million. Consequently, the measures in the proposed AUSFTA will effectively prevent the review of all but a small

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number of very large, or sensitive, US investments in companies listed in Australia.

In addition, the Commonwealth Government may be compelled to include the same provisions in new free trade agreements, further limiting the role of the FIRB.

Investor-State Dispute Settlement (ISDS)

The NSW Government recognises the Commonwealth negotiators' efforts to prevent the inclusion of an ISDS in the proposed Agreement, reflecting the significant opposition to the inclusion of an ISDS process from jurisdictions, including NSW. The NSW Government is concerned, however, that the draft AUSFTA still provides scope, albeit limited, for the introduction of an ISDS through Article 11.16.1 of the Investment Chapter.

Agriculture

The NSW Government recognises the benefits of agricultural trade liberalisation that have been achieved through the proposed Agreement, but is concerned that the Commonwealth Government may be overstating those benefits.

The NSW Government notes that economic analysis undertaken by the American Farm Bureau Federation (AFBF) concluded that the changes in US agricultural imports from Australia and US agricultural exports to Australia would essentially cancel each other out and leave the agricultural sector unaffected.

The AFBF report questions Australia's ability to take full advantage of the increase in beef quotas, claiming that Australia would have to restructure its beef industry or reduce its exports to Asian markets to fill the quotas negotiated in the proposed AUSFTA.

A similar Australian economic analysis on the impact of the proposed AUSFTA on the agricultural sector is urgently required.

Quarantine

The high standard of Australian quarantine laws should not be jeopardised in the interest of improving our trade relations or trade balance with any other nation.

The economic analysis undertaken by the AFBF, states that the benefits to the US agricultural sector of the proposed AUSFTA are dependent on changes to Australia's quarantine rules, particularly for pork, poultry and fruit. It is clearly in the US's interests to persuade Australia to relax its quarantine rules.

The procedures outlined in the proposed AUSFTA raise some doubt about the future integrity of quarantine procedures as an entirely Australian process. The Commonwealth Government needs to restrict the terms of reference of the proposed bilateral committee on Sanitary and Phytosanitary matters so as to ensure the integrity of Australia's autonomy over its quarantine procedures.

Rules of Origin

The Rules of Origin provisions contained in the proposed AUSFTA could potentially impose significant market barriers and administrative costs on NSW manufacturing firms wanting to export to US markets.

The purpose of the Rules of Origin provision is to confine access to tariff concessions to goods originating in Australia and the US, respectively. The proposed AUSFTA, however, appears to adopt the current US regime for Rules of Origin, which is highly prescriptive and very complex. This approach could potentially restrict the ability of NSW-based firms to gain access to the AUSFTA's tariff concessions for manufactured goods, particularly in relation to textiles, clothing and footwear, as well as the automotive components sector.

The differences between Rules of Origin requirements for Australia's free trade agreements with the US, Thailand and Singapore could potentially increase compliance costs and create confusion and uncertainty among Australian exporters of manufactured goods.

Various committees and working groups established under the Agreement

The proposed AUSFTA provides for the establishment of a range of committees and working groups which have the potential to assume a quasi-regulatory role.

The role of the committees is not clearly articulated in all cases, and consequently the implications for existing policy, law and regulation is unknown. For example, the Financial Services Committee will review Australia's foreign investment policy in relation to the financial sector. It is arguably inappropriate for a committee involving another nation's officials to perform a review of Australia's foreign investment policy.

Where committees or working groups are considering issues of joint Commonwealth/State responsibilities, States and Territories should be allowed representation on these groups.

The DFAT National Interest Analysis

The NSW Government believes that the National Interest Analysis (NIA) prepared by DFAT espouses the potential benefits of the proposed Agreement, without balancing these with potential contentious issues for Australia.

The report appears to lack objectivity and does not reflect the complexity of outcomes in some areas. For example, the NIA claims that the 'single desk arrangements ... and quarantine and food safety regimes have been preserved'. In fact, in the case of single desk arrangements, the Commonwealth Government has undertaken to discuss reforms of single desk markets through the World Trade Organisation negotiations on agriculture. In respect of quarantine and food safety regimes, a bilateral committee on Sanitary and Phytosanitary Matters has been established, providing US officials with an opportunity to participate in

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the development of Australia's sanitary and phytosanitary procedures. The NIA does not reflect these complexities.

Further, the NIA reports that 'Australia retains the power to regulate for Australian content, not only in existing forms of media but also, where necessary, in new media'. This statement is not entirely correct. The NIA does not discuss the restriction on increased local content requirements for existing media and does not reflect the requirement for Australia to make a case for regulation of local content in new media.

The NIA reports the anticipated benefits of the proposed AUSFTA, but does not adequately reflect the costs of participation. For example, in respect of government procurement, the NIA does not report the need for Australian governments to forego industry development initiatives, including regional development, a significant aspect of procurement policy.

The section in the NIA entitled 'Costs' limits consideration of the costs of the AUSFTA to the narrow measure of foregone tariff revenue only. This discussion fails to consider the broader costs of the proposed AUSFTA such as the costs of reduced ability for governments to regulate, environmental costs, compliance costs for business under the proposed Rules of Origin procedures, and the costs to business, educational institutions and libraries of the changes to intellectual property rules, among others.