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Submission No: 129

NTEU Submission to Joint Standing Committee on Treaties Regarding the Australia-US Free Trade Agreement

1. The National Tertiary Education Union (NTEU) represents academic and general staff employed by Universities, higher education colleges, and related research Institutes, adult education staff in Victoria, and general staff in Victorian Technical and Further Education Institutes. Our interest in free trade agreements pertains to their implications for education and research, though the Union also has regard to broader considerations.

2. The NTEU's general view of the Australia-United States Free Trade Agreement (AUSFTA) is that it will increase the costs borne by education institutions because of changes to intellectual property, it establishes restrictive parameters for review of university accreditation requirements, and continues the worrying trend of bilateral agreements in advancing the level of liberalisation of trade in education services beyond what the Commonwealth agreed to under the General Agreement on Trade in Services (GATS).

Intellectual Property

3. The immediate impact of AUSFTA when it comes into effect will be to increase the costs of tertiary education libraries, information services, and academic units teaching film and television courses. According to Colette Ormonde, a contributor to the NTEU's journal from the copyright advisory service of the Australian Library and Information Association, the cost increases to Australian institutions will be due the expense of tracking down lesser known copyright holders and publishers as well as the removal from the public domain of 20 years of publications, audio-visual products, and information.

4. It should be noted that the problem caused by Australia's acceptance in AUSFTA of the American copyright standard has not been mitigated to date by the adoption of more liberal provisions, similar to those in the US, for copying for research and educational purposes.

University Accreditation

5. The NTEU's concern about the implications of AUSFTA for university accreditation is a result of Article 10.7: Domestic Regulation, in the Services Chapter. Article 10.7.2 obliges the parties, with a view to ensuring that licensing requirements, technical standards, and qualification requirements and procedures "do not constitute unnecessary barriers to trade in services", to endeavour to ensure that such measures are:

- based on objective and transparent criteria such as competence and ability to supply the service;
- not more burdensome than necessary to ensure the quality of the service; and
- in the case of licensing procedures, not in themselves a restriction on the supply of the service.

6. Article 10.7.2 applies to services generally but University accreditation is potentially affected because it is a type of licensing requirement. The exception for public education among other sectors listed by the Commonwealth under Annex II to

the Services and Investment Chapter pertains only to nominated AUSFTA obligations or disciplines. Unfortunately Article 10.7.2 is not nominated as displaced by the exception. The NTEU submits that no commitment should be given of the kind set out in Article 10.7.2 without an exception for university accreditation.

7. The GATS contained a Domestic Regulation Article that also referred to the specific tests cited above but with the qualifying words *inter alia*. Moreover, the GATS Article did not require a review of, or changes to, licensing requirements, qualification requirements, or technical standards in light of the specified tests. It merely mandated the Council for Trade in Services to negotiate new disciplines in this area, a mandate that is yet to produce an outcome.

8. The absence of the GATS *inter alia* raises the possibility that licensing requirements based on considerations additional to and of a very different kind to those listed in 10.7.2, such as equity, affordability and accessibility, may be called into question - a conclusion reinforced by the narrow examples given in 10.7.2 of objective and transparent criteria. Though there is no such Australian policy at present, the offering of a certain number or proportion of scholarships as a licensing condition for foreign owned private higher education providers would appear to be open to objection as an unnecessary barrier to trade in services.

9. A more likely possibility in light of contemporary Australian versus varying overseas understandings of what constitutes a university is the invocation of Article 10.7.2 against an accreditation requirement that a foreign owned applicant for private university status in Australia offer a broad range of courses and engage to a significant degree in research. There are single discipline or limited focus boutique universities in other countries, as well as teaching-only universities, including in the US. Broader Australian requirements for university status may be seen as unnecessary barriers to trade in higher education services and/or more burdensome than necessary to ensure the quality of the service.

10. This risk is magnified by the diversity of accreditation standards used by the regional accrediting bodies in the United States. While Australia has State accreditation, the States and the Commonwealth have agreed on national protocols for the accreditation of domestic universities, other domestic higher education providers, and foreign providers. To our knowledge, there is no US-wide equivalent protocol. A US accredited university that applies unsuccessfully to operate as a university in Australia may well lobby the US government over the "trade restrictive" nature of Australia's accreditation requirements.

11. Australia has already had the experience of Greenwich University, originally a US institution, shifting to an Australian external territory and attacking the assessment of a Committee jointly established by the Commonwealth and the States that it failed to meet appropriate requirements for accreditation as an Australian university. More recently a panel established by the Queensland Government found against an application to establish a private university in Cairns. While there may be arguments about what should be the appropriate requirements for accreditation these are matters for domestic governments and their expert advisory panels.

12. While it may be argued that some form of international protocol is desirable in this area, any such protocol should be developed by bodies such as UNESCO that have a focus on educational considerations, and work in consultation with international associations of universities and of university staff. Trade agreements with their particular frame of reference, as embodied in Article 10.7.2, are

inappropriate sources of regulation, or processes for revision of domestic regulation, in this area.

13. The NTEU notes that there is a proposed exchange of letters on education between the US Trade Representative and the Commonwealth Minister for Trade recording the two governments' understanding that the Chapters of AUSFTA will not interfere with "non-discriminatory accreditation and quality assurance procedures and training institutions and their programs, including the standards that must be met" and "the need for education and training institutions to comply with non-discriminatory requirements related to the establishment and operation of a facility in a particular jurisdiction". However, non-discriminatory in this context, and elsewhere in AUSFTA, appears to be a trade policy term incorporating an assessment as to whether the measure in question is discriminatory in terms of trade impact on the service providers and investments of the parties to the Agreement, even if the measure applies identical standards to the providers and investors of the parties.

14. The NTEU therefore does not believe that this letter obviates our concern about Domestic Regulation obligation with respect to the accreditation of universities, or for that matter other higher education colleges, post-secondary vocational education and training institutions, and adult education providers. The letter is not an adequate substitute for an exception from Article 10.7.2 under Annex II to the Services and Investment Chapters.

Whittling Down Exclusions and Reservations

15. The NTEU wishes to draw the Committee's attention to the fact that recent bilateral free trade agreements negotiated by the Commonwealth have exceeded the liberalisation commitments given by Australia for the education services sector by under the General Agreement on Trade in Services. This observation is based on the outcome of the Singapore - Australia Free Trade Agreement (SAFTA) and the draft text of AUSFTA. We are unable to assess whether this trend also applies in the case of the agreement with Thailand because the text is not available.

16. Australia's 1994 GATS commitments for education services were expressly limited to private higher and secondary education services. No commitments were given for adult education. Moreover, no commitments were given under Mode 3 of GATS to provide National Treatment for foreign owned private higher education or secondary education providers operating, or seeking to establish a commercial presence, in Australia. Higher education in the WTO context and also for the purpose of bilateral agreements includes post-secondary vocational education and training as well as university-level education.

17. By virtue of its negative list structure and the failure of the Commonwealth to list an appropriate exception, SAFTA applies to adult education. SAFTA also does not reproduce the limitation of the GATS commitments to private secondary and private higher education. There is an exception for public higher and secondary education in SAFTA but only to the extent that such education is a "social service established or maintained for a public purpose". SAFTA does not, however, require Australian governments to provide National Treatment to Singaporean higher or secondary education providers in Australia.

18. The Commonwealth in AUSFTA reproduces some but not all SAFTA outcomes for Australian education services. Adult education is covered, but along with secondary and higher education is subject to a SAFTA-style qualified exception for public education as a social service. US owned providers operating in Australia or

seeking to establish a commercial presence are granted National Treatment, except for subsidies and grants.

19. The NTEU welcomes the preservation of the right of Australian governments to determine the distribution of subsidies and grants to education institutions and therefore, if they so wish, to limit subsidies and grants to public institutions or to extend them beyond the public sector but only to locally owned private providers. However, the effect of granting National Treatment qualified in this fashion is to preclude the use of measures other than subsidies and grants to accord preferential treatment to both locally owned commercial private providers and to public institutions for their commercial activities. This may be viewed as a matter of no significance for current arrangements, but the advantage of Australia's 1994 GATS commitments lies precisely in the scope for future Australian governments to act in ways and circumstances unforeseen by earlier governments and generations of trade officials.

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From: tmurphy@nteu.org.au
Sent: Thursday, 8 April 2004 4:13 PM
To: Committee, Treaties (REPS)
Subject: Submission



Attachment
Information. (567 B.TAJSCOT Submission)

Please find attached the submission of the National Tertiary Education Union to the Joint Standing Committee on Treaties regarding the Australia-US Free Trade Agreement. As the NTEU is located in Melbourne, the most convenient day for the NTEU to speak to the Committee about this submission would be the Melbourne hearings day, which I understand to be the 20th of April.

Regards

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