ACTU Submission to Joint Standing Committee on Treaties Regarding the Australia-United States of America Free Trade Agreement

1. The Australian Council of Trade Unions welcomes the opportunity to make a submission to the Joint Standing Committee on Treaties Inquiry into the draft free trade agreement with the US. The ACTU's general position on trade agreements is that they should be multilateral, positive list in structure, contain effective provisions that uphold and reinforce labour and environmental standards, and have appropriate exemptions for public, social, and essential services. The Australia-US Free Trade Agreement (AUSFTA) has none of these characteristics.

2. The ACTU's strong commitment to multilateral agreements is due to a number of considerations. First, the economic benefits of such agreements are available to both industrialised and developing countries. Second, the proliferation of bilateral trade agreements leads to different rules of origin and associated complexity and other costs for exporters. Third, there is a significant risk of trade diversion due to bilateral preferential trade agreements, which has been highlighted by the recent Productivity Commission evaluation of around 17 bilateral agreements. Fourth, the advantage of multilateral negotiations is that smaller countries are able to aggregate their bargaining power to negotiate on a more equal basis with major economies. Fifth, multilateral negotiations are more appropriate for Australia given our diverse patterns of trade, with major export markets in Asia, Europe, the Middle East and North America.

3. AUSFTA has the additional defect that its patchy outcome in agricultural liberalisation is an adverse precedent for future bilateral and multilateral negotiations. The first key message from AUSFTA is that the US was not willing to open highly protected agricultural sectors such as sugar to competition from a country which is an English speaking liberal democracy, a long term military and political ally, an active supporter and contributor to the American invasion of Iraq, and a host country of important bases important to US surveillance and intelligence capabilities. The second key message is that Australia, the leader of the Cairns Group, is prepared to accept such an outcome. Neither message assists the objective of reinvigorating the Doha round of WTO negotiations through securing the agreement of the US, the European Union, and Japan to the dismantling of barriers to trade in agriculture.

4. Considered in its own terms as a bilateral agreement, and from the perspective of Australia's interests, AUSFTA provides the US (which has a trade surplus with Australia of $A12 billion, a manufacturing share of its exports to Australia of 93%, and advantages in economies of scale and scope and a significantly larger capital base for its manufacturing and service sector firms) very comprehensive access to the Australian market. In agriculture, where Australia has a competitive advantage, key US markets retain comprehensive protection and for others there are long phase-out periods, safeguard mechanisms, and other loopholes. For trade in manufactured goods, the US has retained its yarn-forward rule for textiles and clothing, which significantly disadvantages the Australian industry in terms of exports

to the US. In short, AUSFTA is not a good deal for Australia, which is why there is disquiet among business groups and commentators that tend to be strong supporters of free trade.

5. Lobbyists for AUSFTA have backhandedly acknowledged the poor quality of some of the outcomes for Australia. They disparage "static modelling" (notwithstanding the fact such modelling contributed to the projected $4billion annual gain to Australia advanced to support negotiations in the first place) and resort to a fallback argument to support the agreement, namely the " dynamic efficiency" gain over time. This gain is said to arise from greater integration with the US economy, in large part as a result of the significant curtailment of national interest screening of American investment in Australia. This argument ignores the downside risks of greater integration with the American economy and investment liberalisation and claims that, as a result of more US takeovers, acquisitions, and new business investment in Australia, Australia will obtain greater familiarity with innovative American business models, and a significant increase in the transfer technology and intellectual property.

6. The ACTU does not subscribe to the view that foreign investment from the US or other countries is detrimental to Australia, nor reject the notion of a dynamic efficiency dividend. However, we believe that the dynamic efficiency argument is over-stated by its proponents. The US is already the largest source of foreign investment in Australia, accounting for around 30% of the total, so the projected dynamic efficiency gain assumes a significant increase in US sourced investment that was apparently previously deterred by a Foreign Investment Review Board process that rejected very few applications. Alternately, the dynamic efficiency argument rests on AUSFTA producing a very significant magnetic attraction effect on US investors, overshadowing the lure of other economies (some of which have or are negotiating their own bilateral agreements with the US) that are recipients of US investment. The argument also assumes a reasonably high correlation between American investment and transfer of technology and intellectual property, and that the transfer will occur voluntarily. Performance requirements that would make the transfer of technology and intellectual property a condition for the approval of foreign investment are prohibited in AUSFTA

Labour and Environmental Standards

7. The ACTU acknowledges that AUSFTA breaks with Australian tradition in respect of trade agreements by containing Chapters on Labour and the Environment. It is to be hoped that this approach will apply to other bilateral agreements and that the Commonwealth will support the proposals in these areas of the International Confederation of Free Trade Unions and international environment organisations in the WTO negotiations. However, the detail of Chapters 18 and 19 of AUSFTA indicates that the parties are not serious about regulating this aspect of their trade relationship. Moreover, as has been pointed out by the Labor Advisory Committee for Trade Negotiations and Trade Policy in the US, the standard of the labour provisions in AUSFTA is below that of other bilateral agreements that the US is party to, such as the agreement with Jordan. The remainder of this section of the submission concentrates on the Labour Chapter, but the observations made are also relevant to the Environment Chapter.

8. AUSFTA does not bind the parties to uphold the core labour standards set by the International Labor Organization. Article 18.1 of AUSFTA records the parties 'reaffirmation of their obligations as ILO members and proclaims that each party shall " strive to ensure" that its laws provide for labour standards that are consistent with internationally recognised labour principles and rights. These principles and rights are set out in Article 18.7 in manner that appears to give force to the core ILO standards. However, non-compliance by a party with the stated objective, principles and rights is outside the scope of the dispute settlement proceedings of the agreement.

9. AUSFTA also states in Article 18.2.2 that it is inappropriate to encourage trade or investment by a party weakening or reducing the protections afforded in its labour laws. The parties commit that they shall strive to ensure that they shall not, in order to encourage trade or investment, waive or otherwise derogate from their respective labour laws, or offer to do so, in a manner that weakens or reduces their adherence to the internationally recognised labour principles. But like 18.1, this is not enforceable under the dispute settlement proceedings.

10. The only provision in this area that is actionable under the dispute settlement proceedings is the failure of a party to effectively enforce its domestic labour standards, through sustained or recurring course of action or inaction, in a manner that affects trade between the parties (see18.2.1.(a), 18.6.5 and 21.2) This begs the question as to why an agreement would prohibit a failure to enforce, but not a decision to weaken or reduce, domestic labour standards.

11. The answer to this question does not lie in the alleged difficulty of enforcing the aspirational language used in 18.1 and 18.2.2.Apart from the obvious point that commitments to uphold core ILO standards and domestic labour standards could have been specified without recourse to words such as " strive to", other AUSFTA provisions that set an objective (such as the obligation in Article 10.7.2 to " endeavour to ensure" that domestic regulation requirements meet certain tests) are not excluded from the scope of application of dispute settlement proceedings.

12. The ACTU notes that even claimed breaches of 18.2.1.(a), while falling within the scope of application of the dispute settlement proceedings, are treated differently than claimed breaches of other AUSFTA obligations. A dispute settlement panel dealing with a failure by the party in breach of 18.2.1.(a) to agree on a resolution or to observe the terms of an agreed resolution must, in awarding compensation, take into account factors such as the pervasiveness and duration of the breaching party's failure to enforce the labour law, its reasons for non-enforcement of that law, its resource constraints, and its efforts to begin remedying the non-enforcement since the panels report. No list of mitigating factors can be found in connection with assessing compensation for other types of cases.

13. In addition, in contrast with compensation for other breaches of other AUSFTA obligations, there is a dollar cap on the amount of compensation, and the amount is not payable to the complaining party. The compensation is allocated to a fund jointly administered by the two governments for appropriate labour and environmental initiatives. The overall effect is to make the penalty for breaches of labour obligations less onerous than for other breaches of AUSFTA

14. While there may be a case for spending the compensation amount on such initiatives within the territory of the offending party, joint administration of the fund confers an effective veto role on how that money is spent by the party that failed to either resolve its breach of the labour obligation or to implement an agreed resolution of the breach. A better alternative would be for the fund to be administered by the ILO.

Service Sector Issues

15. The impact of AUSFTA on services occurs as a result of the combination of Chapters 10, 11, and15, the associated annexes and letters of understanding, and the negative list structure of the agreement. The ACTU is opposed to negative list free trade agreements. Such agreements provide only one chance for negotiators to list in the annexes appropriate exceptions for existing measures and existing services. They also have the effect of applying automatically the liberalisation obligations of the agreement to yet to be created services, with corresponding limitation on the regulatory options of future governments.

16. The ACTU shares the objections to AUSFTA by its affiliate, the Media, Entertainment and Arts Alliance, and other organisations in the film, television, radio and cultural sectors. The audio-visual exception notified by the Commonwealth is not comprehensive and therefore fails to empower the government and its successors to remedy deficiencies in our current local content rules for both free to air and pay television and to respond with new regulation to emerging and future delivery platforms. The effectiveness of existing content requirements for free to air television will be undermined by multi-channelling and the limitation in the exception notified on the number of channels to which such requirements may be applied.

17. No exception is listed for broadcasting in general, in contrast to the comprehensive Annex 4-II(A)-10 reservation for broadcasting and audio-visual services listed by the Commonwealth under the Singapore Australia Free Trade Agreement. (SAFTA). It may be argued that the ABC is covered by the general AUSFTA exemption for services in the exercise of governmental authority but this argument is not persuasive in the case of SBS. SBS is a Corporation that competes with other broadcasters not only for viewers but also for commercial advertising and associated revenue. The only other AUSFTA provision that may affect exempt SBS is the definition of an investment in Article 11.17.4, but this depends upon SBS not being or becoming a government owned enterprise with the characteristics of an investment as set out in that Article.

18. In several areas, the exceptions or non-conforming measures listed by the Commonwealth in AUSFTA fail to match the scope and standard of reservations listed in SAFTA. There appears to be no AUSFTA equivalent to the SAFTA reservations for the creative arts, cultural services, and entertainment services; for public utilities and public transport; for services in the exercise of governmental authority devolved to the private sector at the time that the agreement came into force; or from the national treatment obligation in respect of the supply of secondary and higher education services by commercial presence.

19. To be fair the Commonwealth has listed an Annex II exception for all sectors in AUSFTA that allows State governments to adopt or maintain any measure not inconsistent with Australia's Market Access commitments under GATS. However, there is no equivalent reservation for the Commonwealth, or one for all sectors that allows the Commonwealth and the States to adopt or maintain measures that are not inconsistent with Australia's National Treatment obligations under GATS. There is an important exclusion for subsidies and grants from both the Services and Investment Chapters. However, for other forms of preferential treatment of domestic service providers relative to US owned ones, the only exception for all sectors to the National Treatment obligation of AUSFTA is for existing non-conforming measures at the regional level of government.

20. The Department of Foreign Affairs and Trade, in its Regulatory Impact Statement, makes the following observation on page 10. " A number of trade restrictive measures will be bound at existing levels in the list of reservations to the Cross-Border Trade in Services and Investment Chapters. As is the case with the Commonwealth Government (as described above) this will mean less regulatory flexibility for State and Territory Governments to impose new trade-restrictive measures in those areas or to make existing measures in those areas more trade restrictive."

21. It is also worth mentioning, as the Department acknowledges at page 47 of its 1st Edition March 2004 Guide to the Agreement, that a ratchet mechanism applies to existing non-conforming measures listed as exceptions in Annex I, which means that if an Australian government changes a measure in a way which decreases its degree of non-conformity with the specified AUSFTA obligation, that government or any of its successors cannot shift back to the level of non-conformity of the measure extant at the time AUSFTA came into force. Effectively, a wide range of Commonwealth and State measures, with respect to Services including Financial services, and Investments, are placed in a position analogous to that of a car driver who parks and falls asleep in a two way street, and wakes up to find the street designated as one way. This is an inappropriate restriction on the regulatory power of governments.

22. The impact of AUSFTA on the services sector is not transparent, in contrast with the detail provided in the text itself and in Departmental documents of the agreement's consequences for tariffs. A detailed comparison is required between the AUSFTA obligations and the listed exceptions on the one hand, and Australia's GATS commitments on the other – an exercise complicated by the fact that the latter are often expressed by reference to numerical codes for a service sector, a sub-sector, or a particular service within a sub-sector. It is not surprising that in Senate Estimates on Tuesday 2 March Australia's Chief Negotiator, Stephen Deady, elected to take on notice a question from Senator Conroy about what service sector commitments Australia has given in AUSFTA over and above Australia's GATS commitments. No detail can be found either in the National Interest Analysis or the Regulatory Impact Statement. A rough comparison by the ACTU suggests that service sectors and parts thereof where additional commitments may have been given include construction, Commission agents and wholesale trade in services, repair services of personal and household goods, transport services, post and telecommunications, legal services, financial services, real estate services, leasing services, computer-related services, research and development services, taxation, architecture and accounting services, other business services, engineering, planning, agriculture, mining and manufacturing

services, education, sewage and refuse disposal, sanitation and other environmental services, and recreational , cultural and sporting services. Other services such as energy and water supply may be affected because of the negative list structure of the agreement. Notwithstanding DFAT's list of consultations held in its Regulatory Impact Statement, the ACTU would be surprised if ACTU affiliates with members in these services were consulted about additional commitments.

23. The exceptions notified by Australia override nominated obligations, but the Domestic Regulation obligation contained in Article 10.7.2 is omitted from the list of displaced obligations. This Article goes way beyond the GATS equivalent Article and requires Australian governments to ensure that technical standards, qualification requirements and licensing requirements are not more burdensome than necessary to ensure the quality of the service and do not constitute unnecessary barriers to trade in services. The de facto terms of reference for such a review prescribed in the Article are very narrow and unbalanced, and could be used to question those licensing requirements for utilities and other services that reflect considerations such as equitable access, affordability etc.

Investment Liberalisation

24. The ACTU expected some changes to the thresholds for screening of US sourced foreign investment applications but not the removal of all national interest screening of investment for new businesses and of takeovers and acquisitions below $800million, other than for the excepted sectors and enterprises. It is an extraordinary change from $50million as the threshold for scrutiny of takeovers and acquisitions to $800 million in the case of US investment. As the US is the largest source of foreign investment to Australia, this change puts a large question mark over the government's commitment to the existing investment rules.

25. The Office of US Trade Representative estimates that 90% of US investment in Australia over the last 10 years would have escaped screening had the new rules applied retrospectively. Using a three- year retrospective time horizon, DFAT estimates in its Regulatory Impact Statement a reduction in screened proposals by 65-70%. Some commentators have claimed that, under the proposed AUSFTA rules, around 86% of companies listed on the Australian Stock Exchange could be acquired by US interests without being screened.

26. It is acknowledged that the vast majority of applications that are screened by the Foreign Investment Review Board are approved. However, the Board also has a track record of approving applications subject to conditions set to safeguard the national interest. This aspect of the screening process should be borne in mind when it is argued that the current process is simply a time-consuming one that leads to approval anyway.

27. Without wishing to imply the use of these requirements by the Board for conditional approvals, the ACTU is concerned about the removal of reserve powers for industry policy in AUSFTA. Article11.9.1 prohibits the imposition or enforcement of any undertaking to export a given level or percentage of goods or services, to achieve a given level of domestic content, to accord preference to locally produced goods, or to transfer technology, a production

process or other proprietary knowledge. Article 11.9.2 prohibits a shorter list of requirements as a condition for the receipt or continues receipt of an advantage.

Manufacturing Sector Issues

28. The manufacturing sector is experiencing major difficulties in Australia in terms of significant job losses and declining share of exports. The original Centre for International Economics (CIE) Report projecting benefits of a free trade agreement with the US indicated that the latter would be the prime beneficiary of liberalised trade in manufacturing. At the time the Australian Manufacturing Workers Union (AMWU) pointed out that the CIE's projections for manufacturing in Australia's case were based on outdated 1997 data, and that the sector's difficulties had worsened since the data was compiled. The projections also assumed full liberalisation, and a long -term exchange rate that may need to be reassessed in light of the recent appreciation of the Australian dollar. The ACTU understands that the AMWU has commissioned econometric modelling on AUSFTA and may make further comments to the Committee, if possible, once that modelling and the new CIE report to the Commonwealth become available.

29. The ACTU is concerned about the potential exacerbation effect of AUSFTA on job losses in the sector, particularly in the Textile Clothing and Footwear and motor vehicle components industries. As noted earlier in this submission, the yarn forward rule is to the detriment of Australia's exports, and the Textile Clothing and Footwear Union estimates that around 80% of the industry's goods will not qualify for export to the US using this rule.

30. The ACTU acknowledges that the phase-out of tariffs for certain goods by 2010 or 2015 is broadly in line with that already proposed outside the context of a bilateral free trade agreement. However, the Commonwealth could have amended or delayed that tariff reduction schedule in light of the circumstances prevailing in the industries at particular points in time. AUSFTA circumscribes this flexibility.

31. The ACTU is concerned not only to avoid job losses but also to ensure that Australia maintains and expands a high value added manufacturing sector. Tariffs are one of a range of policy instruments available to governments promoting industry development. Unfortunately other instruments are also prohibited by AUSFTA. Mention has already been made of the prohibition on performance requirements in the Investment Chapter, but the AUSFTA Chapter of on Government Procurement is also germane in this context. Article 15.2 affects the ability of Australian governments to use procurement policies to foster industry development by prohibiting preference to domestic goods, services and suppliers for measures and procurement covered by the Chapter. Article 15.5 prohibits the seeking, imposition, or enforcement of offsets by procuring entities.

General Policy Matters

32. The ACTU opposes the concessions granted to the US with respect to the Pharmaceutical Benefits Scheme. There should be no provision for an independent review of product listing decisions. In the absence of text in AUSFTA to the contrary, this provision appears to empower such a review to

overturn PBS decisions. To the extent that they create new or additional opportunities, the commitments in the proposed exchange of letters on pharmaceuticals regarding responding to reports and evaluations, hearings while the Pharmaceutical Benefits Advisory Committee while it is considering technical reports from sub-committees, and applying for adjustments to a reimbursement amount are also of concern. Together with the Agreed Principles in Annex 2-C Pharmaceuticals, which reflect the arguments of US drug companies without any offsetting reference to the importance of affordability of, and equitable access to pharmaceuticals, the letter reads like criticism of the PBS and its procedures and a joint government statement of expectations of different outcomes from PBS processes. Related concerns include the establishment of the joint Medicines Working Group, with an emphasis upon the importance of pharmaceutical research and development, and the changes to the procedures of the Therapeutic Goods Administration with respect to approval of generic drugs.

33. The ACTU objects to the acceptance of the US copyright standard of 70 years after the author's death or completion of production in the case of audio-visual works. Australia is a net importer of intellectual property from the US and this decision, by taking 20 years of works out of the public domain, will increase the costs borne by libraries and education institutions.