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CLRI Submission

JOINT COMMITTEE ON TREATIES

Inquiry into Australia-United States, Free Trade Agreement

Submission by

Social Justice Committee
Conference of Leaders of Religious Institutes (NSW)

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Introduction

The Social Justice Committee of the Conference of Leaders of Religious Institutes in NSW (hereafter CLRI (NSW)) thanks the Joint Committee on Treaties for this opportunity to contribute to its inquiry into the Australia - United States Free Trade Agreement.

CLRI (NSW) represents 3,500 women and men religious, and promotes the life, mission and concerns of religious congregations in the Church and in our society. CLRI (NSW) does this by:

- Articulating our spirituality and commitment as members of religious congregations;
- Raising our corporate voice to challenge the structures of injustice in out state, our country and our world; and
- Establishing committees, working groups and task forces to maximise the potential of the Conference to bring about change, especially structural change, in the area of social justice.

As one of these established committees, the Social Justice Committee as a means through which CLRI (NSW) can act effectively with respect to issues of social justice. The functions of the CLRI Committee are to investigate, initiate action concerning, and prepare papers on, social justice issues. CLRI has established a Trade Justice sub-committee due to its increasing interest in the social justice implications of trade.

CLRI supports and endorses the submission made to the Committee by the Australian Fair Trade and Investment Network (AFTINET).

Key **Points:**

CLRI's submissions raises the following key concerns:

- « That bilateralism shuts developing countries out of any trade benefits, while also resulting in inequitable trading relations between the countries involved;
- That the Australian government must have the capacity to regulate in the public interest, especially in service sectors;
- That water should not be subject to the agreement, and should have been excluded;
- That the agreement will create unacceptable social costs resulting from changes to the PBS and tariff cuts in key areas;
- That the dispute settlement procedures subordinate the public interests to the dictates of trade and restricts democratic rights of government.

Recommendation:

CLRI's wide range of concerns has led us to believe that the agreement is not in the Australian community's interests. CLRI contends that the Committee should recommend that the agreement not be endorsed by Cabinet and should not come into force.

1. Bilateralism

CLRI would like to express its concern over the move towards bilateralism in trade negotiations. While there are problems with the negotiation processes at the World Trade Organisation, decisions regarding the regulation of the international trading system should be made in a multilateral forum. This is particularly important in taking account of the concerns and development needs of developing countries. The consequence of free trade agreements being exempted from Most-Favoured Nation (MFN) status, subject to certain conditions, under Article XXIV of the *General Agreement on Trade and Tariffs,* is that gains from the liberalisation of key sectors, such as agriculture, do not benefit the developing world.

Equally CLRI is concerned about the power-imbalances in bilateral trade negotiations. The dynamic of a bilateral negotiation enables the more powerful negotiating partner to achieve greater gains in access and policy change. In the instance of the Australia-United States Free Trade Agreement, CLRI is concerned that the bilateral process of negotiation has resulted in a lop-sided agreement without great benefit to Australia. CLRI believes that limits on the capacity of the Australian government to regulate areas such as services and investment are against the interests of the Australian community. Moreover, these limits are not reciprocal. With key areas of the American agricultural sector excluded from the Agreement, many of the expected gains to the Australian economy have not been achieved.

2. Services

For services subject to the service chapter, Australia must provide unrestricted market access and National Treatment.[1] Technical standards cannot be overly 'burdensome'.[2]

2.1 Public Services Exclusion

The agreement states that public services are not covered by the services chapter.[3] The definition of a public service mirrors that of the *General Agreement on Trade in Services:* services not supplied 'on a commercial basis, nor in competition with one or more service suppliers'. This definition does not provide sufficient protection to government services as many are now supplied on a commercial basis or in competition (even in limited competition). Services which could come under the services chapter due to this narrow definition include health, education, energy, post and water.

Other problems may arise as the definition is ambiguous as to whether services must satisfy both conditions to be considered a public service. Furthermore, the tests for commercial basis or competition are unclear. On a broad interpretation 'commercial basis' could be argued to refer to services which are not free, while on a narrow

[1] USFTA, Article 10.4; 10.2.
[2] USFTA, Article 10.7.
[3] USFTA, Article 10.1

interpretation could mean that they are offered at a market price. Equally, commercial can refer to consumers and the modalities of supply or to the supplier. The ambiguity of the definition of public services means that there is little protection given to public services, despite their seeming exclusion from the obligations under the services chapter.

Subsidies and grants are excluded, allowing the government to fund public services in these ways.[4]

CLRI contends that public services must be totally excluded from the obligations of any trade agreement.

2.2 Service Reservations

Reservations to the service chapter operate on a 'negative list' approach. There are two negative lists in the FTA:

- Annex I 'Stand-still' under which non-conforming areas will be kept but bound at current levels and unable to be subjected to increased regulation in the future; and
- Annex II 'Carve-out' lists which safeguard certain sectors from agreement obligations. Under Annex II, health and childcare, public education, public training and social welfare sectors are carved out subject to the extent that they are 'established or maintained for a public purpose'.

A negative list approach achieves maximum liberalisation by only freezing or excluding those sectors which are listed. This contrasts with the positive list approach of *GATS,* by which only listed sectors are subject to the specific commitments under Part III of the agreement. The implications of a negative list approach is that it provides a catch-all to sectors which were not considered significant at the time, or may emerge in the future. The positive-list approach is more cautionary, allowing sector liberalisation to occur incrementally and protecting any emerging sectors.

CLRI is concerned that any future service sectors will be subject to the full obligations of the FTA, thereby constricting the capacity of the Australian government to regulate emerging areas. Furthermore, CLRI contends that the exclusion of health, education and welfare services from service chapter obligations should not be subject to an ambiguous 'public purpose' test. It is unclear what constitutes 'established or maintained for a public purpose' as a limitation on government operated health, education and welfare services. This provides an opening for challenges to government services by the United States government, or potentially in the future by companies.

3. Water

CLRI is particularly concerned that water services are not sufficiently protected under the agreement. Commonwealth regulation of water is not excluded from the services chapter in Annex II. State and local government water service regulations are listed in Annex I

[4] USFTA, Article 10.1.

as at a standstill. This means that there cannot be higher levels of water regulation. There is an assumption in the agreement that water will fall under the public service exception under Article 10.1. Due to the difficulties with the definition of public services discussed above it is likely that many water sectors would fall under the agreement. Moreover many water sectors are clearly being delivered on a commercial basis (such as the trial market based water trading systems in the Murray-Darling Basin) and as such would be open to the market access and national treatment obligations as well as the restrictions on technical regulation.

The Ecology sub-committee of CLRI NSW has a particular focus on water. Water is essential to human welfare. It is essential to human survival. Water is a resource that CLRI believes must be regulated in the interests of the environment and the Australian community's equitable access to sufficient water. The privatisation of water in other parts of the world, and in parts of Australia such as Adelaide, has led to price rises and restrictions on the access to water of socially disadvantaged groups. Australia's own waterways have been damaged by years of overuse, which has lead to salinity and other problems. There is a need for innovative water service regulation, coordinated between the states and Commonwealth at the federal level. Under the FTA these forms of regulation, such as the National Water Initiative, may not be excluded from obligations of market access and national treatment. They could further be pursued as an unfair barrier to trade through dispute settlement and result in compensation claims by US companies attempting to pursue commercial operations related to water. Water regulation must be capable of responding to societal and environmental change. The standstill provisions and service chapter limit the capacity of Australian governments to regulate water services in the public interest in a responsive manner.

CLRI notes the Environment chapter of the agreement. CLRI holds that the definition of environmental laws is too narrow. A comprehensive strategy to protect Australia's waterways would not fall under any of the three categories of environmental laws listed in Article 19.9. We believe that any effective environmental regime must allow for innovative and comprehensive environmental policies aimed at the protection of and sustainable management of natural resources.

CLRI contends that water services and the regulation of water must be unrestricted by trade agreements.

4. Social Costs

There are many other aspects of the Agreement that CLRI considers problematic, and against the public interest. These include the changes to the Pharmaceutical Benefits Scheme in the form of opportunities for pharmaceutical companies to influence the Pharmaceutical Benefits Advisory Committee. CLRI supports the maintenance of the PBS in its current form as it allows all Australians to access essential medicine at an affordable price. The side letter on pharmaceuticals allows for pharmaceutical companies to push for more highly priced drugs to be listed on the scheme or to apply for price adjustments after the drugs have been listed. There is widespread agreement that the

consequences of the side letter will be higher pharmaceutical prices for Australians as the review process will push towards higher prices..[5] CLRI is concerned that this constitutes a threat to the continuing ability of disadvantaged groups in Australia to access affordable essential medicine. Moreover, CLRI holds that the review of pricing by pharmaceutical companies should not be prioritised over public health policy-making. Including review processes in the agreement limits the capacity of the government to regulate the PBS in the public interest in the future.

CLRI is further concerned by the potential social costs of tariff reductions in the textiles and automotive industries. CLRI notes that the potential impact of Australian tariff reductions over the next eleven years is high levels of unemployment in regional areas. CLRI believes that there was insufficient study on the impact of these cuts on employment before the agreement was concluded.

5. Dispute settlement procedures

The dispute resolution system allows each government to challenge breaches and omissions under the agreement as well as limited nullification and impairment cases. The dispute system itself is *sui generis,* combining elements of the WTO panel model and existing investment arbitration and dispute settlement systems.

CLRI notes that the transparency aspects of the system are not strong enough under Article 21, as hearings and panel findings may or may not be made public.

The panel is restricted to making findings of fact and determinations regarding the consistency of the government's action with the agreement. Panels are further restricted to considering the relevant provisions of the agreement and party arguments and submissions.[6] The panel system takes the agreement as primary.

All measures which come under the agreement are subject to dispute-resolution. This means that the frailties of the public services test and the exclusion of public services from the services chapter could result in public services regulation being challenged in dispute resolution. In a system, which is limited in its consideration to the agreement at hand, this could easily result in a system where regulations in the public interest are subordinated to the dictates of trade. CLRI holds that this constitutes an unacceptable limit on the capacity of the Australian Government to regulate in the interests of the Australian community.

6. Recommendation:

CLRI's wide range of concerns has led us to believe that the agreement is not in the Australian community's interests. CLRI contends that the Committee should recommend that the agreement not be endorsed by Cabinet and should not come into force.

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[5] Garnaut, J., 'Drug costs will rise with deal: US Official', *Sydney Morning Herald,* 11 March 2004.
[6] USFTA, Article 21.9.