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*Submission to the Joint Parliamentary Standing Committee on Treaties*

*on*

*a Proposed Australia-United States Free Trade Agreement*

by

**The Australian Chicken Meat Federation Inc**

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## CONTENTS

|  | <i>Page</i> |
|--|-------------|
| <i>Executive Summary</i>                                 | 3           |
| Introduction   | 5           |
| Quarantine is an important issue in the FTA              | 5           |
| Quarantine has been negotiated under the FTA             | 6           |
| The economic and social cost of quarantine relaxation    | 7           |
| Chapter 7: Overview                                      | 9           |
| Chapter 7: Must inevitably be extended to all countries? | 10          |
| Chapter 7: Analysis                                      | 10          |
| The DFAT Guide and Disclaimer                            | 12          |
| Retrospectivity, natural justice and procedural fairness | 13          |
| Conclusion   | 14          |
| <i>Attachment</i>  | 16          |
| <i>References</i>  | 19          |

## *EXECUTIVE SUMMARY*

- Quarantine concessions given in Chapter 7 of the FTA Text are comprehensive and significant. These quarantine concessions have serious implications for the Australian chicken meat industry, and no doubt for other industries and our natural environment more generally, given that they will inevitably be extended to other countries.
- The United States is the world's largest exporter of subsidised chicken meat. Understandably, since it is to its commercial advantage, it has been campaigning for years to break down Australia's very conservative and WTO legal quarantine barriers on chicken meat. However, it has never been prepared to challenge them in the WTO.
- The United States has achieved through the "back door" in this FTA significant concessions on Australia's quarantine, and it has claimed poultry as a benefit.
- It is a matter of concern that Australia seems to have "traded-off" quarantine for advantage in other areas in this FTA.
- Australia enjoys a unique natural environment that is normally and currently free from the devastating exotic diseases and pests that plague other countries.
- Like other rural based industries, the chicken meat industry has developed and grown over the last 60 years under Australia's strict quarantine regime, which is perfectly WTO legal, and which has protected the nation and its important animal and plant industries from exotic diseases.
- Not surprisingly, since it is to their commercial advantage to penetrate our market, aggressive subsidised major world exporters will always campaign to break down Australia's strict quarantine regime. Those countries will in their trade propaganda typically characterise Australia's justifiable quarantine regime as an illegal non-tariff barrier. But it is not. Australia's quarantine is perfectly WTO legal and, in regard to our industry, its 1997 cooked chicken meat Protocol has never been formally challenged.
- Australia presently has under-way an import risk assessment (IRA) for uncooked chicken meat in response to requests from major world chicken meat exporting countries including the United States.
- The provisions of Chapter 7 would permit (and may have already permitted) interference, review and the imposition of strict timetables by the United States on this IRA currently under-way without disclosure or transparency to Australian stakeholders.

- The bilateral quarantine concessions granted in FTA Chapter 7 represent a denial of natural justice and procedural fairness to the Australian chicken meat industry which hitherto had been complying in good faith with the open and transparent procedures established in Australia's official IRA Handbook.
- The Australian chicken meat industry has grown to become Australia's most efficient meat industry well ahead of beef, sheep meat and pork in economic efficiency terms. It is Australia's second largest meat industry (after beef) with assets of over \$6 billion, annual turnover of \$3.5 billion and it employs directly and indirectly 120,000 people concentrated chiefly in outer metropolitan and semi rural areas throughout Australia.
- Relaxation of Australia's strict quarantine regime would trigger a substantial flood of imports of subsidised chicken meat from the United States and the other major subsidised world exporters most of whom are currently infected with strains of exotic avian diseases not present in Australia. The economic cost of quarantine relaxation of chicken meat would be very significant and is estimated at \$3.5 billion in GDP lost, \$900 million in household income and 35,000 lost jobs. This economic cost would virtually cancel out most of the claimed economic benefits of the FTA estimated last year at \$4 billion.
- While the ACMF welcomes official public assurances that Australia's quarantine has not been weakened by the FTA concessions in Chapter 7, and that industries would not be "traded-off" in the negotiations, the official DFAT Disclaimer and official statements from the US side, raise serious concerns. Accordingly, the ACMF recommends that the Joint Parliamentary Committee on Treaties review very carefully Chapter 7 on quarantine. **In particular the ACMF requests:**
  - (1) that Chapter 7 have no retrospective application to existing quarantine Protocols;**
  - (2) that Chapter 7 not have application to those Australian IRAs already under-way;**
  - (3) that provision be made for full natural justice and procedural fairness to Australian industries through complete public disclosure, transparency and consultation in the activities of the officials' Committees established pursuant to Chapter 7.**

## **Introduction**

The Australian Chicken Meat Federation (ACMF) regards the proposed free trade agreement (FTA) with the United States as a matter of great significance given the sustained campaign over the years by the United States, and other major subsidised chicken meat exporting countries notably Thailand and the EU, to break-down Australia's quarantine.

The FTA Text includes at Chapter 7 significant concessions by Australia on quarantine.

This should be a matter for careful evaluation by the Parliament particularly because the quarantine concessions of Chapter 7 will inevitably have to be extended to all countries.

This Submission is made in response to the invitation by the Parliamentary Joint Committee on Treaties for submissions by 13 April 2004.

### **Quarantine an important issue in the FTA**

The United States has always made clear, at the outset of the negotiations and repeatedly during the negotiations, that breaking down Australia's quarantine regime is an issue in the FTA (Zoellick 2002; AFR 13 March, 24 May, 21 June 2003).

Lobbying by the subsidised major chicken meat exporters – the United States, Thailand, EU and others – to break down Australia's justifiable and WTO legal quarantine has been under-way for many years as the 1996 Senate Inquiry on the import of cooked chicken meat into Australia attests (The Senate 1996). More recently a concerted world wide attack on the totality of Australia's quarantine regime as has been launched in the WTO by the EU, Canada, the Philippines, US, China, Thailand and India (WTO 2003). The ACMF believes Australia must stand firm in the defence of its quarantine integrity which reflects our nation's unique natural environment and its freedom from exotic pests and diseases which plague and have devastated the agricultural industries and natural environment of other countries. Indeed, it is puzzling that Australia appears not to have sought withdrawal by the US of its WTO case against Australia's entire quarantine system as a pre-requisite for granting the significant concessions provided in Chapter 7.

It is noteworthy that while wrongly characterising Australia's quarantine as a non-tariff barrier the United States has always refrained from any formal WTO challenge of Australia's 1997 quarantine protocol on cooked chicken meat which was arrived at after full and exhaustive WTO Sanitary and Phytosanitary Measures Agreement (SPS) compliant procedures. Rather, the United States is apparently seeking in this FTA to achieve - through the back door - concessions on Australia's quarantine which it is unable to secure under the normal WTO procedures.

ACMF believes Australia's quarantine integrity should not be a negotiation item in trade agreements or an item that can be "traded-off" as a negotiating coin for commercial advantage in other areas.

This FTA, and other FTAs in prospect with Thailand, China and other countries, should not be a vehicle for “back-door” deals which break down Australia’s quarantine regime.

### **Quarantine has been negotiated under the FTA**

Quarantine was listed by both sides as a negotiating item (Zoellick 2002, Vaile 2003). Chapter 7 of the FTA Text attests that quarantine has indeed been negotiated and significant concessions have been granted by Australia. Although assurances by the Australian side that quarantine has not thereby been compromised are welcome (DAFF 04/044WT & 059WT; ABC 17 March; DFAT Guide & Disclaimer), examination of the black letter text of the FTA, and the DFAT Disclaimer raises serious concerns for the ACMF.

The United States side, for its part, clearly believes that important quarantine concessions have been achieved (USDA Fact Sheet; USTR Fact Sheet; Zoellick US Senate 2004). The official USDA and USTR Fact Sheets describe the gains from the FTA in respect of quarantine, citing specific commodities, in very different terms from the public documentation from the Australian side. The USDA Fact Sheet for example states:

- *“The United States and Australia will work to resolve SPS barriers to agricultural trade, in particular for pork, poultry, citrus, apples and stone fruit.*
- *The Agreement establishes a new mechanism for scientific cooperation between US and Australian authorities to resolve specific bilateral animal and plant health matters.*
- *USDA’s Animal and Plant Health Inspection Service (APHIS) and Biosecurity Australia will operate a standing technical working group to cooperate in the development of science-based measures that affect trade between the two countries.”*

The statement by the United States that Australia will work to resolve our quarantine barriers on poultry (and the fact that this is being counted as a benefit by the United States) is a very serious concern. It is of little comfort to the ACMF and presumably to other Australian industries that while, on the one hand, the Australian side argues that no quarantine relaxation has been conceded, on the other hand, the United States side asserts that it has.

It is important that the Joint Parliamentary Committee on Treaties inquires fully into the quarantine concessions given by Australia and establishes whether the quarantine protection of specific Australian industries, including poultry, has in fact been targeted for “resolution” as part of the FTA as claimed by the United States.

If the United States is mistaken in such an important matter it would be desirable that the FTA Text be clarified by an Official Sideletter to Chapter 7. This would not only be fair to the United States but also provide important assurance for Australian bankers and

businesses, and for the jobs of the 120,000 Australians in the poultry industry, that essential quarantine protection from the entry of exotic pests and diseases which underpins the commercial viability of the industry here will not be changed.

### **The economic and social cost of quarantine relaxation**

The economic and social cost to Australia of quarantine relaxation would be very substantial. It is important, particularly at the present time when animal disease outbreaks around the world are at alarming levels, to appreciate the vital bio-security contribution which national governments make towards the development and growth of their livestock and meat industries. Apart from the normal functions of governments in establishing a stable macro-economic and legal regime for investment, commerce and the efficient operation of markets, governments also have a particular responsibility in the development of their livestock industries to ensure that a proper bio-security and animal health regime is maintained through national quarantine and food standards systems. These important responsibilities of national governments, recognised in international agreements, particularly the WTO SPS Agreement and the OIE (Office International des Epizooties (World Organisation for Animal Health)), are essential pre-requisites for investment and economic development of livestock industries world wide - and also for international trade in meat products to occur. [The commercial realities and subsidised nature of world chicken meat trade and production differs from other meats (like beef, pork and sheep-meat). This is described fully elsewhere (Senate Submission 2003, ABARE Outlook 2004) and in the interests of brevity is not repeated here.]

It is perhaps not surprising that commercially aggressive and subsidised exporters of agricultural products, such as the United States, allege that other countries like Australia which they see as an attractive import target misuse bio-security and quarantine measures to protect their markets. The allegations of aggressive and subsidised exporters in this context is familiar “beggar-thy-neighbour” propaganda common in international trade negotiations. The truth is that all countries who have, or aspire to develop, livestock industries require proper bio-security and quarantine regimes administered by their national governments without which the pre-conditions for orderly investment and large scale agribusiness development in their countries would not occur.

Consistent with its WTO obligations, and reflecting its unique environment and natural heritage, Australia has in place strict WTO compliant and comprehensive bio-security and quarantine regimes to protect its livestock industries – cattle, sheep, pigs and poultry – and, of course, also its major grains and horticultural industries also. As recent catastrophic events such as major outbreaks of foot and mouth disease (FMD), bovine spongiform encephalopathy (BSE), Newcastle disease (ND) and avian influenza (AI) in Europe, North America and Asia have shown, disease outbreaks have huge economic and social costs and severely disrupt the orderly development of investment, and international trade, in meat products – to say nothing of the massive environmental disasters involved.

The economic value – quite apart from environmental value – of the Australian government’s strict bio-security and quarantine protection of its livestock industries can

be gauged from recently published research. For example, ABARE has estimated that an outbreak of FMD (foot and mouth disease) would cost Australia \$5.8 billion in the first year, 3.5% in GDP and a 1% increase in unemployment (ARMCANZ Communique 9 May 2001). Other estimates by the Productivity Commission (PC 2002) and the Queensland Department of Primary Industries confirm similarly huge economic and social costs of quarantine failure to our rural industries (QDPI 2001). The PC estimate of an FMD outbreak in Australia is \$13 billion in GDP and over 30,000 jobs lost.

In the case of the chicken meat industry estimates of the economic impact of quarantine relaxation, without allowing for the additional cost of exotic disease outbreak, show a cost of \$3.5 billion in lost GDP, \$900 million in household income and 35,000 in lost jobs. This economic impact would be widespread throughout outer metropolitan and rural areas. Job losses by State are set out below:

| <i>Employment Losses by State: Quarantine Relaxation – Chicken Meat</i> |        |
|---|--------|
| NSW   | 13,056 |
| Victoria  | 9,174  |
| Queensland  | 6,421  |
| S A   | 2,908  |
| W A   | 3,611  |
| Total   | 35,170 |

Source: NIEIR (ACMF 2000)

Maintenance of strict bio-security and quarantine will always remain fundamental to the stability and development of Australia's rural industries – the chicken meat industry included. The response of the Australian government to the Europe's FMD crisis in 2001 by substantially up-grading Australia's quarantine protection is a reflection of the overarching involvement of national governments in the livestock industries of their countries.

The Council of Australian Governments (COAG) meeting in Canberra on 8 June 2001 adopted a comprehensive range of new measures to up-grade Australia's quarantine protection generally as a consequence of that FMD threat. These desirable measures are particularly important to our industry. Devastating avian diseases plague the world poultry industry most notably Newcastle disease (ND), avian influenza (AI) and infectious bursal disease (IBD). Australia is free of the exotic strains of these diseases because of its long record of successful quarantine policy and administration. Australia's disease free status is unique and must be maintained. Assurances by the Australian governments that Australia's strict quarantine regime will not be "traded-off" have been important to the chicken meat industry and, indeed, to Australia's rural industries generally underpinning their investment, stability and orderly growth. Equally important to our industry are assurances, during the current major avian influenza outbreak in Asia,



that quarantine control of chicken meat would be strictly maintained (ABC 17 January 2004).

In regard to the current world avian influenza crisis although many people see Newcastle disease as the foot and mouth disease of the poultry industry, on a global scale highly pathogenic avian influenza is far more devastating. One obvious reason is that most countries currently have effective vaccines against Newcastle disease and are vaccinating.

In 2000, Italy experienced an outbreak of avian influenza that resulted in the destruction of 14 million birds. During March and April 2003 the Dutch industry lost half its poultry numbers in less than three months – around 45 million birds were culled. Avian influenza has also recently plagued the United States with substantial losses. As we are all aware, the H5NI “bird flu” in Asia has not only resulted in the death and destruction of an estimated 100 million birds, but there have been a small number (22) of human deaths associated with the outbreak.

Australia is currently free of avian influenza, and to date the H5N1 virus has never been isolated in this country. There have, however, been five outbreaks of avian influenza of the H7 strain since 1972, the most recent being in 1997. On each occasion the outbreaks have been controlled and the disease eradicated by a stamping out process in accordance with the Australian Veterinary Emergency Plan.

An outbreak of the relative magnitude of the disaster in, for example Thailand, would have severe implications for the prospects of the Australian industry in the short to medium term.

The Australian industry, as well as the Commonwealth and State Governments, has been closely monitoring the progress of the disease since the outbreak began late in 2003. All possible precautions have been put in place, with heightened biosecurity measures the first line of defence.

As already mentioned, Australia is free from exotic strains of avian diseases such as Newcastle disease, avian influenza and infectious bursal disease. These diseases plague the poultry industries of the world – the United States included. It remains vital that Australia maintains its strict quarantine regime against these devastating exotic avian diseases.

## **Chapter 7: Overview**

Chapter 7 of the FTA Text is comprehensive in scope applying to all SPS matters, and it has retrospective application. Hence all of Australia’s existing IRAs (Import Risk Assessments) some of which were put in place years ago, and quarantine Protocols, whether completed or underway, can be re-opened (Article 7.2) by the United States without recourse to prior WTO legal challenge.

Chapter 7 is driven by the overarching aim to facilitate trade. The Chapter sets up two Committees (a high level Committee and a specialist scientific committee reporting to the high level Committee). Both are charged to resolve disputes and achieve consensus on quarantine within strict timetables.

There is no requirement for transparency or reporting to Parliament, nor for notification to and consultation with affected Australian industries and the Australian public who might be concerned with the natural environment and heritage, as a consequence of the new quarantine procedures set out in Chapter 7.

The special dealings, analysis, research and decisions on science and quarantine protocols between Australian and United States officials set out in Chapter 7 will apparently be conducted under the cloak of confidentiality separate from, and apparently compromising, the open and transparent procedures which apply to Australia's official Import Risk Analysis Handbook.

### **Chapter 7: Must inevitably be extended to all countries?**

Unlike other areas of the FTA quarantine preferential deals cannot, it appears, be limited to bi-lateral application. That is, Chapter 7 of the FTA will have to be accorded under the MFN principle of the WTO to all countries. This has been confirmed by the government "*...Under WTO rules, bilateral trade deals cannot include preferential sanitary and phytosanitary treatment, and the proposed AUSFTA is WTO compliant in that regard.*" (DAFF04/059WT, March 2003). The DFAT Disclaimer (see below) however presumably qualifies this latter assertion (of WTO compliance).

It can, in any event, be expected that most other countries will quickly seek, and in practice have to be accorded by Australia, the privileges of Chapter 7. For example, it can be expected that Thailand and China, with whom Australia is already engaged in negotiations concerning FTAs, and who are major exporters of subsidised chicken meat, will request the same Chapter in accord with the MFN principle. The EU and Brazil, also major subsidised exporters, will presumably seek the privileges of Chapter 7 with alacrity.

Inevitably the extension of the elaborate and comprehensive privileges of Chapter 7 to all countries could be expected to transform the ground rules of Australia's quarantine which have prevailed to date, and bring a new level of commercial risk to Australian industries as well as have implications for the Australian environment more generally.

### **Chapter 7: Analysis**

While affirming in a preamble clause (Article 7.3.1) their rights and obligations to each other under the WTO SPS Agreement, Chapter 7 establishes two new bi-lateral officials' Committees charged with important new functions on SPS matters (Article 7.4.1, 9 & 10, and 7-A.1) which qualify and circumscribe the rights Australia has enjoyed generally and under the WTO SPS Agreement.

The first is a high level Committee (The Committee on Sanitary and Phytosanitary Matters) with wide responsibilities (Article 7.4) over SPS matters. Its membership must include trade officials (Article 7.4.8). The second is the Standing Technical Working Group (Article 7.4.9 and Annex 7-A) which reports to the high level Committee and includes the co-chairs of the high level Committee.

The high level Committee is **mandated** to resolve SPS matters arising between the countries' agencies (Article 7.4.5(c)). It is clearly a dispute settlement body on quarantine matters with executive powers. The Technical Working Group has, in addition, as a prime function the resolution of animal and health matters (Article 7-A.4(a)).

Hence **two** new layers of dispute resolution arrangements for quarantine are established under the FTA. One at the technical "science" level, and the second at the level of high officials, which includes trade officials, with mandated executive powers.

Ominously, in the light of the primacy of science and protection of Australia's unique natural environment which have in the past been the guiding principles of Australia's quarantine, both new Committees established in Chapter 7 are heavily charged in carrying out their duties to have regard to the over-arching objectives of "resolving trade issues", "expand trade opportunities"; "facilitating trade" and so on (Articles 7.1; 7.2; 7.4.3; 7.4.5(d)(i); 7-A(1); 7-A(4)(a), (b) & (c); 7-A, B(10)).

Chapter 7 Annex 7-A Section B provides elaborate new operational arrangements (Article 7-A, B10 & 11) to initiate and progress work plans under a strict timetable (Article 7-AB11 & 12) on any quarantine issues with a view to reaching resolution between Australia and the United States. The work plan can include all scientific and administrative matters relating to:

- (a) *"the scope and approach proposed for a risk assessment, and the expertise required for the assessment (including the use of experts from outside the responsible agency);*
- (b) *the technical issues, including hazards, to be addressed in a risk assessment;*
- (c) *the biology and transmission of pests and diseases subject to regulatory control and the type or range of risk mitigation measures that may be available to deal with those pests and diseases;*
- (d) *the risk assessment, including the provision of the full risk analysis report at the appropriate point in the responsible Party's process;*
- (e) *matters that may be referred by either Party to an independent scientific peer review or for other independent scientific input; and*
- (f) *mutually agreeable mitigation measures, where possible."*

This, it seems clear, covers the totality of Australia's quarantine policy.

The power accorded to a foreign government (in this case the United States but inevitably in future other governments) to initiate independent scientific peer review and input, and to be involved in and approve the detail of Australia's quarantine Protocols subsequent to the IRA process is remarkable.

### **The DFAT Guide and Disclaimer**

The DFAT Guide to Chapter 7, and associated government assurances, must be read prudently in conjunction with the important Disclaimer provided by DFAT. That Disclaimer cautions that:

*"...The views offered in the Guide are without prejudice to any legal interpretation of the Agreement by the Australian Government.*

*Before entering into any particular transaction users should:*

1. *rely on their own enquiries, skill and care in using the information;*
2. *check the final text of the Australia-United States Free Trade Agreement and all corresponding legislation;*
3. *check with primary sources in respect of third party submission; and*
4. *seek independent advice.*

*While every care has been taken in ensuring the accuracy of the information provided, the Department of Foreign Affairs and Trade, its officers, employees and agents, accept no liability for any loss, damage or expense arising out of, or in connection with, any reliance on any omissions or inaccuracies in the material contained in this publication."*

The DFAT Disclaimer, therefore, seriously discounts the value of the DFAT Guide itself. Indeed, even without the Disclaimer the Guide could only be of value if it had the status of an official Sideletter to the FTA agreed to by the United States officials. But it does not. There are 26 official Sideletters to the FTA but none on SPS matters. Indeed, the material available from the United States (Fact Sheets USTR, USDA and Zolleck Senate 2004) suggests a significantly different interpretation to Chapter 7 than that proffered in the DFAT Guide.

ACMF strongly suggests to the Joint Parliamentary Committee that legal advice of the Australian Government Law Offices should be publicly available before its hearings commence on the accuracy and interpretation of the DFAT Guide to Chapter 7, in particular the Guide's statements under its numbered paragraphs that:

- (1) "...Nothing in the Chapter undermines the right of either Party to determine the level of protection it considers appropriate."
- (2) "this...Chapter creates no new SPS rights or obligations." and,
- (5) Whether the Guide's interpretation of Paragraph 11 conforms to the text of the FTA and whether such interpretation is likely to be accepted by the Courts.

In spite of its accompanying Disclaimer and lack of agreed official Sideletter status detailed further commentary on the Guide is warranted. This is provided at Attachment 1.

### **Retrospectivity, natural justice and procedural fairness**

The Australian chicken meat industry is Australia's second largest meat industry with assets of around \$6 billion, annual turnover of \$3.5 billion and employs directly and indirectly 120,000 people. It is Australia's most efficient meat industry well ahead of beef, sheep-meat and pork. Nevertheless, we could not hope to compete with the subsidised world major chicken meat exporters such as the United States, Brazil, Thailand, the EU and China most of whom, unlike Australia, are plagued by exotic avian diseases from which we are free.

Australia's quarantine regime on chicken meat is fully WTO legal – hence it is not a non tariff barrier – and our 1997 Protocol has never been challenged in the WTO by the United States or any other country. Understandably – because it is to their commercial advantage – subsidised agricultural exporters like the United States, EU and Thailand will continue to attack Australia's quarantine and endeavour to break it down. Such self serving trade lobbying should be firmly resisted by Australia.

Relaxation of Australia's quarantine through the “back door” under this FTA would trigger a flood of subsidised chicken meat of doubtful disease status, which would largely destroy Australia's industry and, on the realistic commercial assumption of taking at least 40% market share, cost \$3.5 billion in GDP, \$900 million in household income and 35,000 jobs. This economic cost to Australia would virtually cancel out the claimed future economic benefits of the FTA of \$4 billion under earlier calculations (CIE 2003).

The United States side would seem to believe Chapter 7 of the FTA allows retrospective re-opening of Australia's existing quarantine Protocols and interference in and review of current IRAs so as to achieve more favourable outcomes (USTR, USDA Fact Sheets).

Australia's quarantine Protocol on cooked chicken meat put in place in 1997 after extensive WTO legal public IRA processes (including a Senate Inquiry) has never been challenged formally in the WTO. It is a basis on which substantial investment, jobs and growth have continued in the industry. In ordinary circumstances this Protocol would continue in place. However, Chapter 7 of the FTA will now facilitate its re-opening and review on more favourable terms than would have been possible previously.

ACMF believes strongly that this FTA should **not be retrospective**. That is, the FTA provisions should have effect only from the date of the FTA commencement, namely, 1 January 2005. Retrospective re-opening of previous Australian quarantine Protocols which pre-date the FTA should not be allowed.

ACMF also believes that current IRAs underway should not be subject to review, clawback, and revision as a consequence of Chapter 7.

At present a very important IRA on uncooked chicken meat is well under-way with the United States, EU, Thailand, and other countries as proponents. This IRA has been progressing in accordance with Australia's official IRA Handbook. Chapter 7 of the FTA will open the way for interference by the United States in this IRA, review of steps already taken and "fast-tracking" of results including the possibility of independent outside scientific peer review. Such interference by a proponent would, up until now, have been unthinkable under Australia's existing quarantine procedures.

Hence, ACMF believes that **retrospective reach of this FTA into Australia's IRAs currently underway should not be allowed.**

Procedural fairness and natural justice would clearly be denied to the Australian industry, and indeed to other Australian stakeholders concerned with the natural environment, if retrospectivity is allowed to the United States under FTA Chapter 7.

An additional serious question of **procedural fairness and natural justice** arising from Chapter 7 should be brought to the attention of the Parliamentary Joint Committee on Treaties.

It has been revealed that Annex 7-A of Chapter 7 has in fact been agreed and in operation during the last 12 months (Article 7.4.9; DAFF04/044 WT 4 March). The activities of this Technical Working Group have not been disclosed to affected Australian industries and, in any event, such interference in science and risk assessments is not contemplated in Australia's existing IRA processes as described in the IRA Handbook.

ACMF believes the Joint Parliamentary Committee must establish whether the Technical Working Group, now formalised in Chapter 7, has in fact discussed and influenced the direction and possible outcome of the current IRA on uncooked chicken meat (and perhaps other IRAs), and whether its undisclosed and non-transparent activities have led to the confidence by the USDA, as evidenced in its Fact Sheet, that resolution of SPS barriers on poultry can now be counted as a benefit of the FTA.

The denial of natural justice and procedural fairness to Australian industry arising from the confidential and non-transparent activities of the Technical Working Group over the last year (and now formalised in Chapter 7) is a matter, which ACMF believes, should be viewed seriously by the Joint Parliamentary Committee on Treaties.

## **Conclusion**

Australia's quarantine regime, and its predicability and integrity over many years, has preserved our unique natural environment and human, animal and plant health. Our quarantine integrity maintained by successive Australian governments has also underpinned investment in, and the orderly development of, Australia's rural and related industries.

ACMF urges the Joint Parliamentary Committee on Treaties to review carefully the implications of Chapter 7 of the FTA and to recommend changes to the FTA Text essential to uphold the integrity of Australia's quarantine system.

**Further commentary on DFAT Guide to FTA Chapter 7**

**DFAT Guide, Section 1, line 7:** "...Nothing in the Chapter undermines the right of either Party to determine the level of protection it considers appropriate."

**Comment:** This is not explicitly stated in Chapter 7 and, furthermore the processes of Annex 7-A, B(10&11) would not seem to exclude Australia's ALOP from being opened up either directly or indirectly.

**DFAT Guide, Section 2, line 1:** "...In Article 7.3.1, each Party reaffirms existing commitments to the WTO SPS Agreement."

**Comment:** Article 7.3.1 only affirms existing SPS rights and obligations to each other. It is not an unqualified assertion of the primacy of Australia's SPS Agreement rights nor an assertion (and acceptance by the other Party) that nothing in Chapter 7 qualifies or weakens Australia's WTO rights and its sovereign powers under the Quarantine Act 1908.

**DFAT Guide, Section 2, line 1:** "...Article 7.3.2 states that there is no recourse to dispute settlement under the FTA for SPS matters. This is because the Chapter creates no new SPS rights or obligations so there is no need for the Parties to have recourse to dispute settlement under the Agreement."

**Comment:** There is, indeed, no need for recourse to the FTA dispute settlement apparatus (in Ch 21) because Chapter 7 establishes two if not three new special dispute settlement arrangements for SPS matters as between Australia and the US. A mandated responsibility of the (high level) Committee in Articles 7.1, 7.4.3, 7.4.5(c) and for the "scientific" Committee in a "forum" context in Article 7-A.4 and also under strict procedures and timetables in Article 7-A, B10&11. It would be most surprising indeed if any differences remained unresolved after being subject to these formal Committee processes.

**Further Comment:** The assertion that the Chapter creates no new rights or obligations is surprising. The assertion is, of course, not supported by advice from the law officers of the Australian government – which is still awaited according to the DFAF Disclaimer.

**DFAT Guide, Section 3, line 9:** "...Representatives of the trade departments of both Australia and the United States will be members of the Committee. Their key contribution will be to provide advice on international rights and obligations, particularly those relating to SPS measures in the WTO."

**Comment:** Doubtless one other "key" aspect of the contribution of the USTR and DFAT representatives on the high level Committee (which it must be recalled overlooks the work of the "science" Committee) will be to ensure the prominent bi-lateral trade objectives set out in this Chapter (notably in Articles 7.1, 7.2, 7.4.3, 7.4.5(d), 7-A.1, 7-A.4(a), (b) and (c), and 7-A, B10) are enforced.



**DFAT Guide, Section 3, line 14:** "...Detailed operating procedures such as where the Committee will meet, who is responsible for the agenda and other procedural matters are yet to be agreed."

**Comment:** It is surprising that these important matters of process (and transparency) especially agenda setting are not yet agreed and made available to the Parliament to say nothing of Australian stakeholders with vital interests at stake. This confirms again that the deliberations and activities of the two important new quarantine Committees established in Chapter 7 are apparently to operate under the cloak of confidentiality. This, ACMF submits, is unacceptable in such an important area as Australia's quarantine and is a denial of natural justice and procedural fairness to Australian industry, and those people concerned with the environment.

**DFAT Guide, Section 3, line 17:** "...Because Australia and the United States enjoy a significant trading relationship in agricultural products, it is likely there will, at any point in time, be an agreed agenda of market access issues for which quarantine risk assessments are underway or pending, and which may benefit from scientific and technical discussion."

**Comment:** Market access trade issues should not drive quarantine. The primacy of trade reflected in a Chapter dedicated to quarantine, and the intrusion of trade into the science of risk assessments (whether already underway or pending), is to be deplored. Even more fundamentally, this statement in the Guide begs the question of why, if the quarantine risk assessments will benefit from scientific and technical discussion, the US proponent does not provide its information to a transparent Import Risk Assessment, and why the discussion does not take place within the lawfully constituted IRA process? Why is a separate and parallel process being established to allow US officials to provide information other than through the normal IRA process? The answer can only be because the new Committee structure provides a "back door" for the US to achieve its quarantine-based access aims.

**DFAT Guide, Section 4, line 1:** "...Paragraph 1 of Annex 7-A explicitly recognises the importance of protecting human, animal and plant life and health, the rights of the Parties in that regard and their right to maintain their own negotiating systems, risk assessment and policy development processes.

**Comment:** It explicitly does not. It only requires "respecting" of the regulatory systems, risk assessment and policy development processes of each Party. In any event one of the main operational provisions of Annex 7-A is to provide in Section B(10) and (11) new machinery to initiate, overturn and change, under deadlines, Australia's risk assessments and existing and future quarantine Protocols.

**DFAT Guide Section 4, line 7:** "...Paragraph 4 of Annex 7-A specifies that the Working Group will provide a forum for this enhanced technical cooperation with an emphasis on early engagement to avoid unnecessary delays in the risk assessment and policy development processes. Each Party understands, however, that it may not always be possible to reach agreement on scientific issues (Subparagraph 4(a))."

**Comment:** How can "unnecessary delays" arise in the pursuit of science? Surely, technical experts and scientists, including government officials, work diligently and

arrive at conclusions as soon as is practicable. The Annex appears designed to “fast track” science, IRAs and quarantine decisions.

**Further Comment:** In regards “...to reach agreement” the Chapter Annex relies on **consensus** which is a different form of decision making than agreement. Australia will have no rights to disagree (and walk away) in quarantine matters under the FTA under the consensus machinery set down in Chapter 7.

**DFAT Guide, Section 4, line 11:** “...The Working Group builds on the cooperative relationship that already exists between the Australian and United States’ agencies with major responsibility for technical market access issues relating to animal and plant health (Biosecurity Australia and the US Animal and Plant Health Inspection Service (APHIS)). That is why Paragraph 2 of Annex 7-A specifies that the Working Group will be chaired by those agencies.”

**Comment:** But this is a confidential non-transparent relationship underway over the last year the details of which are not public. The details of what has occurred under that relationship and what Australian IRAs and quarantine Protocols have been discussed, and what Australian industries have been targeted should be revealed.

**DFAT Guide, Section 4, line 18:** “...The Working Group is intended to manage a more intensive engagement on a small range of bilateral issues identified by either Party as of particular importance. Article 6 requires each Party to identify those priority issues that are of particular importance, to assist one another in balancing resource constraints.”

**Comment:** Again this is a new concession by Australia agreeing to “fast track” quarantine issues of high priority to the United States. The first group of these have already been cited in the USDA Fact Sheet as pork, poultry, citrus, apples and stone fruit.

**DFAT Guide, Section 4, line 22:** “...Paragraph 8 provides the flexibility to the Working Group to appoint sub-groups to consider particular technical issues. These are intended to focus on specific scientific matters of relevance to the Working Group’s agenda.”

**Comment:** A further new mechanism relevant to Australia’s science rights under the SPS Agreement is thereby established.

**DFAT Guide, Section 5, line 6:** “...Paragraph 11 of the Annex identifies the range of possible types of activities arising from such a referral, but the inclusion of any one of them in the specific work plan will depend on the issue and the stage it has reached in the importing Party’s risk assessment or regulatory process. The possible activities were developed in the light of each Party’s existing processes and are not intended to interfere with or prejudice the outcome of any stage of those processes. Rather, the objective is to identify steps or stages in those processes where enhanced technical exchange may help in resolving issues and moving the process along.”

**Comment:** The text of the FTA indicates otherwise and no such sentiments are set out in the text. Article B-11 clearly establishes new and comprehensive machinery to initiate, interfere with and overturn Australia’s past, existing and future IRAs and quarantine Protocols.

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## Wilson, Frances (REPS)

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**From:** Jeff Fairbrother [jeff.fairbrother@chicken.org.au]  
**Sent:** Thursday, 8 April 2004 3:04 PM  
**To:** Committee, Treaties (REPS)  
**Subject:** Submission from ACMF Inc



ACMF Submission to  
Treaties Co...

**Julia Morris**

Attached is the submission from the Australian Chicken Meat Federation Inc on the proposed Australia-United States Free Trade Agreement.

Acknowledgement would be appreciated.

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