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15 April 2003

The Secretary
Senate Foreign Affairs, Defence and Trade References Committee
Suite S1.57
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BY E-MAIL: fadt.sen@aph.gov.au

Dear Secretary

I apologise for the delay in forwarding to the Committee the ACTU's submissions to the inquiry on the General Agreement on Trade in Services and the Australia/US Free Trade Agreement.

We look forward to discussing our submissions with the Committee.

Yours sincerely

Sharan Burrow
ACTU PRESIDENT

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Submission to the Senate Foreign Affairs, Defence and Trade References Committee on the General Agreement on Trade in Services

1. INTRODUCTION

1.1 The ACTU welcomes the opportunity to comment on issues involved in the negotiation of the General Agreement on Trade in Services. The ACTU also commends the Senate Foreign Affairs, Defence and Trade References Committee for preparing a background paper outlining the different perspectives on GATS and the implications of its particular disciplines.

1.2 This submission will outline the ACTU's views on interpretations of the GATS and on the Requests received by Australia from other WTO members for additional Market Access and National Treatment commitments. While Australia has submitted and made public its Initial Offer, as the term implies further offers may be made by Australia in this round of GATS negotiations.

1.3 This submission will also comment on Australia's Communication to the WTO in respect of the proposed new GATS disciplines under Article VI, Domestic Regulation, and briefly address the issue of government procurement of services. Section 3 of this submission will contain recommendations to improve the consultative procedures of the Department of Foreign Affairs and Trade, though further recommendations on DFAT's role, intended to enhance transparency, are set out in other sections of the submission.

2. SUMMARY OF RECOMMENDATIONS

- That DFAT conduct impact assessments on existing Australian regulatory measures affected by Commonwealth liberalisation proposals to the WTO, and that impact assessment statements be released publicly (Ref 3.5).

- That proposed major changes to Australia's GATS negotiating position be referred to the WTO Advisory Committee to the Minister for Trade, and to parliamentary committees such as the Senate Foreign Affairs, Defence and Trade References Committee and the Joint Standing Committee on Treaties (Ref 3.6).

- That any Offers from Australia subsequent to the submission of the Initial Offer be released in draft form for public scrutiny and consultation (Ref 3.6).

- That DFAT explanatory material on GATS acknowledge that the right of governments to regulate is circumscribed by Market Access and National Treatment commitments (Ref 4.13).

- That DFAT explanatory material commenting upon Article XIV, General Exceptions, acknowledge that the reference to 'necessary'

- in the Article has a distinct meaning from necessary in the view of the Government enacting a measure (Ref 4.13).

- That the Commonwealth abandon support for a Necessity Test for Domestic Regulation, and generally oppose proposals for new limiting disciplines under Article VI (Ref 5.19).

- That the Commonwealth seek amendments to GATS which exclude 'public goods' services from the scope of the Agreement, and also delete Article I 3(c) of GATS (Ref 6.6).

- That DFAT explanatory material on GATS avoid references to the exclusion of public services generally from the scope of the Agreement, while recording that some public services may be excluded, depending on the circumstances of supply (Ref 6.6).

- That the Commonwealth oppose a negative list structure for GATS (Ref 6.7).

- That the approach of expanding Australia's specific Market Access and National Treatment commitments in line with the level of autonomous domestic liberalisation be subject to:

    - the social significance of the service sector or sub-sector (Ref 7.5).

    - whether the domestic liberalisation reform was contentious at the time of its enactment, and the relevant federal Opposition party maintains a policy implying reversal or partial reversal of the reform in the event of a change of government.

- That no further Offers be made that:

    - compromise Australia Post's delivery of reserved services

    - extend commitments in education services

    - include audio visual and related advertising services

    - extend commitments in respect of environmental services

    - extend commitments in respect of health services, including those that are grouped by the WTO in other service classifications, such as Business and Professional Services

    - extend commitments in respect of land transport services.

    - impede the ability of the Commonwealth to require freight movement between domestic ports to be carried by Australian flagged and registered ships

    - impede the ability of the Commonwealth to alter the terms of the Job Network system or to revert to a single or near-monopoly government employment service. (Ref Section 8).

3. EFFECTIVE CONSULTATION AND TRANSPARENCY

3.1 The ACTU commends the Department for its recent program of consultation with the union movement and with non-government organisations generally. The ACTU also welcomes the Commonwealth's decision to establish a WTO Advisory Committee to the Minister for Trade, albeit with limited

representation from the union movement and non-government organisations. However, we have proposals for the Senate Committee's consideration that would broaden and improve consultation by DFAT and the Commonwealth.

3.2 It is important to ensure that Australia's formal negotiation communications to the WTO are informed by the views of relevant organisations and the community generally. DFAT released a Discussion Paper and sought submissions before finalising Australia's Initial Offer. However, earlier important communications to the WTO were forwarded without consultation. The ACTU notes with concern the fact that the first time the union movement was aware of the proposals submitted in 2001 to the Council for Trade in Services was when they were posted on the Department's website. Relevant ACTU affiliates, such as the Finance Sector Union, the Communications Electrical and Plumbing Union, and the Construction Forestry Mining and Energy Union were not consulted prior to Australia submitting its communications on financial services, telecommunications, and construction and related engineering services to the Council for Trade in Services. Nor was the ACTU consulted before Australia issued its communication advocating a Necessity Test for licensing requirements, technical standards, or qualification requirements across a range of service sectors.

3.3 Transparency would assist in ensuring that opportunities for consultation are effectively utilised and that the Department is adequately briefed on community concerns. In addition to posting on its website Australia's communications, it would be useful if the Department displayed, or provided a link to, the communications of other WTO Members. Negotiation is a dynamic process and interested Australian non-government organisations should be in a position to comment on what should be Australia's response to the formal communications of other countries, as well as our own communications.

3.4 Transparency should also apply to Departmental working papers on the ramifications of communications. As mentioned earlier, Australia has made a submission on the introduction of a 'least trade restrictive' Necessity Test for licensing requirements and procedures, qualification requirements, and technical standards. The ACTU has a number of concerns about this Test, which will be addressed in Section 5 of this submission, but it is appropriate here to raise the transparency issue. Given the extent of Australia's commitments arising out of the Uruguay round, the new commitments contemplated in the current negotiations, and the complexity of domestic regulation at national and sub-national level, the ACTU seeks confirmation that the Department has made a provisional assessment of the potential consequences of this Test. The ACTU believes that any such documents should be released by the Department. If no impact assessment was undertaken by DFAT, the communication should not have been issued.

3.5 The ACTU notes that major policy proposals and legislative initiatives recommended by Commonwealth Departments generally are referred to the Office of Regulatory Review, with the initiating Department obliged to submit regulatory cost and benefit documentation. Without seeking to involve that Office in treaty negotiation, the ACTU believes that DFAT should bear a regulatory assessment onus in respect of draft Australian proposals to the WTO and that public release of such documentation would be consistent with open government principles and enable a more thorough consultation process. The impact assessment would focus upon what existing measures were at risk, rather than the cost of regulatory compliance. Clearly, it is easier

to do this in respect of specific sector proposals from Australia for liberalisation commitments, rather than broad liberalising initiatives, such as necessity tests on domestic regulation. The ACTU is not recommending that the Department engage in a limitless exercise of guessing which countries might initiate a dispute over which Australian regulation, and what the likely outcome of the Dispute Settlement procedure would be. But given the relevance of international standards to any dispute over domestic technical standards, information should be collected and released on where our standards in areas covered by our GATS commitments are higher than the corresponding international standard.

3.6 The Department's decision to initiate community consultation meetings in Canberra and in other capital cities is to be commended and the ACTU suggests that this arrangement should be continued as the round progresses. Major changes to Australia's negotiating position, whether in response to the proposals of other countries or to assist with resolving a deadlock, should at least be referred to the WTO Advisory Committee and to parliamentary committees such as the Senate Foreign Affairs, Defence and Trade References Committee and the Joint Standing Committee on Treaties. While the ACTU does not believe that further GATS commitments from Australia should be foreshadowed, any further Offers from Australia should be released in draft form for public scrutiny and consultation.

4. GATS AND THE RIGHT TO REGULATE

4.1 The preambles to GATS and the Doha Ministerial Declaration proclaim the right of national governments to regulate the supply of services. However, an examination of the text of GATS reveals that this right is circumscribed in a number of important ways.

4.2 In the first place the ability of governments to regulate is limited by their country's schedule of commitments. To the extent that National Treatment commitments are undertaken, regulation by way of measures that favour domestic service suppliers is precluded. To the extent that Market Access commitments are undertaken, governments lose the right to regulate the supply of a service by applying, on a national or regional basis, measures which:

- limit the total number of service suppliers by way of monopolies, numerical quotas, exclusive supply arrangements or the requirements of an economic needs test;
- limit the total value of service transactions or assets, in the form of quotas or the requirements of an economic needs test;
- limit the total number of service operations or the total quantity of service output, in the form of quotas or an economic needs test;
- limit the number of persons that may be employed, by the use of quotas or an economic needs test;
- restrict or require specific types of legal entity or joint ventures;

- limit foreign investment in terms of a percentage ceiling or total value restrictions.

4.3 Supporters of GATS often claim that governments retain the right to establish or maintain monopolies. However, this is qualified in the event that a country gives a Market Access commitment for a particular service sector, and fails to schedule a limitation in respect of monopolies. Article VIII of GATS on monopolies and exclusive service suppliers makes this clear in Clause 4, which pertains to the establishment of a monopoly in service sectors covered by a country's commitments after the entry into force of the WTO Agreement. According to Clause 4,such a government decision requires the negotiation or arbitration of a compensatory adjustment under Article XXI.

4.4 The effect of a Market Access commitment on the right to establish a monopoly or exclusive service supplier arrangement is indirectly acknowledged in Australia's 1994 schedule of commitments. Market Access commitments were given in 1994 for insurance services, but with a scheduled limitation enabling States to maintain monopolies or restrictive licensing provisions for workers compensation and third party motor vehicle insurance.

4.5 Two actual examples may be useful in illustrating the significance of the schedule of commitments for government rights to regulate. The first Clark New Zealand Government received advice from the Ministry of Foreign Affairs and Trade that introducing a local content quota for television and radio would be a breach of that country's GATS commitments. The Clark Government is also, notwithstanding its views on the number of universities that a small country can sustain, precluded by the Market Access commitments of the previous National government from setting a numerical limit on the establishment of private universities.

4.6 A country can, of course, schedule a particular limitation or a reservation for a sector or sub-sector for which it is giving a Market Access commitment. Limitations are generally used to maintain existing specific measures which are in some way contrary to the Market Access discipline. However, a scheduled limitation does not confer a general right to regulate the area in question. The principle of standstill applies to scheduled limitations, i.e. changes cannot be made to existing arrangements, or new measures introduced, if they expand the trade restrictive effect of the scheduled limitation.

4.7 A country can also seek to modify or withdraw from its specific commitments. However, under Article XXI it must negotiate a compensatory adjustment with other 'affected' WTO Members. In the absence of agreement on compensation for the loss of trade, arbitration shall occur to ensure compensation. If the modifying Member fails to comply with the outcome of arbitration, other Members can retaliate by denying substantially equivalent benefits i.e. impose trade sanctions. The deterrent effect of this Article effectively locks in the commitments made by governments that were in office at the time of negotiations on specific sector commitments.

4.8 Australia's 1994 Market Access commitments for education services can be used to illustrate the potential impact of the Market Access disciplines on the ability of government to regulate. Australia's education services commitments apply to private higher and secondary education services because of the 1994 decision to describe the sector for which commitments were given as

private education services, rather than education services generally. The ACTU welcomes this distinction and believes it should be maintained in any Australian offer in this round, or subsequent rounds, of GATS negotiations. Yet the commitments still raise issues of loss of regulatory power.

4.9 For example, no limitation was specified that would allow regulatory action to limit service output. In the education context, service output includes the number of graduates. This raises the question as to whether an Australian government would be able to specify a licensing requirement for the establishment of a foreign owned private campus in this country, to the effect that in the event of an Australia-wide graduate over-supply problem in a particular discipline, student intake must be capped for that discipline at the private university, as well as at public institutions

4.10 A similar question arises in connection with the establishment of new private schools in outer suburban areas of capital cities. State governments may make authorisation of a new private school in such an area dependent upon further population growth, due to an assessment that the current population is insufficient for both an established government secondary school and a proposed private school to be viable in terms of enrolments. If the proposed private secondary school were foreign owned, would such a government decision breach the prohibition on limiting the number of suppliers in a regional area, or indeed the prohibition on limiting suppliers by applying an economic needs test?

4.11 GATS does permit, under Article XIV, measures to be taken where 'necessary' to protect public morals, maintain public order, or protect human, animal or plant life or health. However, firstly such measures must not be a disguised restriction on trade in services. Secondly, the term 'necessary' in connection with similar Exceptions Articles in other WTO Agreements has been interpreted by WTO Dispute Panels as incorporating a requirement that the measures taken by a government be 'least trade restrictive' in impact, even if they are not a disguised restriction on trade in services. In other words, though they may have genuinely been taken by a government to protect human life etc, the measures may still be disallowed by the WTO on the grounds that other measures, less trade restrictive in their effect, could have been taken to achieve those objectives.

4.12 The way certain types of regulations are applied is also encompassed by GATS. Article VI on Domestic Regulation provides a mandate to the Council for Trade in Services to develop new disciplines to ensure that measures relating to licensing requirements, technical standards, and qualification requirements and procedures are based on objective and transparent criteria such as competence and ability to supply a service, are 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 services. Existing and proposed new technical standards, and qualification and licensing requirements, are not subject to the three aforementioned criteria at this time, but the way they are applied is. Article VI 5(a) states that Member States shall not apply such requirements and standards that nullify or impair a country's specific commitments, in a manner which:

- does not comply with the criteria proposed as the basis of the new disciplines;

- could not have been reasonably expected of the Member at the time it specified its commitments under GATS.

The practical effect of this Article is unclear and untested but the Article is indicative of the general, limiting approach to the right to regulate underpinning GATS.

4.13 For the reasons set out above, the right to regulate is already qualified to a considerable degree under GATS, notwithstanding the words in the Preamble. The ACTU recommends that the Senate Inquiry propose that DFAT explanatory material on GATS acknowledge the way the right to regulate is circumscribed by specific sector Market Access and National Treatment commitments and that the term 'necessary' in connection with Article XIV, General Exceptions, has a meaning that is distinct from being necessary in the view of the relevant government. Such an acknowledgement would enhance transparency and assist those individuals and organisations in Australia that are unfamiliar with the technicalities of GATS and rely on DFAT advice.

5. THE PROPOSED DOMESTIC REGULATION DISCIPLINE

5.1 Further restrictions on regulatory power may eventuate from the proposed new disciplines pertaining to Domestic Regulation. The Council for Trade in Services of the WTO has a Working Party on Domestic Regulation considering the issues associated with the mandate in Article VI for the development of new disciplines. The ACTU is unaware of the state of the deliberations of that working party. However, we have information on examples of requirements and procedures submitted by Member States to the Working Party in 2002 as trade barriers that could and should be addressed by new disciplines. The examples include:

- zoning and operating restrictions designed to protect small stores;
- different licensing and qualification requirements set by federal and State governments and by different States;
- a requirement for fluency in the language of the country in which a service is delivered, which allegedly is not necessary to ensure the quality of the service;
- 'unreasonable' environmental and safety standards for maritime transport;
- indemnity insurance requirements;
- national standards being different from international ones.

5.2 The above examples suggest that the scope of the proposed new disciplines could be quite wide. The ACTU also has grounds for concern about Domestic Regulation in light of the criteria or aims set in Article VI for proposed new disciplines, the implications of the March 2001 communication from the Commonwealth Government to the WTO on the issue of Domestic Regulation

and the wording of the Accountancy Domestic Regulation discipline negotiated to date pursuant to Article VI.

5.3 Article VI 4 states that any new disciplines shall aim to ensure that qualification requirements and procedures, licensing requirements, and technical standards are, *inter alia*:

(a) based on transparent and objective criteria, such as the competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing requirements, not in themselves a restriction on the supply of the service.

It is noteworthy that, unlike the other clauses in this Article, VI 4 is not expressly if at all limited in its scope to sectors for which a country has given specific commitments.

5.4 The term *inter alia* is important in VI 4 but the nature of the criteria or aims outlined in the text is still of concern. They constitute a potentially narrow frame of reference for judging domestic regulation of the kind covered by Article VI. Licensing requirements, for example, may go well beyond the competence or the ability of the service supplier. They may include public interest, social justice, affordability of access, stability of price or supply, governance, consumer protection, community service, or universal service requirements. Such requirements are inherently "*more burdensome than necessary to ensure the quality of the service*" because they go beyond quality assurance and, for that matter, competence and ability to supply the service. The ACTU's primary concern is that new Domestic Regulation disciplines could further circumscribe the right of governments to regulate.

5.5 A different but still narrow approach was proposed in March 2001 by the Commonwealth Government in a Communication to the WTO on Domestic Regulation, Necessity and Transparency. In it, Australia advocated a Necessity Test centred upon the onus that a licensing requirement, technical standard, or qualification requirement or procedure be not more trade restrictive than necessary to achieve a legitimate policy objective. According to the Australian proposal, a measure would be held to comply with this test "*unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves a legitimate policy objective and is significantly less restrictive of trade."*

5.6 The Commonwealth also proposed that there should be a non-exhaustive list of what were legitimate policy objectives, and suggested that the protection of consumers be on that list, along with quality, professional competence, the integrity of the profession, and administrative efficiency and fairness. The risk associated with such a list is that it could still be of interpretative significance in a dispute over whether an objective not on the list should be considered legitimate.

5.7 The Necessity test should not be confused with a requirement that measures not be disguised trade barriers. The latter notion pertains to trade restrictive measures that purport to meet social, environmental or health objectives, but

either do not meet those objectives or do so incidentally to the primary reason why the measure was taken, namely a protectionist restriction on trade. The Necessity test, in contrast, would apply to measures genuinely taken by a government to achieve a legitimate policy objective. If adopted, it would appear to enable one country to refer such a measure taken by another country to a WTO Dispute Panel. The Panel would be empowered to rule against the domestic regulation on the grounds that the policy objective it was intended to achieve was not legitimate. Were the Panel to conclude that the objective was legitimate, it would still be able to rule against the domestic regulation on the grounds that there was a feasible alternative measure which was less trade restrictive than the one taken.

5.8 Presumably the Panel would be able to do this even if the alternative measure had not occurred to the relevant government. Perhaps also it would be able to do this even if the relevant government had contemplated the alternative measure but decided against it, on the grounds that it was more costly for government to administer, or less efficacious than the measure actually introduced. A measure can be more costly to administer relative to another measure and yet be economically feasible. Equally, a measure can be somewhat more efficacious in achieving a domestic policy objective, but also significantly more trade restrictive, than another measure. Should these considerations be up to a WTO Dispute Panel to balance, and substitute its own judgement for that of the relevant government?

5.9 This is not merely idle speculation as to the type of assessments that may be made by WTO bodies dealing with disputes. While the case involves an Agreement other than GATS, the 11 December 2000 ruling of the Appellate Body in Korea-Measures Affecting Imports of Fresh Chilled and Frozen Beef, is noteworthy. At paragraphs 164 and 165, the Appellate Body, in considering a 'necessity' reference in the General Agreement on Tariffs and Trade, observed as follows:

> *"164 There are other aspects of the enforcement measure to be considered in evaluating that measure as 'necessary'. One is the extent to which the measure contributes to the realisation of the end pursued, the securing of compliance to the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be 'necessary'. Another aspect is the extent to which the compliance measure produces restrictive effects on imported goods. A measure with a relatively slight impact upon imported goods might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects*.
>
> *165 In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX (d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.* "

5.10 Much will depend on whether a Necessity test applies to all licensing requirements, qualification requirements, and technical standards or only to such requirements and standards affecting sectors for which specific

commitments were given. Even if the latter were the case, there would still be a problem should the new disciplines automatically apply. Member States may not have scheduled commitments for those sectors in 1994 were it known at the time that a Necessity test would apply to such sectors.

5.11 Article VI 5 (b) of GATS states that "*in determining whether a Member is in conformity with the obligation under paragraph 5 (a), account shall be taken of international standards of relevant international organisations applied by that Member*". The obligation referred to the application of standards pending the development of new Domestic Regulation disciplines. Nevertheless, it is reasonable to conclude that a WTO Dispute Panel adjudicating a dispute over conformity with a Necessity test would have particular regard to any prevailing international standards for the relevant service sector. A Member maintaining a national standard above the international one would probably be on the defensive in such a dispute.

5.12 Where no international standards operate, perhaps a Panel would consider the practices of other comparable countries in assessing whether one country's measure was more trade restrictive than necessary to achieve substantially the same policy objective. If so, an OECD country that used a measure more trade restrictive than other OECD countries would be on the defensive.

5.13 Australia's proposed Necessity test at least has the virtue of being accompanied by the suggestion that consumer protection should on the list of legitimate policy objectives. Even if such a list were accepted with consumer protection included, this would not be sufficient to safeguard against further expansion of GATS limitations on the right of government to regulate. There would be arguments about what constitutes consumer protection and also, assuming a common definition, comparable countries may have different ways of achieving consumer protection.

5.14 Australia for example prohibits the direct advertising of pharmaceutical products to consumers. Given that pharmaceutical products released for purchase are approved as safe for use as indicated, is this measure a case of consumer protection or cost-containment for the Pharmaceutical Benefits Scheme? One, if not the main reason for the ban is to avoid advertising-driven consumer demand for higher cost products over cheaper alternatives.

5.15 For the sake of argument, let us be optimistic and assume that the prohibition would fall within the scope of consumer protection or some other listed legitimate policy objective. Is Australia's ban more trade restrictive of advertising services than necessary given New Zealand allows advertising but encourages industry self-regulation, and the US also permits advertising to consumers, consistent with standards set by the US government?

5.16 The ACTU notes that the Australian Fair Trade and Investment Network has raised the possibility of a risk to the price stabilisation scheme regulating electricity supply in NSW, as a result of a Necessity Test. The National Tertiary Education Union believes that the least trade restrictive test could be used by an overseas tertiary education services corporation to dispute a licensing requirement for a proportion of student places to be made available on a scholarship basis. The Finance Sector Union has drawn the ACTU's attention to the detailed licensing requirements, technical standards, and staff training obligations connected with the Financial Services Reform Bill 2001.

In addition to the matter raised by the FSU, the 'least trade restrictive test' could have implications for proposals for new bank license conditions, and specifically a requirement for 'real time' ATM transaction fee disclosure, as distinct from the provision of this information in a brochure at the time of provision of an ATM access card. It is germane in this context to note that Article I 2 of GATS defines trade in services as the supply of a service.

5.17 It is appreciated that Domestic Regulation is being dealt with by a Council of Trade in Services Working Party, and that Australia's objective is to ensure that other countries cannot use regulation to nullify their market access commitments. The ACTU is also aware that the 'least trade restrictive' objective is part of the Council of Australian Governments Agreement negotiated several years ago. However, there is a question about the extent to which the COAG commitment actually informs regulatory activity. Further, establishing such a test as a binding WTO discipline raises the stakes considerably. Moreover, much of Australia's international interests in respect of domestic regulation would be achieved by a less onerous test as to whether the real purpose of a regulation was to establish a disguised trade barrier.

5.18 The ACTU is not reassured by the possibility that Domestic Regulation disciplines may be introduced on a piecemeal or sector specific basis, as happened in the case of Accountancy. The Disciplines on Domestic Regulation in the Accountancy Sector include consumer protection as a legitimate objective but also require Members to ensure that measures taken are not more trade restrictive than necessary to fulfil a legitimate objective. These Disciplines, adopted by the Council for Trade in Services on 14 December 1998, do not take effect until 2005. It is noteworthy, in light of subsequent action to re-regulate accountancy and audit companies, that the US in a discussion paper issued when the Accountancy disciplines were being negotiated, suggested that a restriction on the combination of services that could be provided by such companies might be excessively burdensome or restrictive.

5.19 The ACTU recommends that the Senate Inquiry call on the Government to abandon support for a Necessity test, to also oppose an earlier suggestion of the European Commission for a ' pro-competitive ' test on regulation, and to oppose generally new limiting disciplines on Domestic Regulation.

6. SERVICES IN THE EXERCISE OF GOVERNMENTAL AUTHORITY

6.1 Defenders of GATS often try to dispel concerns about the impact of GATS on public services by stating generally that public services are excluded from the Agreement. Rarely is the problematic definition of such services acknowledged.

6.2 Article I 3 (b) does state that the scope of the GATS applies to services except those supplied in the exercise of governmental authority. But the definition of services so supplied, as set out in Article 1 3 (c), is that they are neither supplied on a commercial basis nor in competition with other service suppliers. Few Australian public services appear to meet that definition.

6.3 The problem is that there are different interpretations of 'on a commercial basis' and 'in competition with other suppliers'. Some papers from the Secretariat to the Council for Trade in Services acknowledge that there is an

interpretative problem. Paragraph 53 in the 6 July 1998 Background Note by the Secretariat on Environmental Services, in considering the effect of Article 1.3, includes the following observation:

> *"A key issue is whether sales are made on a commercial basis. To begin with, it is not completely clear what the term 'commercial basis' means."*

6.4 Critics of GATS point to the range of services, including education and health, where there are public and private providers offering the same service, and conclude from this that even if the public providers were judged to be supplying on a non-commercial basis, they are still competing with other service suppliers. Some supporters of GATS question this on the grounds that though the same type of service may be supplied, the purpose of supply differs. For example, the public suppliers may have certain universal access obligations. This argument, however, can be dangerously close to saying that unless the public providers operate on a commercial basis, they are not in competition with private providers of the same service that do operate on such a basis. The wording of Article 1 3 (c) does not conflate the two, but refers to commercial basis and in competition with other suppliers as distinct cases.

6.5 The WTO has not adopted an Interpretative Understanding to resolve these matters. Consequently, it is advisable for governments to be extremely cautious in scheduling commitments and in explaining GATS to the public. It should be noted that in 1994 the Australian government did not rely upon the optimistic interpretation of Article I when it included education services in its schedule of commitments. Instead it limited the effect of the education services commitments by the use of a qualifying description of two of the sub-sectors for which the commitments were given as private higher education and private secondary education. For reasons that are not clear, for the English Language tuition sub-sector commitments were given generally, rather than just for private education services.

6.6 In the event that further GATS commitments are contemplated for other service sectors where there are public as well as private providers, the 1994 education services limitation to private services should be emulated. However, this approach, while an important safeguard, does not protect services that are 'public goods' services yet are supplied by the private sector. In many countries, particularly developing ones, such services, e.g. water, have been largely if not completely privatised. The ACTU therefore recommends that Australia should seek an amendment to GATS to exclude education, health, water, cultural, and other 'public goods' services from the GATS. A second, but less effective option is to delete Article I 3 (c), thereby entrenching a general exemption of services in the exercise of governmental authority. The ACTU further recommends that, in the interest of transparency, DFAT explanations of GATS should not refer generally to public services as excluded from the GATS, but instead include advice to the effect that some public services are excluded from the GATS, depending on the circumstances of supply.

6.7 Failing progress on the proposed amendments, it is crucial to maintain the bottom-up or positive list character of GATS. Governments should retain the ability to decide which services are listed in their schedule of commitments, to list services only in respect of particular modes of supply, and to specify

conditions and limitations as deemed appropriate. A negative list approach, should not be pursued in the GATS. A negative list approach means that all services are automatically covered unless specifically listed as exempt. Future, yet to be created services appear to be captured by negative list Agreements, such as the Singapore-Australia Free Trade Agreement. The ACTU notes that the Negotiating Guidelines and Procedures adopted by the Council for Trade in Services for this round presume the retention of the structure of GATS, but is still concerned that this may not exclude consideration of a limited expansion of 'horizontal' disciplines or negative list approaches.

7. GENERAL REMARKS ON REQUEST- OFFER NEGOTIATIONS

7.1 The ACTU welcomed the Discussion Paper on the GATS Negotiations issued by the Office of Trade Negotiations (OTN) as a step towards greater consultation. The ACTU accepts the technical point made in the Paper that an Initial Offer has no legal status and can be withdrawn and amended at any time. However, negotiations are a political as well as a legal process, involving the issuing of signals and the creation of expectations. ACTU affiliates concerned about the ramifications of further liberalisation on trade in services in a particular area will rightly see the inclusion of commitments for the area in the Initial Offer as indicative that the commitment will be confirmed, and perhaps also extended. As the Discussion Paper notes, "*the initial offer points (often only partially in the direction a Member may be willing to go in further liberalising its services sectors*".

7.2 The ACTU also welcomes the Government's position, as recorded in the Discussion Paper, that it will not compromise the capacity of governments to fund or maintain public services. It is this perspective that underlies the ACTU's opposition to the making of national treatment commitments in a range of service sectors.

7.3 The Discussion Paper states that it is open to Australia in this round of GATS negotiations to delete market access or national treatment limitations in our current schedule of commitments that no longer apply or are regarded as unnecessary. The Paper further notes that Australia is well placed to participate in these negotiations given two decades of domestic reform and describes the outcomes of previous negotiations as largely binding existing levels of reform, rather than making new reform commitments. The ACTU certainly prefers this approach compared to using GATS to introduce changes to domestic arrangements. Nevertheless, there should be limits to binding under GATS already achieved domestic reforms.

7.4 The domestic reform agenda has been and continues to be politically controversial. Notwithstanding the convergence between the major political parties on economic policy and micro-economic reform, there have been important differences on which areas should be reformed in such a manner and how far the reforms should go. Even where there has been broad consensus between the major parties, trade unions, non-government organisations, and minor parties represented in Parliamen6t have often taken a different view. Moreover, as the last few decades have shown, the influence of prevailing economic orthodoxies on major parties and governments can wane due to their failure by their own standards or inability to cope with new and unforeseen economic circumstances. The paper acknowledges that the Government recognises that GATS commitments

should not diminish the overall right to regulate in a way that would constrain the ability to pursue legitimate policy objectives, and that once bound, GATS commitments cannot be modified without providing compensation to affected trading partners. As outlined in Section 4, the notion of an overall right to regulate is open to a range of interpretations. The question that should be addressed is how far should a government that happens to be in power at the time of a round of GATS negotiations go in constraining the ability of future governments to regulate particular services by way of national treatment or market access limitations?

7.5 We have already suggested one factor that should be taken into account is whether a domestic reform was contentious at the time of its enactment, because if it was there may be a reasonable prospect that a new government would seek to overturn or partially reverse the measure in question. Obviously that prospect would be greater if the major opposition party opposed the measure at the time, and maintains a policy outlining a different approach to the issue. Yet there is a further consideration that the ACTU believes is germane, namely the social significance of the service or service sub-sector. Factors which are relevant in this context include whether a service involves public goods, is essential for a decent standard of living, makes a contribution to nation-building or national identity, provides a platform for general economic development, is of environmental significance, or should be provided in a way which facilitates equitable access to the service by members of the community. One or more of these or other relevant factors may operate despite the fact that the service is delivered by private providers. In the ACTU's view, the fact that Australia has autonomously liberalised beyond the level embodied in our current schedule of GATS commitments does not mean that the scheduled limitations on Market Access or National Treatment should be removed in this round to better reflect contemporary domestic arrangements. Depending on the social significance of the service, the regulatory options protected by the scheduled limitations should instead be retained for possible re-introduction and use by future governments.

8. REQUESTS PERTAINING TO SPECIFIC SERVICE SECTORS

8.1 As noted earlier in this submission, additions can be made to Initial Offers. It is also likely that the momentum for greater liberalisation of services in this round will increase in the event that the impasse in agricultural negotiations is resolved. For these reasons, the ACTU believes it is worth stating our view on some Requests that were not part of Australia's Initial Offer.

8.2 **Postal and Courier Services:** The postal and courier services operated by Australia Post are part of national infrastructure and fulfil important community service obligations. Reserved postal services protect this role of Australia Post, but the reservation in terms of grams is less trade restrictive than that enjoyed by the majority of OECD Postal Services. The ACTU believes that no GATS commitments should be given which would compromise Australia Post's delivery of reserved services. In addition, given the already high level of de-regulation of postal and courier services and the importance of Australia Post as the often sole supplier of non-reserved services in rural and remote areas, the ACTU believes further commitments should be avoided that would undermine the revenue base of Australia Post or compromise its ability to continue to deliver affordable non-reserved services. The ACTU takes the

same view towards proposed changes in the classification of postal and courier services.

8.3 **Education Services:** As one of the small minority of countries that gave GATS commitments in education in 1994, Australia is well placed to deny the requests for full commitments and for an extension of existing commitments to encompass primary and adult education. The Discussion Paper gives no details of the requests for full commitments and therefore the ACTU assumes that they entail the removal of the limitation of Australia's commitments to the private provision of education, and the making of a binding Mode 3 commitment in respect of National Treatment. The Discussion Paper already outlines the reasons why our education services commitments are limited to the private provision of education and this distinction should be maintained. The current funding problems of public education institutions would be compounded by a binding commitment to provide transnational providers with the same rights to public funding as are enjoyed by public schools and tertiary institutions. Even if the requests for full commitments pertained only to a binding National Treatment commitment without the removal of the word private from the description of the education sector, we submit that this should not be granted. Australian governments and parliaments should be able to determine the distribution of public funding for education purposes, whether it between domestic and transnational private providers, commercial and non-profit private education institutions, or between public and private institutions and systems of education.

8.4 **Audio Visual and Related Advertising Services:** The ACTU strongly supports the omission of these sectors from Australia's GATS commitments. A viable domestic audiovisual services sector is essential for national and cultural identity and also for projecting Australia, its history and culture, to people in other countries. Local content television, radio, and advertising requirements, migration regulations, and tax concessions and subsidies for domestic productions are part of the platform that maintains the viability of this sector, enhances export potential, and provides employment opportunities. The requests submitted for full commitments in these sectors should be rejected, but so too should proposals that Australia agree to bind existing arrangements. The Media Entertainment and Arts Alliance believes that the reduction in 1992 of the advertising content quota (applying to content other than political advertising, public service announcements, and overseas film and performance promotions) from 100% to 80% has reduced employment opportunities for editors, musicians, and post-production staff generally. To bind the current television advertising quota and other existing content standards and arrangements would deny Australian governments the flexibility to vary requirements as may be needed in response to changes in a dynamic services sector, or to revised assessments of the adequacy of current quotas.

8.5 **Environmental Services:** The ACTU believes governments should retain full powers to regulate services of environmental significance and therefore believes no further commitments should be given in response to requests received in this area. Though classified under Business Services, we have the same view about the requests pertaining to services incidental to agriculture, hunting, forestry and fishing.

8.6 **Health and Social Services**: In contrast with the summary of requests received for Education Services, it is less clear from the summary for this

services sector whether the requests for full commitments in Mode 1 and 3 pertain only to chiropody and podiatry, or also to the commitments sought on services provided by midwives, nurses, physiotherapists, and para-medical personnel. Nor can we tell whether the latter set of requests pertain to the delivery of such services in hospitals, or to the Other Human Health Services or health-related professional services sub-sectors. The ACTU requests more information on the requests affecting health services. We also advise that, from the standpoint of optimising public health outcomes, Australian governments should not be constrained by further GATS commitments regardless of where or in what organisational context health and social services are delivered.

8.7 **Transport Services**: There are a range of public and national interests associated with this services sector. Australian governments should be able to implement freight and passenger land transport policies that assist with meeting energy conservation objectives, minimise road damage, ensure that rural communities have access to rail as well as well as transport services, and that reduce urban pollution and road congestion through the provision of safe and frequent public transport. With respect to air transport, there are security, training and consumer protection issues that have been highlighted by recent local and overseas events and point to the importance of maintaining stable workforces that are employed directly by airports and air transport companies. The ACTU, while we would welcome further details of transport services requests received by Australia, questions whether GATS commitments in this sector are compatible with the aforementioned interests and policy objectives.

8.8 **Maritime Transport**: It is important to ensure that the domestic maritime transport industry remains viable, that it continues to provide employment opportunities on Australian remuneration and employment standards, and that maritime transport services generally uphold core labour standards, ensure the health and safety of workers, and are delivered in a manner consistent with the protection of the marine environment. No GATS commitment should be made that would impede the ability of the Commonwealth to require that ships operating principally between domestic ports be Australian flagged and registered vessels. Capacity and space constraints at some port facilities may have a bearing upon requests that pertain to international maritime transport companies moving or re-positioning their own equipment. Further, the requests for multi-modal access commitments may have implications for government owned rail services in particular States.

8.9 **Apparent EC Personnel Services Request**: The ACTU seeks the advice of DFAT on whether Australia has received requests fro the European Commission for commitments on personnel placement and supply services. Requests in this area are not referred to in the Discussion Paper but are mentioned in what is claimed to be a leaked copy of the EC Request received by Australia. We believe no commitments should be made in respect of personnel placement and supply that would impede the ability of the Commonwealth to alter the terms of the Job Network system or to revert to a single or near-monopoly government employment service.

8.10 **Insurance, Distribution and Retail Services**: According to the Discussion Paper, Australia received requests to delete the scheduled limitation to our 1994 Insurance Services commitments which reserved the rights of States to

maintain monopolies or restrictive licensing provisions for workers compensation insurance and third party motor vehicle insurance. Requests were also received for commitments on distribution or retail services in respect of food products, beverages, tobacco, and pharmaceuticals. No Offers should be made in these areas.

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Submission to the Senate Foreign Affairs, Defence, and Trade References Committee re Australia-US Free Trade Agreement

Introduction

The ACTU - the Australian Council of Trade Unions - is the peak union body representing working men and women in Australia. Seventy-five years old, the ACTU is committed to fair wages and conditions, full employment, safe workplaces, equal opportunity, human rights and social justice.

The ACTU holds grave concerns for Australian jobs, labour standards, environmental standards and sovereign rights to democratic determination of national priorities for public subsidy or regulatory autonomy.

Fundamental democratic standards demand that treaty-making is based on government transparency and public consultation. How can a government, potentially trading Australia's future, have bureaucrats negotiate trade agreements in secret? Publicly available documents and government based analysis is exceedingly general. The breathless assurance of benefit is superficial and there is no analysis of who loses.

How is it possible that Australians stand to gain an additional $4 billion in trade but no sector of the economy is ravished by the dominant size of the American economy and their demands?

Why is it that American citizens are guaranteed a democratic 'parliamentary oversight committee' to monitor the dealings of trade bureaucrats along with a parliamentary debate to 'accept' or 'reject' such agreements while Australians have no such rights?

Executive Government is not a company with the excuse of 'commercial in confidence' rules. Whatever the merits or otherwise of a US trade agreement or any other trade treaty, the Australian people have a right to independent economic and social impact modeling as a basis for broad consultation and parliamentary debate.

The ACTU will oppose any trade agreement that does not include human rights, environment and labour standards designed to protect our people and our communities along with those of other nations involved. Further, we will oppose trade agreements where the public is: 1) not made aware of who wins and who loses in this great game of global monopoly; 2) given the opportunity to debate such; and 3) has the confidence of a parliamentary debate where democratically elected representatives can be accountable for arguing the views of their constituents.

A Democratic Process

The ACTU believes a new process should be established for the consideration, negotiation, and adoption of new free trade agreements (FTAs). The role of the Joint Standing Committee on Treaties or another appropriate parliamentary committee should be expanded to include conducting hearings on issues associated with a proposal to negotiate an FTA, and on Australia's negotiating objectives for the FTA. Major changes in the course of the negotiations in Australia's negotiating

position should also be referred to the Committee. A vote of Parliament should be required for an FTA to be agreed to by Australia.

The ACTU further recommends that the WTO Advisory Group established by the Minister for Trade be re-established as an Advisory Group on Multilateral and Bilateral Trade Agreements. The Group's composition should be altered to provide a better balance between union, non-government organization, and business representation.

Trade agreement or foreign policy alliance

Given the size of the US economy, while Australia's economy is barely the size of Los Angeles, the continuing growth of trade for Australia in the US, the abject US refusal to eliminate agricultural subsidies and the threat to Australia's pharmaceutical subsidies, our film industry, cultural rights, government procurement policies, local content and services, we can be forgiven for asking whether this is about trade or about foreign policy.

Never before has Australia compromised our foreign policy independence for trade favours. Our Government might deny such but US trade negotiator Mr Zoellick himself linked the issue of trade and foreign policy. This is a dangerous precedent for our independence as a nation.

There is no analysis of the potential threat to the multi-lateral trading system successive Australian governments have argued as a priority. Nor are there any guarantees that the standards set in a bilateral trade agreement don't potentially stake new standards for the degree of trade liberalization Australia must commit to within WTO negotiations.

Who gains – Who loses?

Agriculture

The National Farmers Federation has questioned the value of an FTA indicating that they are doubtful that any gains would be made in access to US agricultural markets.

There is the risk to Australia's leadership role in agriculture liberalisation negotiations, given the likelihood that AUSFTA will not deliver an outcome anywhere near the objectives of the Cairns Group. According to the Centre for International Economics (CIE), the largest potential gains to Australia from AUSFTA are in sugar and dairy, areas where there are powerful US lobby groups with a successful track record in resisting liberalisation. The CIE report on Economic Impacts of AUSFTA also states that, whereas the US stands to improve its terms of trade under the full and partial liberalisation scenarios modeled by the CIE, Australia will experience an adverse terms of trade movement unless full liberalisation is achieved. Full liberalisation is an unlikely prospect.

Australia's beef quota has just been met after more than a decade and there must be questions as to the capacity to maintain this level given the current drought conditions.

There has been no debate about the impact of genetically modified US products and food security. Much of America's agriculture is genetically modified to the point where the EU will not accept agricultural products from the US. Canada's experience is one of concern for access to other markets given the impact of GM crops from the US on local production. What are we learning from this experience and what role will our quarantine laws play if they are reduced by US demand in the context of an FTA?

The potential gains for agriculture are limited and yet we potentially put our right to set and maintain food standards and food security at risk.

The ACTU notes that the Department of Foreign Affairs and Trade and the Commonwealth Government have relied upon Reports from the APEC Study Centre and
the CIE to support the contention that an FTA with the US would be beneficial for Australia. The assumptions of the Reports and underlying models are open to challenge on a number of grounds including

- an assumed productivity dividend from greater familiarity with and adoption of US management practices
- labour mobility between regions and across all sectors of the economy
- trade creation will be greater than the trade diversion effects
- full liberalisation.

Consulting groups that share a commitment to trade liberalization can reach different conclusions on the costs and benefits of the proposed AUSFTA. ACIL Consulting, in its report A Bridge Too Far? An Australian Agricultural Perspective on the Australia /United States Free Trade Area Idea, highlighted the consequences of modeling assumptions. At page 48 of the Report, ACIL states that:

"The modest gains that CIE estimated in 2001 would be available to Australia from an FTA with the US appear to have been given too much credence in some quarters, both as regards their size and their certainty. In fact, as we have shown, equivalent modeling with no less credible (in fact arguably more credible) assumptions can generate an opposite answer – that an FTA with the US even if fully achieved would cause a loss of welfare for Australia and leave Australians as a whole worse off "

ACIL is pessimistic about the prospect for gains in agriculture. It notes the trend in the US towards greater agricultural protection and points out at page 23 of the Report that even the North American Free Trade Agreement "is riddled with agricultural exceptions intended to slow down the liberalization process". ACIL emphasises the risk of trade diversion, particularly from Asia, and argues that China and Japan would be irritated by AUSFTA. Its overall conclusion is that AUSFTA, even if agriculture were fully liberalised, would have a small negative effect on GNP, GDP and consumption.

Industry

Bilateral FTAs generally entail the removal of tariffs, usually over a relatively short period. There is a revenue loss to government as a result, which is rarely given adequate if any attention in official cost-benefit assessments of the FTA. This loss needs to be made up from other sources, unless it is bravely assumed that governments are willing to accept lower revenue or that the economic consequences of the FTA will generate sufficient offsetting revenue. The extent of the loss depends

upon the propensity to import from the trading partner, which in this case is very high. According to the APEC Study Centre Report for DFAT on Issues and Implications of an Australia-USA Free Trade Agreement, a fifth of Australia's imports are from the US.

Zero tariffs can have an adverse impact upon local firms and industries, particularly if they have previously enjoyed a rate of protection above the average, are owned by transnational corporations based in the trading partner, have diseconomies of scale or scope relative to competitors in the trading partner, or lose other forms of assistance as a result of the FTA. Many if not all of these factors are relevant to key manufacturing firms in Australia. It is no surprise that the APEC Study Centre Report records fears of the competitive impact on domestic firms of AUSFTA in light of the massive economies of scale enjoyed by US firms. The Report's central argument, based on EU experience, is that the competitive efficiencies generated by the FTA will enhance domestic firm performance to the benefit of consumers, and that greater intra-industry trade will improve economies of scale due to a higher degree of specialisation. It refers to European firms that previously undertook the entirety of a production process deciding to specialise in only parts of the process, or to concentrate on market segments, in response to the economic integration of Western Europe.

What must not be lost in analysis is that the EU is a single market economy with its own parliament, region-wide labour mobility rights, regional protectionist policies in certain sectors, and regional adjustment and assistance programs which compensate to some degree for the loss of national government assistance powers and programmes. None of these conditions apply in the case of a bilateral FTA with the US. The key questions in the Australian context are whether increased specialisation would be sufficient to offset the massive scalar advantages of major US firms, and how the FTA would affect in the long run the breadth and depth of our manufacturing base in key industries. In the ACTU's view, while increased specialisation might assist with a niche market strategy, it would not overcome the advantages of scale enjoyed by US firms targeting the same market. In any event a niche market approach would over time reduce the contribution of Australia's manufacturing base to employment, technological innovation, and the competitiveness of other sectors that is enhanced by a broadly based manufacturing sector.

The ACTU's concerns about zero tariffs are reinforced by the findings of the CIE report. Over 50% of current Australian imports from the US are manufactured goods and the greatest gain to the US from AUSFTA is also in the manufacturing sector, including metal products, motor vehicles, and parts. US motor vehicle and parts exports to Australia as a result of the FTA are projected to rise by 46.6%. US TCF exports are predicted to increase by 104.5%. On the other side of the ledger, while Australian TCF exports are projected to rise by 75.48%, the forecast rise for Australian motor vehicle and parts exports to the US is 10.33%.

The Centre for International Economics predicts gains for the textiles, clothing and footwear industry. This is hard to believe given that TCF industry output has collapsed by around 30% in the past four years.

In light of the above, the ACTU does not support lowering or eliminating tariff barriers in an FTA with the US. Our average rate of tariff of around 3.7% is so low that the claimed benefits of tariff reductions have already been achieved. Tariffs are higher in certain sectors as a result of domestic assessments about the requirements of those industries, and such assessments, rather than negotiations with the US, should remain the basis of deciding tariff levels.

In the event that zero tariffs are agreed, much will depend on whether some industries are exempt from tariff reductions, on the timeline for adoption of a zero tariff position for other industries, and on their access to other forms of industry assistance during and after any phase-out period. NAFTA, for example, established a 5-15 year timeline for the elimination of tariffs, depending on the industry sector, and some US tariffs can be maintained for 3 to10 years under the Singapore-US FTA. However, in the case of the latter and the recent Chile-US FTA, it is noted that textiles and clothing tariffs disappear immediately, subject to rules of origin.

Rules of origin are also important. The ACTU does not support extending into AUSFTA the concession made by Australia to Singapore in the Singapore –Australia Free Trade Agreement (SAFTA) allowing specified goods to be deemed to be originating from Singapore if the allowable cost to manufacture is 30% of the total cost to manufacture. The ACTU further submits that goods produced in the low wage export processing zones in Guam and Saipan should not be eligible to be considered as US originating goods under AUSFTA.

NAFTA includes provision for members to take safeguard action by way of duties on imports if imports from other members cause, or even threaten to cause in certain cases, serious injury to domestic industry. The ACTU notes that Australia's Statement of Negotiating Objectives includes the aim of exempting Australian products from US general safeguards legislation. While the US Steel Industry measures are pertinent in this context, the issue of safeguard provisions in AUSFTA warrants further consideration given that Australia is the far smaller of the two economies.

The ACTU is concerned about the possible consequences of the proposed AUSAFTA for other forms of industry assistance. It notes that in the 2000 National Estimates Report of the Office of the US Trade Representative (USTR), Australia's schemes for Export Market Development Grants, for Automotive Competitiveness and Investment, and for TCF import credits were identified as trade barriers.

Government procurement policies can also assist domestic industries, particularly small business. The US has a history of using procurement policies for this purpose, despite increasingly seeking to limit other countries' procurement options. The US has announced procurement objectives for AUSFTA and is reported to be seeking to persuade Australia to join the WTO plurilateral agreement on procurement. Australia should retain its ability to set industry development criteria in procurement programs, to maintain Commonwealth purchasing quotas from small and medium businesses, and to protect State and Local Government rights in this area.

Services

With respect to trade in services, the ACTU believes that AUSFTA should adopt the reported exclusion of subsidies from the services chapter of the Singapore- Australia FTA (SAFTA), and in line with advice received on SAFTA our services commitments under AUSFTA should be confined at the very least to those on our existing GATS schedule. In particular, there should be no expansion of National Treatment commitments. Moreover, in these negotiations Australia should reconsider the negative list approach embraced for services in SAFTA.

A negative list approach has two major problems. First, because all services are automatically liberalised unless listed as exempt, the government has only one chance to get it right. Consequently, a government should conduct a comprehensive

assessment of the impact of the Disciplines of the Agreement on existing services before determining its list of exemptions. Setting aside our concerns about the adequacy of the consultation and assessment process at the time Australia finalised its initial GATS commitments, this problem in the case of SAFTA was resolved because Australia largely reproduced its 1994 GATS commitments in SAFTA.

The second problem is that all future, yet to be invented services appear to be automatically covered by the liberalisation disciplines of SAFTA. This represents an extraordinary curtailment of the prerogatives of future Australian governments, which are the only ones able to judge the regulatory powers needed for future services. Australia should therefore both confine its AUSFTA services commitments to the current GATS schedule and ensure that AUSFTA follows the GATS model of a positive list approach.

Where AUSFTA should depart from the GATS approach is in the drafting of any provision exempting services supplied in the exercise of government authority. The GATS definition in Article I 3 (c) should not be reproduced in a bilateral FTA given the ambiguities about the meaning of " on a commercial basis " and " in competition with one or more service suppliers".

A red flag for Australians is that according to all reports the US has ambitious services liberalisation objectives for the AUSFTA negotiations. It has long sought the abolition of our local content requirements for audiovisual services such as free to air television programmes, advertising, and radio music content. The ACTU notes that the audiovisual services sector is highlighted by the USTR as one of the liberalisation gains from the recent FTA with Chile. It believes that Australia should reject any US overtures for the abolition of local content requirements. Australia should also refrain from agreeing in AUSFTA to reduce the various percentage content requirements for audiovisual sub-sectors. Whether the existing quotas are maintained or varied should be a matter for successive Australian governments to decide.

The ACTU welcomes the recognition in Australia's Statements of Objectives of the need to ensure that appropriate regulation and support measures can be taken to achieve Australia's cultural and social objectives in audiovisual services. However, this may be a diplomatic way of stating that audiovisual services will be excluded from AUSFTA, an indication that existing arrangements will be scheduled as a reservation and therefore subject to standstill, or a way of foreshadowing there will be scope for achieving the objectives, but using other policy instruments other than content quotas.

On the assumption that the first interpretation is accurate, the ACTU believes that an effective exclusion is best achieved by also scheduling an exemption in respect of advertising services related to audio-visual services. This was done in Australia's 1994 schedule of GATS commitments by specifying that the Advertising Services sector for which commitments were given did not include " production or broadcast/screening of advertisements for radio, television or cinema".

This qualification was not reproduced in SAFTA and hence, while an exemption was listed for audiovisual services, there may be some doubt about whether it extends to content requirements for radio, television and cinema advertising, given the acceptance of the WTO's Service Classifications and the inclusion of Advertising Services under Business Services. For the avoidance of doubt, AUSFTA provisions in this area should be consistent with Australia's GATS schedule.

The USTR lists telecommunications, financial services, and adult education and training services as liberalisation gains from the recent FTAs with Chile and Singapore. Enhanced market access for US telecommunications companies is cited as an objective of the US in the USTR's letter to Congress notifying the Administration's intention to negotiate an FTA with Australia. Yet Australia already has a very open telecommunications sector. The letter also proposes additional disciplines for telecommunications, and specialised disciplines for financial services.

No details are given, but presumably the disciplines sought entail greater liberalisation than prescribed in current GATS Annexes in these sectors, and provided in practice by domestic policy. The APEC Study Centre report states that the US wants the removal of restrictions on the use of broadband for broadcasting. The ACTU calls upon DFAT to initiate consultations on the US proposals with unions in the telecommunications and financial services sectors. We support the telecommunications objective in respect of internet charging included in the Commonwealths Statement of Australia's Objectives for AUSFTA.

Australian education unions should be consulted in the event that the US seeks commitments in education beyond those given in GATS in 1994. In light of the adult education outcome in the US-Chile FTA, the ACTU believes AUSFTA commitments in respect of education services should not exceed Australia's GATS commitments. No GATS commitments were given for adult education by Australia in 1994, nor is adult education part of Australia's Initial Offer for this round of negotiations.

There appears to be a departure from Australia's GATS commitments in education services in Australia's treatment of education under SAFTA. The GATS commitments for Market Access apply only for private secondary and higher education services, except in the case of English Language Tuition where no distinction was made between public and private services. Under SAFTA's negative list approach, education services are automatically covered an exemption is specified, which was done only with respect to National Treatment and for primary education. The effect is to apply under SAFTA the Market Access disciplines to public as well as private secondary and higher education. This perhaps unintended expansion of commitments should not be repeated in AUSFTA.

Although not specifically mentioned in the USTR letter, the APEC Study Centre report also predicts a US claim for open skies for air services. Given the recent developments in this sector, the ACTU requests urgent advice from DFAT as to whether this is the case. Our view is that there is too great a risk of destabilising competition in the Australian market for an open skies policy to be granted to US carriers.

The silence from DFAT and government ministers in regard to the guaranteed protection of services is of utmost concern. Services sit at the heart of the culture and security of our communities and sovereign rights to determine the level and quality of services is essential to any independent democracy.

The Pharmaceutical Benefits Scheme

The PBS is widely reported to be a preoccupation of the USA, notwithstanding its omission from the USTR letter. This scheme is essential to the affordability of prescription drugs and hence critical to the maintenance of public health in this country. The ACTU would also strongly oppose any US suggestion that the Australian prohibition on advertising prescription drugs to consumers be replaced by the American model of setting standards for such advertising. There is enough

evidence to suggest that advertisements promoting prescription drugs to doctors can have cost-escalation effects because of the displacement of generics from medical prescriptions. Allowing direct advertising to consumers would compound the problem. No commitments should be given that would undermine the PBS.

Standards and Mutual Recognition

The Statement of Australian Objectives for AUSFTA includes the aim of pursuing opportunities for harmonisation or mutual recognition of mandatory and/ or voluntary. technical standards. There should be limits to this process.

The ACTU does not support encompassing therapeutic goods in any programme of mutual recognition of standards and certification procedures as part of or arising out of AUSFTA. The Therapeutic Goods Administration has often decided, in the interests of public health, to set different standards for approval (sometimes closer to European practice) to those of the United States Food and Drugs Administration. There is also an industry policy issue to be considered, as separate Australian approval requirements, medical research institutes, and the Pharmaceutical Industries Investment Program are all part of a cluster of agencies and programmes encouraging and maintaining the existence of a local pharmaceutical and therapeutic goods industry.

Food and related standards warrant similar caution. There are already cases of high energy drinks with potentially harmful additives and caffeine levels circulating in Australia as a result of CER. The USTR cites our labeling requirements for genetically modified food in its National Estimates Report. Australia should not agree to AUSFTA provisions limiting domestic powers in respect of labeling or the regulation of genetically modified crops.

Investment

The USTR letter indicates the desire to eliminate or reduce barriers to US investment in Australia, to secure treatment as favourable as that provided to domestic investors, and acquire greater rights for US investors in the establishment and operation of investments in Australia. While commonly interpreted as aimed at Australia's provisions for a national interest test on foreign investment, some commentators believe that the US will come to the negotiating table seeking NAFTA-style investment provisions for AUSFTA. The ACTU seeks assurances that the Australian government would not contemplate the latter, given the use of NAFTA's investment provisions to challenge environmental regulations. We note with approval that the Statement of Australia's Objectives proclaims that the Government will ensure that AUSFTA outcomes do not impair Australia's ability to meet fundamental objectives in environmental policy, among other policy objectives.

The ACTU is also concerned that Australia's Model Investment Promotion and Protection Agreement, apparently developed for bilateral investment agreements with developing countries where a real risk existed of inappropriate government behaviour, could cause similar difficulties in the event that those provisions are incorporated into AUSFTA. According to the 2 October 2002 edition of the Financial Times, even the US has sought to define more strictly the notion of measures which

are tantamount to expropriation or have equivalent effect, in order to ensure that regulatory action that simply diminishes the value of a foreign investment is not covered by the investment provisions of treaties. The provisions of Australia's model agreement should be amended to narrow the scope of the sections requiring compensation for expropriation to remove the risk to legitimate regulatory action by governments. Any investment section of AUSFTA should similarly exclude regulatory measures that reduce the value of an investment.

Australia may rarely use its powers to block foreign investment but that is no argument to override them in AUSFTA or even qualify them by locking-in thresholds for the activation of the national interest test, or a restrictive definition of that test. The application of sector-specific percentage limits on foreign investment, such as but not limited to those that apply to Qantas, Telstra and media, should also remain matters for national government decision. Further privatizations may be undertaken by Australian governments. Commonwealth governments may also conclude that other, new sectors warrant specific limits on foreign investments. For this reason, a negative list approach to investment, as has been introduced in SAFTA, should be avoided in AUSFTA

Employment

John Howard's mantra of a $4 billion benefit brings with it the assumption of increased employment. Just as we fail to understand these purported benefits, the cry of more jobs is one that should be treated with extreme caution. The Canadian experience is a sobering one. Between 1989 and 1997 870,000 export jobs were created but during the same period 1,147,100 jobs were destroyed by imports - thus creating a net loss of 276,000 jobs. The Australian community has every right to ask for more specific modeling. A similar impact on Australian employment would be disastrous.

Labour and environmental standards

The Commonwealth government has persistently opposed the inclusion of labour and environmental standards clauses in FTAs. The argument of a developing country veto in the WTO context does not apply in this case. Moreover, the US, even under the current Administration, has committed to include labour and environment provisions in FTA's, notwithstanding the NAFTA precedent of dealing with these issues in separate side agreements.

Labour and environmental provisions are part of the core text of the Singapore-US FTA (SUSFTA). This agreement reaffirms the two countries' ILO obligations, and includes the onus to ensure that domestic laws provide for labour standards consistent with internationally recognised principles, and that such laws are not weakened to encourage trade or investment.

The Chile-US Agreement (CUSFTA) has similar provisions to SUSFTA. In addition, CUSFTA contains the objective of ensuring that workers and employers have fair, equitable, and transparent access to industrial tribunals, and a cooperative mechanism to promote compliance with the ILO Convention on the Worst Forms of

Child Labour, and respect for the ILO Declaration on Fundamental Principles and Rights at Work.

SUSFTA and CUSFTA also contain provisions in respect of environmental standards. Australia can therefore have no excuses for not supporting labour and environmental provisions in AUSFTA. The central question however is the content of labour provisions and the extent to which action can be taken under dispute resolution to uphold standards. In the ACTU's view, AUSFTA should improve upon the US FTA's with Chile and Singapore by including commitments to the core labour standards of the International Labour Organisation and making such commitments enforceable using AUSFTA's dispute settlement provisions.

Dispute Settlement and Transparency

Under SUSFTA and CUSFTA, core obligations of the Agreements are enforceable using the dispute settlement procedures. Moreover, the two FTAs provide for open dispute panel hearings, release of submissions, rights for interested other parties to submit views and a roster of environmental and labour experts for disputes in theses areas. AUSFTA should emulate these aspects of the dispute settlement provisions of SUSFTA and CUSFTA

Trade and the Asia Pacific Region

As outlined earlier in this submission, the ACTU is concerned that Australia's support for AUSFTA may cause difficulties in our region. It is true that a few other countries in the region may have, or are considering, an FTA with the US. Our position, however, is more complicated because of our status as a European settler-state , our participation in the war with Iraq, and the fact that we have yet to gain a seat at the table or even observer status at important East Asian regional meetings.

What of our ambitions for inclusion in an ASEAN PLUS regional agreement? What of APEC? At the very least there should be some explanation of the Government's analysis of any likely impact on developments in our own region.

It is also imperative that we ask questions about New Zealand. With our economies increasingly integrated what will be the impact of NZ exclusion from a FTA with the US? Are we making decisions that will have impact via the backdoor on the sovereign rights of our nearest neighbour?

ACTU/AFL Alliance

The ACTU has a comprehensive agreement with its American counterpart, the AFL-CIO, which sets out the basis on which we would both support or oppose a FTA between our nations. A copy of a joint statement by both organisations' presidents is attached.

Conclusion

Given the vast disparity in the size of the economies of the negotiating parties - Australia's economy is only 4% of the size of the USA economy – the ACTU is still convinced that multi-lateral negotiations would offer better prospects by virtue of equalising perceived economic advantages and negotiating power. There is the risk of trade diversion. It has been argued that studies of CER and NAFTA suggest the diversion risk is minimal. However, there was significant unilateral liberalisation in respect of other trading partners undertaken by Australia and New Zealand in the wake of CER and, even before the conclusion of NAFTA, two thirds of Mexico's trade was with the US and many of its firms benefited from US duty concessions.

The ACTU's view is that Australian governments should retain the power to regulate the economy and society in the interests of the Australian community. The ACTU will not support bilateral or multilateral trade agreements, including the proposed AUSFTA, that remove key industry assistance and employment promotion powers, promote deregulation and commercialisation of public and other services of social significance, or preclude national interest tests on foreign investment. Nor will the ACTU support an Agreement that sacrifices the interests of Australia's manufacturing and services sectors – sectors which are the preponderant sources of employment and the key to Australia's competitiveness in the modern world economy – to secure gains in agriculture.

It must be remembered that unilateral action by successive Commonwealth governments has created a highly liberalised Australian economy. The US is likely to make the price of AUSFTA the removal of the relatively few remaining, but socially significant and politically sensitive, Australian barriers to free trade.

Winners or losers, our community is entitled to transparency and consultation, public and parliamentary debate before we trade our future. Surely the standards set by a conservative American administration are at least good enough for Australia. A parliamentary committee to oversee all negotiations and a parliamentary debate - this is not too much to ask of John Howard's government. The ACTU would like to think that such would be preceded by parliamentary inquiries guaranteed to allow for broad input and debate by contrast with the timeline associated with this procedure.

Australia and Australian jobs and services first - that is the real test of nation building. Trade and foreign policy must not be linked if we are to remain an independent democratic nation in charge of our own destiny.

(Attached document: AFL-CIO and ACTU: Joint Statement on a possible US-Australia Free Trade Agreement)

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