

Chapter 9

Trade in Services

9.1 Chapter 10 of the AUSFTA relates to the cross-border trade in services, that is, services provided under specified conditions. Chapter 13 of the AUSFTA, cross border financial services are treated separately from other cross-border services, and are dealt with separately below. (Financial services include banking, insurance, and similar incidental or auxiliary services.)

9.2 Chapter 10 does *not* include service delivery where an entity in one Party has established a commercial presence in the territory of the other Party. Such an enterprise would fall under the investment provisions in Chapter 11.

9.3 The services sector includes a large number of relatively small enterprises engaged in a wide variety of activities. Consequently, it is difficult to point to a single regime of policies affecting the freedom of trade in this sector. Furthermore, because the trade in services usually does not require the movement of goods across borders, trade restrictions do not tend to occur in the form of tariffs. Two separate forms of trade restriction can generally be identified: policies artificially restricting the supply of services, and policies which increase the real resource cost of services.

9.4 In both Australia and the USA, there are currently relatively low barriers to trade in the services sector. Both countries, for instance, have under the General Agreement on Trade in Services (GATS) a range of obligations in relation to reducing barriers to trade in services.

9.5 Under chapter 10, each Party will accord the other Party national or most-favoured-nation treatment, whichever is more favourable for the service supplier. Neither Party may limit the number of service providers or require those providers to have an office in its territory. There is a range of exceptions specified in Annexes 1 and 2 of the AUSFTA.

9.6 Countries may require, for professional services suppliers, the authorization, licensing or certification of services suppliers. As these requirements may differ between countries, each country, or its relevant professional bodies, may have certain rules about recognising the education or experience obtained, requirements met, or licences or certifications granted in foreign countries. Sometimes this recognition is pursuant to formal agreements with the foreign country concerned or a country might accord such recognition unilaterally.

9.7 Article 10.9.1 makes it clear that the Chapter does not prevent a Party from according such recognition to persons from foreign countries - but under Article 10.9.4 it must not do so in a way that would amount to a means of discrimination between countries in the application of its requirements, or a disguised restriction on trade in services. If a Party accords such recognition to persons from a non-Party then

the MFN Treatment obligation does not require that it accord such recognition to persons from the other Party (Article 10.9.2). However, it must give the other Party the chance to show that it should also be accorded such recognition (Article 10.9.3).

9.8 Article 10.9.5 and Annex 10-A to the Chapter provide a formal mechanism by which the two Parties can encourage such recognition in respect of their professional service suppliers. Annex 10-A also provides for the establishment of a Professional Services Working Group that must report to the Parties, within two years of the entry into force of the Agreement, including with any recommendations for initiatives to promote mutual recognition of standards and criteria. The Working Group has a broad mandate to look at issues relevant to the provision of professional services, but with a particular focus on exploring ways to foster the development of mutual recognition arrangements among the relevant professional bodies, and on the scope to develop model procedures for the licensing and certification of professional services suppliers.

9.9 A substantial number of submissions raised concerns regarding the protection of local content requirements in the entertainment industry. These are discussed in a separate chapter of this Report.

9.10 The services chapter of the AUSFTA operates on the basis of a 'negative list'. That is, a service falls under the AUSFTA if it is not specifically excluded in an Annex. This model may be contrasted with the GATS, which operates on the basis of a 'positive list', where the GATS applies only to those services listed. A number of submissions expressed the view that Chapter 10 of the AUSFTA should operate on the basis of a positive listing of services to be affected. This would provide greater clarity and be consistent with the GATS agreement.

9.11 Under the AUSFTA, newly developed services automatically fall under the agreement. This is described in the Regulation Impact Statement in the following terms:

[The] framework of the Agreement ensures that commitments are more far-reaching than those negotiated under the WTO's General Agreement on Trade in Services (GATS). For example, where GATS follows a "positive list" approach, this Agreement uses a "negative list" under which key obligations like national treatment apply to all services trade, except for measures or sectors specified in annexed lists of reservations. This approach has a liberalising and transparent thrust in that all exceptions must be specifically reserved, or they are deemed to be liberalised. It also ensures that any new services are automatically covered by these obligations.¹

9.12 Under these provisions, it is argued that Australia would lose the ability to protect new, innovative services from full competition under 'infant industry'

1 Commonwealth Government *Regulation Impact Statement (RIS)* 30 April 2004, p.10

arrangements. Even if, in Australia's view, it is clearly in our national interest for a new service to be excluded from the AUSFTA, we will be unable to do so.

9.13 It has also been raised that Australia may not benefit from commercialisation of publicly funded Research and Development (R&D)². The concern is related to the threat that the AUSFTA will result in job, production and R&D capacity and export opportunities being taken offshore³. The transfer of technology and domestic content requirements for R&D grants constrain the 'national benefits test' and may limit any future Governments capacity to implement national benefits criteria.

9.14 Substantial concern was raised about the treatment of government services offered on a commercial basis, with claims that such services would not be exempt from American competition under the AUSFTA. Given the contraction of direct government services in recent years, and its replacement by outsourced services delivered privately on a competitive basis, substantial elements of Australian government service delivery may fall under the AUSFTA. Submitters expressed concerns about the suitability of arrangements which may see Australian government services delivered by outsourced companies not even operating in Australia.

9.15 The government has consistently stated that governments will retain the right to regulate and that government services are excluded from the Agreement.

There is nothing in AUSFTA that would undermine the right of governments to adopt appropriate regulations that are in the public interest, for example, to achieve health, safety or environmental objectives. Nor does it require the privatisation of government services. Public services provided in the exercise of governmental authority will also be excluded from the scope of the services chapter.⁴

9.1 The Regulation Impact Statement describes the AUSFTA as:

“GATS-plus” in relation to domestic regulation: it respects the right of governments to adopt domestic regulation affecting trade in services, but contains enhanced provisions on transparency and the processes for adopting such regulations. These provisions reflect proposals Australia and other countries have put forward in the WTO services negotiations.⁵

9.16 A number of submissions have called attention to the failure of the AUSFTA to allow for greater temporary movement of professional and business people across borders. The cross-border trade in the services industry, in particular, relies on the ability of the people delivering those services to travel freely between Australia and

2 Federation of Australian Scientific and Technological Societies, media release, 15 June 2004

3 *Submission 528*, FASTS, p.1

4 DFAT *Frequently Asked Questions on AUSFTA*

5 Commonwealth Government *Regulation Impact Statement (RIS)* 30 April 2004, p.10

the USA. This may in fact be one of the most substantial impediments to free trade in cross-border delivery of services –yet it is untouched by the AUSFTA.

9.17 The representative of the Australian Services Roundtable expressed the group's views about the AUSFTA in general and the provisions regarding movement of people in particular.

Chapter 10 on cross-border trade and services delivers us no new market access. What it delivers us is some limited and highly qualified new legal protection, known as national treatment. It delivers it in roughly half-a-dozen subsectors where we do not yet have that protection in the GATS in the WTO. How useful are those new protections? They are significant but they offer both Australia and the United States scope now to improve their GATS offer. Frankly, though, we would be surprised if Australia went down that particular path, as one of the areas we have given national treatment to is water supply, which we have specifically said we will exclude from our GATS offer. So the legal protections, on balance, are limited.⁶

To conclude, some of our members are deeply concerned. I am not going to cover culture, intellectual property, audiovisual or e-commerce because you will receive submissions directly on all those issues. But in the membership there is no matching enthusiasm in any of the other sectors to counter that deep concern. We see that the positives are in financial services and in government procurement but, with regard to government procurement, the US market is harder to access and more limited than we initially thought, and we are doing a lot of work in that area. On balance, most of the membership sees the agreement as benign.⁷

9.18 On people movement, the Australian Services Roundtable expressed considerable disappointment.

There is one major absence from the FTA—that is, a chapter on the temporary movement of business people. This is something the services industries particularly were seeking. It gets no mention. In services, if you cannot get a visa and get across the border you cannot deliver your service. It is a major omission. It is important.

9.19 This disappointment was reiterated by one of the groups that is most enthusiastic about the AUSFTA. The group's spokesman, Mr Alan Oxley told the Committee:

One thing that our business group, along with the services group, was disappointed about was the failure to include liberalisation of the movement of personnel. We know that officials tried—the timing was against it because of the Iraq war and because of increased security—but we do not see why, if the government is willing to commit to a large package to help

6 *Committee Hansard* 5 May 2004, pp.23-24 (Drake-Brockman, ASR)

7 *Committee Hansard* 5 May 2004, p.24 (Drake-Brockman, ASR)

reform the sugar industry as part of the package of responses introduced in this agreement, it should not also adopt, as a major long-term target, an agreement with the United States to improve movement of personnel. As a group, we urge you to adopt that as one of your findings.⁸

9.20 The Select Committee regards the establishment of the Professional Services Working Group as a key feature of the Chapter on Services, and hopes that it will prove its value by exploring ways to facilitate the flow of professionals between the two countries. The mutual recognition of qualifications is clearly one area that requires its attention. But of equal priority is the question of the movement of business people and professional service providers between Australia and the US.

Financial Services

9.21 Under chapter 13 of the AUSFTA, cross border financial services are treated separately from other cross-border services. Financial services, in this context, include banking, insurance, and similar incidental or auxiliary services. The separate treatment of financial services recognises the particular need for regulation in this sector.

9.22 Chapter 13 requires each Party to accord the other Party national or most-favoured-nation treatment, whatever is more favourable for the financial service supplier. It requires each Party to allow its nationals to freely purchase financial services from the other Party, and prevents Parties from artificially limiting the number or size of financial service providers. There is a range of exceptions to these general obligations, specified in Annexes 3 and 4 of the AUSFTA.

9.23 The AUSFTA sets out requirements for increased transparency in the administration and development of financial services regulations. The AUSFTA also provides for the establishment of a 'Financial Services Committee' with the task of examining ways to further integrate the financial services sectors of the two Parties, and discussing issues which arise in the implementation of this chapter.

9.24 Both the Australian and United States Financial Services markets are currently relatively open, although schemes for prudential regulation operate in both nations.

9.25 Australia and the USA both have sophisticated systems of prudential regulation to ensure that financial services are only undertaken by appropriate service providers, and to ensure that the industry handles clients' funds with probity. Concerns were raised with the Committee asserting that the AUSFTA must not become a means by which Australia's prudential regulatory regime is undermined.

8 *Transcript of Evidence*, 5 May 2004, p.27 (Oxley, AUSTA)

9.26 The membership, role, and manner of operation of the Financial Services Committee (created under article 13.16, with further information in an exchange of letters) is not currently clear. For instance, the extent of industry involvement or consultation in the Committee's deliberations, and the extent of parliamentary oversight of the Committee's outcomes, is not specified.

9.27 The impact of providing United States investors with direct access to trading screens on the Australian stock exchange (ASX) is difficult to assess. This proposal is not directly included in the AUSFTA, but is one of the items slated for progression by the Financial Services Committee. Currently, Australian investors can invest directly in securities on the New York Stock Exchange, but United States investors must pay intermediaries in Australia to trade on their behalf on the ASX. The extent to which this direct access would provide benefits to listed Australian companies is not yet clear.