

Australian Democrats Dissenting Report

1. INTRODUCTION

The Australian Democrats support fair trade that is in the national interest. In our opinion, the Free Trade Agreement the Government has negotiated with the USA does not fit this description. Keen to try and cash in on their support for the Bush administration's policies in other areas, the Howard Government has accepted a substandard deal that will do more harm to Australia's future than good.

The 'national interest' is about more than the economic bottom line. It includes our social and labour standards, the preservation and improvement of our environment and our national cultural identity, and these factors must also be taken into account in any trade decisions. It is critical that the terms of the agreement do not affect our ability to regulate freely in the national interest in future.

Wide-ranging trade agreements such as this FTA will have an impact on every facet of our economic, social, cultural and environmental future and must be assessed in these terms.

The Australian Democrats believe Parliament should have a critical role to play in the trade agreement-making process – that is, to scrutinise, debate and vote on any such agreements that can so significantly affect our future.

1.1 The Inquiry

The Democrats supported the establishment of this Select Committee into the Australia-US Free Trade Agreement. Given that the Executive Government has the power to enter into this Agreement without the involvement of the Parliament, it is important that the Senate, as the house of review, carefully scrutinise and analyse the terms of the deal to determine whether it is in Australia's interest.

This Inquiry has conducted extensive hearings around the country, and has received over five hundred submissions from individuals and organisations keen to share their views about the impact of this Agreement. The Committee Secretariat staff are to be commended for their incredible hard work and diligence throughout this process.

They are also to be commended for a very high quality Final Report. The major issues of the Agreement that have emerged through this Inquiry have been outlined and discussed in a thorough and reasoned manner. It comprehensively covers the detail of the Agreement, and the divergent views about the more controversial aspects of the deal. The discussion in each chapter is very detailed, outlining the arguments of witnesses and comparing these to the DFAT and Government responses.

In the Democrats' opinion, however, the conclusions reached by this Report do not go far enough. Based on the evidence we have seen over recent months and after thoroughly analysing this deal, we believe that it is not in Australia's interest.

In this Minority Report, the Democrats will explain our response to this Inquiry. It is not our intention to restate the discussion of each issue and the evidence provided to the Inquiry contained in the majority Report, but we believe the Report's conclusions should be stronger, and an overall recommendation should be made against support for the deal.

1.2 Parliamentary Involvement in the Treaty-Making Process

Parliamentary approval of treaties has been an important part of Australian Democrat policy for some time. Former NSW Senator Vicki Bourne introduced the *Parliamentary Approval of Treaties Bill* in 1995, which we continue to pursue. Throughout this year, we have emphasised the importance of this issue, and have continually called for agreements such as this USFTA to be brought before the Parliament for scrutiny and debate.

We would like to make one distinction, however, between our policy in this regard and the approach taken in the Committee's Report. The Democrats appreciate that a distinguishing feature of modern international trade agreements is that unlike other types of international treaties, trade agreements are strictly enforceable, and impose binding justiciable constraints on government.

The Committee Report argues that this therefore establishes greater justification for Parliamentary approval of trade agreements, as opposed to 'conventional' treaties. We understand that the focus of the Committee in this Inquiry is on the impact of trade agreements specifically, and can therefore appreciate why Parliamentary approval of trade agreements is the main concern of the Report. However, it is our strong belief that Parliamentary approval of treaties should not be restricted to trade agreements alone.

As a matter of principle, we believe Australia should consider itself strictly bound by all international agreements it enters into, irrespective of the nature of dispute settlement procedures contained within each treaty. The mere fact that one treaty is not as 'enforceable' as another is not, in our opinion, sufficient reason to consider it exempt from the need for Parliamentary consideration. The Democrats will continue to support the need for parliamentary approval of all international agreements.

Having said this, the recommendations of the Report in relation to the Parliamentary approval of trade agreements propose a useful process to ensure that there is greater democratic legitimacy in seeking to bind Australia to major trade agreements.

This process, which is outlined in the Report, would ensure that the elected representatives of the people of Australia have an opportunity to have a voice in the process of entering into binding international commitments. The Parliament would have a role in approving the Government's priorities for trade negotiations, which would give the Government a greater democratic mandate in negotiations. A

concluded trade agreement that conformed to already agreed objectives would be more likely to receive final Parliamentary approval.

This process is similar to the one that operates in the United States, where Congress has an opportunity to accept or reject any major agreement entered into by the Executive Government. It is time that Australia embraced a similar arrangement. The current system, where commitments are made by our Executive without consultation that have a significant impact on every facet of Australia's economic and social structure and bind us long into the future, is inappropriate and lacks democratic legitimacy.

2. ECONOMIC BENEFIT?

The Government has based most of its sales pitch relating to this FTA on the assumption that it will bring a significant economic benefit to Australia. While the Democrats believe that wide-ranging trade agreements of this nature should be assessed according to a broader set of criteria than mere economics, it is useful to look at the vastly divergent views about whether the Government's loudly proclaimed benefit is ever likely to eventuate. We recognise that economic modelling is an inexact science, and that there are a range of different assumptions that can be used to produce remarkably different results. However, we believe that the Government has deliberately misled the Australian people with respect to the benefit of this deal, and they have done so according to results from their own economic modelling study. It is useful, therefore, to consider the report that the Government is basing its projections on, and outline the shortcomings of this analysis.

Characteristic of the debate on the FTA thus far is the fact that the economists just can't agree on the benefits of this deal, or lack thereof. The Government commissioned the Centre for International Economics to model the impact of the FTA – the same organisation that predicted the FTA would be worth \$4 billion a year if it got rid of *all trade restrictions* between the two nations. This time, the CIE told the Government exactly what it wanted to hear – and in fact, decided that even though the deal left many trade barriers in place, the projected benefits of the deal had ballooned out to more than \$6 billion a year.

The CIE report has been criticised for using grossly overstated estimates and unrealistic assumptions. Dr Philippa Dee of the Australian National University was commissioned by the Committee to conduct alternative economic modelling of her own and came up with a far more realistic figure of \$53 million a year. As Dr Dee herself describes it, this is "a tiny harvest from a major political and bureaucratic endeavour."

Dr Dee's report also demonstrated how this agreement sets a precedent in a couple of significant ways.

- Firstly, Australia has accepted this Agreement (even though it didn't contain any access to the US sugar market), but rejected the EU/US proposal on agriculture at

the World Trade Organisation meeting in Cancun, which (while not ideal) could have provided greater benefits for Australian farmers because the proposals started to address the problematic question of US domestic agricultural subsidies.

- This FTA sets precedents with respect to tailoring rules of origin based on tariff classification. In the past, all rules of origin were based on a relatively simple rule for regional value content of goods. These tailor-made rules have been criticised as being the result of protectionist lobbying by producer interests, and Australia can be now said to be condoning such an approach.
- The fact that we have accepted such wide-ranging safeguard measures (especially for beef and textiles) is a step backward from WTO practice.
- Our extensive IP commitments will set a precedent for Australia's approach to IP regulation in the future.

One of the key examples made by Dr Dee about the overinflated assumptions used by CIE in their analysis related to government procurement provisions of the Agreement. The benefit to be gained from these opportunities depends on the whether Australian businesses are able to take advantage of them.

The CIE study considers that Australia might be able to achieve 30% as much market penetration as Canada. However, Dr Dee argues that this is doubtful – Canada is a much bigger country, and much closer to the US than Australia (90% of the Canadian population live within 160 km of the US border, which stretches for over 6400km).

Geography and economy size play a significant role in trade. Trade volumes tend to increase with the size of the importing and exporting countries, and decrease with the distance between them. The Canadian economy is almost 70% larger than the Australian economy, and the Australian economy is almost 30 times further away from the US.

Therefore, Australia's trade with the US in government procurement could be expected to be 4% as large as that of Canada.

Dr Dee's report also takes into account the fact that tight 'rules of origin' can dilute the benefits of goods market opening by disqualifying some goods for preferential tariff treatment. It is possible that many Australian products could have difficulty meeting the rules of origin, and thus not be eligible for preferential tariff treatment.

Dr Dee reports that empirical evidence suggests that the proportion of trade that takes place at preferential tariff rates in preferential agreements is typically remarkably low. That is, even though there is the scope for preferential tariff rates, many companies don't take advantage of them. There are two contributing factors to explain this:

1. Production processes are becoming increasingly geographically fragmented, and rules of origin are becoming harder to meet, and
2. The costs of complying with rules of origin, especially for small and medium-sized businesses, are high. In some respects, it is easier for businesses to just

accept the tariff rather than have to go through the difficult and expensive process of proving their eligibility for special treatment.

Further, rules of origin can have a trade diverting effect, as they can affect the import sourcing choices of producers.

Dr Dee's revised projection of the benefit likely to be achieved through this deal reflects adjustments taking into account rules of origin, trade diversion, and costs such as additional royalty payments resulting from the extension of the copyright term, the costs of administering the Agreement, and the long-term cost of the sugar package.

There has also been a great deal of disagreement about the potential benefit of the Investment chapter of the FTA – with economists unable to agree on the effect the deal will have on Australia's equity risk premium and the various dynamic impacts the Agreement is likely to have. A particularly interesting point that is made in the Majority Report is that Treasury is usually very sceptical of using dynamic productivity gains (DPGs) as a basis for policy decisions and does not seek to estimate them in costings. The CIE study, however, uses DPGs as the major contributor to the projected \$6.1bn benefit Australia will derive from this Agreement.

The Democrats believe that this evidence demonstrates further that the gains cited by the CIE report are flawed and overstated, especially given that the figures have been based on assumptions the Treasury itself refuses to use in normal policy advice.

In our view, Government rhetoric about the benefits of the deal cannot be taken seriously. Given the magnitude of the costs in areas of key social, cultural and environmental policy, it is difficult to find any benefit for Australia in this deal at all.

3.0 KEY AREAS OF MAJOR COMPROMISE

The following discussion will outline some of the key areas of concern to the Australian Democrats. While this is by no means an exhaustive discussion (which could potentially be longer than the text of the Agreement itself), this is not to say at all that the impact on other sectors is less important, or that they are less affected. In fact, it is when the FTA is taken as a whole that the extent of the damage it will cause is properly revealed.

3.1 Pharmaceuticals and Health

As the Majority Report suggests, the PBS is integral to Australia's health care system, is core social policy and should never have been included in any debate or negotiations on trade.

Furthermore, the report acknowledges that the Government misled Australians, saying the PBS system would not be traded away in the FTA negotiations, it was not 'on the table' and that US negotiators were 'in no way going after the PBS'.

Once it became clear that the PBS was indeed on the table, the Government downplayed its importance, in contrast to the enthusiasm shown by US negotiator, Bob Zoellick who said in his response to US Congress questions, that it was a 'breakthrough' for US pharmaceutical interests.

The Democrats therefore find it extraordinary and regrettable that the report should merely find it 'unfortunate' that the government included the PBS in the FTA and conclude that;

"... now this has occurred, our task is to examine closely the relevant provisions and assess the possible impact and implication for the PBS into the future."

The Democrats strongly disagree that the Senate should simply assess the impact for the PBS sometime in the future. We consider that, based on the evidence, it is entirely appropriate for the Senate to reject the PBS provisions in the FTA and implementing legislation.

The PBS can and will be impacted by the FTA. The Majority Report sets out the proposed changes in some detail and presents evidence that the FTA will be detrimental to the PBS. The Democrats accept that medicine prices will not automatically rise under this Agreement, but there is ample evidence that this is highly probable. It would therefore be irresponsible to support the Agreement and hope that these negative results will not occur, as the Majority Report recommends.

Background

Australia's PBS has been attacked consistently by US pharmaceutical companies and their Australian subsidiaries, because it delivers some of the lowest patented drug prices in the developed world – according to the Productivity Commission, three to four times lower than those in the US. It does this through pharmacoeconomic analysis and reference pricing that determines the benefits of new drugs and its national bargaining power. It is not surprising therefore that the pharmaceutical industry, both here and in the US, has been calling for changes to the FTA that would strengthen the capacity of the industry to increase those prices.

However, the pharmacy sector is already the most profitable and influential industry in the US and has been for the past 10 years. In the fiscal year 2003-2004 it has been reported that the industry spent US\$150 million to influence public policy. There are 675 pharmaceutical lobbyists in Washington alone. In the 1999/2000 US election cycle the pharmaceutical industry spent \$20 million on campaigns contributions of which \$15 million was provided to the Republican Party.¹

In October 2003 it was reported that President Bush told our Prime Minister that raising Australian prices for US pharmaceuticals was important to ensuring that

¹ Public Citizen "The Other Drug War 2003: Drug Companies Deploy an Army of 675 Lobbyists to Protect Profits" *Congress Watch*, June 2003

consumers in all countries, not just the US, paid for high research and development costs.²

Is research & development cost really the issue?

The US Administration has argued that Australia has not borne its share of the research and development costs of new medicines, making US consumers pay the bill. However, over the last few years, the Australian Department of Industry, Tourism & Resources has provided \$300 million in grants for pharmaceutical manufacturers undertaking research and development in Australia and from 2004/05 to 2009/10 a further \$150 million. In any case, US pharmaceutical companies spend 2 to 3 times more on marketing, administration and lobbying than they do on R&D and their profits are twice the cost of their R&D expenditure.³

The Australian Productivity Commission established that the largest price differences between Australia and the US are for aggressively marketed new drugs involving small molecular variations and minor additional patient benefit – the so-called 'me-too' drugs - and that PBS prices for new drugs providing genuine benefit are much closer to the US prices.

Principles of equity and affordability missing

As has been pointed out by Dr Ken Harvey and others, the FTA emphasises the need to reward manufacturers of "innovative" new pharmaceuticals in Annex 2-C but does not include any principles on the need of consumers for equitable and affordable access to necessary medicines (the first principle of our National Medicines Policy).⁴

It also leaves out the hard won principle of the Doha Declaration on the Trade Related Intellectual Property Rights (TRIPS) Agreement in Public Health, viz:

"Trade agreements should be interpreted and implemented to protect public health and promote universal access to medicines."

The dispute resolution process will rely on the principles in the FTA when determining Australia's compliance with its obligations. Therefore the rights of the drug company will be favoured over the rights of Australians to access drugs under the Agreement.

Again, the Majority Report acknowledges this issue but does not suggest a remedy. If the FTA is to include any reference to any element of Australia's health system, a position strongly rejected by the Democrats, then there should be an overriding provision that places public health concerns, including the right to affordable medicines, as the fundamental principle of all decisions, over and above the rights of pharmaceutical companies.

² Colebatch T, "Bush wants end to medicine subsidies", *The Age* 24 October 2003

³ Families US Foundation "Profiting from Pain Where Prescription Drug Dollars Go" *Families USA* Publication No. 02-10-2002

⁴ Harvey, K et al, "For Debate: Will the Australia-United States Free Trade Agreement undermine the Pharmaceutical Benefits Scheme", *MJA* August 2004

Review Process

The establishment of a review process in cases where decisions are made to not list a drug is also an area of substantial concern. While the FTA does not specify that the review process is to be binding, it provides yet another opportunity for the pharmaceutical industry to have input into, and bring pressure on, the operations of the PBS.

A consultation paper has been released on the proposed workings of this review process, but decisions regarding its final operation will be completed subsequent to the consideration of the FTA legislation and the paper suggests that the review will be conducted in secret. While the DoHA have argued that the proposed review process cannot overturn PBAC decisions, it begs the question; what is the point of the review? It is noteworthy that Medicines Australia, an industry body, has applauded the introduction of an 'appeals mechanism'.

Transparency

The pharmaceutical industry has made much of the need for greater transparency within the PBS process. However, as many commentators have noted, the 'commercial-in-confidence' rights of pharmaceutical companies are guaranteed within the FTA, yet the public are denied access to drug company data, despite evidence that drug companies withhold information that could impact on decisions about the use of drugs.

This is yet another example of the rights of pharmaceutical companies being prioritised over and above that of the health of the Australian public. Another element of transparency ignored by the FTA relates to the financial relationship between drug companies and researchers and policy makers. Again these serious concerns have been acknowledged within the Majority Report, but not reflected in its recommendations.

There is also no information available regarding how transparency will apply to the proposed Medicines Working Group. This special group, which will contain health officials from the U.S. as well as Australia, does not specify any role for consumers or public health organisations. It is essentially a closed group, which allows another country to play a role in the design and implementation of Australia's medicines policy. No details are available on the terms of reference for this group nor on the process that will guide its operation.

Yet the Majority Report suggests we should have faith that this group will work for the benefit of Australians, despite the fact that the agenda of the US negotiators, pressed by the American pharmaceutical industry, is focused on different outcomes.

Generic Drugs

The impact of the intellectual property provisions of FTA on the entrance of generic drugs into the marketplace will have several, significant impacts for Australia's medicines policy and the PBS.

As Dr Harvey and colleagues have noted:

"Several intellectual property provisions of AUSFTA are likely to delay the introduction of cost-effective generic drugs. Others prevent our generic drugs industry from alleviating public health crises in neighbouring countries (Article 17.9.6). Article 17.9.8 of AUSFTA locks in the preferential patent term extensions accorded to pharmaceuticals. Article 17.10.4 takes the radical step of linking and indefinitely "preventing" market approval by the Therapeutic Goods Administration if any type of patent has been "claimed" over the relevant drug. This facilitates litigation replacing innovation in Australia, as it has in the US and Canada. Original patent owners will seek to "evergreen" their exclusive rights over "blockbuster" (high sales volume) pharmaceuticals, with speculative and ultimately spurious "claims" over the process or capsule rather than the active ingredient." ⁵

The Majority Report details the important role that generic versions of drugs play in keeping down drug prices, and consequently costs to the PBS. Research at the Australia Institute in Canberra has estimated that if such changes succeed in delaying by 24 months market entry of generic versions of just the top five PBS expenditure drugs due to come off patent, this could increase the cost of the PBS by \$1.5 billion over 2006–2009.

The FTA requires that Australia maintain a five-year "data exclusivity" period for pharmaceutical test data. While this is consistent with current Australian law, it limits Australia's ability to reduce this data exclusivity period in the future. The longer this data exclusivity period the longer the delay of the introduction of generic drugs. This will limit the ability of future governments to pursue changes in this area to reduce costs to the PBS.

Any delay to the move to generic drugs will add costs to the PBS and is a further compelling reason to reject the Agreement.

Parallel Imports

The Majority Report also recognises that the FTA will have the effect of permanently banning parallel imports of pharmaceuticals as an option for encouraging competition in the pharmaceutical sector in the future. While recognising that this practice is not currently permitted within Australia, the report concurs with the position offered by the parliamentary library paper that suggests that:

⁵ Harvey, K et al, "For Debate: Will the Australia-United States Free Trade Agreement undermine the Pharmaceutical Benefits Scheme", *MJA* August 2004

"Over the last two decades Parliament has been progressively allowing parallel importing of other forms of IP, such as copyright over music, books and computer software. Similarly, Australian patent law now provides that patent-holders cannot place certain anti-competitive restrictions on the sale of products.

Given these trends, combined with escalating PBS costs and the competitive advantages that parallel importing may provide, it is reasonable to assume that future parliaments would have considered changes to patent law that would void restrictions on parallel importing. AUSFTA would remove this as an option for pharmaceutical reform."⁶

Advertising

There are provisions within the FTA to allow pharmaceutical manufactures to disseminate pharmaceutical information via the Internet. This appears to be a "toehold" strategy to eventually bring in direct-to-consumer advertising (DTCA) in Australia. DTCA is legal in the US but not in Australia. It has been associated with a substantial increase in patient demand for and use of products often not in accord with best clinical practice.⁷

Medicare

In the view of economist, John Quiggin, Medicare can also be threatened under the provisions of the FTA.

"The private insurance lobby in Australia has opposed Medicare since its inception, and would be strengthened immeasurably by a much larger and stronger US industry. The single-payer and bulk-billing provisions of Medicare, already under severe strain, could be rendered unworkable by legal challenges under the FTA."⁸

3.2 Australian Culture and Local Media Content

Australia has a system of controls in place to ensure that a basic minimum level of Australian content is broadcast in our media. Our cultural policy exists to ensure a diverse range of local voices is heard, and uniquely Australian stories continue to be told.

The Democrats strongly support the Australian cultural sector, and will resist any attempts to weaken our strong and vibrant national cultural identity.

In previous Agreements, such as the Australia-Singapore Free Trade Agreement, the Government secured a total exemption for all cultural industries from the Agreement.

⁶ Dr Kate Burton and Jacob Varghese, *The PBS and the Australia-US Free Trade Agreement*, Parliamentary Library Research Note No. 3, 21 July 2004

⁷ Harvey, K et al, "For Debate: Will the Australia-United States Free Trade Agreement undermine the Pharmaceutical Benefits Scheme", *MJA* August 2004

⁸ John Quiggin, *A completely misleading description*, Evatt Foundation Paper, 16 June 2004

In this AUSFTA, in the face of pressure from the largest film and television market in the world, the Government has sold out the Australian cultural sector.

The Majority Report explains the changes that have been agreed to in the FTA and the criticisms of these changes by Australia's cultural industries, in particular the Media, Entertainment and Arts Alliance. It covers the inflexibility of 'ratchet' mechanisms that prevent future governments from increasing levels of Australian content in our media once they have been lowered, as well as the impact on multichannelling, advertising, pay-TV, public broadcasting and 'interactive audio and/or visual services', which DFAT asserts will adequately cover new media.

The conclusions to this Chapter in the Majority Report are disappointing, in that they barely exist. DFAT has the last word on each of the issues, and the report reads as if the Committee accepts DFAT's assurances on these matters. The Democrats do not agree with this position, and believe that there is a significant danger for the future of Australian cultural industries. There should have been a blanket exemption for all cultural industries (such as was included in the Singapore FTA).

The Democrats note that the FTA does include provisions for quotas of Australian content on television. However, these quotas are locked at specific levels, and can never be increased. If quota levels are lowered by a future government, they can never be returned to their current levels.

Further, the FTA provides that the US can challenge any regulation for Australian content in new media, which will severely limit future government regulatory options that may be required to deal with new technologies and new modes of delivery of audiovisual content.

Specifically, the Government may not impose local content requirements on most pay television channels. Of those pay television channels where the Government may act to impose local content rules the level of local content is set at very low levels, in no way similar to the current free to air television rules. Further, the Government will never be able to regulate existing media (unless currently regulated) for local content. This means cinema (including e-cinema) may never be regulated. Also, the Government may not begin to act to introduce rules for interactive media until the level of access for Australian audiences to local production is already found to be at unacceptably low levels. There is no ability to take pre-emptive action.

As Ms Megan Elliott of the Media, Entertainment and Arts Alliance explained in her testimony before the Senate Inquiry:

"The agreement will severely constrain the ability of this and future Australian governments to determine cultural policy, giving to the government of the United States a much stronger role in the determination of that policy. We will be moving from a position of being solely in charge of our own cultural policy to one where we must

consult with the largest cultural producer in the world, and our dominant trade partner, on how we determine our future."⁹

The Democrats believe that we should not grant the US a role and voice in determining our cultural policy.

Investment in Films

In the Investment chapter of the Free Trade Agreement, Australia has agreed to 'national treatment' rules, which prohibit each Party from discriminating against investors of the other country in any way.

Most of the financial support provided to the development and production of Australian feature films, TV programs and other projects in this country is provided through government assistance by way of 'investment' rather than grants or subsidy. Agencies such as the Film Finance Corporation acquire copyright interests and earn returns on their investment.

The Democrats are particularly concerned that this FTA may mean that these agencies cannot exclusively invest in Australian films, which will cripple the Australian film industry. When asked a question about this issue in the Parliament, the Minister was unable to give a clear answer. The Democrats made it clear that we understood that direct grants and tax rebates were exempted from the FTA, but the Minister was unable to prove to the Senate that public *investment* in domestic film production would be protected from the deal.¹⁰

Further, in answer to a question from Senator Ridgeway on this matter, the following evidence was given before the Committee:

Mr Herd – The way in which the agreement is currently framed, the way in which it is drafted, imposes performance requirements on governments. For example, currently a condition for the Film Finance Corporation to invest in a project is that it contains significant Australian content and is made by Australians. That is a performance requirement. The agreement, as it is currently drafted, would allow the US to say: 'That's a non-conforming measure. The Australian government can't do that any longer.' One of the big problems that we see with the current drafting is that for some reason the negotiators saw fit not to reserve the Film Finance Corporation, the Australian Film Commission, the Australian Broadcasting Corporation and SBS—all those cultural institutions which invest in Australian content—from the application of the agreement, with regard to not only the services chapter but the investment chapter.

Mr Harris—When this issue of investment was raised with the negotiators, they said that they had taken it on board and were going to address it and find out whether it was an issue. They simply have not

⁹ See *Transcript of Evidence*, Tuesday 4 May 2004 (Elliott)

¹⁰ See *Senate Hansard*, 30 March 2004

got back to us. We are essentially on notice that they are going to address it. That was not the intention of the agreement. All we are saying is that, as the text exists now, we see that as the result.¹¹

Public Broadcasting

A final point is that the Democrats remain very concerned that the FTA may have an impact on Australian public broadcasting through the ABC and SBS. Funding arrangements for our national broadcasters will not be affected, because Commonwealth subsidies and grants are specifically excluded from the Agreement. However, as will be discussed later in this section, the definition of 'public services' in the FTA is ambiguous and untested, and excludes services provided on a commercial basis or in competition with other service providers. Given that SBS advertising and ABC product marketing operate in a competitive commercial environment, any regulation to do with these services may not be covered by the 'public services' exemption. This may mean that the US could challenge some regulation of public broadcasting, claiming it is inconsistent with the USFTA.

The Democrats believe that the terms of the FTA that will have such a marked impact on Australian culture are very dangerous to our future national identity, and therefore cannot be supported. We agree, once again, with the words of Ms Megan Elliott:

"The cultural policies of the Australian government have brought enormous benefit to Australia through the music, literature, theatre, film and other art forms they have helped nurture and support. Australia has a generally open and transparent cultural economy. It is open to trading cultural goods and services from other countries, and the economy in general benefits from Australian creators' ability to export. What is at stake in this agreement is whether Australia will continue to have the ability to determine its own cultural policy or whether that freedom is to be constrained by or sacrificed to the pursuit of a larger free trade agenda. All through this negotiation the cultural sector have been clear in the position we put to government: we do not believe that the Australian government should give up the flexibility to act that it currently enjoys. Cultural policy should not be made subservient to trade liberalisation."¹²

3.3 Intellectual Property

Both Chapter 3 of the Committee Report and the complementary Parliamentary Library paper provide a very detailed outline of the changes that have been agreed in Chapter 17 of the FTA, and the concerns that have been raised about these by various sectors. A central point of both the Report chapter and the DPL paper is how significantly this Agreement either pre-empts or directly contradicts current Australian debate about appropriate reform to our copyright law. The DPL paper also analyses

¹¹ See *Transcript of Evidence*, Tuesday 4 May 2004 (Herd/Harris)

¹² See *Transcript of Evidence*, Tuesday 4 May 2004 (Elliott)

where proposed changes to Australian law go further than the FTA, and further than current US copyright law.

This chapter of the Agreement is potentially one of the most significant – with the most far-reaching reforms which will have a direct and serious impact on Australian innovative industries. Some of these changes, such as the ratification of the WIPO treaty, are positive reforms. However, aspects of the chapter relating to extension of the copyright term, provisions relating to anti-circumvention devices, and liability of ISPs relating to copyright infringement are very dangerous developments.

Copyright Term Extension

The question of the extension of the copyright term has been dealt with extensively elsewhere in this report. Even if we are to disregard for a moment arguments pertaining to the advisability of enacting such a policy in direct contradiction of the recommendations of recent domestic reviews into the operation of Australia's copyright regime, the mere cost of this move is sufficient to give rise to concern. Given that we are making this change at the behest of the world's largest single exporter of intellectual property, it is useful to consider the calculations done by Dr Dee in her modelling of the impacts of the Agreement that prove just how much this move is going to cost Australia.

Dr Dee has concluded that extending the term of copyright by an extra 20 years will create a cost to Australia, because as a net importer of copyright material, we will have to pay additional royalties to copyright holders for existing works. According to Dr Dee's calculations, Australia's net royalty payments could be up to \$88 million higher per year as a result of extending the term of copyright. The discounted present value of the cost to Australia of extending the copyright term is about \$700m. This is an extremely significant amount of money, and these extra costs will have a severe impact on our cultural industries.

Chapter 17 and the IT Sector

The Department of Foreign Affairs and Trade has described the Intellectual Property outcomes of the FTA as 'harmonising [Australia's] intellectual property laws more closely with the largest intellectual property market in the world.' Given the amount of power wielded by US corporations in the field of copyright and patent protection, this prospect gives rise to some concern.

The Democrats have warned against allowing the Free Trade Agreement to go down the American route of giving extraordinary power and privilege to giant software companies, which can then be used to stifle competition.

Aspects of the US Digital Millennium Copyright Act (DMCA) have seen the major software companies in that country frustrate and block smaller companies and IT research teams, by using the law to threaten and financially exhaust any competition. The prospect under this FTA of expanded software patents, rigorously enforced anti-circumvention provisions, and increased liability for internet service providers are a matter of considerable concern.

The Australian Democrats strongly support the development and use of open source software, and a diverse and competitive IT environment in Australia. We believe that we must retain our sovereignty in this area, and resist any efforts to sell out Australia's successful proliferation of small and medium-sized companies to US multinational giants, while stepping on civil liberties in the process.

The Electronic Frontier Foundation has conducted an investigation of the operation of the DMCA, and the impact it has had on the independent software industry in the US.

This investigation has found that since they were enacted in 1998, the “anti-circumvention” provisions of the DMCA, codified in section 1201 of the Copyright Act, have not been used as Congress envisioned. Congress meant to stop copyright pirates from defeating anti-piracy protections added to copyrighted works, and to ban “black box” devices intended for that purpose. In practice, the anti-circumvention provisions have been used to stifle a wide array of legitimate activities, rather than to stop copyright piracy. As a result, the DMCA has developed into a serious threat to several important public policy priorities. Experience with section 1201 has demonstrated that it is being used to stifle free speech and scientific research, impedes competition and innovation, and has been misused as a new general-purpose prohibition on computer network access.¹³

Critics of the DMCA in the US are becoming more vocal, and there is increasing pressure on the US government to amend these provisions that are not operating as originally intended. It seems inconceivable, therefore, that the Australian government would agree to introduce them into Australian law through this FTA. As IT law expert Mr Brendan Scott has written in his submission to the Senate Inquiry:

"These are prohibitions on accessing data which has been protected by a technological measure. The explicit purpose of these provisions is to prohibit data interoperability. If open source vendors are not permitted to implement data interoperability, they will face substantial barriers to entry in many important submarkets. In essence, a vendor will be locked out of competition merely because the current incumbent uses a protected format for customers to store their data in. These prohibitions were initially created to protect a small minority of content producers from competition from new technologies, particularly in respect of audio and video content. However these provisions have already been subject of much broader implementation in the United States. In particular they have been used to inappropriately attempt to suppress competition in respect of printer cartridges and garage doors. Even pressing the shift key can be a breach of the US version of these laws. They can be used to anti-competitive effect on any article to which a computer chip can be attached - and there is every reason to suspect that if this category does not already encompass all manufactures, it will do so in the not too distant future.

¹³ Submission 165 Appendix 2, Mr R Russell, p.1

While they have been characterised as applying to prevent unauthorised copying of music, it would be a grave mistake to think they will be restricted to this area in the future. The anti-circumvention provisions are a legislative imprimatur to the reduction of competition across the whole breadth of the economy. No analysis of the economic impacts of the FTA that I am aware of takes into account this extensive anti-competitive effect. At its worst it will shave percentage points off Australia's GDP. "¹⁴

If there were any doubts as to the seriousness of the potential impact of these changes on the open source sector, one only needs to consider the words of Mr Rusty Russell, a member of Australia's open source community who appeared before the Senate Inquiry:

"Let me make this clear: people in the Open Source industry feel directly threatened by the laws required by the FTA. We have seen threats issued against Open Source developers in the United States, and we fear the same thing here. This kind of fear, and this kind of uncertainty, as I have already noted, is toxic. It drives people from the industry, and it drives people from engaging in innovative activities. And that is a real shame; because currently in Australia we have some of the most talented, and innovative, Open Source developers of any country in the world."¹⁵

The Democrats oppose the introduction these measures into Australian law. This is a dangerous move that will stifle competition and innovation in our IT sector, and it cannot be supported.

3.4 Sanitary and Phytosanitary Measures

It seems clear that as a result of the FTA, the US will now have the capacity to have considerable influence over our quarantine measures.

The FTA will establish two committees and a series of procedures that are designed to provide a forum for the negotiated resolution of quarantine issues 'with a view to facilitating trade'.

Through this process, either party can force a review of the other party's quarantine measures. The review is carried out by Standing Technical Working Group on Animal and Plant Health Measures, which can carry out a risk assessment on quarantine measures, identify mutually agreeable mitigation measures and even refer matters to an 'independent scientific peer review'. The FTA states clearly that both parties have an obligation to seek to resolve issues by mutual consent.

¹⁴ Submission 297, Mr B Scott, p.1

¹⁵ Submission 165a, Mr R Russell, p.13

The Democrats have always maintained that quarantine issues should be resolved solely on the basis of the best available science, where the primary objective is to protect animal and plant health and the environment. Compromising Australia's natural environment and biodiversity should not be a matter for negotiation.

Chapter 5 of the Committee Report outlines the concerns that have been raised about the new consultative committee on SPS issues that has been agreed through the FTA, especially pertaining to the apparently different interpretations of what the role of this Committee will be according to USTR and DFAT published material and statements. While the Government maintains that there is no evidence to suggest that this deal will make Australia's quarantine system vulnerable to US pressure, concerns have been raised (which are echoed by the Committee in this Chapter) that the mere existence of a forum that will be used by the US to try to advance its trading interests at the expense of Australian environmental protection.

Once again, while this Report outlines the concerns relating to this chapter of the FTA, it stops short of recommending that the Senate not endorse the deal, urging "constant vigilance" instead. The Democrats believe that making quarantine decisions on any criteria other than the best available science is unacceptable, as is granting a voice to US trade interests in the development of Australian environmental policy.

As Professor Weiss and Dr Thurbon pointed out to the Senate Inquiry:

"Under the agreement, we will trade our scientifically-based quarantine system for one based on a political calculus, already strongly foreshadowed in the [recent] disgracefully anti-Australian conduct of Biosecurity Australia. In other words, we will trade away our enviable status as one of the world's leading disease-free agricultural producers, a status upon which the future of our industry depends."¹⁶

GE Food Labelling

The US does not have labelling of genetically engineered foods, and is currently pursuing an action through the WTO against the European Union to challenge EU labelling laws, which the US regards as a 'barrier to trade'. The Agreement places a positive obligation on Australia to accept US technical regulations as equivalent to our own. Further, Article 8.7 of the Agreement states that Australia must allow the US to participate in the development of standards and technical regulations, 'on terms no less favourable than those accorded to [Australia's] own persons.'

As the Australian Fair Trade and Investment Network has stated:

"These changes to processes and procedures for the regulation of quarantine and GE regulation give the US a formal role in Australia's policy. It ensures that trade obligations to the US will be high on the list of priorities when regulations are being made."¹⁷

¹⁶ Submission 307, Professor Weiss and Dr Thurbon, p.2

¹⁷ Submission 416, AFTINET, p.19

The Democrats find it completely unacceptable that the United States will now have a direct role in the determination of Australian public policy with respect to areas such as genetically engineered crops. These are matters which are still the focus of community debate in Australia, and must be resolved with regard to our own national interest, not those of our trading partners.

3.5 Trade in Services

As the discussion in the Majority Report explains, the FTA uses a 'negative list' approach to services, which means that all services are included in the agreement unless they have been specifically exempted. The text of the FTA includes an exemption for 'services supplied in the exercise of Governmental authority'. The Agreement uses the same definition as the WTO General Agreement on Trade in Services: that is, 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.'

This is clearly ambiguous, given that so many essential public services have either been privatised or are in the process of becoming so and many are supplied in a competitive environment.

There is a very general reservation in the Agreement for Australia to 'adopt or maintain' any measure with respect to a number of services, including public education, health and child care. However, other essential public services such as water, energy services and waste disposal are not included in this reservation, and are therefore not protected.

As the Australian Fair Trade and Investment Network submission argued:

"Water has not been excluded through any reservations, so any Commonwealth regulation of water services will have to comply with the USFTA. State and local government water services regulation are permitted at 'standstill', but if they are changed the US could challenge them. The agreement assumes that public water services will be protected, but many water services are already delivered on a commercial basis, so the protection is highly doubtful.

There may be circumstances in which governments believe that it is in the public interest to limit foreign ownership or management of water resources. For example, in the current discussion of the establishments of markets in water rights for the Murray-Darling Basin, it may be thought appropriate to give some priority to local landholders, or to place some limits on foreign investment in water rights. Because water services have not been reserved from the USFTA such regulation would be inconsistent with the agreement and could be challenged by the US government on the grounds that it did not give 'national treatment' to US investors."¹⁸

¹⁸ Submission 416, AFTINET, p.16

The Democrats are committed to ensuring that this FTA does not compromise the ability of governments at all levels in Australia to deliver essential public services to their communities.

3.6 Agriculture

The Majority Report chapter on Agriculture outlines the provisions that have been agreed in the FTA, as well as the concerns about the long lead-in times for market access in the beef sector, the omission of sugar, and the long-term impact of this deal on Australia's ability to maintain a strong negotiating position when seeking an ambitious reform package for agriculture through the WTO.

The Democrats have been particularly critical of the approach taken by the Government in relation to the agricultural aspects of this deal. The deal was sold for a long time on the basis that it would achieve an excellent result for our farmers. However, we have been presented with an Agreement that does no such thing. Comments made by US Trade Representative, Robert Zoellick, reported at the time the deal was concluded, speak volumes about exactly what sort of deal we've got here. Mr Zoellick spoke proudly about what a great deal this was for America, and how they had resisted Australia's pleas for even just a little more access. He stated,

"And we have an 18-year phase-out that Prime Minister Howard personally was pushing to get lowered, which we didn't lower. And it actually should work well with our industry, because we only increased the quota for manufactured beef." ¹⁹

An article in *The Australian* at the time reported the following comments:

"On dairy products, Mr Zoellick sounded especially pleased, using irony to call the Australian increase "huge" and trumpeting the fact that Canberra had been unable to end the tariff protection for US dairy farmers. "And, frankly, in terms of dairy, I think we've increased our quota -- didn't touch the tariffs one bit -- the huge amount of about maybe \$30 or \$40 million a year." ²⁰

These remarks are extraordinarily boastful. The fact that John Howard made a personal appeal, and was rejected, and the Americans boasted about it, is particularly humiliating.

It is particularly disappointing that no 'Most Favoured Nation' clause has been included in this FTA, which would ensure that the US would have to extend to Australia trade terms no less favourable than those agreed by the US in the proposed 'Free Trade Area of the Americas'. The Government has accepted a substandard deal on agriculture, which is a source of great disappointment, given that the Government had promised huge gains for this sector. The Democrats have been critical of the fact

¹⁹ Eccleston, Roy "US Trade Supremo Boasts of 'Con Job'", *The Australian* 11 March 2003, p.8

²⁰ Eccleston, Roy "US Trade Supremo Boasts of 'Con Job'", *The Australian* 11 March 2003, p.8

that a bilateral deal was pursued at all, given that much greater advantage for our farmers can be obtained through the WTO process, which is the only forum where the vexed question of US agricultural subsidies can be dealt with.

4.0 CONCLUSION

The Democrats have closely monitored the progress of this FTA, and have been consistently critical of both the secretive nature of the negotiation process and the terms of the deal.

After carefully considering the detail of the Agreement, the Democrats have decided that on balance, this FTA does more harm than good to our national interest. For this reason, we will not support this legislation when it arrives in Parliament.

We believe it should never have been negotiated in the first place. While the Democrats support fair trade that is in our national interest, we believe that 'fair trade' means any trade liberalisation commitments are made in line with those of our trading partners and that we are not unduly disadvantaged as a result of any trade deal. It also means recognising that trade has a global impact, and that we have a duty to consider what would be best for the whole world.

In this regard, we believe that the multilateral approach to trade negotiations should be pursued with more energy by our Government. The Australian Democrats believe that we do need some form of comprehensive rules based system for international trade: a world system with clearly established rules and processes and with all countries being able to negotiate in good faith and abide by the agreed terms. As British commentator George Monbiot recently wrote with respect to global trade negotiations, the developing world is 'beginning to shake itself awake' and 'the proposals for global justice that relied on solidarity for their implementation can [now begin to] spring into life'.²¹ The Democrats believe that we must do whatever we can to facilitate this development, for our own sake and the good of the entire world.

The Democrats sincerely thank the Committee Secretariat Staff, the Parliamentary Library, Dr Patricia Ranald, Ms Louise Southalan, Ms Megan Elliott, Mr Richard Harris and Mr Simon Whipp, Mr Dan Shearer, Mr Brendan Scott, Mr Rusty Russell, and Dr Matthew Rimmer for their assistance on this issue over the past two years and through this Inquiry.

Recommendation: That the Senate opposes the Australia-US Free Trade Agreement and implementing legislation, because on balance, they do more harm than good to Australia's long term national interest.

Senator Aden Ridgeway

²¹ George Monbiot, *The Guardian*, September 2003.