Chapter 3

3.1 The following Chapter is a 'snap shot' of the key topics that were raised during the Senate Committee's inquiry. Each topic is briefly described in the context of the AUSFTA and, when relevant, Australia's policy and/or legislative framework.

3.2 The Senate Committee is still considering evidence and there are still several key witnesses to be interviewed. As a consequence each topic's key issues are still under discussion but some of the main concerns raised to date have been broadly outlined in this Chapter.

3.3 It has been made clear to the Select Committee that the AUSFTA is very much a 'living' document. Throughout the text there are clauses and letters that provide for the ongoing review of certain aspects of the Agreement – usually by way of committees and working groups, and occasionally by discussions at the level of government officials. The extent and nature of the power bestowed on these in-built review mechanisms varies. It will be important for the government to manage these mechanisms carefully. A list of the relevant provisions is included as an appendix to this Interim Report (Appendix B).

3.4 Once all the evidence and submissions have been considered, the arguments will be expanded and the findings presented, when the Committee presents is Final Report to the Senate.

Key Topics

Pharmaceuticals

General - AUSFTA Chapter 2 – Annex 2C

3.5 Chapter 2, National Treatment and Market Access for Goods, Annex 2-C Pharmaceuticals covers the principles and commitments relating to the treatment of pharmaceuticals. Annex 2-C sets out agreed principles recognising the value of innovative pharmaceuticals; contains requirements for transparency of process for listing and pricing of pharmaceuticals; establishes a Medicines Working Group to promote 'mutual understanding' of issues, including the importance of pharmaceutical research and development; seeks greater regulatory cooperation; and permits manufacturers to use the internet to disseminate information.

3.6 An exchange of side letters to the AUSFTA clarifies Australia's understanding of the commitments made in relation to the Pharmaceutical Benefits Scheme (PBS). It reaffirms Australia's commitment to increase transparency of the PBS listing process and provides the opportunity of an 'independent review' for decisions not to list a drug.

3.7 Chapter 17 contains a number of commitments relating to patent law for pharmaceutical products. They include: offering the possibility of extending the term of patent where there has been a delay in the marketing approval process (Article 17.10.2); providing measures to prevent marketing approval of a generic drug before a

patent covering the product has expired (Article 17.10.4(a)); and requiring a patent owner to be notified of an application for marketing approval of a generic version of a patented product before the patent expires (Article 17.10.4(b)).

3.8 In addition, Chapter 21, Institutional Arrangements and Dispute Settlement, is applicable to the chapters relating to pharmaceuticals, namely Chapter 2 (including Annex 2-C on pharmaceuticals) and Chapter 17 (which contains commitments relating to pharmaceutical patents). The dispute resolution provisions under Chapter 21, Article 21.7, require that a panel of three people with experience in law, international trade, or international trade-related dispute resolution be set up to resolve matters of dispute.

3.9 Australia is widely regarded as having one of the most equitable, accessible and efficient pharmaceutical benefits schemes in the world. Currently, the Australian Government subsidises the cost of listed drugs so that consumers pay less for medicines. Around 80% of all prescription medicines available at pharmacies are subsidised through the PBS. The PBS covers more than 158 million prescriptions each year at a cost of over $4.5 billion per year.[1]

3.10 The established process for listing medicines on the PBS involves assessment by the Pharmaceutical Benefits Advisory Committee (PBAC), an independent expert body whose membership includes doctors, other health professionals and a consumer representative. When considering an application for listing, the PBAC takes into account the medical conditions for which the medicine has been approved for use in Australia; its clinical effectiveness, safety and cost-effectiveness (value for money) compared with other treatments.[2]

3.11 If a drug is recommended for listing on the PBS, and the Minister accepts that recommendation, the drug is referred to the Pharmaceutical Benefits Pricing Authority (PBPA), which negotiates with the manufacturer on the price at which the drug will be listed on the PBS and advises the Minister accordingly.[3] The cost of listed medicines has generally been kept relatively low because the PBS is effectively the single buyer in a market with a number of competing pharmaceutical sellers. [4]

Issues under consideration

3.12 The sustainability of the PBS and future of drug prices in Australia is an issue of interest not just to one sector of the Australian economy or community, but one that directly impacts on all Australians. Should the AUSFTA result in higher prices for pharmaceuticals, Australians would bear this cost either indirectly, as increasing tax

1 www.health.gov.au/pbs/general/aboutus.htm, 26 May 04

2 www.health.gov.au/pbs.general/list_on_pbac.htm, 26 May 04

3 Department of the Parliamentary Library, "The Pharmaceutical Benefits Scheme: Options for Cost Control", Current Issues Brief no. 12, 2001-02, p.2

4 Department of the Parliamentary Library, "The Pharmaceutical Benefits Scheme: Options for Cost Control", Current Issues Brief no. 12, 2001-02, p.8

revenue is need to support the PBS, or directly through higher out-of-pocket expenses for non listed drugs.

3.13 Under the AUSFTA, Australia has made a number of commitments to 'increase transparency' of the PBS listing process, including making available an independent review process that can be invoked by an applicant after an adverse decision of the PBAC. It has been argued that these changes will open the PBS listing process to increased lobbying from pharmaceutical companies, and possibly compromise the principles on which the PBAC decision making process is based. In particular, it is asserted that the 'independent review' process is likely to take more account of the principles set down in Annex 2-C (recognising the value of 'innovative pharmaceuticals' and 'research and development'), than the PBS principles of cost-effectiveness and equity of access to affordable medications.

3.14 In response to these concerns, the government has issued press releases assuring Australians that nothing in the AUSFTA with the United States will lead to an increase in pharmaceutical prices, and that the fundamental architecture of the PBS, including the pricing and listing policies, remain unchanged by the Agreement.[5] However, to date the government has not been able to back up these assurances with detail on how the changes that are required will be implemented, thus the actual effect of the changes cannot be conclusively determined. The AMA has stated in its submission that the Australia government assurance that the draft AUSFTA will not lead to overall increase in the price of drugs in the PBS is basic to the AMA support[6]. However, they do remain concerned at suggestions by the United States Finance Committee, that the PBS process for patented drugs would increase as the of the AUSFTA.[7] . The AMA also stated that the PBS is not simply about pharmaceutical products, it is about health outcomes[8].

3.15 Likewise, concerns have been raised about the potential impact of the Medicines Working Group on the Australian government's capacity to set its own pharmaceutical policies. Critics have argued that the Medicines Working Group will simply be a forum for the US pharmaceutical lobby, through the United States government, to put pressure on the Australian government's policies of providing equitable access to affordable medicines with a view to seeking higher prices for drugs.

3.16 The terms of the AUSFTA provide scant detail about the exact composition and role of the Medicines Working Group, save that it will comprise appropriate federal officials and its objective is: "to promote discussion and mutual understanding of issues relating to this Annex…, including the importance of pharmaceutical

5 The Hon Mark Vaile, MP, Media Release, 16 June 1004, accessed at: http://www.trademinister.gov.au/releases/2004/mvt046_04.html, and 21 May, accessed at: http://www.trademinister.gov.au/releases/2004/mvt036_04.html

6 submission 105, p:1 (AMA)

7 submission 105, p:1 (AMA)

8 submission 105, p:1 (AMA)

research and development to continued improvement of healthcare outcomes." DFAT's Guide to the Agreement simply states that: "the details of how the Working Group will operating and the frequency of meetings are yet to be decided."[9] Recently at the PBS round table discussion, the government provided some further information about the role of the Medicines Working Group.[10].

3.17 The Select Committee believes that it is imperative that any implementing legislation introduced to give effect to the AUSFTA contains appropriate clauses setting out the structure and powers of the Medicines Working Group and specifying the manner in which that Working Group shall interact with the decision-making processes and powers of the PBAC and the PBPA.

3.18 It may be that the Australian government takes a different view of the future role of the group to the United States government, which clearly believes that it will be a forum for furthering its stated trade agenda on pharmaceuticals. The possibility that this working group will create a form of institutionalised pressure that will undermine key elements of Australian public health policies is one that the Committee cannot dismiss lightly without further consideration.

3.19 Pharmaceutical patents are a key area of concern for the Committee is the possible impact of the changes to patent law required by Chapter 17 of the AUSFTA. Several witnesses have argued that these changes will provide scope for United States pharmaceutical companies to seek to extend the life of pharmaceutical patents and delay the introduction of more cost-effective generic medicines which typically reduce drug prices overall.

3.20 The net result would be that Australians would pay more for certain medicines than they would otherwise have done without this AUSFTA. Some weight is given to these concerns in statements included in the United States International Trade Commission report on the effects of the AUSFTA. It notes that the AUSFTA "extends patent and trade secret protections beyond *TRIPS* and other applicable international agreements"[11], and lists the pharmaceutical industry as one beneficiary of these changes.

3.21 The pharmaceutical patents aspect of the AUSFTA is yet another area where, without seeing the implementing legislation, it is difficult to assess the likely impact of the changes agreed to by the Australian government. Even then, the Senate Committee would want to know what steps the government will take to ensure that the patent system is not open to abuse by pharmaceutical companies seeking to extend their monopoly over a particular medication beyond a fair period as set out in current patent law.

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9 Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement: Guide to the Agreement*, March 2004.

10 Committee Hansard (AUSFTA Inquiry), PBS round table, 21 June 2004, (Lopert & Deady)

11 United States International Trade Commission, *U.S.-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects*, USITC Publication 3697, May 2004, p.115

3.22 If the enabling legislation does indeed open the way for pharmaceutical companies to effectively extend the term of their patent monopoly, thus delaying the introduction of generic drugs, it would seem that the government's claim that drug prices will not rise as a result of the AUSFTA is not sustainable. This is an important matter for the future of the public health system in Australia, and not one that should be skimmed over for the sake of potential gains in other areas of the economy.

3.23 Regarding the issues concerning blood, an exchange of letters (attached to Chapter 15 dealing with Government Procurement) deals with trade in blood plasma products and blood fractionation services. Should a current review (in Australia) of arrangements for plasma fractionation services result in suppliers of such services being selected through tender processes, these services will fall under the AUSFTA provisions. While Australia's TGA will continue to regulate blood products, wherever they are produced, and while Australia can preserve its policy on using plasma collected from Australian donors, concerns have been expressed about our capacity to ensure the implementation of such policies and regulations.

Intellectual Property

General -AUSFTA Chapter 17

3.24 Chapter 17 of the AUSFTA, the Intellectual Property (IP) Chapter, consists of 29 Articles and 3 Exchanges of Letters. It is the largest chapter in the AUSFTA and includes the following subject matter: copyright; trademarks; domain names; industrial designs; patents; regulated products; and IP enforcement.

3.25 One of the key obligations in Chapter 17 requires Australia to extend its term of copyright protection by an additional 20 years. Article 17.4.4 provides for an extension of the term of copyright protection in Australia from 50 years from the death of the author to 70 years after the death of the author, in line with United States law. There is no obligation on Australia to enact retrospective protection of copyright material that has already fallen into the public domain.

3.26 Chapter 17 also commits Australia to ratifying certain international IP agreements such as the World IP Organisation (WIPO) Copyright Treaty 1996. Australia has already implemented most of its obligations under the WIPO Copyright Treaty, however the AUSFTA requires Australia to go further in some respects, to more closely align with United States law. For example, Article 17.4.7 requires a ban on devices for circumventing technological protection measures (TPMs) and extends the scope of criminal offences relating to the manufacture and sale of circumvention devices. Australia will have a two year period from date of entry into force of the AUSFTA to implement its obligations in relation to TPMs.

3.27 Article 17.11.29 and Side Letter 1 cover Internet Service Provider (ISP) liability obligations. These obligations establish a system for dealing with allegedly infringing material on ISP systems and networks. An ISP will receive 'safe harbour' immunity when dealing with alleged copyright infringements on their system or networks if they comply with certain conditions.

3.28 The implementation of some of Australia's obligations under the IP chapter will require amendment to current IP legislation.

Issues under consideration

3.29 With the inclusion of IP in the AUSFTA, there is some debate in evidence received by the Committee about whether it is appropriate to include IP in an agreement that has the aim of advancing free trade. IP rights are generally seen as a restraint on commerce since they can be used to preserve monopoly power and to inhibit technological developments. The adoption of United States standards of IP protection in a way that overrides domestic law reform processes is a precedent-setting step for Australia.

3.30 Several submissions argued that negotiation of Chapter 17 was a failure of proper policy making and that the level of detail and lack of flexibility in the AUSFTA is inappropriate. This may restrict future development of IP law and policy in Australia by making Australia's position irreversible regardless of success or failure of measures under the AUSFTA, unless the United States consents to any future changes.

3.31 Australia's lead negotiator, Ms Toni Harmer from DFAT, has disagreed with these assertions, arguing that the IP chapter strengthens Australia's IP protection at the same time as providing flexibility to create appropriate exceptions.[12]

3.32 Chapter 17 is selective in the way that it requires Australia to bring its IP laws into line with the United States. Australia is generally only required to adopt United States standards where they broaden the scope of IP protection. Concern has been expressed about the lack of consultation and evaluation throughout the AUSFTA negotiation process in relation to Chapter 17 and the significant legislative and policy changes to Australian IP law which it requires.

3.33 Some parts of Chapter 17 are at odds with previous assurances by the Commonwealth Government that they would not be included in the agreement. For example, Trade Minister Mark Vaile is reported as saying that the copyright term extension was one of the 'standout issues' where Australia and the United States remained at odds in the IP part of negotiations. Specifically, he is quoted as saying that '(t)here is a whole constituency out there with a strong view against copyright term extension and we are arguing that case'.[13]

3.34 Ms Harmer has told the Committee that the Commonwealth Government consulted widely about the impact of the AUSFTA on IP law in Australia, and will continue to do so.[14]

3.35 On matters relating to extension of copyright protection term, including: Harmonisation of Australian and United States IP law; and costs/benefits to

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12 *Transcript of Evidence*, 18 May 2004, p. 101 (Harmer, DFAT).

13 Australian Financial Review, *'Mickey Mouse holds key to the future'*, 8 December 2003.

14 ibid, p. 102.

authors/owners versus costs/benefits to users, many submitters have argued that the extension of the copyright protection term in Australia will come at a cost to the Australian economy since Australia is a net importer of IP. Further, any increased copyright protection would tend to benefit foreign copyright owners at the expense of local consumers. The AUSFTA will require Australia to extend its copyright term. However a comprehensive independent analysis of the costs and benefits of the extension has not yet been undertaken.

3.36 The extension of copyright comes despite a recommendation in 2000 by the Australian Intellectual Property and Competition Review Committee that the current copyright protection term should not be extended and that no extension of the copyright term should be introduced in the future 'without a prior thorough and independent review of the resulting costs and benefits.'[15] In 2001, the Commonwealth Government accepted that recommendation, stating that it had 'no plans to extend the general term for works'.[16]

3.37 The inclusion of the copyright extension in the AUSFTA also contradicts assurances by the Commonwealth Government throughout the negotiation process that it was resistant to such an inclusion.

3.38 Despite the Commonwealth Government's claims that harmonisation with United States law will be economically beneficial through increased trade and investment,[17] the Committee has received evidence that the AUSFTA will not result in a complete harmonisation of Australian copyright laws with those of many of Australia's major trading partners, including the United States. There will remain important areas in which there is a lack of harmonisation.

3.39 Further, while the Committee received evidence from groups who strongly support the copyright extension, concern was repeatedly expressed that Chapter 17 is protective of the interests of copyright owners at the expense of users. This would significantly alter the current balance in favour of owners and may be exacerbated because the AUSFTA does not harmonise aspects of United States law which are protective of the interests of members of the public. The result of introducing these provisions in Australia without making appropriate adjustments to strengthen the interests of users may result in copyright law in Australia being even more protective of owners than United States law.

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15 IP and Competition Review Committee, *Review of IP legislation under the Competition Principles Agreement*, September 2000, p. 13.

16 *Government Response to IP and Competition Review Recommendations - Information Package*, at http://www.ag.gov.au/www/securitylawHome.nsf/Web+Pages/A6C3825011D8A8B1CA256C330000CF9A?OpenDocument, p. 1 (accessed 7 June 2004).

17 See, for example, Attorney General, Philip Ruddock, "Opening Address – Australian Centre for IP and Agriculture Conference: Copyright: Unlucky for Some", http://www.ag.gov.au/www/ministerruddockhome.nsf/Alldocs/RWP21E60A98ACC4ECE2CA256E3B0080AA84?OpenDocument&highlight=unlucky%20for%20some (accessed 16 June 2004).

3.40 For example, Australia's standard of originality for copyright is much lower than the threshold in the United States. Further, the 'fair use' defence to copyright infringement in the United States operates more broadly than the Australian 'fair dealing' defences. In 1998, the Copyright Law Review Committee recommended 'the expansion of fair dealing to an open-ended model' in Australia.[18] However, this recommendation has not been implemented in Australian law and the Commonwealth Government has shown no intention of adopting a flexible 'fair use' exception in the future.

3.41 Regarding the issues of 'contracting out' of exceptions to copyright infringement the AUSFTA allows copyright owners to transfer their copyright rights by contract which would mean that contracts could prevail over exceptions to copyright infringement such as 'fair use'. There are some doubts as to whether the relevant provision in the AUSFTA actually achieves this intention. The Commonwealth Government has indicated that this provision is consistent with the current law in Australia,[19] but this directly contradicts a recommendation of the Copyright Law Review Committee in its 2002 report, *Copyright and Contract*, that parties should not be allowed to contract out of exceptions.

3.42 There have been issues raised regarding anti-circumvention of TPMs, including geographical coding; impact on open source software, and impact on parallel importation. Chapter 17 requires Australia to ban devices for circumventing TPMs and extends the scope of criminal offences relating to the manufacture and sale of circumvention devices. The AUSFTA takes a much more expansive definition of 'controlling access' to a work than is embodied in current legislation. This is despite the fact that the Phillips Fox report of the Digital Agenda Review (January 2004), commissioned by the Attorney-General's Department, recommended that TPMs should be limited to devices that prevent or inhibit the infringement of copyright.

3.43 Further, litigation is still taking place through the Australian courts to decide whether regional coding on DVDs is an effective TPM. If the final decision is that it is, then the more stringent provisions in the AUSFTA could effectively reintroduce restrictions on parallel importing of DVDs (and other works), only a few years after Australia has relaxed such restrictions. The Australian Competition and Consumer Commission has repeatedly expressed its opposition to the concept of regional coding.

3.44 The open source software industry is particularly concerned with the TPM provisions of the AUSFTA, arguing that the provisions will severely limit the industry's ability to function and develop.

3.45 Regarding the matter of increased burden on ISP, including obligations relating to 'safe harbours', the AUSFTA requires Australia to introduce a more

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18 Copyright Law Review Committee, *Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners*, September 1998, Recommendation 2.03.

19 *Australia-United States Free Trade Agreement, Guide to the Agreement*.

prescriptive regime than it currently has for creating 'safe harbours' for ISPs. The Phillips Fox Digital Agenda Review recommended that changes should be made to Australia's procedures to provide greater certainty, however it did not recommend such a detailed approach as that taken in the AUSFTA. The level of detail may not allow sufficient flexibility in the implementation process for Australia.

3.46 The AUSFTA differs from current laws in Australia in relation to the process of temporary reproduction (caching) of material as part of a telecommunications process. In Australia, the caching exemption under the *Copyright Act* 1968 does not distinguish between automatic and non-automatic caching. The AUSFTA gives ISPs 'safe harbour' immunity only if caching is carried out through an automatic process. Educational institutions have also expressed concerns about issues relating to temporary copying.

3.47 Regrading software and patents, the AUSFTA extends patents to 'all fields of technology'. This is arguably very damaging to the software industry, as well as consumers, as it limits development opportunities and decreases competition. Note that issues relating to pharmaceutical patents are addressed above in the Pharmaceutical section.

3.48 There have been concerns raised about enforcement measures. The AUSFTA introduces into Australia increased civil and criminal penalties and procedures for breaches of IP law. This includes the introduction of criminal penalties where currently only civil remedies exist.

3.49 The United States approach to IP law is quite different to the approach in Australia and has been widely criticised, even within the United States. Australian copyright law is more pragmatic and regulated, depending less on litigation and the development of case law than in the United States. Submissions pointed out that it may not be appropriate for Australia to adopt features of, for example, the United States *Digital Millennium Copyright Act 1998* (DMCA). However, Ms Harmer from DFAT told the Committee that the AUSFTA does not require Australia to replicate the DMCA word-for-word.[20]

3.50 Concerns have been expressed about disputes that may arise because of Australia's chosen form of implementation of its AUSFTA obligations. The Australian negotiators have downplayed the significance of the dispute resolution chapter (Chapter 21) of the AUSFTA.[21] However, since Chapter 17 is based largely on United States law, it might be argued that the United States has certain expectations about what it means and will insist that its provisions be interpreted in accordance with United States law. This may be regardless of Australia's views of its legal effect and interpretation.

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20 *Transcript of Evidence*, 18 May 2004, p. 102 (Harmer, DFAT).

21 *Transcript of Evidence*, 10 May 2004, pp. 15-16 (Deady, DFAT).

Sanitary and Phytosanitary Measures

General - AUSFTA chapter 7

3.51 To understand the complexity of the Sanitary and Phytosanitary (SPS) provision under Chapter 7 of the AUSFTA, it is important to understand its relationship with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and the GATT Settlement of Dispute provisions.

3.52 The AUSFTA reaffirms existing commitments to the WTO SPS Agreement and consequently the AUSFTA does not contain a separate provision for dispute settlement on SPS matters because the WTO dispute mechanisms apply.

3.53 Currently there are a number of regulatory agencies in Australia and the United States with the responsibility for SPS matters. The Australian government's quarantine policies are delivered through Biosecurity Australia under the follow legislative frameworks: the *Quarantine Act (1908)* and subordinate legislation, the requirements of the *SPS Agreement* and with the standards for import risk analysis developed by the Office International des Epizooties (OIE) and under the International Plant Protection Convention (IPPC)[22].

3.54 Within Australia, risk analysis is considered to be the foundation stone on which all quarantine policies and actions are built. Biosecurity Australia undertakes import risk analysis as a process to identify, assess and manage the risks associated with the importation of animals and animal-derived products, and plants and plant-derived products. Any major policy changes to date in relation to Australia's quarantine framework have been made in a manner consistent with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and current Government policy. Biosecurity Australia has enormous responsibility to ensure that the integrity of the scientific rigour which forms the basis of the import risk analysis, policies and regulations of sanitary measures in maintained.

3.55 The Animal and Plant Health Inspection Service (APHIS) is one of the main agencies responsible for protecting and promoting United States agricultural health, administering the Animal Welfare Act, and carrying out wildlife damage management activities.[23]. Like Australia, the United States operates in a manner consistent with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

3.56 The continuation of both Australia and the United States commitment to the WTO SPS Agreement is clearly stated in Chapter 7 Article 7.3.1 of the AUSFTA. This bilateral agreement goes further by allowing, under Article 7.4.5, the establishment of a bilateral SPS committee, which will consist of representatives from both Australia and the United States who have the responsibility for SPS matters.

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22 *www.affa.gov.au/docs/market_access/biosecurity/index.html* viewed on 25 May04

23 www.aphis.usda.gov/ipa/about/welcome.html viewed on 25 May04

3.57 One aim of this committee is to increase the mutual understanding of SPS measures and regulatory processes of each country. This committee will also provide a forum where the various countries can interact and exchange information on technical matters. It can establish additional working groups in addition to the Standing Technical Working Group on Animal and Plant Health Measure – the provisions are set out under Annex 7.

Issues under consideration

3.58 There is a considerable amount of concern about the need to establish an SPS Committee and a Technical Working Group, and what their role and influence will actually be. Some of these concerns are underpinned by the perception that Australia and the United States, at times, use SPS measures as a trade barrier. In the Australian context, particularly as we are an island nation, the integrity of our scientifically based import risk assessment is of paramount importance to the well-being of our environmental, agricultural and aqua-cultural sectors.

3.59 There have been some assurances[24] that the SPS committee and the technical working group will provide a forum for dissemination of information and discussion on technical and scientific interest. Challenges to the decision-making process are allowable but only on the basis of science[25].

3.60 Many have argued that Australia's scientifically based quarantine regime will be compromised under the influences of an SPS committee and Technical Working Group. This perception is reinforced by statements made in the United States[26] that under the AUSFTA certain SPS restrictions will be addressed through that group. The United States is one of the more frequent users of WTO dispute settlement provisions on sanitary and phytosanitary restrictions[27].

3.61 Mutual recognition, awareness and discussion as a result of interaction between each country's quarantine regulations regimes is desirable. However, it will not take much for Australia to lose its 'clean and green' status if an invasive disease or pest enters the agricultural and aquacultural industries. There is no room for Biosecurity Australia to be pressured to compromise its robust scientifically based import risk assessment regime. To do so would see Australia lose its competitive advantages as a nation with relatively low disease status.

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24 Transcript, The Hon. Mark Vaile MP, Minister for Trade, Australia "Transcript of doorstop interview following Australia-US FTA signing" 18 May 2004 and *Transcript of Evidence* 18 May 2004, p:5, (Greville, DAFF)

25 *Transcript of Evidence* 18 May 2004, p:4, (Greville, DAFF)

26 United States International Trade Commission, "US-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects", May 2004, p: 54, 56, 59

27 *Transcript of Evidence* 18 May 2004, p:25, (Gosper, DFAT)

Agriculture

General – AUSFTA Chapters 2 and 3, Annex 3-A; Tariff Schedules – Annex 2-B

3.62 Chapter 2 sets out the tariff elimination schedule for agricultural products and Chapter 3 (Agriculture) establishes a Committee on Agriculture, institutional provisions and safeguard measures. Procedures for the elimination of tariffs and the establishment of duty-free tariff rate quotas on some agricultural products are set out in the Tariff Schedules.

3.63 With respect to United States Tariffs, five main categories will be established: existing zero tariff, immediate tariff elimination, and elimination of tariffs in equal annual instalments over 4, 10 and 18 years. A few products are covered by additional staging categories (e.g. beef, avocadoes and wine).

3.64 No provision is included for changes to tariffs on sugar or sugar products, nor for a change to the above-quota duty rate for dairy products. For dairy, there is an increase in the volume of the duty-free quota available. Agricultural tariffs will be eliminated over time except for these two industries.

3.65 Most Australian tariff rates on agricultural products are already zero. The remainder will be eliminated immediately the Agreement enters into force.

3.66 United States Tariff Rate Quotas will apply to beef, dairy, tobacco cotton, peanuts and avocadoes. The Agreement provides for the quota limits to be progressively increased during the tariff elimination period.

3.67 For beef, in year 1 the duty rate within the quota will be reduced to free and in subsequent years the quota level will be progressively increased. From years 9-18 the above-quota duty rate will be progressively reduced to zero.

3.68 A safeguard arrangement will apply to imports exceeding 110% of the additional AUSFTA quota during the 18-year tariff elimination period. After that the level of duty-free imports will be unlimited but a price based safeguard will apply. This mechanism can only apply to imports exceeding the year 18 quota level plus an additional 420 tonnes per year from year 19. However, unlike the WTO agreements on safeguards, AUSFTA does not require that there be a causal link between the surge in imports and the injury.

3.69 A number of dairy products will be subject to quota; some of these already have an agreed WTO quota. An additional quota volume will be allocated for each product and the in-quota duty rate reduced to zero immediately. The additional quota amounts will then be increased by 3-6% per year after year 1. The duty rates on all non-quota dairy products will be reduced to zero over the 18-year tariff elimination period. The quota and duty on Goya cheese will also be eliminated over this period.

3.70 New quotas will apply to tobacco, cotton, peanuts and avocadoes. For tobacco, cotton and peanuts, the year 1 quota will be increased by 3% per year and the outside quota tariff will be eliminated over 18 years. Avocadoes will have two seasonal quotas from year 2. A base quota of 1500 tonnes will apply between 1

February and 15 September and a further amount of 2500 tonnes may enter duty-free between 16 September and 31 January. The outside quota tariff will be eliminated over 18 years.

3.71 A horticulture price-based safeguard applies to a limited number of horticulture products listed in Section A of Annex3-A. It will apply if the FOB price of Australian products is lower than the specified trigger price for that product. The trigger price is the average of the prices applying in the two lowest years of the previous five years. The safeguard is assessed for each shipment individually. After the 18 year tariff elimination period these products will be duty free and safeguard free.

3.72 The AUSFTA also declares that the two countries will co-operate on seeking the reform of international agricultural products in the WTO and other forums. A Committee on Agriculture will be established and will meet annually.

3.73 Both countries have agreed not to use export subsidies on agricultural products traded into the other's market. The two countries have agreed to co-operate to remedy the effects of export subsidies applied by third parties.

Issues under consideration

3.74 The complete exclusion of the sugar industry from the Agreement has provoked considerable discussion. The public debate has resulted in the announcement of a $440 million compensation package for the industry. This, in turn, has raised the question of whether other industries adversely affected by the Agreement will receive similar assistance packages. It has also been suggested that Australia's acceptance of this omission will weaken our negotiating position when seeking an ambitious reform package for agricultural products in the WTO.

3.75 The need for an 18 year phase-in period before some tariffs and quotas are completely eliminated has been questioned. This seems to be an unnecessarily long period for industries to adjust to the new level of competition.

3.76 There has been considerable disquiet among commentators that the Doha Round negotiations have been neglected during the negotiation of the AUSFTA. There is concern, also, that so much time and so many resources have been applied to this Agreement, that Australia and the United States will be unable to regain the necessary momentum to achieve a satisfactory outcome in the WTO negotiations.

3.77 As mentioned above, there is already concern in Australia over the need for an 18 year phase-in period, which seems unreasonably long. The extension of safeguards beyond that time seems to be completely against the spirit of the Agreement.

3.78 There is an absence of a most favoured nation clause. Such a clause would require the United States to extend to Australia treatment no less favourable than that accorded to agricultural products from a third country. Such a clause would require the United States to pass on to Australia any concessions it negotiates on agricultural products in a trade agreement with any third country, e.g. Chile or NAFTA. This may become extremely important if the United States is successful in negotiating the

proposed Free Trade Area of the Americas, which would include several of Australia's main competitors in agricultural exports.

3.79 The National Farmers Federation[28] while expressing disappointment on the deal with agriculture stated that they do recognise that there are some benefits for agricultural producers and therefore support the deal. The NFF also indicated in its evidence that the AUSFTA would be enhanced with the inclusion (through an exchange of letters) of a most favoured nation provision.[29]. This raises the issues as to why a most favoured nation provision has not been included for agriculture while it has been included in the Chapters applying to Services (Article 10.3) and Investment (Article 11.4). A most favoured nation provision would allow Australia equal treatment with any market access opening the US may grant on agriculture to other countries in other FTAs they may negotiate.

Manufacturing and Labour

General - AUSFTA including chapters 2, 4, 5 & 18

3.80 Chapters of the AUSFTA affecting the manufacturing sector include Chapter 2 (National Treatment and Market Access for Goods), Chapter 4 (Textiles and Apparel) and Chapter 5 (Rules of Origin).

3.81 Chapter 2 applies to trade in all goods and commits both Australia and the United States to non-discriminatory treatment in trade in goods. Only those goods substantially made or transformed in Australia or the United States, which qualify under the rules of origin in Chapter 5, benefit from the commitments contained in Chapter 2. Chapter 2 consists of 13 Articles, 3 Annexes and an exchange of letters. It includes the following subject matter: national treatment; elimination of customs duties (tariffs); temporary admission; waiver of customs duties; import and export restrictions; and export taxes.

3.82 Under Article 2.2 of Chapter 2, Australia and the United States have agreed to abide by their WTO commitments to provide National Treatment. Essentially this means that Australia and the United States will provide the same treatment to imported goods from each other as they do to domestically produced goods. Under Article 2.3, tariffs on originating goods of the other party will be eliminated. The AUSFTA specifies whether the particular category of good will be duty free from the date the agreement comes into force, or will be subject to removal over a specified period.

3.83 Chapter 5 sets out the rules for determining which goods are originating and therefore eligible for preferential tariff treatment under the AUSFTA. The chapter consists of 17 Articles and an Annex.

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28 Committee Hansard, (AUSFTA Inquiry), 5 May 2004, p133 (Corish, NFF)

29 Committee Hansard, (AUSFTA Inquiry), 5 May 2004, p147 (Corish, NFF)

3.84 Chapter 4 deals with issues affecting the trade in textiles and apparel. The chapter includes emergency safeguard mechanisms, rules of origin and customs cooperation. An Annex to Chapter 4 sets out the product-specific rules of origin applying to textiles and apparel which vary considerably depending on the particular product. The rules of origin which apply to textiles and apparel are based on a change in tariff classification approach and apply the stringent 'yarn forward' test. However, there are some exceptions to these rules of origin.

3.85 Chapter 18 (Labour) of the AUSFTA reaffirms both countries' obligations as members of the International Labour Organisation (ILO) and strives to ensure that the labour principles and rights stated in Article 18.7 are recognised and protected in domestic law.

3.86 The AUSFTA requires that each country effectively enforces its own domestic labour laws and that there be fair, equitable and transparent access to labour tribunals and courts. The AUSFTA recognises that it is inappropriate to encourage trade or investment that may weaken or reduce the protection afforded in each other's domestic laws.

3.87 There is a significant difference between Australia and the United States regarding the enforcement of labour laws. In the United States, labour laws are Acts of the United States Congress and are enforceable by actions of the federal government. Article 18.8.1 of the AUSFTA contains a definition of labour laws. The Australian Government is not able to enforce state labour laws. Therefore the AUSFTA has defined labour laws to mean Act/s of a parliament of Australia or regulation/s promulgated pursuant to such Act/s, directly related to the internationally recognised principles and rights set forth in Article 18.7. This means that the Australian Government would be responsible for a failure to enforce effectively either state or Federal laws. The Australian Government would be required to consult with the relevant state government should a dispute arise.

3.88 The dispute settlement procedures set out under Chapter 21 of the AUSFTA apply to the Labour Chapter in that the members of the panel chosen to determine the dispute are required have expertise or experience in the matter under dispute. Penalties are applied in the form of fines up to US$15 million p.a. paid to the Party complained against. Within Chapter 21, dispute provisions in relation to labour only apply to domestic labour laws which have not been effectively enforced. It should be noted that conformity to the ILO obligations are not subject to dispute settlement under Chapter 21.

Issues under discussion

3.89 Under the AUSFTA, the vast majority of tariffs on manufactured goods in both the United States and Australia will fall to zero on commencement. However, since United States manufacturing tariffs are generally lower than Australian manufacturing tariffs, Australian tariffs will have further to fall. This will eliminate an obvious benefit to the Australian economy. Concern was expressed that if Australia loses its tariff advantage it will be necessary for increasing numbers of employers to

either cease production or move offshore to the extent to which they will be unable to pass on their losses.

3.90 Evidence expressed concern that the rules of origin are complex and overly detailed and may not be sufficient to ensure that only products which are substantially produced in Australia or the United States will obtain concessional entry under the AUSFTA. The 'yarn forward' rule for textiles and apparel is said to significantly disadvantage Australia. Since up to 80% of Australia's textile and clothing industry sources its yarn from Asia the majority of the industry's goods will not qualify for tariff-free United States market access.

3.91 Australia has a significant trade imbalance with the United States and in 2002/2003 recorded the highest merchandise trade deficit with the United States than it has with any other trading partner. Since the trade imbalance is most acute in manufactured goods, it was argued that the AUSFTA will result in a worsening of the bilateral trade imbalance. It was pointed out that the potential for increased exports under the agreement needs to be offset with the likelihood of increased imports.

3.92 The Committee received evidence arguing that the AUSFTA will have a significant adverse impact on the manufacturing sector in Australia, including considerable exacerbation of job losses, particularly in the textile, clothing and footwear and the automotive components industries.

3.93 The Committee is concerned about the potential impact on domestic manufacturing industries and urges the Commonwealth Government to devise a structural adjustment package equivalent to the sugar package to assist affected industries.

3.94 The Committee also notes that the AUSFTA will have a considerable impact on state/territory governments and their responsibilities to assist small business to meet United States quality standards. The Commonwealth Government should engage in discussions with the states/territories with a view to assisting them in meeting these obligations.

3.95 Evidence suggested that there are a large number of non-tariff barriers which will also have the effect of limiting any increase in Australian exports to the United States. These include: United States product liability insurance costs; different United States technical standards; United States national security restrictions; and tax implications.

3.96 The Committee received evidence expressing concern that the Labour Chapter does not provide any enforceable mechanisms to address domestic laws in Australia and the United States which are not consistent with core labour standards under the ILO.

Cross-border Trade in Services

General– AUSFTA chapter 10

3.97 Chapter 10 of the AUSFTA relates to the cross-border trade in services, that is, services provided under specified conditions.

3.98 The chapter 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.

3.99 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.

3.100 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.

3.101 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.

Issues under consideration

3.102 A substantial number of submissions have raised concerns regarding the protection of local content requirements in the entertainment industry. Under the AUSFTA, the Australian government would lose its ability to negotiate or impose higher local content requirements for broadcasting. This is a particular concern in relation to subscription television and new media services, where the current local content and expenditure requirements are much lower than for free to air television. This may effectively shut the Australian entertainment industry out of subscription broadcasting and new media, as they compete with inexpensive, readily available American programming.

3.103 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.

3.104 Under the AUSFTA, newly developed services automatically fall under the agreement. Australia would lose the ability to protect new, innovative services from full competition under 'infant industry' 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.

3.105 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 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.

3.106 Substantial concern was raised about the treatment of government services offered on a commercial basis. 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.

3.107 It has also been raised that raised that Australia may not benefit from commercialisation of publicly funded Research and Development (R&D)[30]. The concern is related to the threat that the AUSFTA will result in job, production and R&D capacity and export opportunities being taken offshore[31]. 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.

Financial Services

General– AUSFTA chapter 13

3.108 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.

3.109 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

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

31 submission 528, p:1

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.

3.110 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.

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

Issues under consideration

3.112 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 have been raised asserting that the AUSFTA must not become a means by which Australia's prudential regulatory regime is undermined.

3.113 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.

3.114 The impact of providing United States investors with direct access to trading screens on the Australian stock exchange (ASX). 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.

Government Procurement

General – AUSFTA chapter 15

3.115 Chapter 15 of the AUSFTA covers government procurement. It requires each government to afford the suppliers, goods and services of the other country the same treatment that applies to domestic suppliers, goods and services.

3.116 Australia's government procurement process is already largely unrestrained. The United States, however, has two pieces of legislation which currently impact upon Australian companies' ability to supply goods and services to the United States government: The *Trade Agreements Act* of 1979 (which prevents United States Federal Government agencies from accepting bids from Australian companies because Australia is not exempt under the Act); and the *Buy America Act* of 1933, which

imposes a 6% penalty on the supply of foreign goods to the United States Federal Government. The AUSFTA would remove the impact of these two Acts on Australian suppliers.

3.117 There are, however, a range of exceptions included in the AUSFTA, particularly in the areas of defence, and in policies designed to favour procurement from small and medium firms, and from minority groups in each nation.

3.118 In practice, the most significant impact on Australian government purchasing will be the imposition of new tender requirements, as set out in Articles 15.7 and 15.8 of the AUSFTA. Under these requirements, there is likely to be a larger number of open tenders (as opposed to selective or invited tenders) for Australian government procurement. The AUSFTA will also impose standards for the advertising of tenders, and requirements for the time between the announcement and the close of tenders.

Issues under consideration

3.119 While the size of the United States government procurement market is massive, submissions expressed some doubt about the likelihood of Australian companies substantially penetrating those markets. Submissions pointed, for instance, to the limited success Canadian companies have had in securing United States government contracts, despite their obvious advantage of proximity. As a result, the expected benefits from this chapter may be overstated.

3.120 Concern was expressed about the greater reliance on open tendering processes. Currently, limited tenders are used by government agencies where such a tender would be more efficient or less time consuming than full open tendering. The loss of this flexibility may result in increased costs to government without delivering a better outcome in terms of the final contract signed.

3.121 Concern was expressed that the AUSFTA may limit or remove the Australian government's capacity to implement policies to prefer services delivered by local companies, particularly in regional areas.

3.122 The extent to which State governments in both nations will be bound by this chapter of the AUSFTA is still extremely unclear, which means that the potential United States market available to Australian companies is also unclear.

3.123 The new process of 'supplier challenges' to government procurement decisions has the potential to increase the time taken to conduct procurement, decreasing the efficiency of those procurement operations without delivering a better outcome in terms of the final contract signed.

3.124 Some submissions argued that, either instead of or as well as concluding the AUSFTA, Australia should accede to the WTO's 'Agreement on Government Procurement'.

Investment

General– AUSFTA chapter 11

3.125 Chapter 11 of the AUSFTA relates to investment, which is defined very broadly to include not just investment in equity, debt, derivatives or similar financial instruments, but also activities including construction, management, revenue-sharing, the conduct of an enterprise, or the possession of property. Any activity which involves the commitment of capital or assumption of risk in return for the expectation of profit, may be considered investment for the purposes of the AUSFTA.

3.126 Under chapter 11, each Party will accord the other Party national or most-favoured-nation treatment, whichever is more favourable for the investor. In particular, parties will be unable to impose performance requirements (such as a requirement to export certain proportions of goods or services, or requirements for local content or technology transfer) on investments. Parties will also be unable to require that their nationals be appointed to senior management positions. Finally, parties will be required to allow the free transfer of funds relating to covered investments, into and out of their territory. There are a range of exceptions specified in Annexes 1 and 2 of the AUSFTA.

3.127 The AUSFTA will have a particular impact on the operation of the Foreign Investment Review Board, which is currently notified of acquisitions exceeding $50 million for existing businesses or $10 million for new businesses. The threshold in both cases will rise under the AUSFTA to $800 million.

Issues under consideration

3.128 A significant number of submitters expressed concern about the proposal to relax the FIRB notification thresholds by several orders of magnitude. An 8-fold rise in the threshold in the case of new businesses is extremely significant, and it seems inevitable that this would result in a reduction of the FIRB's capacity to protect Australian national interests.

3.129 Like the chapter on Services, this chapter 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. Submissions raised concerns about the appropriateness of this model, and expressed a preference for a "positive list" where the AUSFTA would only apply to investment fields specifically listed.

3.130 It has been claimed that the impact of the liberalisation of investment will be the single biggest factor in determining the overall economic impact of the AUSFTA on Australia. However, the impact of this chapter depends substantially on second and third order 'dynamic' impacts, which are almost impossible to quantify using current modelling techniques. Moreover, the United States International Trade Commission has assessed that, while the AUSFTA will add transparency, it is not expected to generate significant amounts of new investment between the two countries. It is therefore difficult to arrive at a view about the overall economic impact.

3.131 Concern was expressed about the impact of investment liberalisation on labour laws and the environment, notwithstanding provisions such as Article 11.11 (relating to the environment). Submissions argue that the AUSFTA must not result in Australia losing the capacity to appropriately regulate for the protection of the environment, and the protection of workers' conditions.

3.132 The impact of the AUSFTA on research and development appears to be mixed. On the one hand, the investment provisions may increase Australian firms' access to venture capital. On the other hand, the decreased restrictions on foreign investment may result in large United States corporations taking over Australian companies which have received public R&D funding, thereby appropriating for the USA the benefits of research and development funded by Australia.

Environment

General – AUSFTA chapter 19

3.133 An important provision under Chapter 19 Environment is the recognition of the rights of each Party to establish its own levels of domestic environmental protection. Each Party retains its right to exercise discretion with regard to investigatory, prosecutorial, regulatory, compliance and resource allocations decisions.

3.134 The Australian government has constitutional responsibility for implementing environmental international treaties and agreements and has particularly strong international commitments regarding oceans, endanger and migratory species and climatic change. However, most land based environmental issues are national rather than internationally focused.

3.135 In Australia, many environmental regulations fall under the administration of state governments - for example, land clearing. The Australian government is responsible for the administration of the *Environmental Protection and Biodiversity Act 1999*. This Commonwealth legislation provides a national framework for environment protection through a focus on protecting matters of national environmental significance and on the conservation of Australia's biodiversity[32].

3.136 Under both Chapters 19 and 18 (Labour), each Party recognises that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Article 19.6 also recognises the right to strengthen capacity to protect the environment and to promote sustainable development in concert with strengthening of bilateral trade and investment relations. Parties will also explore ways to support further activities in relation to the Joint Statement on Environmental Cooperation.

3.137 It is well recognised within Australia that strong community ownership, involvement and appropriate enforceable legislation helps to protect Australia's

32 Department of Environment and Heritage website – www.deh.gov.au/epbc/ viewed 17 June 04

environment from the potential effects of mobile capital or other short-term profit objectives. While trade and the environment can be complimentary there is also the matter in which increases in GDP may lead to increases in the use of natural resources such as water, energy and land; so therefore what is gained in the short term, in a monetary sense, may be lost in the longer term if Australia's valuable but limited natural resources are degraded.

3.138 Under the Article 19.1 each Party shall ensure that its laws provide for and encourage high levels of environmental protections and shall strive to continue to improve their respective levels of environmental protection.

3.139 Under Chapter 11 Article 11.11 Investment and Environment, the provision is designed to protect the environment and the rights of each Party to regulate so that investment activities as it relates to Chapter 11 are carried out in a manner sensitive to environmental concerns. Furthermore, investor-state dispute provisions which have been included in other bilateral trade agreements with the United States do not apply to the environment provision under this AUSFTA. This means that private investors can not directly challenge government decisions[33].

3.140 However, Article 19.7.5 does allow for dispute settlement provisions outlined in Chapter 21 to be applied to Article 19.2.1(a). This Article relates to the failure of either Party to effectively enforce their respective environmental laws. As in the case of the 'Labour' Chapter, Chapter 21 allows for the establishment of a panel, where the members chosen to determine the dispute are required have expertise or experience in the matter under dispute. The Joint Committee established under Chapter 21 will discuss environmental matters and offer opportunities for input from public and private parties. A key aim is to work towards environmental cooperation and collaborative consultation while enhancing international agreements on environmental matters.

Issues under consideration

3.141 There are some concerns that an assessment of the potential environmental impacts as a result of this AUSFTA has not been undertaken. The potential consequence both financially and environmental are yet to be explored, particular when considering the concerns raised about the provisions under Chapter 7 (SPS) and Australia's quarantine regime.

3.142 Even though there is not an explicit provision for investor-state dispute there are some concerns that private investor/s may, through their respective governments, raise a matter of concern. In that event, the governments must consult. Many of the concerns are due to unknown factors about how disputes will be handled and / or how the dispute results will impact financially and on Australia's natural resources.

3.143 There have been concerns raised regarding the provision relating to 'expropriation' under Chapter 11 and Chapter 22.3. These concerns relate to how these articles apply to taxation and potential claims for compensation, and the potential

33 See dispute settlement section below for more information.

impact upon any future environmental levies, or taxes, and thus prohibiting the introduction of new taxes and levies to encourage environmental sustainability, including activities to reduce global warming impacts.

3.144 Concerns have been raised regarding the United States lack of disclosure of labelling of genetically modified food, as well as its challenging of EU labelling laws through the WTO. Given this history, there is a likelihood of the US bringing pressure to bear on Australia's labelling laws. These concerns persist even though under Article 8.5.3 there is not any recourse to dispute settlement regarding the acceptability of technical regulations of other Party.

3.145 The inclusion of water and water services (by not excluding them through any reservations) has the potential to limit or bring to a 'standstill' future state and local government regulation. This could have enormous implications any future government water reform agendas - particularly public water services that are delivered on a commercial basis.

Local Media Content

General – AUSFTA Annex I & II

3.146 Under the AUSFTA, there are a series of Schedules contained within the Annexes that deal with non-conforming measures. Annex I-14 & I-15 and Annex II-6 to 8 & II- 9 relate to the following sectors: broadcasting, broadcasting and audiovisual services and advertising services. The obligations relevant for these sectors are national treatment, most-favoured nation treatment (although Annex II-6 to 8 also includes market access, while II-9 obligation is only most-favoured nation treatment) and performance rights. The measures relevant to those sectors are: *Broadcasting Services Act 1992* and *Radiocommunications Act 1992.*

3.147 The relationship between 'obligations' and ' measures' as they apply to the above-mentioned sectors are important because Annex I sets out, in accordance with Articles 11.13[34] and 10.6[35], a Party's existing measures that are not subject to some or all of the obligations imposed by the following Articles:

- 10.2 or 11.3 (National Treatment);
- 10.3 or 11.4 (Most-Favoured-Nation Treatment);
- 10.4 (Market Access);
- 10.5 (Local Presence);
- 11.9 (Performance Requirements); or
- 11.10 (Senior Management and Boards of Directors).

34 FTA Chapter 11 Investment, Article 11.3 - Investment Non-Conforming Measures

35 FTA Chapter 10 Cross-boarder Trade in Services, Article 10.6 – Services Non-Conforming Measures

3.148 Annex II sets out, in accordance with Articles 10.6 and 11.13, the specific sectors, sub-sectors or activities for which that Party may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by the following Articles: 10.2 or 11.3; 10.3 or 11.4; 10.4; 10.5; 11.9; or 11.10. (Note that these Articles are the same Articles listed above for Annex I.)

3.149 Under Annex I and Annex II, a Party reserves the right to maintain existing non-conforming measures[36] that are specifically identified in its Schedule. One difference between these two annexes is that Annex I cannot make the measures more restrictive whereas Annex II can; and it can adopt new non-conforming measures as long as the measures have been identified in the relevant schedule.

3.150 Importantly, measures under Annex I are subject to a 'ratchet mechanism', which means if a Party liberalises a measure, making it less inconsistent with the obligations of the relevant Chapter, it cannot then became more restrictive. (i.e. the liberalised measure becomes bound as part of the AUSFTA commitments). For example, if the existing level of the mandated Australian television local content is reduced, say from 15% down to 10%, it cannot be returned to the former level (15%) in the future.

3.151 In Australia, programming content is regulated by compulsory standards determined by the Australian Broadcasting Authority. Pay TV drama channels are also regulated by a compulsory standard requiring expenditure on minimum amounts of Australian drama programs. Furthermore, an additional licence condition on some regional commercial television licensees specifies that licensees broadcast minimum amounts of local content within their local broadcast areas[37].

3.152 The Australian Film Commission is the Australian Government's agency responsible for supporting the development of film, television and interactive media projects and their creators. It focuses its efforts on the independent production sector, namely companies and individuals who are not affiliated with broadcasters or major distribution and exhibition companies[38].

3.153 The Film Finance Corporation Australia is the Government's primary agency for funding screen production. It invests in a diverse range of feature films, adult television drama, children's television drama and documentary. It aims to strengthen cultural identity by providing opportunities for Australians to make and view their own screen stories. It invests only in projects with high levels of creative and technical contribution by Australians[39].

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36 Non-conforming measures are those that are identified in the relevant schedule that do not conform with the obligations on national treatment, most-favoured nation treatment, performance rights, market access, local presence and senior management and boards of directors.

37 http://www.aba.gov.au/tv/content/index.htm, viewed on 8 June 2004

38 Australian Film Commission, Annual Report 2002-2003, http://www.afc.gov.au/archive/annrep/ar02_03/ar001.html, viewed on 10 June 2004.

39 http://www.ffc.gov.au/about/ viewed on 10 June 2004.

Issues under consideration

3.154 The key issue for media and broadcasting is whether the AUSFTA allows sufficient flexibility for the Australian government to pursue cultural objectives through local content regulations now and into the future. The government has made assurances that its right to ensure local content in Australian broadcasting and audiovisual services, including in new media formats, is retained under the deal.[40] However, significant question marks remain.

3.155 While existing local content quotas for free to air television are unaffected, witnesses to this inquiry have raised concerns about the 'ratcheting' provisions that will prevent a government from increasing local content requirement back to these levels should they be lowered in future. The agreement also prevents any future increases in local content requirement that a government may wish to institute. In addition, the Committee has heard conflicting views about the government's ability to change existing sub-quotas or institute new sub-quota requirements for specific program types within the 55% local content requirement.

3.156 The AUSFTA provisions on local content on subscription television place caps on expenditure requirements for local content that a government may institute in the future. This is important as pay-TV may well become the dominant television market. It has been pointed out to this committee that the 10% expenditure requirement currently in place for local drama content results in only 3.8% of total transmission time.[41] Under the agreement, the government may raise the expenditure requirement to a maximum of 20% only after a process that includes consultations with affected parties including the United States. As the AUSFTA appears to limit the government's ability to institute other forms of local content regulations, this Committee is concerned to know how the government can back up its assurances that it will be able to ensure local content on this form of media into the future.

3.157 In Annex II, Australia has reserved the right to adopt or maintain certain local content requirements for various forms of media, including "interactive audio and/or video services. However, the Annex appears to place limitations on the extent of government regulation allowable. For example, while Australia maintains the right to take measures to ensure access to Australian audiovisual content, the agreement stipulates that such measures would, *inter alia*, be implemented only after consultation with afected parties, be the minimum necessary, be no more trade restrictive than necessary, and not be unreasonably burdensome.

3.158 It is unclear to the Committee at this stage just how much flexibility these stipulations allow for a future government to regulate local content in new media to achieve cultural objectives. It would seem that much depends on the interpretation of this wording in future negotations, and, potentially, in the dispute resolution process should this be invoked.

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40 The Hon Mark Vaile, MP, Media Release, 8 February 2004, accessed at: http://www.trademinister.gov.au/releases/2004/mvt008_04.html

41 Screen Producers Association of Australia, Submission no 163, p.11

3.159 While the AUSFTA was not intended to affect the ability of either government to control public services, including public broadcasting, concerns have been raised that the actual text of the agreement leaves some uncertainty about whether Australia public broadcasters would fit the definition of government supplied services in Chapter 10, which stipulates that they are "any service which is supplied neither on a commercial basis, nor in competition with one or more major services providers".[42] This committee would like some assurance that the exemption for government services will indeed cover all activities of Australia's public broadcasters.

Institutional Arrangements and Dispute Settlement

General – AUSFTA Chapter 21

3.160 Chapter 21 deals with both the administrative arrangements and any dispute matters that may arise under the AUSFTA. Fundamental to the AUSFTA is Article 21.1.1 as it requires a Joint Committee to be established to supervise the implementation of the AUSFTA. Importantly the Joint Committee plays a predominant role in interpreting the AUSFTA to the Australian and United States governments[43].

3.161 The Joint Committee will be central to the ongoing evolution of the AUSFTA and will comprise of each country's government officials and chaired by the United States Trade Representative and the Australian Minister for Trade or their respective designees. It will meet annually and consider proposed improvements, amendments, interpret and review the functioning of the AUSFTA.

3.162 The Joint Committee is pivotal to the dispute settlement procedures. Article 21.5 emphasises that disputes should try to be settled through consultation and should be fully examined as to how the matter might affect the operations of the AUSFTA. The dispute mechanisms adopted under Chapter 21 are built on the WTO dispute settlement model.

3.163 The Joint Committee can establish subcommittees, technical working groups and arbitral panels to consider matter of dispute, when and if, consultations have not been effective. Each Party is responsible for designating a respective office when a panel is established and for providing administrative assistance, cost and operations for that panel[44].

3.164 Under Article 21.2 either Party may request consultation on any matter it considers may affect the operations of the AUSFTA. An important aspect to this Article is that it is only possible to bring nullification and impairment cases for commitments made in the following six chapters: Chapter 2 (National Treatment and Market Access for Goods); Chapter 3 (Agriculture); Chapter 5 (Rules of Origin);

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42 Australian Broadcasting Corporation, Submission no 371, p.2

43 Department of Foreign Affairs and Trade, March 2004, "Australia – United States Free Trade Agreement - A Guide to the Agreement", p.121.

44 FTA - Article 21.3 and Article 21.7 and 21.8

chapter 10 (Cross-Border Trade in Services) Chapter 15 (Government Procurement) or Chapter 17 (Intellectual Property Rights). Either Party under Article 21.5 may request consultation to any matter it considers might affect the operations of the AUSFTA.

3.165 In the event of a breach of the AUSFTA Article 21.10 – 21.14 provide a range of solutions which include compensation. Article 21.14 allows the Joint Committee to review the operations and effectiveness of Article 21.11[45] and 21.12[46] within a five year timeframe after the AUSFTA has entered into force, or within six months after benefits have been suspended or monetary assessment have been imposed.

3.166 An investor state dispute settlement mechanism is not established under Chapter 11-Investment. However, Article 11.16 does allow an investor of a Party to submit to arbitration, with the other Party, a claim within the scope of the Chapter 11, although it must be permitted under that Party's law. Subsequently, consultation between the Parties may occur in accordance with the provisions under Chapter 21. Moreover, under Article 21.15 neither Party may provide for a right of actions under its domestic law against the other Party on the grounds that a measure of the other Party is inconsistent with the AUSFTA.

Issues under consideration

3.167 There have been some concerns regarding the power and influence of the Joint Committee established under Chapter 21 on Australia's domestic decision making processes. This is especially the case given that the Joint Committee is responsible for the interpretation and operations of the AUSFTA. Evidence[47] has been at the peak of a hierarchical structure under which fall committees such as the Standing Technical Working Group report and the SPS Committee. More importantly, the Joint Committee reserves the power to interpret the AUSFTA to the Australian and United States governments operating together[48].

3.168 It is difficult to determine the costs and benefits for the proposed Joint Committee and its subcommittees, panels and working groups as the detail regarding the administrative and ongoing operations costs are yet to be provided. The impact of another level of bureaucracy, and of extended timelines as a result of the Joint Committee's deliberations, has yet to be assessed. Australia is making commitments in

45 Article 21.11 Non-Implementation – this relates to a panel determining that a Party is not conforming with its obligations or causing nullification or impairment (as in Article 21.10) and can not reach an agreement, it can enter into negotiations on developing mutually acceptable compensation.

46 Article 21.12 Non Implementation with Certain Disputes – this relates a panel determining that a Party not conforming with its obligations under the Chapter 18 Labour Article 18.2.1(a) and Chapter 19 Environment Article 19.2.1(a)

47 *Transcript of Evidence*, 18 May 2004, p:31 (Greville, DAFF)

48 Department of Foreign Affairs and Trade, 'Australia-United States Free Trade Agreement, A Guide to the Agreement" March 2004, p:121

which some of the critical detail, particularly in relation to the Joint Committee, is yet to be understood or explained to the Senate Select Committee's satisfaction.