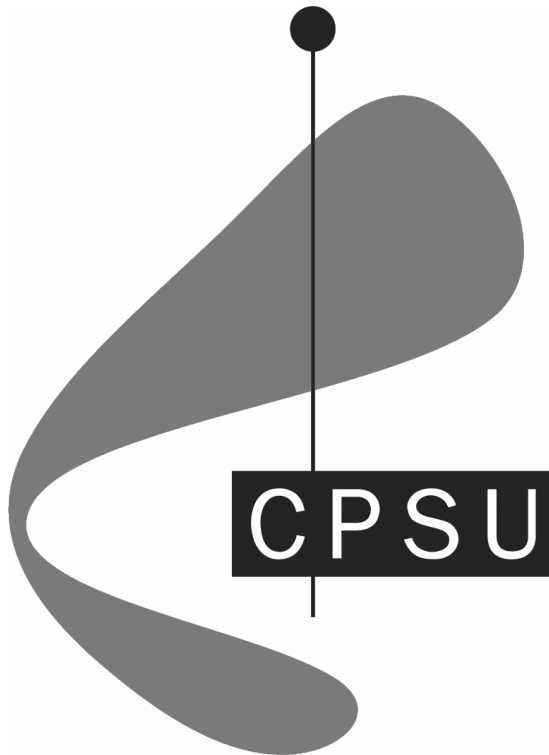


CPSU, Community and Public Sector Union



submission to

**Senate Select Committee on the
Free Trade Agreement between
Australia and the United States of America**

30th April 2004

Introduction

CPSU, Community and Public Sector Union welcomes this opportunity to make a submission on the Senate Inquiry into the proposed Free Trade Agreement (the Agreement) between the United States of America and Australia.

CPSU is a federal union with regions and sections in each State and Territory. CPSU (PSU Group)'s coverage is predominantly in the Commonwealth public sector, but also includes ACT and NT public sectors, and public and private sector employers in the communications, education, aviation, broadcasting, health and pharmaceutical industries.

Our members include people doing work in the areas of administration, sales, engineering, communications, information technology, legal, technical, scientific research, broadcasting and many others.

CPSU supports and endorses the submission by the ACTU to this inquiry and proposes only to comment on those aspects of the AUSFTA that will have an impact on the public sector in Australia and other industries where CPSU has membership.

Trade in services

Scope of application

Chapter 10 of the AUSFTA, "Cross-Border Trade in Services" applies to measures adopted or maintained by a Party, by service suppliers of that Party. The scope of this chapter is stated to exclude "services supplied in the exercise of governmental authority within the territory of each respective Party".¹

This Article further states that a "service supplied in the exercise of government authority" means "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers".²

This definition is identical to the problematic definition of public services contained in the General Agreement on Trade in Services (GATS). This issue was discussed in some depth in the Senate Inquiry into GATS and the AUSFTA and subsequent report "Voting on Trade".³ As stated in earlier submissions on this topic,⁴ CPSU believes this definition of public services is unclear and raises many issues which should be explored prior to the implementation of the AUSFTA.

CPSU draws this committee's attention to recommendation 4 of the Senate Inquiry into GATS, namely that:

¹ US Free Trade Agreement, Article 10.1(4)(e).

² *ibid.*

³ "Voting on Trade, the General Agreement on Trade in Services and an Australia-US Free Trade Agreement", Report by Senate Foreign Affairs Defence and Trade Committee, November 2003.

⁴ CPSU Submission to Senate Inquiry on GATS and USFTA, 2003; CPSU Submission to ACT Public Accounts Committee Inquiry on GATS, 2003;

“The Committee recommends that the government clearly define and make public its broad interpretation of Article 1.3 of GATS so that the public is aware of the basis on which future negotiations are undertaken.”⁵

CPSU believes it is remiss that this important recommendation has not yet been taken up by the government and that this remains an issue of deep concern to CPSU.

Negative list approach

An important overall consideration is that the AUSFTA operates as a “negative” list, so this chapter is intended to apply to every service supplied under government authority in Australia that is offered on a commercial basis and/or in competition with one or more service suppliers, unless separately listed as a reservation.

As discussed in the aforementioned Senate Committee Report into trade,⁶ the issues arising from a negative list approach mean that future governments will be bound by the rules of the AUSFTA, and this is of particular concern in regard to new industries and services which may not yet exist. Those governments will be bound by this agreement, and not able to regulate in those sectors, irrespective of any national public interest considerations which may arise.

CPSU endorses the view of the Committee expressed in that report, that “a negative list approach is a highly risky strategy that appears not to be justified by the efficiency argument that it is ‘inherently more liberalising’ ”.⁷

Commercial basis

A question arises as to how government services offered on a commercial basis are to be treated under the AUSFTA.

Under the definition of services in Article 10.1, the AUSFTA will allow service suppliers from the USA to compete for service provision in Australia in any situation where private providers or suppliers operate, or where commercial principles apply, unless specifically excluded.

In Australia, many public services are provided under government authority by both public and private providers operating concurrently in areas such as education, health, water, prisons, telecommunications and energy.

It is unclear as to how the qualification “supplied on a commercial basis” would be defined in practice, as it would be hard to find an area of service provision in Australia in which public services have not been subject to commercial principles to the extent that they could broadly be considered as being offered on “a commercial basis”.

Public services in Australia have been increasingly exposed to competition from private sector service providers, and offered on a commercial basis, since the introduction of National Competition Policy in 1995. National Competition Policy in Australia has seen

⁵ “Voting on Trade, the General Agreement on Trade in Services and an Australia-US Free Trade Agreement”, Report by Senate Foreign Affairs Defence and Trade Committee, November 2003.

⁶ Ibid, p 119.

⁷ Ibid, p 121.

government business activities at the Federal, State and Local levels subject to commercial principles under the implementation of structural reform and competitive neutrality policies.

It can be argued that, to a significant degree, the AUSFTA seeks to extend the same free market principles of competition in Australian service provision to US service suppliers that were extended within Australia from the public sector to the private sector through National Competition Policy. In other words, this is National Competition Policy on a global scale, extended in application to extend to the USA the opportunity to compete for public sector service provision in Australia, and vice versa.

However, unlike National Competition Policy, there are no public interest considerations in the AUSFTA concerning social, environmental and employment factors that exist to balance against the economic basis of the agreement. It is relevant to note that even with the existence of public interest guidelines in the NCP's Competition Principles Agreement, the experience of NCP, particularly in regional Australia, was at best, mixed.⁸

The AUSFTA chapter on trade in services can also be seen as the application of many of the principles of the WTO's General Agreement on Trade in Services (GATS) enacted between Australia and the USA, particularly in relation to public services.

The concerns of the CPSU in this context are those that hinge on the right of governments to regulate service provision, or to re-regulate in the case of market failure.

Under the AUSFTA, as is proposed under similar GATS provisions, once a service is offered on a commercial basis or opened to competition it cannot be withdrawn from competition or taken back under public control without a penalty applying to the Party or State.

Governments in Australia would therefore be precluded from intervening in the market in situations where the provision of services required government intervention to ensure that services were delivered, unless these services are reserved under Annex II of the AUSFTA.

An example of this is found in the 2002 ACT Health Review (known as the "Reid Report") which recommended that the purchaser/provider model which legislatively differentiated the purchaser from the Government and NGO providers in the ACT health system, be phased out.

This review identified a market failure in the provision of pathology services, and found that the two private providers were "almost certainly less efficient with less clinician satisfaction than the ACT Pathology Service which preceded it."⁹ Pathology services have been returned to public provision. If the AUSFTA was implemented, a move to

⁸ "Riding the Waves of Change", Report of the Senate Select Committee into the Socio-economic Consequences of National Competition Policy, February 2000.

⁹ ACT Health Review Background Paper: New Directions for Health and Disability Services, Chapter 4 Purchaser/Provider, May 2002.

restore public provision of services such as this would be open to challenge by the USA and there would be nothing the ACT or Federal Australian governments could do about it.

Reservations on services trade

The AUSFTA will apply to all of Australia's services sectors at all levels of government, unless a sector is listed as a reservation under one of the annexes to the AUSFTA. Reservations on services are categorised according to whether governments can increase the level of regulation (Annex II), or only maintain or decrease the level of regulation on these services over time (Annex I).

Those services identified as being only able to be made more liberalised or open to the USA service providers in Annex I include "all existing non-conforming measures at the regional level of government". This provision is a signal that whilst the AUSFTA does not at this stage apply to state or territory trade in services and investment, that is an area that has been identified for further negotiation and action.

Australia has listed the services that it may wish to increase regulations or restrictions on trade in Annex II of the AUSFTA. In the language of the AUSFTA, these are areas that can be made more "non-conforming", with law enforcement, correctional services, social security, social welfare, public education, public training and child care are reserved "to the extent that they are social services established or maintained for a public purpose".

It is interesting to note here that the qualification "established or maintained for a public purpose" more clearly captures the notion of these services as public services, something which is lacking in the definition of services as those "supplied in the exercise of government authority".

"Established or maintained for a public purpose" is also a much broader definition that would likely identify many more government or public sector services as being closed to access by US service providers. It is clear however, that the intention of the AUSFTA is to capture as many government services as possible for trade between the two parties.

Again, due to its application as a "negative list", this means that all other services not listed as reservations in Annex II are open to competition from non-Australian service providers.

Social security

CPSU notes Annex II-5 which contains reservations by Australia on cross-border trade in services and investment with respect to "income security or insurance, social security or insurance, social welfare, public education, public training, health and child care".

Whilst this list appears broadly inclusive of social security and welfare payments, the individual items on this list are not defined in the AUSFTA. This raises the question of whether this list is designed to include only those payments made under the Australian Social Security Act, or is to include every other income or welfare support payment made under other legislation.

For example, the Family Tax Benefit is considered by most Australians to be a welfare payment. However, the Family Tax Benefit is administered pursuant to “New Tax System” Acts rather than under the Social Security Act.

While it is our view that this payment would or should be captured within Annex II-5, there is no certainty of this. This is because it is not possible to definitively discern from the text of the AUSFTA how these measures are to be defined in practice, therefore creating doubt about the application of the AUSFTA in many areas.

There are many areas of government assistance to individuals that may not be captured within the list contained in Annex II-5. For example Centrelink lists a number of assistance services under the heading of Business, Rural and Rent Assistance that may be outside the scope of Annex II-5.¹⁰ These include: retirement assistance for farmers, dairy exit program, drought assistance package, farm help, rural transaction centres and many more.

It is of concern to CPSU that given the far reaching consequences for the Australian public sector from the signing and implementation of the AUSFTA that much of the minutiae of the agreement remains unclear.

This is an area that requires further clarification from the Australian Federal Government, as it is of critical importance that the extent of the AUSFTA is properly understood prior to implementation.

Public Broadcasting

Public broadcasting is not specifically referred to in the AUSFTA, yet the regulation of this may be captured under the definition of public services to the extent that some areas of public broadcasting are services provided on “a commercial basis or in competition with other service providers”.

The activities of public broadcasters in Australia such as ABC and SBS cover a broad spectrum of media and under a variety of business arrangements including co-productions, outsourced productions and in-house productions. Public Broadcasting in Australia is a mix of commercial, public and community broadcasting services.

CPSU believes it is of concern that public broadcasting has not been included as a reservation to the USFTA, as that would have more clearly signalled the government’s intention that it reserved the right to regulate in this area in the future without any qualification.

It is likely that some of the commercial enterprises that the ABC and SBS have embarked on that create, licence, market and retail consumer products in association with their broadcast programs will be captured under the AUSFTA. To the extent that these do not intrude on the capacity of either organisation to provide their public broadcasting functions, these arrangements should not be of concern.

¹⁰ Centrelink Annual Report 2002-03, Figure 2: Our Services, p. 15.

In regards to government funding of the ABC and SBS, the AUSFTA contains a general exclusion on subsidies and grants in Article 10.1 which would adequately capture the funding of public broadcasting.

Government Procurement

Chapter 15 of the AUSFTA deals with government procurement. According to the DFAT Guide to this Chapter, the AUSFTA creates a presumption of open tendering for government contracts, with other forms of tendering such as selective or limited tendering only allowed in certain circumstances.¹¹

Government procurement has in the past been treated as an area of some sensitivity by governments, and has been effectively omitted from the scope of the multilateral trade rules under the WTO, in the areas of both goods and services.

More recently, government procurement has been carved out of main commitments of the General Agreement on Trade in Services and is listed as a separate agreement, the Government Procurement Agreement (GPA). Australia is not a signatory to the GPA, although the USA and most OECD countries are.

According to DFAT Special Negotiator on Free Trade Agreements Mr Deady, there are several reasons why we are not a signatory to the GPA: "In our view, elements of the GPA are discriminatory. The tendering process elements of it are very prescriptive. Decisions have been taken by a number of governments not to sign on to that agreement."¹²

This has meant that Australia has (until the AUSFTA) been excluded from selling to the US federal government, although the USA has had no similar restrictions on being able to participate in the Australian government procurement market.

One of the effects of the AUSFTA on government procurement is that Australia will be exempted from the Buy America Act. This 1933 legislation is aimed at supporting US domestic companies and domestic workers by buying American-made goods, increasingly something of an anachronism in the era of global trade and the WTO.

Like the USA, Australia has a similar scheme known as Ausbuy that has similar objectives to the Buy America Act and aims to "encourage all three levels of Government in Australia to promote the essential role of Australian owned companies in creating quality jobs for Australians..."¹³

Like the USA, Australia is grappling with the consequences of global trade which is seeing increasing numbers of domestic jobs disappearing and being "off-shored" to countries with lower labour costs. This is an issue of great concern to the CPSU which

¹¹ http://www.dfat.gov.au/trade/negotiations/us_fta/guide/15.html, p.4.

¹² Senate Foreign Affairs Defence and Trade Committee, Estimates Hansard 3 June 2003, p 129.

¹³ Downloaded from www.ausbuy.com.au

represents workers in IT and call centres which have been at the forefront of job losses to off-shore companies.

CPSU members employed by Telstra have had the most exposure to this trend, with 450 jobs now located in India. Industry reports estimate that between 2 and 4 per cent of Australian white-collar jobs could be lost to off-shoring in the future.¹⁴

Whilst public interest considerations behind Ausbuy and the Buy America Act have been ineffective in stemming the flow of jobs off-shore, it is nevertheless important to note that one of the consequences of the AUSFTA is the abandonment of the ability for governments to link their own procurement policies with these public interest considerations.

It is important to note however that the Australian government preference for small and medium enterprises that is part of Australia's government procurement guidelines¹⁵ has been retained in the AUSFTA under Annex 15-G of Chapter 15.

Example – Provision of Influenza Vaccine and Blood Products to protect Australian's Health and Welfare

The Australian company CSL limited provides blood products and influenza vaccines to protect Australian's health and welfare under contracts with both state and federal Governments. CPSU understands that the supply of plasma and related blood products is secured by short term contracts but that the federal Department of Health and Ageing and CSL Limited have yet to sign a longer term contract for provision of these products. CPSU also understands that long term contracts are not in place with state governments for flu products, beyond this flu season.

A USFTA side letter from the Australian government indicates federal government support for US firms seeking to be allowed to tender to provide some blood products.

CPSU has been advised that US companies are "already lodging objections" to ongoing contracts with CSL for influenza vaccines. While the quote may indicate a misunderstanding of the formal process at this stage in the ratification process, it is clear that US companies have a very high level of interest in performing this work.

The 2001 review conducted by Sir Ninian Steven found that blood products should be supplied by CSL which is based in Australia for health and national security reasons.

Should the tendering process be opened up to US companies with the support of the federal government, only commercial factors will be taken into account, health and national security concerns may well play second fiddle to trade concerns.

The USFTA has created significant instability for workers employed at CSL limited and threatens their job security and possibly the viability of a significant Australian company.

¹⁴ Booz Allen Hamilton survey reported in AFR 30th April 2004, p 80.

¹⁵ See Department of Finance and Administration Guidance on Complying with Legislation and Government Policy in Procurement at www.dofa.gov.au/ctc/complying_with_legislation

Recommendation on CSL:

Relevant Australian Governments should expedite matters so that there is certainty that these products will continue to be provided by CSL.

Conclusion

CPSU believes there are many areas, including those outlined above, that require serious examination and consultation prior to the enactment of the AUSFTA. The lack of adequate and detailed information on several key definitions is a major omission in any attempts to assess the impacts of the agreement. The long term implications of enactment of the AUSFTA mean that these considerations cannot or should not be glossed over.

CPSU endorses and supports the ACTU submission to this Committee.