

SENATE SELECT COMMITTEE ON THE FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND THE UNITED STATES OF AMERICA

WESTERN AUSTRALIAN SUBMISSION

INTRODUCTION

- 1.1 Western Australia supported the development of the Australia-United States Free Trade Agreement (AUSFTA) as it recognises that free trade can offer substantial benefits for nations. In addition, the Commonwealth Government's initial analysis indicated substantial benefits arising from the agreement. Western Australia's preliminary analysis of the agreement, however, suggests that the impact on the national economy is not likely to be large, and that the beneficial outcomes for Western Australia are likely to be relatively modest.
- 1.2 Western Australia welcomes the move towards trade liberalisation in the agreement. There is the potential for some gains for Western Australia through the AUSFTA, for example increased lamb and wine exports and cheaper manufactured goods.
- 1.3 For the most part, however, there will be little change to significant areas for Western Australia, such as exports of minerals and energy. In addition, moves towards liberalisation in some areas have been disappointingly small, and represent lost opportunities to expand Western Australia's exports in industries such as shipbuilding and beef.
- 1.4 Given the complexity and length of the AUSFTA, a longer time period to undertake analysis and prepare submissions to this inquiry would have been appropriate. Hence only a preliminary analysis of the impact of the agreement on Western Australia has been undertaken.
- 1.5 It is noted that the Commonwealth Government has commissioned further economic analysis and modelling for the AUSFTA and that this work includes the implications of the agreement for the States and Territories.

SPECIFIC ISSUES

2 AGRICULTURE

- 2.1 There are a number of elements of the AUSFTA that are expected to be positive for the State's agricultural exports.

- 2.2 Potential opportunities for Western Australia exist for the export of horticulture products such as strawberries and olives (subject to industry expansion), dairy products, beef, lamb and wine. There may also be new opportunities for WA industry from the removal of tariffs on seafood products.
- 2.3 The agreement is not, however, as comprehensive in agriculture as was hoped. The products of most value, including beef and dairy, made some gains but most gains will not be realised for periods up to 18 years and longer.
- 2.4 The wine industry was hoping that the removal of technical barriers would offer significant export opportunities and, although US import tariffs on wine will be removed by year 11, the technical and labelling issues relating to the blending and vintage of Australian wine, as well as distribution issues, were not adequately addressed and remain significant barriers to wine exports.
- 2.5 The United States' refusal to liberalise trade in the sugar industry is disappointing. Although Queensland's sugar industry has been the main focus in the media, Western Australia also has a sugar industry and has missed out on potential benefits through the AUSFTA's exclusion of sugar.
- 2.6 Recent newspaper reports indicate that US farmers and farmer groups are under the impression that follow-up talks on Sanitary Phyto-Sanitary (SPS) items, including Australia's quarantine and food safety regulations, could lead to considerable expansion of exports to Australia. The American Farm Bureau has indicated that the agreement could lead to the elimination of existing quarantine restrictions on a number of products including pork, poultry, fruits, nuts and vegetable products¹.

The situation relating to SPS and the commitment Australia has made to the US needs clarification in both countries.

- 2.7 The current quota includes all beef products. The additional quota, however, excludes carcasses and half-carcasses of beef and processed beef made ready for particular uses by the consumer, that is 'fancy cuts'. It is noted, however, that this stage this is not a significant issue for Western Australia as the export of this product over the past five years has been quite low.
- 2.8 Although Australian agriculture did not make the gains initially hoped for, the losses to agriculture should also be minimal. Current tariffs on the import of agricultural products into Australia are low by world standards (average about three per cent) so the removal of tariffs on all agricultural imports from the US should not have a significant impact on Australian agricultural industries.
- 2.9 With respect to single desk arrangements, it is noted that Western Australia's current marketing arrangements for eggs and potatoes under *The Potato Marketing Act, 1946* (WA) and *The Marketing of Eggs Act, 1945* (WA) will remain under Annex I.
- 2.10 With respect to the temporary admission of goods, Article 2.5 of the AUSFTA states that goods taken into the US duty free to be used in trade demonstrations etc cannot be

¹ "WRAP-US farmers believe Aust quarantine will be changed in the FTA", Australian Associated Press Financial News Wire, 16 March 2004

consumed in the US and must be removed. Article 5 of the Convention on Temporary Admission of 1990 (Istanbul Convention), however, states that samples of food and beverages that are not distributed in packs are to be consumed at the event.

Both parties to the AUSFTA are obliged to meet their international obligations under the Istanbul Convention and it needs to be confirmed that the relevant chapter in the AUSFTA does not undermine that.

3 MANUFACTURED GOODS

- 3.1 The AUSFTA should have a positive impact for Western Australia regarding the purchase of manufactured goods. The immediate reduction of tariffs for manufactured goods is expected to increase the competitiveness of goods from the United States. Western Australia also expects to benefit from the reduced price of consumer goods, such as cars, and also from the increased competitiveness of farmers and miners as a result of lower input costs. However, it remains to be seen whether the cost of business inputs, such as heavy equipment used in mining, will fall.
- 3.2 Many of the changes under the AUSFTA, however, will not result in a significant increase in Western Australia's exports to the United States.
- 3.3 It is anticipated that the benefit of the AUSFTA for Western Australia's mining and energy exports will be modest. Minerals and energy commodities (excluding 'confidential items' such as alumina) comprised approximately one-third of all merchandise exports by Western Australia to the United States in 2003. Under the AUSFTA, all exports of metals and minerals will be duty free. However, the rates of protection applying to Australian exports of petroleum, mining and basic metal exports in 2002-03 were quite marginal.
- 3.4 Western Australia is unlikely to gain significantly from the new arrangements by which 97 per cent of exports of manufactured goods to the United States will be duty free from the commencement of the agreement. Western Australia's largest manufactured goods export category to the United States is medicaments, followed by pearl and stones. While the effect on the AUSFTA on exports of these commodities is not known, it can be assumed that these are quite specialised products and, therefore, might be less sensitive to any price changes that result.

4 RULES OF ORIGIN (ROOs)

- 4.1 It is understood, from the Commonwealth Government, that, in general, Australian industry has accepted the United States approach to the Rules of Origin (ROOs).
- 4.2 The ROOs are, however, complex and it is necessary to know the nature of the individual products to determine their impact. Any additional analysis on the likely impact of ROOs on Western Australian industry would be welcome.

5 TECHNICAL STANDARDS

- 5.1 The establishment of a mechanism to address the development, adoption, application or enforcement of standards, technical regulations or conformity of standards, technical regulations or conformity assessment procedures is welcome. It is noted that this process does not deliver immediate gains and there is no means to assess the rate of progress.

6 INTELLECTUAL PROPERTY

- 6.1 It is reassuring that the obligations largely reflect Australia's current system of protection for intellectual property and that the obligations do not apply to subject matter that is already in the public domain at the time the agreement comes into force.
- 6.2 It is noted, however, that Australia will be required to align its intellectual property laws and practices more closely with those of the United States, including increased obligations for Internet Service Providers and increased enforcement provisions. This is a complex area and Western Australia would welcome further information on the likely impact, including costs, of the obligations under this chapter for Western Australian businesses.
- 6.3 The WA Farmers Federation and generic agricultural chemical manufacturers have expressed concern that the Intellectual Property chapter of the agreement extends the data protection for new data to 10 years and that is not consistent with proposed new data protection legislation.

The Commonwealth Department of Agriculture Fisheries and Forestry, has advised, however, that the AUSFTA is consistent with the proposed new data protection legislation and that the obligation extends to eight years only for new data, where it is not accompanied by the conjoint approvals of certain new uses, which in the proposal attracts the three additional one-year extensions.

7 MEDICINES

- 7.1 In relation to medicines, the draft AUSFTA impacts on the following areas:
- Prices paid for medicines
 - Timely availability of new medicines
 - Direct to consumer advertising of prescription medicines.
- 7.2 There is concern that this draft agreement includes provisions that are likely to lead to an increase in the cost of medicinal drugs in Australia through the Pharmaceutical Benefits Scheme (PBS) and an extension of medicine patents.

The pressure on prices will be brought about through the independent review of any negative decisions by the Pharmaceutical Benefits Advisory Committee (PBAC); increased transparency of the PBAC processes without a corresponding improvement in transparency of information from manufacturers; an opportunity for pharmaceutical

manufacturers to apply for an adjustment to PBS prices and the establishment of a medicines working group of each country's officials.

- 7.3 In the USA, the intellectual property (IP) provisions included in the AUSFTA, have led to the effective extension of pharmaceutical monopolies by delaying and preventing the entry of low cost 'generics' to the market. PBS data indicates that the prices of brand name (patented) drugs fall by an average of more than 30 per cent after patent expiration and the entry of generic medicines. Delays to the availability of generic pharmaceuticals will therefore significantly increase pharmaceutical expenditures in Australia over time particularly in hospitals where generic brands are used extensively. Additionally, delays in the availability of generics will weaken the PBS reference pricing system, a critical component of the 'PBS framework'.
- 7.4 A rise in medicine costs through the PBS and any delays in the availability of generic equivalent medicines will have a direct impact upon the cost of medicines purchased by the public sector. Medicines are the second most expensive item after salaries in the health budget and a small increase in costs in addition to the implementation of new medicines in the market will have a significant impact upon the health budget.
- 7.5 Regulatory cooperation between the United States Food and Drug Administration (FDA) and Australia's Therapeutic Goods Administration (TGA) is of no direct concern. Improved cooperation between the regulatory authorities will assist pharmaceutical manufacturers in registering their products in the US and Australian markets. There are also potential benefits for consumers in situations where a medicine has a small market in Australia due to limited indications for use. Currently, it may not be economical for the manufacturer to apply for marketing approval for a particular indication or product form (such as a liquid form for children) in Australia.

A closer relationship between the FDA and TGA may enable these products to reach the Australia market in the future.

- 7.6 The provision on dissemination of pharmaceutical information via the Internet raises significant concern that this will allow Direct to Consumer Advertising (DTCA) in Australia. DTCA is legal in the USA and New Zealand but not in Australia. It has been associated with a substantial increase in usage of the products targeted (and thus health care costs) which are often not in accord with best practice.
- 7.7 Spending on DTCA in the US has grown rapidly, reaching US \$2.5 billion in 2000. There is no evidence of improved drug utilisation, improved doctor-patient relations, or reductions in hospitalisation rates, attributable to DTCA. The aim of the prohibition of prescription drug advertising is health protection. Any change that would weaken the current restrictions on such advertising should be based on evidence that there are health benefits. It should also be noted that the recent National Competition *Review of Drugs, Poisons and Controlled Substances Legislation* (Galbally Review) included a recommendation that current advertising restrictions on the advertising of prescription medicines to consumers should be retained (Recommendation 11).

8 INVESTMENT

- 8.1 Western Australia is a substantial beneficiary of the extensive US investment in its resources sector. With the deregulation of local energy markets and the increased price competitiveness of our energy inputs, further investment is expected to be sourced from the US.
- 8.2 Consequently, Western Australia supports the liberalisation of investment restrictions by United States business under the AUSFTA, but notes that this is likely to have minimal impact on United States investment in Western Australia. Although the mining industry in Western Australia is dependent on significant levels of foreign investment for exploration and infrastructure development, to our knowledge there has been no United States foreign investment proposed in Western Australia that has been rejected by the Foreign Investment Review Board.
- 8.3 Western Australia welcomes the statement from the Commonwealth that Australia has retained the right to examine significant foreign investment proposals in all sectors to ensure they do not raise issues contrary to the national interest.
- 8.4 Given the strong interest of US companies in the Western Australian economy, it is reassuring that the agreement does not include a provision for investor-state dispute settlement but relies on the current legal system for dispute resolution.

9 TEMPORARY ENTRY OF BUSINESS PEOPLE

- 9.1 It is disappointing that no progress was made in the negotiations on the matter of visas and work permits. It is understood that Australia and the United States have agreed to continue discussion on this through a separate process. Western Australia looks forward to the resolution of this matter in the near future.

10 TELECOMMUNICATIONS

- 10.1 The provisions of the AUSFTA will assist smaller Australian telecommunications companies and Internet Service Providers by ensuring accessibility to, and the unbundling and interconnection of, telecommunications networks in the US. Increasing access to the networks will make it easier for smaller Australian companies to access the US markets and Internet content. On the other hand, US firms may find it easier to enter the Australian market.
- 10.2 Western Australia is supportive of the universal service obligations and is pleased to see that these are endorsed by the agreement.

11 SHIPBUILDING

- 11.1 The outcome for the shipbuilding industry is seen as a lost opportunity. There do not appear to be significant gains in respect to access to the shipbuilding industry, with only ship repairs and maintenance having its 50 per cent tariff reduced.

- 11.2 Shipbuilding is a significant and growing industry in Western Australia and its fast ferry industry is regarded as a world leader. Removal of the Jones Act related restrictions would have allowed the industry to sell Western Australian manufactured boats directly into the United States market. The continuation of the US prohibition on the import of any boats for US domestic use under the Jones Act is disappointing and limits further growth potential.

12 GOVERNMENT PROCUREMENT

- 12.1 Opening the US government procurement market is an advantage to Western Australian goods and services companies as it provides an opportunity that did not previously exist. In reality, however, most Western Australian businesses may have limited capacity and sustainability to bid in the US government procurement market.
- 12.2 During October 2003, the Western Australian Government gave without prejudice agreement to its government procurement market being included in the negotiations for the AUSFTA. The Prime Minister has recently written to the Premier of Western Australia seeking Western Australia's final decision on the inclusion of its government procurement market in the AUSFTA. He also requested that the Western Australian Government reconsider its reservation on preferences or restrictions associated with programs promoting regional development. At the time of writing the Government was considering these requests.

13 CULTURE AND THE ARTS

- 13.1 Western Australia welcomes opportunities to develop trade and investment links in the culture and the arts sector with the US, but is strongly opposed to setting content and quota regulations that restrict Australia's ability to make important decisions about its own culture. In the words of Richard Letts, Executive Director of the Music Council, *It is inappropriate that Australian cultural decisions should be made not according to our own cultural assessments, but to conform to US trade objectives*. The main concerns with the AUSFTA are in relation to the low quotas set for local product on subscription television and with Article 16.4, relating to non-discriminatory treatment of digital products.
- 13.2 Through ScreenWest and ArtsWA the WA Government has committed to supporting the development of the Western Australian film, theatre, television and contemporary music industries. It is pleasing that the AUSFTA will not erode the State Government's capacity to support the arts and cultural sector through grants, subsidies and tax incentives. However, the AUSFTA is likely to affect the market for cultural product through restricting local content regulations.
- 13.3 While local content quotas on free-to-air television remain at 55 per cent, the caps on expenditure for Pay TV will be the lowest in the developed world and take no account of the future potential of subscription television in Australia. Australian productions currently struggle to compete in the market against syndicated American productions on production costs and/or economic grounds. American productions mostly recoup their production expenditure in their home market and can thus be sold to Australian broadcasters for much less than Australian productions.

- 13.4 The low caps on Pay TV expenditure have implications for the viability of Australia's film and television sector into the future. The AUSFTA restricts the ability for Australia, and Western Australia, to take up opportunities that might emerge from the growth of the Pay TV industry to a point where it could afford higher levels of expenditure on Australian product. A larger market would assist in developing the film and television industry, which would enable it to be more competitive in the global market.
- 13.5 A greater take-up of Pay TV, with low levels of Australian content, also has important implications for Australia's ability to maintain its cultural identity. Australia needs to retain its right to ensure local voices are heard and local stories are told on its most popular broadcasting mediums. The AUSFTA should take into account the potential growth of subscription television in Australia.
- 13.6 Broadcasting regulations are a responsibility of the Commonwealth Government. The AUSFTA will affect Western Australia in the same way that it affects the rest of the Australian independent production sector. If there is no increase in production expenditure by Pay TV, there will be no corresponding opportunity to attract this expenditure to WA.
- 13.7 There has been little investigation of opportunities for the sector as a result of the AUSFTA. This is because the sector has been concentrating on combating the perceived threat of restricted local content regulations. If the AUSFTA limits the ability to get local stories produced, then Australia will have limited product available and thus reduced ability to compete in the international market. In any case, the balance of trade in audiovisual produce is so far in the US' favour that this imbalance is unlikely to be affected by the AUSFTA.
- 13.8 Article 16.4: Non-Discriminatory Treatment of Digital Products requires close examination. Currently it appears that there are no restrictions on digital product outside the audio-visual and broadcasting sector. This may have implications for online publishing and other parts of the industry dealing with digital media.
- 13.9 See Attachment A for a summary of industry concerns that have been brought to the attention of the WA Government.

14 LABOUR

- 14.1 Western Australia is of the opinion that there are at least two key areas in which the Commonwealth Government is arguably in breach of the spirit and intent of the Labour Chapter of the AUSFTA. These are:
- a) Article 18.1, Statement of Shared Commitment, based on the demonstrated ability of the *Workplace Relations Act 1996 (Cth)* (WR Act) in practice to undermine the internationally accepted right of workers to bargain collectively; and
 - b) Article 18.3, Procedural Guarantees and Public Awareness, due to the inability of employees to seek remedies for apparent administrative deficiencies in the application of the no disadvantage test with respect to the registration of certain Australian Workplace Agreements (AWAs).

14.2 In addition, it is clearly arguable that the Commonwealth is failing to effectively enforce its labour laws in the specific case of the no disadvantage test for AWAs. However, due to the caveat attached to Article 18.2, Application and Enforcement of Labour Laws, the case for a breach of this Article is more difficult to make out at the present time.

14.3 The reasons for these statements are detailed in Attachment B of this submission.

15 SERVICES AND INVESTMENT

15.1 Western Australia welcomes the opportunities that may become available for Western Australian service providers under the AUSFTA.

15.2 Western Australia considers it essential that the sovereign power of the Western Australian Parliament to legislate to protect the health and safety of its citizens and to protect its natural resources is not eroded. For example, it is essential that the State has the ability to regulate water resource use in the future.

15.3 Western Australia welcomes the assurance from the Prime Minister that Australia has retained the right to regulate in areas including health and the environment. However, we believe this needs further discussion and analysis as part of the JSCOT process.

15.4 Environment

It is understood that provisions in the Investment Chapter mean that changes to licences to take water do not constitute expropriation, subject to the changes being made in a non-discriminatory way (see Annex 11-B, clause 4(b)). In Western Australia these licences are issued under section 5C of the *Rights in Water and Irrigation Act* and the Act provides for their amendment on a number of grounds, only some of which are compensable.

The scenario set out in Article 19.1 calling for jurisdictions to *strive to continue to improve their levels of environmental protection*, is strongly supported.

15.5 Cross-Border Trade in Services and Investment

Gambling, betting and alcohol: It is noted that there is no reservation for gambling and betting in Annex II of the agreement and no reference to national treatment and local presence in relation to alcohol in Annex II-10. Advice from the Department of Foreign Affairs and Trade indicates that these issues are addressed in a side letter to the agreement. Given Western Australia's request for an Annex II reservation in these areas, information from the Commonwealth on what, if any, implications the removal of these reservations may have for Western Australia will be welcome.

Social Services: It is noted that there is no reference to public utilities and public transport in relation to social services in Annex II-5 of the agreement. Information on any implications of the omission of these services will be welcome.

16 CONSULTATION WITH THE STATES AND TERRITORIES

- 16.1 The consultation process with the States and Territories organised by the Department of Foreign Affairs and Trade is acknowledged and appreciated. This process included briefing sessions before and after the majority of the rounds of negotiations and the provision of a number of papers on various aspects of the services and investment chapters of the AUSFTA.
- 16.2 There were, however, a number of difficulties with the consultation process that could be avoided for future consultations.
- 16.3 With respect to State and Territory representation at the negotiations, it was disappointing that the representative nominated before the third round of discussions was informed at the last moment that he could not attend. It is suggested that in future it is made clear to the other party at the outset that Australia will have at least one representative of the States and Territories on the Australian negotiating team.
- 16.4 The National Interest Analysis states that:

The States and Territories . . . participated closely . . . in ensuring the appropriate framing of reservations to the Cross-Border Trade in Services and Investment Chapters.

While the States and Territories were asked to provide their input into Australia's Annex II list (in early January), it is disappointing they were not kept informed of the results of the negotiations in the area, even when they specifically asked the Commonwealth for information during a teleconference after the agreement was announced. Consequently Western Australia was not aware that the reservations it had requested, and informed by telephone would be covered by Commonwealth reservations, were not in the final Annex II list until the draft text was made public.

It is suggested that in future the States and Territories be kept informed of developments during the final negotiations as soon as is practicable.

- 16.5 It was disappointing that, despite agreeing to do so, the Commonwealth did not provide the States and Territories with information on the outcomes of the negotiations or the draft text before these were made public.

While it is recognised that there are protocols to be observed during negotiations, it is recommended that State and Territory Governments be kept informed of progress, particularly on areas that affect them, during the final stages of the negotiations.

AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT

CULTURE AND THE ARTS

Summary of industry concerns brought to the attention of the Western Australian Government

- The immediate impact of the AUSFTA is not the issue so much as concerns that we have not future-proofed Australian content and the production industry.
- The Screen Producers Association of Australia (SPAA) has stated that the caps on Australian content will be the lowest in the developed world under the FTA.
- Pay TV services will only have to spend 10 per cent of their production budget on local content, and this quota only applies to services providing arts, children's, documentary, drama and educational shows. It is well known that an expenditure budget of 10 per cent results in significantly less than 10 per cent of total transmission time. SPAA has stated that the actual transmission time is 3.8 per cent. (The existing 10 per cent level was set in recognition that local content is very expensive compared with foreign product and a higher level would have been prohibitive to getting Pay TV started in Australia.)
- Should the Commonwealth Government ever wish to increase the 10 per cent local content quota on subscription television, it is only able to do so with respect to drama channels, and only to a maximum of 20 per cent. To increase the level on drama channels, Australia will need to consult with 'affected parties' in the United States. These consultations are likely to be organised by powerful organisations such as the Motion Picture Association of America (MPAA), which has expressed public and strident opposition to Australia's local content quotas.
- The current level of 55 per cent Australian content on free-to-air has been maintained in the AUSFTA. However the Commonwealth Government has forfeited its right to increase this quota to take into account changing circumstances. (It should be noted however, that free-to-air broadcasters frequently exceed the current 55 per cent quota.)
- There is no provision to regulate E-cinema, which may be an important method of distributing films in the future. Currently, there is no regulation of local content in Australian cinemas. However, should cinema usage change in a significant way, for example cinemas becoming a venue for watching broadcasts, imposing local content regulations may become desirable.
- Article 16.4 (Non-Discriminatory Treatment of Digital Products) will need to be examined carefully for its potential to impact on areas outside of the audio-visual and broadcasting sectors. There could be a detrimental impact for Australian publishers if Article 16.4 negates current legislation designed to protect Australian publishers from the larger US market. Current legislation prevents US publishers selling a title by an Australian author in Australia, whilst that title is still in print in Australia.
- It may be that there will be implications for US productions being filmed in Australia with respect to adoption of US industrial regulations. This subject requires further investigation.

AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT

LABOUR

Potential Breaches of the Labour Chapter of the AUSFTA

1. Chapter 18 of the AUSFTA (the Labour Chapter) consists of eight articles including Statement of Shared Commitment (18.1), Application and Enforcement of Labour Laws (18.2), Procedural Guarantees and Public Awareness (18.3), Institutional Arrangements (18.4), Labour Cooperation (18.5), Labour Consultations (18.6), Internationally Recognised Labour Principles and Rights (18.7) and Scope (18.8).
2. Based on the draft text of the Labour Chapter, Western Australia has identified a number of potential breaches of the AUSFTA, largely related to the operation of the *Workplace Relations Act 1996 (Cth)* (WR Act) in practice. Such breaches are probably best described as breaches of the apparent spirit and intent of the Labour Chapter rather than actual direct breaches.
3. The following outlines these potential breaches:
 - a) Statement of Shared Commitment – Article 18.1:
 - i. Paragraph 1 of Article 18.1 states – *The parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). Each Party shall strive to ensure that such labour principles and the internationally recognized labour principles and rights set forth in Article 18.7 are recognized and protected by domestic law.*²
 - ii. One of the ‘internationally recognized labour principles and rights’ listed at Article 18.7 is the right to organise and bargain collectively. The ability for employers to engage employees on the condition that they enter into an Australian Workplace Agreement (AWA), which has been established as a principle through the operation of the WR Act in practice, arguably undermines this internationally recognised labour principle. That is, where employees are forced into individual agreements they have arguably lost the ability to bargain collectively under the WR Act.
 - iii. In WA’s view this is a clear breach of the spirit and intent of the Labour Chapter.

² AUSFTA Draft [1 March 2004] Chapter 18 – Labour – Article 18.1(1)

- iv. This view is reinforced by past observations of the Committee of Experts (COE) of the ILO. For example in 1998 the COE stated *some job positions are being designated as 'Australian Workplace Agreement (AWA) only' positions, with no real opportunity for the workers to have their terms and conditions of employment governed by a collective agreement. In the view of the Committee, such situations could amount to anti-union discrimination, contrary to Article 1, and could not be said to encourage and promote voluntary collective bargaining, contrary to Article 4. The Committee, therefore, requests the Government to indicate in its next report any steps taken to ensure that under the Act as applied in practice, workers cannot be discriminated against for seeking to have their terms and conditions determined through collective bargaining. The Committee also requests the Government to comment on the question of whether the Act, in practice, results in the effective discouragement of collective bargaining.*³
- v. This issue was again pursued by the ILO COE in 2000. *[A]ccording to the Committee of Experts several provisions of the 1996 Federal Workplace Relations Act called into question the application of Articles 1 and 4 of the Convention by excluding certain categories of workers from the scope of the legislation and limiting the scope of trade union activities covered by the provisions concerning anti-union discrimination, as well as giving primacy to individual contracts over collective relations through the Australian Workplace Agreements procedure.*⁴

b) Application and Enforcement of Labour Laws – Article 18.2:

- vi. Importantly, this Article contains the principal caveat limiting the scope of each party's obligations regarding the enforcement of its labour laws. That is, *[a] party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, after the date of entry into force of this Agreement* (emphasis added).⁵
- vii. Whilst it is clearly arguable that the Commonwealth is failing to effectively enforce its labour laws in the specific case of the no disadvantage test for AWAs, it would presumably have to be demonstrated by the Government of the USA that the Commonwealth of Australia is doing so in a manner affecting trade between the parties. That is, *to encourage trade or investment by weakening or reducing the protections afforded in their respective labour laws.*⁶

³ ILCCR: Examination of individual case concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification: 1973) Published: 1998

⁴ ILCCR: Examination of individual case concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification: 1973) Published: 2000

⁵ Ibid – 18.2(1)(a)

⁶ Ibid – 18.2(2)

- viii. The Commonwealth's 'Guide to the Agreement' emphasises this caveat along with the fact that only the government of each party can bring an action for breach of this section via the AUSFTA's dispute settlement procedure (DSP).
 - ix. Penalties can issue as a result of such DSP determinations in *the form of a fine of up to \$US15 million per annum (adjusted for inflation) to be paid by the Party complained against into a fund, to be spent at the direction of the parties on appropriate labour initiatives in the territory of that Party.*⁷
 - x. However, should AWAs that are registered based on a flawed interpretation of the no disadvantage test increase in numbers, the case could be made that Australia is gaining a competitive advantage through reduced labour costs in direct violation of Article 18.2.
- c) Procedural Guarantees and Public Awareness – Article 18.3:
- xi. On face value it appears the intent of this Article is to ensure that workers and employers in general will continue to have fair, equitable and transparent access to labour tribunals and/or courts.
 - xii. The Article provides that *[e]ach Party shall ensure that persons (persons being defined as natural persons or enterprises) with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labour tribunals for the enforcement of the Party's labour laws.*⁸
 - xiii. It compels each Party to *ensure that its administrative, quasi-judicial, judicial, or labour tribunal proceedings for the enforcement of its labour laws are fair, equitable and transparent*" and provides further that *[e]ach Party shall provide that the parties to such proceedings may seek remedies to ensure the enforcement of rights under its labour laws.*⁹
 - xiv. Whilst the Commonwealth would likely argue that it is compliant with this requirement, it is arguable that the Office the Employment Advocate's policy regarding the application of the no disadvantage test to certain AWA provisions (such as so called 'voluntary overtime' provisions) represents a failure to comply with this Article, at least in spirit.

⁷ AUSFTA – Guide to the Agreement – Chapter 18 – Labour pg 110

⁸ AUSFTA Draft [1 March 2004] Chapter 18 – Labour – Article 18.3(1)

⁹ Ibid 18.3(2) and (3)