



ASU Submission to the

Australian Senate

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

April 2004

by Greg McLean, ASU Assistant National Secretary

(See final paragraph of submission for advice on writer)

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For further details on the ASU, its industries, locations and Branches, see

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Who is the ASU – why are we interested in the USA-FTA?

The Australian Services Union operates within the public sector including corporatised entities, the electricity industry, water industry, ports, railway industry, state government, Australian Taxation Office and local government. The ASU also has interests within the private sector, in particular clerical and administrative functions of business, business equipment, the social and community services sector and private sector transport industries (including airlines, railways, shipping and some road transport).

Outline of ASU concerns

The ASU's concerns on the USA Australia Free Trade Agreement are similar to views and concerns held over the World Trade Organisation – General Agreement on Trade in Services (GATS) negotiations and issues that were a consideration within the proposals put forward by a range of countries.

In particular the list of issues that had been submitted by the European Union. Along with interests put forward by American business lobby groups, including references that regulation, regulatory frameworks inhibit trade, and concerns that some Government regulation was inappropriate in some industries, specifically the electricity/energy sector.

In this currently considered USA - Australia Draft Free Trade Agreement, the ASU has a range of concerns including the following:

1. The manner in which Trade Agreements such as USA FTA are negotiated including the limited time for the Australian community to respond, noting that there are substantial government agencies at a national level, agencies and state governments affected, along with approximately 650 local government authorities throughout Australia, all possibly affected by such Agreements.

Indeed with the complexity of regulatory frameworks operating at the three (3) government levels, that is local government, state government, and national government, it should mean lengthier time tables may be more appropriate in the future and may well be of assistance in allowing all parts of the Australian community to have input into draft Trade Agreements.

Australia is after all a similar geographical size to the United States, and having a complexity of national government and state government laws and regulations, along with a structure for local government.

2. National governments, such as the Australian Government, have substantial technical reserves in order to develop Trade Agreements and similar on behalf of Australian society. These reserves are not similar/same as those available to local governments, non-government organisations and in some cases state governments who may not have the necessary expertise or financial availability in order to respond appropriately to these enquiries.

One means to assist in further allowing the Australian community to put forward submissions would be for the Federal Government to provide equitable funding, a degree of financial support, or subsidies in order to allow democratically elected organisations including those whose ballots are conducted by the Australian Electoral Office, (including elected trade unions) the opportunity to develop and put forward quality submissions that would canvass all aspects of their organisation's concerns. Thus providing a more detailed response by the Australian community.

3. While the Australian Government resources might be able to match that of governments such as the USA Government, USA community organisations, unions, business organisations, peak industry lobby groups and others within the USA community would be more able to respond than their Australian counterparts, simply based upon financial resources, which would be a reflection of current business density, market related issues and the numerical size of community groups, including unions.

The large size of the US economy, agriculture, business, services sectors covered by GATS along with foreign owned but USA established/based companies (eg. European manufacturing and services sector companies) all add to the resources of USA interests to respond.

Perhaps the draft Trade Agreements could include subsidies, for community based organisations to access, thus enabling equitable responses from all interested parties. After all, at law we provide legal aid, perhaps financial support for the compilation of society views on Trade Agreements should be a consideration .

The ASU notes that a range of community organisations will put forward views for their respective industries/sectors, but the ASU will raise the following specific concerns with respect to the industries where ASU members are employed –

Chapter 1 – Article 1.2 General Definitions

The ASU believes that the following sub points relate to industries, callings and areas of engagement of ASU members –

Sub Point 7 – Enterprise

This would be an area of interest to a range of state government corporatised entities, local government authorities and Private Public Partnerships, including “build own operate”, and “build own operate” transfer schemes.

Sub Point 10 – GATS

The ASU has placed Submissions before the Australian Senate in response to the General Agreement on Trade in Services negotiations, and previously appeared before the relevant Senate Standing Committee.

Sub Point 13 – Government Procurement

It is expected that this sub-clause would find coverage for state government, local government, and include the provision of equipment, but also services that are currently open to National Competition Policy and industry sectors where government authorities choose to place businesses on commercial footings.

Sub Point 20 – Regional Government or Regional Level of Government –

The ASU expects that this Division will be binding upon state governments and local government insofar as state governments have a right to legislate for the conduct of state government businesses and enterprises, and to legislate for local government, and thus the ASU believes state governments will undertake a natural extension to ensure inclusion of all local government and government services.

The full effects of this provision for industries such as the water sector where commercial “build own operate” and “build own operate transfer” schemes are often used may create an alteration to the contracts drafted for such provisions, where local government may expect to include local or regional content or commitments to expend monies and employment at a local level to retain localised employment and reinvestment in the community.

Chapter 8 of the Report – Regional Governments

The ASU notes within the Submission that “each party shall provide information to Authorities of Regional Governments to encourage their adherence to the provisions of this Chapter as appropriate”.

This is seen as an after the fact, rather than a before the fact, in seeking the views of local and regional government.

Monies spent after the fact could be also used before the fact for community and local government input.

Chapter 8 - Technical Barriers to Trade

Concern is held that should such a requirement be needed, by local government that not only should an education program be involved but a consultation program should precede any agreements made on behalf of local government.

Chapter 10 – Cross Border Trade in Services

Provides direct reference in part 2 (a) “Central, Regional, or Local Government and Authorities;
(b) non-Government bodies in the exercise of powers delegated by Central, Regional or Local Government Authorities.”

This section again refers to a requirement by local government to be participative within the “Chapter 10 – Cross Border Trade in Services” but again little consultation has taken place with local government, the service providers and employees within the industries, that will/could be affected.

Chapter 11 – Investment

The ASU notes a series of references within the draft agreement that attempt to streamline investment laws operating between Australia and the United States of America.

However, the ASU has some specific concerns in respect of the appointment of senior management and boards of directors of state-owned corporations, “build own operate “ , “build own operate transfer” schemes, contracted out schemes and private sector companies. We note that under the Agreement an interpretation, of a lesser number of directors to be Australian based than is currently applicable, see part – Article 11.10 Senior Management and Boards of Directors.

This is of specific concern to the ASU should these enterprises cease to trade or become financially unsound and that due to the Australian Government's "current policy on payments of employee entitlements", the issue of community accountability for inappropriate actions of directors and senior management, that would not normally be held accountable at law or to a community standard or expectations maybe unrealised as these directors and senior managers may well live outside the country.

The ASU believes that clarity should be addressed within this section of the Agreement.

Chapter 14 – Competition Related Matters

The ASU notes the intention of the provisions for Article 14.2 "Competition Law and Anti Competitive Business Conduct, Article 14.3 "Designated Monopolies" and Article 14.6 "Cross Border Consumer Protection", which includes international consumer protection and enforcement are included in this Chapter.

The specific concerns held by the ASU are located within the term "Article 14.3 – Designated Monopolies" and "14.4 – State Enterprises and Related Matters", which are not prescriptive but leave the door open for either party to argue for the treatment of an Australian local government function, corporatised entity, state-owned corporation, or similar business unit service delivery function to be applicable under this "Designated Monopoly" provision.

Specifically the ASU's concerns in this area are inclusive of waste services collections by metropolitan authorities, councils and/or similar. The operation of state-owned corporations for the provision of water services, or other services may be categorised as monopoly services at a time in the future.

The ASU believes that the Agreement would be far better if it was to nominate upfront the specific areas of designated monopolies as the open ended approach may well provide a moveable feast for the future and opportunities to open up government monopoly businesses that were currently not considered as such. Noting the references on Pages 14.7 of government business, government monopoly/state enterprise.

The issues of transport including Railways - city, suburban and interstate, Ferries and Buses and in general public transport monopolies currently held by governments.

14.6 Cross Border Consumer Protection

An additional concern to the ASU is the enforcement and access for individuals to Article 14.6 Cross Border Consumer Protection and a consideration that as state-based legislation in Australia is often the pre-eminent legislation for consumer rights, that an individual consumer may become embroiled in an argument between a state consumer affairs department versus the Australian Consumer Affairs Department versus US Consumer Affairs Department and the myriad of expensive litigation and merry-go-rounds that this may create for the individual consumer. Clarification on the use of such legislation and specific operational examples involving practical state-based consumer legislation would appear to be a decided advantage for reference in such a Trade Agreement.

Chapter 15 – Government Procurement

Local government, state governments and in turn corporations of state, local and national governments will be affected by “Chapter 15 – Government Procurement” insofar as Chapter 15 , point 2 “by any contractual means, including purchase, lease or rental, with or without an option to buy – build – operate – transfer contracts and public works concession contracts”.

The ASU is concerned that the inclusion of “build own operate” and similar contracts for the provision of services, most notably in regional Australia (which could include building, building construction works, sewerage treatment works or any infrastructure project etc) where the council/local government authority may wish to give consideration in a favourable way to the value of a local or regional company involved in the construction, employment or on-going operation, and the return benefit to the community of local employment , purchasing etc.

Under the draft Trade Agreement the local community might not be able to encourage these local investments or undertakings.

This may not benefit the local/regional community, but could adversely affect local employment and in turn harm other aspects of the community, and overall lessen the communities’ services.

The encouragement of regional employment opportunities and the value this adds to the Australian community has been outlined in the ASU Submission to the House of Representatives Inquiry into Local Government Cost Shifting.

The ASU would ask that the Committee take consideration of the views expressed in the House of Representatives Cost Shifting Inquiry by a range of parties promoting regional employment opportunities, and also give consideration to the unanimous recommendations of the House of Representatives Inquiry into Local Government Cost Shifting.

Chapter 18 – Labour

The ASU acknowledges the contribution made by the Australian Council of Trade Unions in raising matters related to this Clause.

However, the Australian Services Union is also an affiliate of the – **Public Services International** – representing approximately 20 million public sector workers worldwide, whom the ASU works with on issues relating to its public sector membership, water, electricity, utilities membership and in general its public sector membership, inclusive of local government.

International Transport Workers Federation – which covers ASU membership within the transport industry, shipping, airlines and the rail industry.

Union Network International – which represents ASU membership in private sector, clerical administrative areas, call centres and similar office related industries.

The ASU finds itself increasingly working with other unions and international union movements. This increasing focus on international labour relations and labour industry related issues and industry sectors now raises considerable opportunities for unions to examine issues both within the broad terms of the USA Australia Free Trade Agreement, and also specifically within Chapter 18 – Labour Related Issues.

The ASU notes that with article 18.4 – Institutional Arrangements – that specific references are made to the establishment of a sub-committee (to operate under structure and guidelines as established under Chapter 21 – of the USA Australia Draft FTA) for discussion on the matters related to Chapter 18.

Specifically the ASU notes within sub-Paragraph 1 – Article 18.4 -

Article 18.4: Institutional Arrangements

1. “The role of the Joint Committee established under Chapter 21 shall include discussion of matters related to the operation of this Chapter and the pursuit of the labour objectives of this Agreement. The Joint Committee may establish a sub-committee on Labour Affairs, consisting of central Government Officials of each Party who are primarily responsible for labour or workplace relations, and officials of other appropriate agencies, to meet at such times as such officials deem appropriate to discuss matters related to the operation of this Chapter. Each meeting of the sub-committee shall normally include a public session”.

The ASU notes specifically the words “consisting of central Government Officials of each Party who are primarily responsible for labour or workplace relations, and officials of other appropriate agencies, to meet at such times as such officials deem appropriate to discuss matters related to the operation of this Chapter”.

The ASU would consider that representation on this sub-committee should in fact be a series of sub-committees relating unions that share common dialogue with their US counterparts for industries affected by this Agreement. An example of this would be the ASU as the largest industry in electricity, water and local government in Australia, interfacing directly with its USA counterparts for discussions on these Clauses and future developments.

The ASU notes that a similar current arrangement exists for cross border co-operation and discussion of principal industrial relations matters between countries within the European Union and that similar cross border conferring should be possible under the USA - Australia Free Trade Agreement if the Agreement’s intention is to provide openness, transparency and a movement towards reductions in trade barriers.

It is contended by the ASU that if it is worthwhile the establishment of a specific Clause 21 to deal with labour related issues, that the encouragement of sub-committees, based upon Industries, should be appropriate

The opportunity for the Senate to make such a productive request of the draft Agreement, would seem to be in accordance with the spirit of co-operation, the attempt to clarify and break down trade barriers and the recognition that labour and labour related Clauses within the USA FTA Agreement and references to the International Labour Organisation Charters, would form an important basis for future development and understanding of Trade issues.

It is noted that such sub-committee meetings could be encouraged and/or facilitated by the parties with observance from international union agencies such as the above, and/or the International Labour Organisation in the first instance. The ASU looks forward to expanding upon this point if granted an opportunity of appearing before the Committee.

Some specific additional points on –

Water Services

The ASU notes the specific reference within the USA FTA to water resources being excluded from the Trade Agreement in their current form, however future changes to water industry structures may be encompassed within the USA FTA.

The ASU's concerns within the water industry lie in the **state-owned corporations, state public water sector infrastructure and the water resources functions of state governments and local government** for the supply of water and treatment of waste water related products.

ASU concerns are based on the water related issues from catchment, network services (pipes, etc.), and their supply to domestic and industrial consumers that have a direct relationship with the above referred to corporations, state or local government instrumentalities.

The ASU's concerns include the age of some parts of the Australian water industry and its ability to service an ever increasing population and the availability of capital to local government and state corporations in order to meet the future demands of Australian citizens and business.

Such pressures may well require a review of the present structure of the water industry and open it up at a later time to structural review, and the basis of inclusion within the USA/Australia FTA Agreement.

Environmental concerns will also be of significant importance as we continue to raise the bar on environmental issues and the communities' expectations, including business, of environmental related water industry issues, plus the impact of climate change for water catchment and reticulation.

These concerns may also see changes brought about to the Australian water industry that may not be privatisation, but contract construction, turn key projects, new financing arrangements and manifestations of Private Public Partnerships.

Alterations to the Australian water industry may be twofold including both infrastructure construction and the operational aspects. These two separate issues may become related and may also be seen as “build own operate”, Private Public Partnerships or similar.

The ASU believes that all aspects including “build own operate”, infrastructure construction, reticulation and all aspects of water from catchment to tap must be exempt from the USA FTA, for now and the future.

Utilities - Electricity Utility Industry

The Australian utility industry, in particular the electricity utility industry, has undertaken significant reform over the last 15 years. These reforms have seen outcomes as diverse as corporatisation, privatisation, contracting out and in some cases, little planning for the future needs of consumers in energy consumption, growth of sector use by the community and the re-investment in staff and equipment in order to build the system. Seasonal electricity system shortages are a feature of at least two Australian states.

Efficiency sought by both the private sector and corporatised sector have over the last 10 years or more, made a significant financial return to the shareholder (private and public), but often at the expense of future system needs.

These utility industries are an important and significant infrastructure both poles and wires, generation, and emergency services (call centres etc) and the staff that support all these services. Electricity is today, along with water, considered an essential service for the home and business

The ASU is concerned that with NON REFERENCE to the utility sector (electricity) within the USA FTA that further pressures could be placed upon the electricity sector that would result in continued reduction in services to the community, an increased movement towards profit driven outcomes as opposed to security of supply and services.

Accordingly, the ASU believes that the USA FTA Agreement should include a reference to the Australian electricity industry that would thereby exclude the electricity industry from the USA FTA Agreement. Please note this is not just an issue of retail of electricity but the infrastructure, network and construction operations that must be planned between 5 and 10 years into the future by governments.

Regulatory Frameworks

The ASU has considerable concern in respect of all Trade Agreements that are negotiated by the Australian Government, when it comes to the terms and topics of regulatory frameworks and regulations that can be imposed by national, state and local governments.

Regulation of trade and services is an important issue that ensures not only Australia domestic consumers but also business (small and big) receive a fair and equitable share of the services that are available within a society.

Regulatory frameworks often ensure the –

Balancing of business and environmental concerns,
Fairness and equity for all,
Recovery of capital investment on infrastructure projects (eg. electricity industry, network distribution charges, maximum recovery costs on use of infrastructure, eg. tollways etc.), to allow future construction, maintenance and system development.

Regulation is often a way in which governments can ensure fairness for all without the necessity for complex / detail laws and the possibility of a minefield of litigation,

Regulation is now seen “as part of the law”, and is most definitely necessary as governments allow a broader range of providers to fill society’s needs on services they previously provided by monopoly and supported by government departments. In Australia these “ regulators “ also provide the basis of a fair share for all, or as we say “a fair go”.

Governments that negotiate the reduction or removal of access to regulatory frameworks, will be creating an environment of inequity, which will be of considerable disadvantage to the citizens of Australia (and other countries) over the years to follow.

Regulation and regulatory frameworks are seen as a critical issue.

Appearance before the Committee

The Australian Services Union holds concerns in a number of areas of the Trade Agreement, and supports a range of other unions and community groups in their voicing of issues for the Committee’s consideration.

The ASU also seeks to expand the above views, provide additional information to the Committee and appear before the Committee’s public hearings.

Appearance by the ASU before the Senate Committee is respectfully requested.

Looking forward to your earliest reply.

Note on writer - Greg McLean

ASU Assistant National Secretary and the National Co-ordinator of the sectors of Local Government, Electricity (Energy), Water and Railways, and is the ASU campaign coordinator for GATS and Quality Public Services.

He is also a member of the Public Services International Public Sector Working Group, and coordinator of PSI APREC Utilities Network, and works with other unions facing reform of their sectors, including within the region. He is therefore able to speak on these issues and how they affect public sector workers and their communities.

Greg has also appeared before a range of Parliamentary inquiries.