

27 April 2004

Secretary  
Senate Select Committee on the Australia-United States Free Trade Agreement  
(AUSFTA)  
Suite S1.30.1  
The Senate  
Parliament House  
Canberra ACT 2600

Dear Sir/Madam

In the context of the Howard Government's rhetoric about National Sovereignty, I urge Committee Members to note the following irregularities in the Government's efforts to fast-track the ratification of AUSFTA with totally arbitrary deadlines related to forthcoming elections in both the United States and Australia.

### **1 Irregularities in the Ratification Schedule**

- . Submissions to your Committee close on 30 April 2004 but the promised updated economic modelling from CIE has yet to be released
- . Criticism of AUSFTA by AFTIINET needs urgent investigation as claims are being made to JSCOT Inquiry that the delivery of socially just public and social policies at all levels of government may been compromised by an over-emphasis on the rights of corporations involved in Australia-U.S. trading and investment activities
- . That AUSFTA may be compromising our strong regional relationships with the countries of Oceania and Asia which are providing the bulk of Australia's net trading surpluses

### **2 Recommendations**

- . Comprehensive investigations of the economic, legal, social and cultural impact of AUSFTA are required
- . Legal consultancy is required to investigate the claims made by AFTINET about the likely impact of AUSFTA on the future delivery of socially just public policies at all levels of government
- . Competing economic models of the likely impact of AUSFTA need further reviews

- . The Howard Government's arbitrary timelines for the ratification of AUSFTA must be rejected
- . That all Enabling Legislation towards the ratification of AUSFTA can be foreshadowed but should be deferred until after the 2004 Federal Elections
- . That the Senate Select Committee must be convinced that AUSFTA does not compromise our regional strategic relationships in trade, defence and foreign relations
- . That the cultural consequences of a more overtly commercial society be reviewed

During the Inter-War Period (1919-39), an earlier generations of leaders was clearly over-zealous in its commitment to relations with Britain over our national interests. I believe that a similar tunnel vision has emerged in relation to AUSFTA.

I have enclosed a paper *Changing Australia by Treaty?* to further develop these concerns. The Senate Inquiry has the authority to act to assist in the resolution of these issues by calling on expert opinion to review criticisms offered by AFTINET.

Yours faithfully

Denis Bright

## **Background Paper: *Changing Australia by Treaty?***

**Attachment to a Submission to the Senate Selected Committee  
on the Australia-United States Free Trade Agreement  
(AUSFTA)**

**Denis Bright**

**27 April 2004**

This paper requests the Senate Select Committee of the Australia-United States Free Trade Agreement (Senate Inquiry) to investigate the criticisms from AFTINET on the implications of the Australia United States Free Trade Agreement (AUSFTA) for the delivery of public and social policies in Australia. It provides more background material to justify this investigation. Consideration will be given to the incredibly broad scope of AUSFTA and its potential impact on many areas of Australian life with the possibility far-reaching legal and constitutional implications. Reference is made to the precedent of the North America Free Trade Agreement (NAFTA) since 1994 and its imposition of the neoliberal political agenda in Canada and Mexico. Finally, attention is given to the political communication strategies being used by the Howard Government to fast-track the ratification of AUSFTA.

Reaching a conclusion on the complex links between political and legal processes in the ratification of AUSFTA requires expert submissions to ensure that it is not compromising national sovereignty or imposing the partisan values of neoliberalism as law on the Australian community. This article therefore raises issues of concern to me and does not attempt to offer solutions beyond the need for a more realistic ratification timetable and more public debate on the implications of AUSFTA.

### **Section 1 The Challenges to Australian Sovereignty Through Use of External Affairs Powers**

After prolonged negotiations from 14 November 2002, the United States and Australian Representatives announced the conclusion of the AUSFTA Agreement on 8 February 2004 (Department of Foreign Affairs and Trade (DFAT, 2004c). A delay in the release of the Draft Text until 4 March 2004 created a very tight deadline for community organizations to prepare submissions to the Joint Standing Committee on Treaties (JSCOT) by 13 April 2004 and this Senate Inquiry 30 April 2004. Indeed, updated economic modelling from the Centre for International Economics (CIE) was not available to assist with this submission although it was scheduled for release on 8 April 2004 (DFAT, 2004b: 1-2).

Kevin (2004: 293) maintains that negotiation and implementation of AUSFTA is the most challenging and far-reaching of the Howard Government's checkered foreign policy decisions. It impacts on almost every aspect of national life. Once a commitment to AUSFTA has been made, Australians need to live with its consequences for a very long time as an incoming government would not withdraw flippantly from obligations to a trusted ally.

If U.S. Congress approves AUSFTA, the pressures on Australia to stay with the artificially fast schedule for ratification during the current year may become unstoppable. This Senate Inquiry is empowered to recommend a more cautious path in view of the implications of AUSFTA for future generations. The Senate Inquiry could recommend that foreshadowed Enabling Legislation required for the operation of the AUSFTA could be deferred until after the 2004 Federal Elections. This will interrupt the artificially fast schedule imposed by the Howard Government in the ratification processes (Deady,

2004a; JSCOT, 2004:13). Appendix 1 from JSCOT (2004: 8-49) summarizes the legislation which would need to be deferred in the interests of promoting public debate. Reservations about AUSFTA expressed by submissions from three states to the JSCOT Inquiry on AUSFTA need further consideration (Premier of Victoria, 2004; Premier of Western Australia, 2004; The Cabinet Office NSW, 2004).

If AUSFTA is finally ratified without this essential public debate, there is always the possibility that the High Court could be asked to review legal problems associated with the operation of AUSFTA under Section 75 (i) of the Constitution. More likely however, there may be some grey areas in the legal powers of the Commonwealth for resolution in the High Court at a much later date.

However, the AUSFTA Agreement specifically anticipates these problems in its Disputes Resolution Processes in Chapter 21 (DFAT, 2004a: 21.10). Article 21.1 gives authority to the handling of disputes arising from the Agreement to a Joint Committee with representatives appointed by both governments and jointly chaired by the Minister for Trade of Australia and the United States Trade Representative or their nominees. The Joint Committee established under AUSFTA has authority to establish standing committees, working groups, other bodies and to seek the advice of non-governmental persons or groups. While emphasis will be placed on the avoidance of disputes between friendly countries, a list of panelists for dispute resolution is to be maintained to ensure that no party has an unfavourable advantage in trade and commerce. (DFAT, 2004: 21.2). Access to the arbitration processes is solely with the approval of the Joint Committee and the decisions of the panel could result in financial penalties (DFAT, 2004: 21.8) Article 21.15 prohibits appeals by aggrieved parties to these arbitration processes to domestic courts in either country. This Senate Inquiry needs to refer the legal significance tribunals imposed by AUSFTA for comment by specialist legal opinion.

The broadband scope of AUSFTA suggests that use of external affairs powers in a ratified treaty will contribute to the political values of neoliberalism becoming part of the Australian legal system as in a fully ratified treaty all section of the treaty including annexes and letters of exchange will have been incorporated into Australian law. Ratchet provisions in AUSFTA also prevent future Australian Governments from lowering regulatory standards agreed upon in the Agreement in areas such as media content or the strengthening of industrial awards or foreign ownership provisions against take-over of Australian firms (AFTINET, 2004:7).

While Annex 2 of the AUSFTA makes a specific concession to allow possible regulation on foreign ownership by U.S. firms in residential sub-divisions, the full weight of resources available to multinational companies could still be used to support political campaigns calling for the deregulation of urban and regional planning legislation at state and local government levels. Even the imposition of road-based solutions to urban transportation could be imposed on the community by slick advertising campaigns funded by corporate interests. Precedents exist overseas for the imposition of costly road based megaprojects to enhance the market expectations of freeway suburbs (Flyvberg, 2003: 136-142).

Other examples of administrative problems facing all levels of government under the strengthening of neoliberalism in AUSFTA now include:

- . Right of pharmaceutical companies to challenge decisions of the Advisory Committee of the Pharmaceutical Benefits Scheme (Side Letter on Pharmaceuticals)
- . Insistence that decision of the Medicines Working Group are soundly commercially based (Annex 2c)
- . Extension of patent laws for drug companies and its impact on the capacity of the Pharmaceutical Benefits Advisory Committee to fast track the production of generic Drugs (Article 17.10)
- . Application of the ratchet effects to prevent a strengthening of regulatory controls over investors through legitimate planning and public service delivery (Article 11)
- . Commitment to commercial accountability in the delivery of public utilities such as water, electricity and public transport despite problems revealed by Productivity Commission inquiries into privatized utilities (Article 10)
- . Side letters in AUSFTA of the Government's commitment to the privatization of Telstra and the implications for future governments who want public sector involvement
- . Capping of Australian content in sections of the Australia media and the opening up of the media to foreign ownership (Annexes I-II)
- . Future of subsidies to public broadcasting when some outlets like JJJ Radio might interfere with the rights of commercial investors (Article 10.1)
- . Involvement of U.S. Authorities in reviewing the appropriateness of quarantine standards including the labelling of GE foods (Article 8.7)
- . Problems arising from the prohibition on access to domestic courts for appeals against dispute resolution processes (Article 21.15)
- . Extension of copyright laws and their impact on public libraries and educational institutions (Article 17.4)
- . Possible challenges to Australian environmental laws because of their commercial impact (Articles 19.7 and 22.1)

## Section 2 The Precedents of the North Atlantic Treaty Model (NAFTA)

In its management of AUSFTA is a political issue, the Howard Government has always emphasized the minimalist nature of the proposed changes and their compatibility with national sovereignty. DFAT (2004c) has played a very essential role in this political communication. This ongoing one-sided interpretation is reflected in the following statement:

Free trade leads to higher economic growth, better living standards and more and better job Opportunities. .... The higher incomes that free trade brings will enhance the ability of both The US and Australia to achieve fundamental economic and social processes. Nevertheless, The Government will ensure that outcomes of FTA negotiations do not impair Australia's ability to meet fundamental objectives in health care, education, consumer protection, cultural policy, quarantine and environmental policy. The Government will continue to place a high priority on consultations with the States and Territories, industry and professional bodies and community organizations as the negotiations proceed.

(Department of Foreign Affairs and Trade. 2004c. *Australia-United States Free Trade Agreement: Guide to the Agreement*, 1.)

Similar strategies were used to sell NAFTA in North America. Paul et al (1993:3) warned that the minimalist changes in commercial life from closer ties with Mexico and Canada do not stand alone in isolation from longer term economic, social and cultural changes. The minimalist political communication of NAFTA was framed around positive measures such as:

- . promotion of *conditions of fair competition* within the free trade area
- . increasing investment opportunities within NAFTA
- . effective protection and enforcement of intellectual property right
- . creation of a framework for further co-operation to enhance the benefits of the agreement

Paul et al. (1993). *North American Free Trade Agreement*, 3.

These positive and co-operative goals are hardly evident in current phase of the long running dispute between the USA and Canada to stop softwood exports from British Columbia (*The Globe Mail*, 6 March 2004: 1). The U.S. Department of Commerce authorized the Customs Service to impose a 27 per cent tariff on imports arriving from the Canfor Corp in British Columbia because of alleged unfair support from the Government of British Columbia to timber producers. Canfor Corp retaliated with an appeal to the NAFTA Panel which ruled in Canada's favour and a potential saving of \$10 million a quarter to the company. Advocates of NAFTA always claimed that National Trade Commission would work to rectify the underlying causes of the disputes before they get to this belligerent stage.

In the case of the trucking dispute between the USA and Mexico, domestic political pressures in the U.S.A. delayed the opening up American roads to commercial trucks

from Mexico. These problems may foreshadow political pressures that could be imposed on Australia to lighten future regulatory measures on the rights of U.S. Corporations.

In 1995, the Texas Department of Transportation with the approval of the Clinton Administration imposed a three year ban on the movement of Mexican trucks beyond transfer points in the immediate border region of the U.S.A. following complaints from American trucking companies over safety violations. This contravened Articles 1202-03 in Chapter Twenty of the NAFTA Agreement but U.S. authorities claimed to be acting under Article 2101 of Chapter Twelve to uphold standards of health, safety and consumer protection in transportation (Burgess. 2002: 285).

The U.S. Senate also passed the Murray Shelby Bill to support this ban but President Bush did not write this legislation into law. When a Disputes Panel of the National Secretariat of NAFTA ruled in favour of Mexico on this issue, the Bush Administration negotiated with a compliant neoliberal Mexican Government to reach the following compromises (Burgess. 299):

- . Mexico raised safety standards for vehicles and commercial driving protocols for its Federal Motorways which were now comparable to standards in the U.S.A.
- . Improvements to road infrastructures to cope with the increased volumes of cross-border traffic and a strengthening of inspection and monitoring services
- . Negotiations between transport authorities and trucking unions in both countries to address issues of concern about employment and working conditions
- . Passage of new legislation in the U.S. Congress to diffuse the problems cross-border trucking and the expected reopening of the borders to Mexican trucks by January 2002
- . Resolution of antagonism towards the penetration of U.S. supermarket chain stores into Mexico to serve the increased road traffic despite complaints from local outlets

(Burgess. 2002: 298-308).

The litany of political compromises against national sovereignty continues in the way the Mexican Government has been pressured to comply with requests from the USA for more open investment in lucrative real estate developments. Although ownership of land by foreigners is prohibited in border regions and coastal districts under the Mexican Law, political negotiations soon achieved a break-through as the world's largest economy interacted with a more minor player ( Martin, 2001: 510). However, overseas investors could by-pass the law by establishing civil law trust funds with Mexican Banks. The lack of direct ownership carried tax advantages which are not available to Mexicans who legally own property. The sheer economic advantages of U.S. investment in Mexican real estate helped to silence local opposition. Short term taxes on property were also able to be by-passed in favour of capital gains arrangements payable by the trust funds at the time of asset sales (Martin, 2001: 534) There is no great backlash from Mexicans who wanted to invest in U.S. real estate as they represented a very elite section of the population. Martin (2001: 538) however notes that these elites were not except from a battery of U.S. taxes from income tax to gift duties and /or estate tax.



### Section 3 Interaction Between Political and Legal Processes in Implementing AUSFTA

Reforming Australia in the neoliberal mould has been an ongoing agenda of the Howard Government since 1996. Manne (2004: 10) notes that this agenda is still unfinished and it has been a frustrated agenda because of the influence of minority parties in the Senate. Despite the set-backs, the neoliberal reforms of the Howard Government have resulted in the sale of public assets, trimmed welfare benefits, introduced industrial relations reforms, put pressure on unemployed people to accept exploitative work practices, introduced a regressive consumption tax and ongoing boasts about budget surpluses. AUSFTA is now emerging as another blessing to the Howard Government in furthering its neoliberal political agenda.

Garnaut (2002: 124) also warns that the Howard Government's infatuation with AUSFTA may drive a wedge between Australia and our established friends in the closer Asia-Pacific Region. Commodity trade growth in the eleven years from 1989-2000 has actually been strongest in the so-called restrictive markets of Asia which rewarded Australia with highly profitable trading balances. Further up to date economic modelling is necessary to resolve this dilemma in association with detailed strategic assessments of the impact of AUSFTA on our regional ties.

These strategic costs and possible constitutional problems in domestic governance must be weighed against the immediate short-term political benefits for the delivery of the unfinished neoliberal domestic political agenda. Should administrative problems emerge in the future as suggested in the AUSTINET Submission to the JSCOT Committee, the Commonwealth has sufficient constitutional powers to make future legislative amendments even if these come at great costs to the authority of government agencies wanting to live up to the long traditions of commitment to health, welfare and essential infrastructure within the public sector (AFTINET. 2004: 5-7).

However, without future legislative changes, the evidence from High Court Cases about the implications of the use of external affairs powers to change the nature of Australian Federalism is always conflicting. In *The Commonwealth v The State of Tasmania* (1983: 5), there is a review of most significant cases relating to the application of external affairs powers to issues affecting domestic governance in Australia. In the above-mentioned case, Justice J. Brennan supported the narrow margin in favour of halting work on the Franklin River Project but warned against any use of external affairs powers for domestic political agendas. The constitutional issues raised by AFTINET in its recent submission to JSCOT (2004) require further attention.

The Howard Government has had a dream run in its management of AUSFTA as a political issue with few penetrating critical press reports and quite manageable levels of public interest. Linking AUSFTA into the proven *development first* agenda of past high profile leaders from Queensland, Tasmania and Western Australia has traditionally bowled over the skeptics who wish to argue the finer points of law and political protocol.

The Howard Government is locked into a simple political message that AUSFTA is *good for Australia and good for economic growth*. Of the press articles reviewed in the Factiva Data Base (2004), reporting on AUSFTA peaked in Mid-February when the Australian Government announced that negotiations with the U.S.A. had been finalized. Less than 26 per cent of articles on AUSFTA between January and late April 2004, were in fact published after the release of the Draft Text on 4 March 2004.

In the absence of a Draft Text until 4 March 2004, press reports on AUSFTA were obviously constructed from secondary sources. When the text was finally released, AUSFTA had ceased to be very newsworthy as it had already been interpreted ad nauseum. The Howard Government had clearly won the communication battle to promote AUSFTA as a positive change. It had succeeded in framing public opinion on this issue from an initial fear of the unknown prior to 8 February 2004 (Kosicki, 2003: 74-67).

In summary, my paper supports the need to delay ratification of AUSFTA until the details are more thoroughly debated and specific criticisms from AFTINET are fully investigated by the Senate Inquiry. All Enabling Legislation should be foreshadowed and then debated after the 2004 Federal Elections. The AUSFTA Agreement carries no mandate to *Change Australia by Treaty*.

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