



Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR COMMUNITY AFFAIRS

MEMBER FOR GINNINDERRA

Senator Peter Cook
Chair
Senate Select Committee on the Free Trade Agreement
between Australia and the United States of America
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

I refer to the letter of 6 April 2004 from Mr Brenton Holmes, the Secretary of the Senate Select Committee, on the Free Trade Agreement between Australia and the United States of America seeking a submission from the ACT Government. The ACT Government is pleased to make a submission to your inquiry.

The ACT Government participated in Commonwealth-State-Territory consultations prior to and during the negotiation of the AUSFTA.

The AUSFTA outcome is disappointing and falls significantly short of the negotiating objectives released by the Commonwealth Government at the commencement of the negotiations. In addition the ACT Government remains concerned that the AUSFTA will have negative implications for significant areas of Australian public policy.

The ACT Government considers that a number of aspects of the AUSFTA should be subject to close scrutiny.

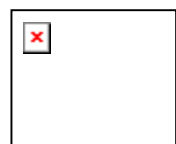
Pharmaceuticals Benefits Scheme

Notwithstanding Commonwealth Government assurances, the ACT Government is concerned that the proposed AUSFTA has potentially significant implications for Australia's Pharmaceutical Benefits Scheme (PBS). While steps to increase transparency in the operation of the PBS are welcome, proposed changes to the PBS are likely to lead to increased costs for consumers and for State and Territory health systems.

The draft AUSFTA provides that the Australian Government will allow pharmaceutical companies to consult relevant officials prior to making applications for listing of a product under the PBS. The Pharmaceutical Benefits Advisory Committee (PBAC) will further allow companies to comment on expert evaluations of their products. Even more significantly, as the Office of the US Trade Representative has emphasised, Australia will be required to

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433



establish a review panel, in effect an independent appeals mechanism, for drug companies whose products are not recommended for listing on the PBS. There will also be provision for adjustments to PBS prices after listing.

The impact of these proposed changes would be to open the door for major US pharmaceutical companies, possessing very extensive legal, financial and technical resources, to lobby the PBAC, pursue appeals against negative decisions, and generally secure much greater leverage in price negotiations.

In addition to these provisions, the AUSFTA will require changes to Australia's intellectual property regime which will prevent the marketing of generic versions of patented pharmaceuticals before the patent covering the product has expired, and require companies intending to manufacture a generic drug similar to a product facing patent expiry to notify the original pharmaceutical manufacturer.

These proposed changes are likely to delay the production and availability of generic drugs and lead to increased prices under the PBS.

These changes will have a significant impact on the long-term viability of the PBS and on the costs and availability of drugs for Australian citizens.

Given the critical importance of the PBS for Australia's health care systems, especially in the context of an ageing population, the ACT Government recommends that the operation of the PBS be excised from the AUSFTA.

Plasma Fractionation Services

Although blood plasma fractionation supply services will be excluded from the scope of the AUSFTA, a side letter provides that Australia will review Australian plasma fractionation arrangements by 1 January 2007. The review will be undertaken by all Australian jurisdictions and will include examining whether suppliers of fractionation services should be selected through a competitive tender process.

Australia has a long-standing national policy of self-sufficiency in the supply of blood and blood products. The provision of plasma fractionation services is a joint Commonwealth-State responsibility.

The ACT Government is committed to maintaining high quality blood supply services consistent with the mandates of the National Blood Agreement, including:

- delivery of the safest and most clinically effective treatments for Australians; and
- maintaining self-sufficiency in blood products, that is, plasma products will continue to be derived from plasma donated by Australian blood donors.

At the present time Australia has a sole fractionator (Commonwealth Serum Laboratories - CSL), and while that undoubtedly reduces the negotiating ability of the National Blood Authority to secure the best commercial deal it also places CSL under the direct influence of Australia's legal and regulatory processes. As a consequence, Australia's blood supply is one of the safest in the world.

Issues that could be considered in the review process include:

- Australia's ability to maintain self sufficiency in blood supply;
- An increasing number of regulations that ensure safety but diminish donor numbers;
- Australia's current inability to produce sufficient Intravenous Immunoglobulin for clinical demand;
- the capacity of Australian Red Cross Blood Service to respond to the present or any future plasma shortfall;
- development of comprehensive national clinical guidelines, which are evidence based, for every product;
- horizon scanning for new products, non-plasma replacement products, new and/or better fractionation processes; and
- risk and cost analysis of another on-shore fractionator and/or offshore fractionators.

Environment issues

The ACT Government remains concerned that the AUSFTA does not include adequate protection for legitimate government regulation to protect and enhance the environment. Australian Governments may be exposed to the risk of litigation and the need to pay compensation as a consequence of environmental regulation. The expropriation provisions of the AUSFTA (Article 11.7) could result in compensation being sought and awarded to US-based companies even when no discrimination against a foreign investor was involved and where no compensation would be payable to Australian or other investors under domestic law. In this regard it should be noted that the term investment is defined widely to include licences, authorisations or permits under Australian law,

Other free trade agreements have provided general exceptions for environmental regulation, for example, the Australia – Singapore Free Trade Agreement provides an exception relating to the conservation of exhaustible natural resources (Chapter 8, Article 19).

It is also significant that the Commonwealth Government has not released (and indeed not commissioned) analysis of the potential environmental impacts of the proposed AUSFTA, for example the implications of increased export-orientated agricultural output on scarce water resources and salinity in the Murray-Darling basin.

Foreign Investment Review Board

The proposed AUSFTA involves significant change in Australia's foreign investment review framework.

Under the terms of the AUSFTA, the ability of the Foreign Investment Review Board (FIRB) to examine proposals for US investments in Australia will be significantly reduced by increasing the screening threshold for US investments in existing Australian companies in non-sensitive sectors from AU\$50 million to AU\$800 million, and by precluding the examination of investments in new businesses. As the Office of the US Trade Representative has noted: "Most US investments would be exempted from screening".

In addition, Australia may be obliged to include similar provisions in new free trade agreements (for example a possible agreement with China) further limiting the FIRB's role.

Given the potential significance of the proposed changes, the implications of the AUSFTA for Australia's foreign investment review framework should be examined very carefully.

Investor-State Dispute Settlement

The ACT Government has supported the exclusion of an ISDS mechanism from the AUSFTA. Inclusion of an ISDS mechanism would be inappropriate for an Agreement between two countries that protect the rights of investors through mature and comprehensive legal systems. The ACT Government is concerned, however, by the provision of Article 11.16 that: "Upon ... request, the Parties shall promptly enter into consultations with a view towards allowing [a private arbitration] claim and establish [ISDS] procedures." This provision provides a back door for the subsequent establishment of an ISDS mechanism.

Audiovisual sector

According to the Commonwealth Government, the AUSFTA protects Australia's right to ensure local content on Australian media, and retains the capacity to regulate new and emerging media, including digital and interactive TV.

Briefing by the Department of Foreign Affairs and Trade (DFAT) states: "For free-to-air television, provision has been made for regulation in a possible multi-channelled environment and if television channels move to other delivery platforms. The capacity to regulate beyond existing measures for important formats on subscription television, such as drama, documentaries or children's programming, has been guaranteed. The Government will also be able to take measures to ensure that Australian content on new media platforms is not unreasonably denied to Australian consumers, should it determine that Australian material is not readily available to them."

Notwithstanding these comments, the United States has identified the audiovisual sector as a major win in the AUSFTA. According to the Office of the US Trade Representative: "In broadcasting and audiovisual services, the FTA contains important and unprecedented provisions to improve market access for U.S. films and television programs over a variety of media including cable, satellite, and the Internet."

Examination of the AUSFTA text indicates that the Commonwealth Government will have a restricted capacity to regulate for local content in new and emerging media. This will impact on the ability to regulate for the maintenance of Australian cultural identity, and could negatively affect Australia's film and television production industry.

ACT implications

The Commonwealth Government has commissioned further economic modelling by the Centre for International Economics on the AUSFTA and intends to identify State and Territory impacts in this, but ACT and other jurisdictions have not been consulted on this and the results of the modelling have not yet been released.

The prospective benefits and costs of the AUSFTA for the ACT economy are uncertain, but appear unlikely to be highly significant. Any benefits of the AUSFTA are likely to develop over the medium to long term, flowing from closer integration of the two economies, rather than any immediate opportunity created by improved market access in particular sectors.

While the Commonwealth has held up access to the US Government procurement market (Federal and State) as a significant opportunity for Australian businesses, it will take some time for Australian firms to start making inroads or indeed look seriously at these markets. Companies will need to attend to all the infrastructure and organisational issues required to tap new offshore markets likely to be characterised by significant inertia and unstated bias to local suppliers.

It should also be noted that so far only 27 US States have so far agreed to participate in the AUSFTA Government procurement chapter – significantly fewer than the 37 US States participating in the Chile-US Free Trade Agreement. Missing are 10 States that participated in the Chile-US FTA, including including the large administrations of California, Illinois, Massachusetts and Michigan. It is hard not to view this as a poor signal of interest and intent. Australia's negotiators also clearly failed to properly engage the US States.

ACT government procurement legislation and practices are already broadly consistent with the obligations of non-discrimination and transparency in the AUSFTA. Moreover the procurement provisions of the AUSFTA will not apply to contracts under AU\$666,000 (for good and services) and AU\$9,396,000 (for construction). Given the relatively small size of ACT contracts, there is unlikely to be substantial interest from US companies in the ACT Government procurement market.

Commonwealth/State/Territories consultation

As noted above, the ACT Government participated in Commonwealth-State consultations prior to and during the negotiation of the AUSFTA. The Department of Foreign Affairs and Trade held a number of meetings and teleconferences with States and Territories, and provided a range of background papers as the talks proceeded.

There were however significant deficiencies in this process that limited genuine consultation between the Commonwealth, States and Territories.

Despite a number of requests to DFAT for sight of working texts, States and Territories received access to only four draft chapters (government procurement, cross border trade in services, financial services and investment) during the negotiations. Information on other aspects of the negotiations was limited to general briefings that were an insufficient basis on which to properly evaluate the likely national and regional implications of the Agreement.

This deficiency was not remedied by the limited participation of two State and Territory representatives as observers at several but not all negotiating rounds.

Despite assurances that the Commonwealth Government would ensure that States and Territories remained engaged during the final stages of AUSFTA negotiations, there was virtually no feedback or consultation during the final round of negotiations (except in the area of government procurement).

The ACT Government considers it important that, in future, the Commonwealth consult the States and Territories on a timely basis throughout major trade negotiations, including during their final stages. Final consultations should include State and Territory Ministers.

Consideration should also be given to the role of the Australian Treaties Council. The Council of Australian Governments agreed to the establishment of the Treaties Council in June 1996. Premiers and Chief Ministers welcomed this initiative and saw it as a potentially

important new Federal institution. Since then, however, the Treaties Council has met only once, in conjunction with the November 1997 COAG meeting. Negotiations of the significance of the AUSFTA should be the subject of consultation at the level of Heads of Government through the Treaties Council.

The ACT Government also notes that in its November 2003 report on the General Agreement on Trade in Services and an Australia-US Free Trade Agreement, the Senate Standing Committee on Foreign Affairs, Defence and Trade made a series of bipartisan recommendations regarding treaty negotiations and Commonwealth parliamentary processes. These recommendations were:

The Committee recommends that the government introduce legislation to implement the following process for parliamentary scrutiny and endorsement of proposed trade treaties:

- a) Prior to making offers for further market liberalisation under any WTO Agreements, or commencing negotiations for bilateral or regional free trade agreements, the government shall table in both Houses of Parliament a document setting out its priorities and objectives, including comprehensive information about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.
- b) These documents shall be referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for examination by public hearing and report to the Parliament within 90 days.
- c) Both Houses of Parliament will then consider the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, and then vote on whether to endorse the government's proposal or not.
- d) Once parliament has endorsed the proposal, negotiations may begin.
- e) Once the negotiation process is complete, the government shall then table in parliament a package including the proposed treaty together with any legislation required to implement the treaty domestically.
- f) The treaty and the implementing legislation are then voted on as a package, in an 'up or down' vote, i.e. on the basis that the package is either accepted or rejected in its entirety.

The legislation should specify the form in which the government should present its proposal to parliament and require the proposal to set out clearly the objectives of the treaty and the proposed timeline for negotiations.

The ACT Government considers that further consideration should be given to measures which would provide greater transparency and opportunities for timely inputs by stakeholders, including State and Territory Governments, in the treaty negotiation process.

Yours sincerely

Jon Stanhope MLA
Chief Minister