Rail Tram & Bus Union National Office

Submission the Senate Select Committee Inquiry into the proposed US-Australia Free Trade Agreement (USFTA)

April 29, 2004

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Introduction

The Rail Tram & Bus Industry Union represents 35,000 employees in the rail, tram and government bus sectors across Australia. It is an affiliate of the Australian Council of Trade Unions (ACTU) and the International Transport Workers Federation (ITF), and a member of the Australian Fair Trade and Investment Network. AFTINET is a national network of 85 organisations supporting fair regulation of trade consistent with human rights and environmental protection. The RTBU welcomes this opportunity to make a submission to the Senate Select Committee on the proposed US-Australia Free Trade Agreement (USFTA), and supports the submissions made by AFTINET and the ACTU.

The RTBU has drawn heavily on the work of AFTINET in preparing this submission.

There is extensive public interest in this Agreement and it is important that this should be reflected in the Committee's review process. While the government's public consultation processes have improved during the course of these negotiations, we remain concerned that, given the great impact of the proposed agreement on regulation in important areas of social policy, the public consultation process has still been inadequate. On nearly every point of concern in the text, the RTBU and the public were not permitted to know what was proposed or had been agreed to until after the text was published. This meant that the process of public consultation had much less meaning than it should. The RTBU had no idea that regulation of rail and public transport services would be affected by the USFTA, and could only address this issue now, well after the negotiation was completed. The RTBU, like everyone else, was repeatedly assured by government statements that culture would be protected, that the PBS was safe, that quarantine was safe, that sugar was 'in'. The government did not maintain these commitments, and in retrospect, these repeated undertakings appear to be cynical massaging of the public.

The first part of our submission deals directly with rail and public transport impacts and concerns.

The second part of our submission deals with general concerns about the USFTA, including studies of the economic effects of the USFTA,

the structure of the agreement and its general impacts on the ability of governments to make law and policy in the public interest.

The third part considers impacts on particular areas of policy which affect our members, and the Australian community as a whole:

- changes to Australia's pharmaceuticals system and blood plasma product supplies,
- the restriction on regulation of services and investment,
- restrictions on future regulation of Australian content requirements in new media,
- increased US influence on quarantine, GE laws and environmental policy-making,
- tariff cuts and manufacturing jobs, and
- limits on flexibility in government procurement.

The fourth part analyses the National Interest Analysis (NIA) and the Regulatory Impact Statement (RIS) on the USFTA supplied to the Committee. These are at best incomplete, and at worst misleading. Firstly, the statements omit some significant disadvantages of the agreement. For example, they do not state that access to the US sugar market is totally excluded. They state that the PBS and Australian content rules will not be adversely affected, but fail to detail the changes to these policies, which are in the agreement, and their impacts. They fail to mention the joint US-Australian committees in the areas of medicines and public health, quarantine, and technical standards including food labelling. These processes give the US government direct input into Australian policy in all these areas and need to be carefully examined for their likely impacts on Australian policy. The statements fail to give details of the government-to-government disputes process, which could have a significant effect on the ability of Australian governments to regulate. The statements also claim that there is no current investor-state complaints process, but fail to mention that the agreement has provision for a future investor-state complaints process to be developed if it is requested by an investor.

These serious omissions mean that the statements are not a credible evaluation of the national interest or regulatory impacts. This reflects a contemptuous attitude by the Australian government towards the public and the parliament, which should not go unchallenged.

Recommendation

> The Senate Select Committee should recommend that this agreement not be endorsed by Cabinet and not come into force, as it is contrary to the national interest.

Impact on the rail and public transport sectors

The RTBU notes that the proposed USFTA Annex I retains Foreign Investment Review Board oversight of investments greater than $50 million in rail infrastructure. The FIRB has not rejected nor put conditions on any US public transport investments, which have so far been in the rail sector, and two been greater than $50 million in value.

However in Annex II – 5, 'public utilities and public transport' are not listed among the public services about which existing or new regulations can be made which do not comply otherwise with the draft FTA. In the recent Singapore-Australia FTA, Annex 4-II (a), p6, the comparable exception includes 'public utilities and public transport'.

Therefore, the Committee must assume that the US Trade Negotiator demanded and received the agreement of the Australian Trade Minister, that public transport, and utilities like electricity, gas and water, be fully exposed to the Services and Investment provisions of the FTA, and then to the Disputes process.

Rail transport in Australia has been subject to over a decade of upheaval, marked by restructuring, privatisation, mergers, and third-party access, in both freight and passenger services.

US investors, notably RailAmerica based in Victoria (recently sold to Tolls / Patrick – Pacific National), and Genesee & Wyoming based in Western Australia and operating in WA, SA, the Northern Territory and NSW, are significant players in the Australian rail industry. As the new ownership structure of Australian railways consolidates, US Class I railway companies may move to take over some of the remaining freight operators. The current US rail operators in Australia are considered to be small regional players in the US market.

The regulatory framework for the contemporary rail industry has been very slow to catch up to the changes of the past decade. There are significant processes underway at the national level to create a national regulatory and safety regulatory system. In NSW, the Glenbrook and Waterfall Special Commissions of Inquiry are forcing a major change in state rail safety regulation. In Victoria there is also an accident-driven process to modernise the rail safety laws and regulations. As well, Australian Standard 4292, a foundation of present rail safety laws and

regulations, is due to be reviewed from April this year. AS4292 has been found wanting in NSW and Victoria.

By failing to reserve public transport as an area of regulation that may not conform to the FTA, the Australian Trade Minister has left open the possibility that US rail operators in Australia will object to the tighter regulatory framework which is now developing, arguing that the new regulations, at both a national and state / territory level, are a barrier to trade.

While we have not yet had US investment in tram or bus services, there are significant changes taking place in NSW and Victoria, which may be repeated in other states / territories, as the initial experience of privatisation and contracting out of government bus services is reviewed. The RTBU is very concerned that any shift to greater public sector involvement in urban tram and bus services in coming years will also be subject to the proposed FTA and its disputes process. The RTBU believes that regulation of urban public transport is not appropriate for the Disputes Panel in an FTA, but should remain the prerogative of democratic structures in our cities, states and nation.

Of the four rail freight privatisations between 1997 and 1999, in three cases the US buyers refused to or were reluctant to undertake collective bargaining with their employees, tried to drive down wages and working conditions, and in two cases imposed individual contracts (AWAs) on their employees.

The RTBU is strongly opposed to the anti-worker policies of these companies being bolstered by the proposed Free Trade Agreement. The Labour Chapter in the proposed FTA is too weak to address the issues raised by these bitter experiences of our members.

Economic impacts

There is considerable doubt about whether the USFTA will result in any benefits to the Australian economy as a whole, since econometric studies have predicted very small impacts, some being negative. This is in part because both the US and Australia have relatively few trade barriers and are already significant trading partners with a high level of economic integration. This raises the question of whether the proposed USFTA is needed at all.

Econometric studies are limited by the assumptions built into the models they use. Most models include the assumption of perfect labour mobility. This assumes that those displaced by increased imports will be perfectly mobile and able to be retrained to take advantage of growth elsewhere in the economy, which is not generally the case in practice. The omission of unemployment effects means that such studies generally overstate economic benefits (Quiggin, J., 1996, *Great Expectations: Microeconomic Reform and Government in Australia*, Allen and Unwin, Sydney).

It is therefore significant that econometric studies on the USFTA have predicted either very small gains or losses to the Australian economy, even without full inclusion of unemployment effects.

The original CIE economic consultants study commissioned by the government assumed totally free trade in agriculture yet predicted gains for the Australian economy of only 0.3% ($US2 billion) after 10 years. The results of this study were heavily dependent on the assumption that the USFTA would result in the removal of key US barriers to trade in agriculture, especially in the sugar, dairy and beef industries (Australian APEC Study Centre, *An Australia-US Free Trade Agreement: Issues and implications* Canberra, 2001).

A study by ACIL consultants predicted slight losses to the Australian economy, partly because of trade lost to other trading partners in the Asia Pacific area. (ACIL Consultants, *A Bridge too Far?* Canberra, 2003, www.rirdc.gov.au/reports/GLC/ACIL-ABridgeTooFar.pdf.).

Many trade economists argue that bilateral trade agreements tend to increase trade between the bilateral partners but divert trade from other trading partners, so reducing overall economic gains. For this reason, such agreements are often called Preferential Trade Agreements

(PTAs) rather than Free Trade Agreements. A working paper prepared by staff at the Productivity Commission examined 18 PTAs and found that '12 had diverted more trade from non-members than they have created amongst members'. It also found that 'many of the provisions needed in preferential arrangements to underpin and enforce their preferential nature- such as rules of origin- are in practice quite trade restricting' (Adams, R., Dee, P., Gali., J and McGuire, G., 2003, *The Trade and Investment Effects of Preferential Trade Arrangements-Old and New Evidence*, Productivity Commission Staff Working Paper, Canberra, p. xii).

Similar points were made by the authors of an International Monetary Fund Working Paper. This econometric study found in relation to the USFTA that 'slightly negative effects on Australia are related to trade diversion from Japan, Asia, and the European Union in machinery and equipment, basic manufactured goods and textiles' (Hilaire, A., and Yang, Y., The United States and the New Regionalism/Bilateralism, IMF Working Paper, 2003, p.16).

The US economy does not promise much to exporters over the next decade. A January 2004 study of the US import market by the Washington-based Centre for Economic and Policy Research predicts that imports into the US in 2013 will be reduced by between US$90 billion and US$375 billion, in 2003 dollars. This study finds no scenario that predicts an increase in US imports over the next decade. This is based on a conservative assumption that the US foreign debt will stabilise at 50 per cent of GDP, which is a very high debt level for a developed economy, and a range of assumptions about currency levels, the growth of US exports, and the price elasticity of demand for US imports and exports. (Baker, Dean and Weisbrot, Mark, *Fool's Gold: Projections of the US Import Market*, Centre for Economic and Policy Research, Washington, January 8, 2004. http://www.cepr.net/Import_Projections.htm)

The authors argue:

> "This inevitable adjustment process has enormous implications for developing countries seeking access to US markets. It seems that, as a group, they can no longer expect to increase their exports earnings from US markets in the foreseeable future, regardless of the terms of present or future commercial agreements. The only countries that can gain from increased access to US markets will be those that do so at the expense of other countries.
>
> "Commercial agreements such as the WTO, proposed FTAA [Free Trade Area of the Americas], and bilateral agreements typically require developing countries to make important and sometimes economically costly concessions in such areas as intellectual property, rules governing investment and government procurement, or other policies. For most countries, the costs of such concessions can be expected to exceed any gain they might anticipate from increased access to a shrinking US market for their exports". (Baker, Dean and Weisbrot, Mark, p 1-2)

Australia could only expect to increase its share of the US import market over the next decade, in this scenario, by displacing imports from other countries, such as China and Mexico. In fact, the proposed FTA is most likely to be adverse for Australia in broad economic terms.

This scenario suggests that the US motivation in pursuing a 'free trade' agenda in the WTO and in bilateral and regional agreements, is to overcome a very pressing economic problem by increasing its exports, rather than allowing its trading partners to increase their exports.

The government has admitted that the original CIE study is no longer valid, because the access to US agricultural markets is much less than it assumed. Sugar has been totally excluded and access to beef and dairy markets is phased in over much longer periods. The government announced it would conduct a competitive tendering process for another study, then announced a week later that CIE consultants had again been selected. This has been greeted with understandable scepticism by trade economists. For example, Allan Wood wrote in *The Australian* on March 9, 'The modelling work commissioned by the government is not going to convince anyone if it simply confirms Howard's view. It certainly won't dispel the suspicion that the government has something to hide.'

The response to this economic outcome by supporters of the Agreement is to say that no matter how bad the agreement is in its details, it is good for us because it gives access to the world's leading economy. This response cannot withstand scrutiny.

Australia is already highly integrated with the US economy in goods, services and finances, and in education about business systems. This integration already produces a massive trade deficit with the US. Except for a few products and services of special significance, there is already virtual free trade and investment between the two economies. The supporters of greater integration are really calling for a widespread takeover of medium size Australian enterprises by US corporations, and this is facilitated by the new $800 million threshold for Foreign Investment Review Board scrutiny of US investments under the proposed Agreement.

This development could only lead to significant closure of productive enterprises in Australia, and a greater outflow of revenues in dividends, royalties and interest, thus weakening our society in the medium to long term.

The title "free trade agreement" is a misnomer for this proposed Treaty. It is really another charter for greater power for giant corporations at the expense of the Australian people and Australian democracy. This is a major reason for the Senate Select Committee to reject the proposed USFTA.

Impact of the USFTA on the ability of governments to regulate

Government-to-Government Dispute process limits democracy

The dispute process enables a government to claim that a law or policy of the other country is in breach of the USFTA, or is preventing it from getting the benefits expected from the agreement (Article 21.2). The dispute process requires initial consultations, referral to a Joint Committee of US and Australian government officials and finally, if not resolved, to a dispute panel of three agreed trade law experts. Hearings may or may not be public, and the panel may or may not invite non government representatives to make written submissions. The panel's initial decision can be revised after comments from the governments, before final decision. The panel can order that a law be changed or compensation be paid. The decision may or may not be made public and cannot be appealed. (Articles 21.5 – 21.11). This process is highly deficient compared to the standards and requirements of Australian courts dealing with commercial issues. In Australia at present, only the High Court can strike down laws, but the proposed FTA will allow trade lawyers to do so through an opaque process.

This process based on trade law can be used to challenge social regulation judged to be inconsistent with the agreement, like policies on medicines or the regulation of essential services, such as public transport and rail systems. It is a clear restriction on the democratic right of governments to regulate in the public interest.

The danger is that social policies will be determined by a process which gives priority to trade law. Recently a World Trade Organisation disputes panel found that US restrictions on internet gambling designed to prevent social harm from excessive gambling were a barrier to trade. This shows that trade law has difficulty recognising the right of governments to regulate against social harm (Nicholas, K., 'Online bets on cards with WTO', *Australian Financial Review*, March 30, 2003, p.3).

The particular example of internet gambling has been excluded from the USFTA, as both governments agree on the need to regulate in this area. However, the application of a disputes process based on trade law may well over rule other areas of social regulation.

No immediate investor-state complaints process but could develop later

The government has claimed that there is no process in the USFTA which allows corporations to challenge laws or sue governments. The US wanted this process, based on the North American Free Trade Agreement model, which has enabled corporations to challenge environment laws and sue governments for millions of dollars (Public Citizen 2001, 'NAFTA Chapter 11 Investor-to-State cases: Bankrupting Democracy', Public Citizen, Washington, www.citizen.org). However the USFTA **does** provide a foot in the door for such a process. If there is a 'change in circumstances' an investor can request consultations with the other government to make a complaint. The other government is then obliged to 'promptly enter consultations with a view towards allowing such a claim and establishing such procedures' (Article 11.16.1). This must be rejected.

Increased US influence in Australian policy and law making

The USFTA establishes a series of committees that give the US increased influence over Australian law and policy-making, and prioritise US trade interests over other social policy concerns. The agreement establishes committees on medicines and health policy, on quarantine issues and on technical standards like food labelling, including labelling of Genetically Engineered food. These are all areas where the US has identified Australian health and environmental policies as barriers to trade. In all cases the terms of reference of the committees give priority to US concerns about trade issues and not to Australian health or environmental policy. These Committees must be rejected.

Negative list for services and investment

The USFTA has a negative list structure for both services and investment. This means that all laws and policies are affected by the agreement unless they are specifically listed as reservations. This differs from WTO multilateral agreements like the General Agreement on Trade in Services (GATS), which is a 'positive list' agreement, meaning that it only applies to those services which each government actually lists in the agreement. The negative list is therefore a significantly greater restriction on the right of governments to regulate services than the WTO GATS agreement.

There are two sets of reservations for 'non-conforming measures' which may not be consistent with full national treatment and market access for US firms, or which may be considered 'too burdensome' or a barrier to trade by the US government.

Annex A or 'standstill' reservations mean that existing laws and policies can remain, but they are 'bound' at current levels and cannot be made more regulatory without being subject to challenge by the US government under the disputes process. There is a 'ratchet effect'

which means that if an existing law or policy is made less regulatory, it must remain at that lower level and cannot be changed back by a future government. For example, if the current government reduced Australian content rules in film and television, a future government would be unable to restore them to current levels. This is a significant restriction on our democracy.

Annex B contains reservations which enable governments to make new laws, but some of these also contain restrictions. For example, the Australian content rules for new media contain strict limits.

The RTBU strongly rejects the failure of the proposed USFTA to include 'public utilities and public transport' in Annex II, for the reasons set out above.

New services or areas not specifically named in the Agreement are automatically covered by the terms of the agreement. Again this restricts the right of future governments to respond to new developments.

Specific policy impacts on services and investment are examined below.

Specific Policy Areas of Concern

1. Pharmaceutical policy and regulation

The Pharmaceutical Benefits Scheme (PBS)

The US negotiators and pharmaceutical lobby groups clearly identified the price control mechanism of the PBS as a target from the outset of the negotiations and throughout the negotiation process. In the US, the wholesale prices of common prescription medicines are three to ten times the prices paid in Australia (The Australia Institute (2003) 'Trading in our Health System?' Canberra www.tai.org.au). US pharmaceutical companies have argued consistently that Australia's price control system through the PBS is an unfair barrier to trade. They have been successful in achieving changes to the PBS process in the USFTA. The Australian government's assurances that the USFTA 'does not impair Australia's ability to deliver fundamental policy objectives in health care and does not change the fundamental architecture of the PBS' are unconvincing (DFAT 2004 RIS p 3).

The changes set out in the side letter on pharmaceuticals give pharmaceutical companies more opportunities to influence the Pharmaceutical Benefits Advisory Committee before its decisions, and provide for an independent review of decisions not to list certain drugs on the PBS. The decisions of the committee to list new drugs are made on both health and value-for-money grounds. The value-for-money decisions are based on comparisons with cheaper generic drugs. Review of decisions could therefore result in more highly priced drugs being listed. Australia is also required to provide companies an opportunity to apply for price adjustments after drugs have been listed.

The changes will alter the PBS in several important ways. Firstly, the procedural changes prioritise the commercial interests of US pharmaceutical manufacturers above the social policy objective of providing affordable access to medicines to all Australians. Locking these changes into the framework of a trade treaty limits the ability of future governments to regulate the PBS with the public policy objective of providing accessible drugs at the forefront. The operation of the PBS involves balancing a number of important objectives, which include rewarding innovation for new and useful drugs, as well as ensuring that Australians have affordable access to important medicines. The

USFTA selects only one of these objectives, to the benefit of pharmaceutical companies, and enshrines it within a trade treaty, without granting the public policy objectives the same status. The objective of maintaining drug affordability is not mentioned within the side letter at all. This is a dangerous direction in which to take Australian social policy and should be rejected.

The importance of having policy flexibility in this area has been recognised within the US Congress itself. In October 2003, a bipartisan group of US Congress members wrote to the US President urging him to quarantine pharmaceuticals from the USFTA altogether, because including them would place a dangerous restriction on public health policy-making. These Congress members recognised that changing Australia's PBS would not only impact on Australia's health policy but on the ability of future US governments to introduce changes in the US to make drugs more affordable (Walker, T 'Support from US to leave drugs out of trade talks', *Australian Financial Review* 23 October 2003).

The detail of the changes has still to be developed, and the US has signalled its intention to be involved in this process. US Senator Jon Kyl is quoted as stating that the USFTA is 'only the beginning of negotiations over Australia's pharmaceutical system' and that 'there is much more work that needs to be done in further discussions with the Australians' in relation to pharmaceuticals (Garnaut, J (2004) 'Drug costs will rise with deal: US official', *Sydney Morning Herald* 11 March 2004).

A second important implication is the likelihood of the changes resulting in cost increases for the PBS. US Trade Representative Robert Zoellick himself has stated that the USFTA changes to the PBS will change the prices of pharmaceuticals in Australia (Garnaut, J (2004) 'Drug costs will rise with deal: US official', *Sydney Morning Herald* 11 March 2004). There seems little doubt that drug companies will use their great resources to argue for higher priced drugs to be listed, and for price rises after drugs are listed, through the new procedures that Australia must adopt. Professor David Henry of Newcastle University has predicted that the review process 'pushes towards higher, not lower, prices' (ABC Radio National *PM*, March 4, 2004).

A cost blowout for the PBS would destroy its capacity to make essential medicines accessible at affordable prices, which is the fundamental purpose of the scheme. These changes will most severely affect marginalised groups in Australia, particularly indigenous people, the disabled, pensioners and poor families with children. These changes must be rejected.

Medicines working group

A related change in the USFTA is the setting up of a joint medicines working group based on the same commercial principles which contribute to the high cost of medicines in the US (Annex 2c). These

principles include the 'need to recognise the value' of 'innovative pharmaceutical products' through strict intellectual property rights protection. Again, the principles do **not** include the Australian public health goal of affordable access to medicines for all, which is completely unbalanced. The inclusion of this committee in the USFTA ensures that the US government can influence future policy and challenge it on trade grounds.

It is important for Australia to be able to maintain an independent position on the development of health policy, and not be required to our base policy on the trade interests of another country. Such matters should not be included in a trade treaty.

Supply of Blood Services and Products

The USFTA imposes restrictions on future policy making and regulation of blood fractionation supply services. In March 2001, the Report to the Commonwealth Minister for Health and Aged Care by a committee chaired by the Rt Hon Sir Ninian Stephen recommended that Australia's blood products continue to be supplied by a central entity, CSL, for national security and health reasons, to ensure that there was continued national capacity to supply these products. This report followed a lengthy inquiry, including submissions and hearings (www.nba.gov.au/pdf/report.pdf). However the USFTA now imposes requirements on future Australian governments which are directly contrary to the findings of the Stephen report.

The USFTA requires contracts with a central government entity for blood fractionation services to conclude no later than 31 December 2009 or earlier. It not only requires a future government to review these services, but dictates the policy position that this future government must take. Under the USFTA a future government 'will recommend to Australia's States and Territories that future arrangements for the supply of such services be done through tender processes consistent with Chapter 15 (government procurement)'. It is unacceptable for a trade agreement to dictate the health policies of a future government, and more so when it requires a future government to act contrary to the findings of the 2001 inquiry.

Further, the USFTA imposes a trade test even on the safety and quality requirements that Australia may place on suppliers of blood plasma products or fractionation services. These requirements 'shall not be prepared, adopted or applied with a view to **or with the effect of** creating unnecessary obstacles to trade'. This trade criteria will now apply to displace other legitimate policy grounds when regulation of blood products is being developed. As discussed above, by inserting such a commitment into a trade treaty it becomes subject to the dispute settlement provisions, which means any regulation in the future in this area can be challenged for 'having the effect of creating an unnecessary obstacle to trade'. Such a question would be decided by trade experts, not by experts in the safety of blood products, or in

public health policy. This is an unacceptable restriction on Australia's ability to determine policy in critical areas.

Changes to Patent Laws could delay access to cheaper medicines

The USFTA contains changes to patent laws that could delay access to cheaper generic medicines. These include extensions of patent periods in some circumstances, and changes which make it easier for drug companies to raise legal objections and delay the production of generic drugs. (Article 17.10).

In the US, drug companies have used such legal tactics aggressively. Since the PBS price control system relies on comparisons with cheaper generic drugs, delays in the production of generic drugs will contribute to price rises. This change to patent laws is actually trade restrictive. In any case, because it impinges on Australia's PBS, it should be rejected.

2. Extension of copyright means higher costs for libraries and education bodies

The USFTA extends the period for which copyright payments must be made from 50 years after the death of the author to 70 years, in line with US law (article 17.4). This will be costly for libraries and educational bodies, as Australia has adopted the US copyright standard without the US' more generous rules for copying for research and education purposes.

Copyright law is supposed to provide a balance between fair rewards for authors and excessive protection which raises prices. The Australian Intellectual Property and Competition Review Committee recommended that copyright not be extended without a public inquiry. The USFTA denies us this public debate (Henry Ergas 'Patent Protection an FTA complication', *Australian Financial Review*, 24 February 2004, p. 63). This change to copyright law should be rejected.

3. Restrictions on Regulation of Investment and Services

The USFTA is a 'negative list' agreement for two key areas, investment and services. All of Australia's laws and policies on investment and services at all levels of government are affected by the agreement unless they are listed as reservations. There are two annexes which list reservations:

Annex I 'Stand-still': this is a list of areas where laws that do not conform to the USFTA will be allowed to remain. However, these laws are 'bound' at current levels, like tariffs, and cannot be changed, except to make them less regulatory. New regulation can be challenged by the US government on the grounds it is trade restrictive or too burdensome for business. This is a significant restriction on democracy.

Annex II 'Carve-out': lists reserved areas for which governments can make new laws without restrictions. However, some of these are limited. For example, health, education and welfare services are listed, but only to the extent that they are 'established or maintained for a public purpose'

New services or areas of investment are automatically subject to the agreement, and cannot be reserved by future governments. This restricts the ability of governments to respond to new developments.

Investment

US investment in Australia must be given 'national treatment', meaning it must be treated in the same way as local investment (Article 11.3). US investors cannot be required to use local products, transfer technology or contribute to exports (Article 11.9).

Existing limits on foreign investment are retained for newspapers and broadcasting, Telstra, Qantas, Commonwealth Serum Laboratories, urban leased airports and coastal shipping. However, these limits are subject to 'standstill' and cannot be increased. The Foreign Investment Review Board (FIRB) retains the power to review investments of over $50 million in these areas, and in military equipment, and security systems, the uranium and nuclear industries (Annex 1).

Regulation of foreign investment can only be increased for urban residential land, maritime transport, airports, media co-production, tobacco, alcohol and firearms (Annex 2).

However the threshold for FIRB review of all other investment in existing businesses has been lifted from $50 million to $800 million. US investment in new businesses in areas not listed as reservations will not be reviewed at all. The US government estimates that if these rules had applied over the last three years, nearly 90% of US investment in Australia would not have been reviewed (US Trade Representative, 'Summary of the US-Australia Free Trade Agreement', Trade Facts, p 1, 8 February 2004). The Australian government is also proposing to extend these changes to investors from other countries. This is a massive reduction in review powers.

Services: the USFTA and public services

'Services' is a very broad category and includes such important areas as health, education, water, postal, energy, public transport and environmental services. The USFTA applies to all levels of government – federal, state and local.

The text states that the services chapter does not apply to public services (Article 10.1). These are defined as services **not** supplied 'on a commercial basis, nor in competition with one or more service suppliers'. This is the same flawed definition that has been used in

other agreements, such as the WTO Services Agreement (GATS). In Australia many public services are supplied on a commercial basis or in competition with other service suppliers, including health, education, water, energy and post. Such services could be covered by the agreement, unless they are listed as reservations.

Queensland Rail and RailCorp in NSW are corporatised. TransAdelaide tenders for its urban public transport services every five years, using a purchaser-provider model. The RTBU is very concerned that these providers of urban public transport services may be covered by the Services chapter because they are corporatised, and because they compete in a broad sense with private sector public transport providers in their cities. Are they "in" or "out"? The RTBU is strongly opposed to the idea that a free trade agreement could impinge on public transport policy.

Any trade agreement should clearly exclude public services, particularly essential services.

USFTA rules do not apply to subsidies or grants (Article 10.1), which does protect public funding of public services from being challenged.

Australia must treat US companies as if they were Australian companies (Article 10.2). Australia must also give full 'market access', which means no requirements to have joint ventures with local firms, no limits on the number of service providers, and no requirements on staffing numbers for particular services (Article 10.4).

Australia's qualifications, licensing and technical standards for services cannot be 'more burdensome than necessary to ensure the quality of the service' (Article 10.7). Regulations could be challenged by the US government on these grounds.

These obligations apply to all services unless they have been specifically reserved.

Services reservations

Annex I - 'Stand-still': Existing laws and polices of state and local governments are listed as reservations but are 'bound' at current levels, cannot be made more regulatory, and are subject to the 'ratchet' effect if they are reduced, which means they cannot be restored to previous levels.

Annex II – 'Carve-out': Social welfare, public education, public training, health and child-care are reserved, but only 'to the extent that they are established or maintained for a public purpose', which is not defined. If the US challenged a childcare regulation, for example, it is unclear what Australia would have to do to prove that the childcare services were 'established or maintained for a public purpose'.

It is important to note that this list of reservations leaves out two areas that were included in a similar list of reservations in the Australia-Singapore Free Trade Agreement, public utilities and public transport.

The failure to reserve public utilities (water and energy services) and public transport means that future governments will not have unrestricted rights to make new law or policy in these areas, and that any such regulation could be challenged by the US government. This failure to clearly reserve public services and essential services in the USFTA should be rejected.

Water services

Water has not been excluded through any reservations, so any Commonwealth regulation of water services will have to comply with the USFTA. State and local government water services regulation are permitted at 'standstill', but if they are changed the US could challenge them. The agreement assumes that public water services will be protected, but many water services are already delivered on a commercial basis, so the protection is highly doubtful.

There may be circumstances in which governments believe that it is in the public interest to limit foreign ownership or management of water resources. For example, in the current discussion of the establishment of markets in water rights for the Murray-Darling Basin, it may be thought appropriate to give some priority to local landholders, or to place some limits on foreign investment in water rights. Because water services have not been reserved from the USFTA such regulation would be inconsistent with the agreement and could be challenged by the US government on the grounds that it did not give 'national treatment' to US investors. This failure of the proposed USFTA to carve-out water services must be rejected.

Telstra Privatisation Side Letter

This letter outlines the government's policy to sell the rest of Telstra. The US insisted on this letter. This issue is still being debated by the Australian parliament as a matter of public policy, and should not be part of a trade agreement. This side letter to the proposed USFTA must be rejected.

4. Australian content in film, television and music

The government claims that the USFTA protects Australian content and culture. In reality, there are strict limits on future governments' ability to ensure that Australian voices continue to be heard.

Under Annex I, Australia's existing local content quotas are 'bound', and if they are reduced in the future they cannot later be restored to existing levels. Under Annex II, future Australian governments are severely limited in the laws they can introduce for new media

For multi-channelled free-to-air commercial TV, Australian content is capped at 55% on no more than 2 channels, or 20% of the total number of channels made available by a broadcaster, up to only three channels. **For free-to-air commercial radio broadcasting,** Australian content is capped at 25%. The expenditure requirement on Australian content for **subscription television** is limited to 10% (which can rise to 20% for drama channels, but again, only on conditions which allow the US to challenge).

There are more restrictions on **interactive audio and/or video services,** since the Australian government must first prove that Australian content is not readily available. Any rules must be applied transparently and be no more trade restrictive than necessary, and can be challenged by the US. These restrictions severely limit the capacity of future governments to respond to new circumstances and new forms of media.

Public broadcasting

Because public broadcasting is not listed in either of the Annexes, it is not excluded from the agreement. The funding of public broadcasting is protected by the general exclusion of subsidies and grants (Article 10.1). However the regulation of public broadcasting could be affected by the agreement because the definition of public services excludes services provided on a commercial basis or in competition with other service providers. SBS advertising or ABC product marketing may not be excluded by this definition. This ambiguity may mean that the US could challenge some regulation of public broadcasting, claiming it is inconsistent with the USFTA.

5. Quarantine, GE labelling and the Environment

New processes have been established under the USFTA which will give the US government and US companies direct input into Australian laws and policies on quarantine and technical standards, including labelling of GE food.

(a) Quarantine

Two new committees have been established with representatives from both sides. The first, called the Committee on Sanitary and Phytosanitary Matters, deals with quarantine policy and processes. However, one of its objectives is 'to facilitate trade' between Australia and the US. Its functions include 'resolving through mutual consent' matters that may arise between the Parties (Article 7.4). The second committee is a technical working group, which is also established with the objective of facilitating trade (Annex 7-A, para 1).

Australia's quarantine regulations should be made on a scientific basis in the interests of Australia, not as part of a trade dialogue with a much more powerful country. The promotion of trade and the quarantine

protection of Australia's environment, crops and livestock are separate roles which should not be combined. These two new committees created by the proposed USFTA should be rejected.

(b) Genetically Engineered food labelling laws and crop regulation

The US does not have labelling of GE food, has challenged EU labelling laws through the WTO, and identified Australian labelling laws as a 'barrier to trade'. The USFTA requires Australia and the US to give 'positive consideration' to accepting the other party's technical regulations as equivalent to their own, and to give reasons if they do not (Article 8.5).

Australia must give US representatives the same rights as Australians to participate in the development of Australia's standards and technical regulations. The USFTA even states that the Australian government will recommend that Australian non-governmental bodies should also let US government representatives have the same rights as Australian citizens to participate in Australian NGO processes for developing standards for Australia (Article 8.7).

These changes to processes and procedures for regulation of quarantine and GE regulation give the US a formal role in Australia's policy. It ensures that trade obligations to the US will be high on the list of priorities when regulations are being made. This change proposed in the USFTA must be rejected.

(c) Environment

There is a general clause stating that Australia and the US will be able to make laws that are necessary to protect human, animal or plant life or health. However, these laws must not be a 'disguised restriction on trade in services' (Article 22.1 incorporating GATS Article XIV).

Both Australia and the US have committed to encouraging the development of 'flexible, voluntary and market-based mechanisms' for environmental protection (Article 19.4). Since much environmental regulation is not and cannot be voluntary or market based, this is an extraordinary statement to have in a trade agreement. Fortunately the statement cannot be enforced through the disputes process, which only applies to environment laws if a government fails to enforce its own laws (Article 19.7.5). Article 19.4 should be rejected.

6. Tariff cuts and Manufacturing Jobs

Australia's remaining significant tariffs are on textiles, clothing and footwear (15-25%) and on motor vehicles and parts (5-15%). Both of these industries employ thousands of workers of non-English speaking background in regional areas of high unemployment. Tariffs on motor vehicle parts will fall from 15% to zero when the USFTA comes into

force, which will mean immediate job losses. Tariffs on assembled motor vehicles will be phased out by 2010 and on clothing by 2015 (Annex 2b).

The Australian Productivity Commission reports that 78,000 people work in the textile, clothing and footwear industry. Most of these workers are women of non-English speaking background. The car industry employs almost 54,000 people, mostly men over 35, of whom 26% are of non-English speaking background. Both industries provides significant employment in regional areas where there is little alternative employment, including Northern Adelaide, Mt Gambier, Bordertown, Geelong, Albury, Ballarat, Burnie, Devonport, Launceston, Wollongong, Taree, Ipswich and Toowoomba (Productivity Commission reports on the Auto Industry, 2002 and the Textile Clothing and Footwear Industry, 2003, www.pc.gov.au).

Regional studies are required to assess the employment impacts of these tariff changes in the proposed USFTA. These studies should have been undertaken before these changes were agreed. Because of the likely job losses, these tariff cuts in the proposed USFTA must be rejected.

7. Government Procurement

There are some government purchasing schemes which give preference to local products or require foreign contractors to form links with local firms to support local employment. These will not be permitted under the USFTA. This is an unreasonable restriction on the right of governments to have local and regional development policies. At the time of writing, state governments were still considering whether to agree to be included in the government procurement chapter of the agreement, and only about half of US state governments had agreed to be included in the agreement. This section of the proposed FTA is also likely to produce net job losses in Australian manufacturing, because the current trading relations between the two countries produce a large trade deficit for Australia, particularly in elaborately transformed manufactures.

National Impact Analysis and Regulatory Impact Statement

The National Interest Analysis (NIA) and Regulatory Impact Statement (RIS) on the USFTA supplied to the Senate Select Committee are at best incomplete, and at worst misleading.

In general, they omit some significant disadvantages of the agreement. For example they do not state that that access to the US sugar market is totally excluded. They also omit many details in the agreement about review processes and joint US- Australian committees in the areas of medicines and public health, quarantine, and technical standards including food labelling. These processes which give the US government direct input into Australian policy in all these areas should have been carefully examined for their impacts on Australian policy. The statements also claim that there is no current investor-state complaints process, but fail to mention that the agreement has provision for a future investor-state complaints process if it is requested by a corporation. The statements fail to give details of the government-to-government disputes process, which could have a significant effect on the ability of governments to regulate.

These serious omissions mean that the statements are not a credible evaluation of the national interest or regulatory impacts.

The National Impact Analysis (NIA)

NIA p3 point 8, para 1: the summary on agriculture does not mention the exclusion of sugar, nor the long lead times of up to 18 years for access on beef and dairy products. These are significant areas where the agreement falls far short of market access for major agricultural products.

The summary claims that quarantine and food safety regimes have been preserved. The summary fails to mention that the agreement established two new joint US-Australian committees. The first, called the Committee on Sanitary and Phytosanitary Matters, deals with quarantine policy and processes. However, one of its objectives is 'to facilitate trade' between Australia and the US by 'resolving through mutual consent' matters that may arise (Article 7.4). The second committee is a technical working group, which is also established with the objective of facilitating trade (Annex 7-A, para 1).

The summary also claims that food labelling standards are protected. The summary fails to mention that US does not have labelling of GE food, has challenged EU labelling laws through the WTO and identified Australian labelling laws as a barrier to trade. The USFTA requires Australia and the US to give 'positive consideration' to accepting the other party's technical regulations in areas like food labelling as equivalent to their own, and to give reasons if they do not (Article 8.5).

Australia must give US representatives the same rights as Australians to participate in the development of Australia's standards and technical regulations. (Article 8.7).

p4 point 8 para 6: the summary on investment states conclusively that there is no investor-state complaints process, but fails to mention Article 11.16.1 which states that if there is a change in circumstances, an investor can request that such a process be established. The other government is then obliged to 'promptly enter consultations with a view towards allowing such a claim and establishing such procedures'.

p4 point 8 para 10: states that the agreement does not change the 'fundamental architecture' of the PBS. It fails to mention changes which increase that ability of drug companies to influence decisions of the PBAC about which drugs are listed for subsidy under the PBS and to seek price rises after drugs are listed (Side Letter on Pharmaceuticals).

It also fails to mention that the agreement sets up a joint medicines working group based on the same commercial principles which contribute to the high cost of medicines in the US (Annex 2c). These principles include the 'need to recognise the value' of 'innovative pharmaceutical products' through strict intellectual property rights protection. The principles do **not** include the Australian public health goal of affordable access to medicines for all. This is completely unbalanced. The inclusion of this committee in the USFTA ensures that the US government can influence future policy and challenge it through the government to government disputes process.

p4, point 8, para 10: The summary of Australian content in new media claims that Australia retains the power to regulate new media but fails to mention that the power to regulate for local content in new media is strictly limited. **For multi-channelled free-to-air commercial TV** Australian content is capped at 55% on no more than 2 channels, or 20% of the total number of channels made available by a broadcaster, up to only three channels. **For free-to-air commercial radio broadcasting** Australian content is capped at 25%. The expenditure requirement on Australian content for **subscription television** is limited to 10% (which can rise to 20% for drama channels, but, only on conditions which allow the US to challenge). There are more restrictions on **interactive audio and/or video services,** since the Australian government must first prove that Australian content is not readily available. Any rules must be applied transparently and be no more trade restrictive than necessary, and can be challenged by the

US. These restrictions severely limit the capacity of future governments to respond to new circumstances and new forms of media (Annex 2 reservations).

The Regulatory Impact Statement (RIS)

p1-2: the 'Objectives' sections again claim that there are no impacts on affordable medicines under the PBS or Australian content in new media. See above for what is omitted and why this is misleading.

p2: the Options section is presumably intended to present alternative policy options but it does not. Instead it simply repeats the summary of issues in the NIA, with all of the omissions outlined above.

Conclusion

Many trade economists question whether the USFTA will result in benefits to the Australian economy, as there are already few trade barriers, access to US agricultural markets is limited and a preferential agreement may divert trade from other trading partners. In any case, the price paid would be too high. The Australian economy is only 4% of the size of the US economy, so economic integration means that Australia is likely to adopt US models of regulation, rather than vice versa. Despite assurances, the USFTA weakens Australian price controls on medicines and limits the regulation of Australian content in new forms of media. It adopts US copyright laws, which will cost consumers more. It sets up joint US-Australian committees to review policies on medicines, quarantine and food labelling. It treats social regulation of essential services as if they were tariffs, 'bound' or frozen at current levels and subject to challenge if increased. Such challenges would be judged under the rules of trade law, without regard to the social impacts. It restricts governments' rights to use purchasing to support local development. In short, the USFTA removes many options for policies to safeguard the public interest without democratic debate or decision.

Recommendation

The Committee should recommend that this agreement not be endorsed by Cabinet and not come into force, as it is contrary to the national interest.