Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America

Dear Senators,

I suggest that the proposed Free Trade Agreement between Australia and the United States of America is *not* in Australia's national interest.

I have had time to read only a few chapters of the draft text, and have come across several points that concern me (treated seriatim below), and the few positive points are mostly vague statements of intent. I have also heard much more of concern, but I have not related those issues here – I refer you instead to AFTINET's submission.

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The Preamble

The resolution of the two governments to improve the living standards of their people is good.

Article 16.4 (Non-discriminatory treatment of digital products)

I believe paragraph 1(b) would make it very difficult or impossible to introduce local content rules, if we decided that we wanted to do that. (Unless the exceptions in paragraphs 3 and 4 are sufficient – which I don't know.)

And paragraph 2 would prevent us supporting, say, a fledgling film industry in the Pacific Islands, by giving them some preferential treatment. We should leave options such as this open to a future Australian government.

Article 17.2 (Trademarks, including geographical indications)

I don't really know what a "geographical indication" is, but it sounds like, say, a flag, or the name 'Canberra' written in a particular style. I would think that geographical indications should normally **not** be eligible for copyright/patent/trademark protection.

Requiring, as a condition of registration, that trademarks be visually perceptible (paragraph 2), sounds to me like a perfectly sensible requirement. Why does the Agreement prevent this? (If it is merely to allow sounds and scents to be trademarkable – which in any case sounds a bit dubious to me – this is the wrong way to say it: think of digital pictures with electronic 'watermarks' in them.)

If I want to register a trademark for a conference in 2006, and I see no point in keeping the trademark thereafter, the Australian government will be prevented from giving me such a short trademark registration under paragraph 9. Huh?

Several paragraphs within article 17.2 seem too strongly weighted towards 'mark' owners.

Article 17.4 (Obligations pertaining to copyright)

Where a period of copyright is based on the author's lifetime, this Agreement requires that the copyright period extend to at least 70 years after the author's death (paragraph 4). Isn't the concept of copyright protection meant to be a compromise between public utility and an author's rights? In which case, doesn't the public utility far outweigh an author's rights once he or she is dead? Isn't 70 *hours* after the author's death a much more sensible compromise than 70 years after? (Personally, I reckon copyright protection for ten or twenty years, or until the earlier death of the author, would be an even better compromise.)

The restrictions in relation to “effective technological measures” are **FAR** too broad. According to the definition in subparagraph 7(b), the plastic wrapping around a CD case is an effective technological measure, and the shopkeeper who sees me struggling to open it with my arthritic hands, must not offer me a pair of scissors to help me do so. Or to take a slightly less extreme example, if I want to sell music stores a device to de-activate those metallic tags on CDs that ring an alarm if taken out of the store without being purchased first, I can't: that would be manufacturing a device to circumvent an effective technological measure.

And anti-virus vendors would have to move out of Australia, wouldn't they? (How do they operate now, in the U.S.?) If a computer virus includes some trivial effort to hide its internal workings, together with a comment that they are hidden to preserve copyright, wouldn't reverse engineering the virus be circumventing an effective technological measure?

Paragraph 7 – on effective technological measures – has so many details in it, that it is about as long as the whole of Chapter 20 – on transparency. Isn't there something a little unbalanced here?

Article 21.1 (Joint Committee)

Is paragraph 5 (confidential information) really a good idea? Isn't one of the principles of 'transparency and openness' (the very next sentence!) that information upon which a government decision is made, should be made public? (The same comment applies to several other references to confidential information.)

Paragraph 7 (review of environmental effects) is good, but it should say: “At its first meeting, **and at such other times as the Parties may agree**, ...”, to avoid the unfortunate possibility that this article is interpreted to mean that environmental effects may **only** be considered at the first meeting.

Article 21.2 (Scope of application)

Part (c) is preposterous! Just because one Party expected some benefit from the Agreement, is no reason for them to complain if they turned out to have expected too much. (What if the U.S. expects to increase profits on agricultural exports to Australia the next time we suffer a drought, but the Australian government provides drought relief which slightly reduces those expected profits. Do we have to pay a fine for that?) The requirement for reasonableness is not enough.

Article 23.4 (Entry into force and termination)

Paragraph 2 (termination of the Agreement) is a most important provision! :-)

Minor questions

Why are some terrirories excluded from Australia's “territory” (definition 1-A.2(a))?

What does “Each Party shall, at a minimum, give effect to this Chapter” (paragraph 17.1.1) mean? (Is there an option to ignore the other chapters?)

What does “in consultation with the other Party” mean in sub-paragraph 21.7.3(b)?

Interesting (paragraphs 21.7.4 and 21.7.5): Individuals on the initial contingent list established pursuant to paragraph 4 – drawn up before the Agreement comes into force – shall comply with the code of conduct to be established by the Joint Committee – presumably after the Agreement comes into force!

Why should a Party be able to prevent a panel seeking information from whomever it thinks fit? (paragraph 21.8.3)

Finally

I am concerned that the phrase “disguised restriction on trade” is used so often. Shouldn't it be replaced by a phrase which unambiguously does not apply to measures introduced for good, but non-trade, reasons?

Yours sincerely,

Andrew Lenart

30 April 2004