Enquiry of the Australian Senate Select Committee

into

The Free Trade Agreement Between Australia and the United States of America

Statement (to accompany Submission of 31 April 2004)

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* The views contained in this submission are those of the authors, and should not be taken as representing the views of either University. .

Opening Statement

We would like to point out that we are presenting our submission as experts in the politics of international economic relations and that we seek to offer a big picture perspective on the impacts of the changes required to our rules and institutions under this trade deal.

So, in addition to addressing four major areas of economic impact in the main body of our submission, we also set out in our concluding remarks our explanation of how the Australian government has ended up in this dire situation.

We are sure that you will read the report carefully. And so will just summarise our major findings now:

Our submission presents compelling evidence that the deal on the table will cause irreversible damage to Australia's short and long-term economic interests, ushering in a new era of economic serfdom under the adoption of US-inspired economic laws.

Under the agreement, we will trade our scientifically-based quarantine system for one based on a political calculus, already strongly foreshadowed in the disgracefully anti-Australian conduct of Biosecurity Australia. In other words, we will trade away our enviable status as one of the world's leading disease-free agricultural producers, a status upon which the future of our industry depends.

We will trade the right to independently decide which drugs deserve to be subsidised with Australian taxpayers money for a system based on the secret profit calculations of US pharmaceutical companies.

We will trade the right to repeal patents violating the basic precondition of 'fair basis' for an intellectual property system that violates internationally acceptable interpretations of 'innovation' and 'discovery'. (Fair basis ensures that patent monopolies are granted only in exchange for the adequate disclosure of new knowledge.)

We will trade our public procurement-linked industry development programs for access to a US market geared towards promoting US firms with the very types of development programs we will abolish.

We will accept insultingly miniscule market access gains for a narrow range of our most competitive agricultural exports in exchange for unfettered access to our own agricultural market for heavily subsidised US products.

We will trade all of these things in the deluded pursuit of a 'special' relationship with the world's superpower. Delusions about this relationship informed the misguided belief of Australian negotiators that the US would abandon its 'aggressive advocacy' of US business interests in this trade deal to further our 'special' friendship. They ended up with a deal that threatens to erode and ultimately destroy the very institutions that underpin Australia's economic competitiveness and social wellbeing.

Our full submission is available on the website www.australianinterest.com

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Submission

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Preamble

We welcome the opportunity to testify before this Senate Committee. We are making this Submission because we are shocked at the way public debate on the Free Trade Agreement has been stifled and curtailed, and the way the potential costs and benefits of the Agreement have been systematically distorted. Our submission is based on the views we have presented on the website www.australianinterest.com.

Introduction

This Submission details our concerns relating to four specific areas of the proposed Free Trade Agreement with the United States:

(1) Changes impacting Quarantine (Sanitary and Phytosanitary Standards, or SPS)
(2) Changes impacting the Pharmaceutical Benefits Scheme (PBS)
(3) Changes impacting Government Procurement
(4) Changes impacting Intellectual Property Rights (IP)

We focus on the ways in which the deal's proposals run counter to the Australian interest, and the grounds upon which the deal must be rejected by the Senate.

However, as experts in the politics of international economic relations, we also seek to bring a 'big picture' perspective to this hearing. So, after addressing the four areas of economic impact identified above, we seek to explain how the Australian government came to negotiate our country into this glaringly lopsided, nationally detrimental agreement.

We argue that the Australian government's deluded sense of the 'special' nature of its relationship with the world's superpower saw it enter into negotiations under a misguided assumption: that the United States would modify its publicly proclaimed approach to international trade negotiations (i.e., its 'aggressive advocacy' of US business interests in overseas markets) in order to further the 'special friendship' that our countries are believed to enjoy.

Evidence presented herein points to the fact that:
(1) The government originally sought a comprehensive, far reaching deal with the US, including tariff reductions in key sectors in which Australia is most competitive (including beef, dairy, and horticulture)
(2) The government's negotiating team, led by Minister Mark Vaile, believed that such a deal would be possible due to our 'special' relationship with the US, and urged Australian business leaders both at home and in the US to support the negotiations on that basis.
(3) That this assumption was misguided and, as many Australian industry representatives predicted, our negotiators achieved negligible concessions for Australian exporters in areas in which we are most competitive. Most damaging however, they accepted far reaching changes that now threaten to erode and ultimately destroy the very institutions which underpin Australia's economic competitiveness and social wellbeing.

(1) Changes impacting Quarantine

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Proposed change:
The establishment of:

(a) an Australia-US Standing Committee on Sanitary and Phytosanitary Matters
(b) an Australia-US Standing Technical Working Group on Animal and Plant Health Matters

Rationale:
To provide forums for the resolution of trade-related quarantine disputes between Australia and the US. The assumption is that Australia (according to claims made by US government and US industry) uses its stringent quarantine laws as a barrier to trade.

Grounds for rejection:
Australia's scientifically-based quarantine decision-making processes are the linchpin of our enviable status as one of the world's leading disease-free agricultural producers. As international trade in agriculture becomes increasingly competitive, our disease free status will be our greatest competitive advantage -- the jewel in the crown of our agricultural industry. As such, our outstanding disease-free status must be guarded at all costs. ***Basing quarantine decisions on anything but the most stringent of scientific evidence runs counter to Australia's short and long-term economic interests.***

US market access pressures have no role to play in Australia's scientifically-based quarantine decision-making processes. However, ***it is a fact that US agricultural producers intend to use the proposed Committee on Sanitary and Phytosanitary Matters and the Working Group on Animal and Plant Health Matters to pursue the reduction and elimination of Australia's scientifically-based Sanitary and Phytosanitary standards.***

This intention is clearly stated in the American Farm Bureau Federation's March 2004 report: 'Implications of an Australian Free Trade Agreement on [sic] U.S. Agriculture', which states that:

> The draft [FTA] provides for follow-up talks on sanitary and phytosanitary measures ... ***gains in United States exports*** of meats (particularly pork) and fruits and vegetables (including items such as citrus products, apples, and stone fruits***) depends on the success of these sanitary/phytosanitary talks*** ... . ***Assuming that progress is made in the sanitary/phytosanitary follow-up talks called for in the draft, United States exports of these commodities could expand $150-200 million over the intermediate and longer term.*** For example, United States exports of pork and poultry currently ... are subject to sanitary and phytosanitary regulations that keep the trade volume minimal. ***With progress in sanitary and phytosanitary talks and improved market access, United States exports of pork could reach $50 million, with poultry exports reaching $25 million*** ... ***With the elimination of tariffs and sanitary/phytosanitary restrictions on fresh and processed vegetables, fruits, and nuts, United States exports of $80 million over the 1999-2001 period could increase by 50%, or $40 million.*** (emphasis added).

Clearly, the forums established under the FTA are intended as the means to vigorously pursue the reduction and elimination of Australia's rigorous quarantine standards. Indeed, as evidenced in the AFBF statement above, US industry has already put dollar values on the gains it expects to reap from the reduction and eventual elimination of Australian quarantine standards!

If this seems shocking enough, it should come as no surprise. The much anticipated elimination of our enviable quarantine system is precisely the outcome that US agricultural lobbyists have publicly fought for since the FTA was first mooted. Indeed, this chapter of the agreement could well have been lifted directly from the statement of demands of the Californian Farm Bureau Federation (CFBF) to the US International Trade Commission:

> ...[Australia's] burdensome phytosanitary restrictions are currently limiting export opportunities [so in order to increase export volumes] The California Farm Bureau Federation requests that...in addition to the standard WTO-based SPS language that is normally included in a free trade agreement...any FTA with Australia establish a standing SPS committee that will meet at least twice a year, and that would be under the direction of the US Trade Representative's office and their Australian counterpart. ***While technical regulators and scientists would of course be active participants, a policy level committee would help ensure that the technical and policy priorities are consistent and compatible...***[1] [emphasis added]

At least the CFBF was generous enough to allow some scientific input into our quarantine policy deliberations!

Of course, the *US government* also intends that the bodies established under the agreement will provide a forum to 'address' Australia's quarantine 'barriers' in a range of key agricultural sectors. According to a February 8 USTR press release: ***Food inspection procedures that have posed barriers in the past will be addressed, benefiting sectors such as pork, citrus, apples and stone fruit***' (emphasis added).[2]

The fact that US government and industry propose to use the new forums to pressure Australia to reduce quarantine standards has not been lost on Australian agricultural producers. Indeed, representatives from many Australian industries have expressed grave concerns about the implications of politicizing our science-based system by including US trade representatives in quarantine-related discussions:

Horticulture (apples, stone fruit, bananas):
Jan Davis, Chief Executive of Queensland's Fruit and Vegetable Growers Association:

> When we're looking at the material that the US is putting out for their own constituency, the wording's very different to the stuff that we've seen coming out of the Australian Government and yes, there are things in there that start the alarm bells ringing ...The Americans are very keen to get their apples into Australia and our quarantine rules say no, because of the risk of importing a disease called fire blight. If,

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[1] http://www.cfbf.com/issuesxs/trade/us-aus-fta.aspx (10.3.2003)
[2] February 8, 2004, 'U.S. and Australia Complete Free Trade Agreement Trade Pact With Australia Will Expand U.S. Manufacturing Access to Key Pacific Rim Market' http://usembassy-australia.state.gov/hyper/2004/0209/epf104.htm

hypothetically, trade considerations became a consideration in quarantine discussion, we could find that we were outgunned.[3]

Pork:

Paul Higgins, Chief Executive of Pork Ltd. (Australia's pork industry body):

> The general mood of the trade environment has influenced the import risk assessment process".[4] .... The Americans seem to have one view, and the Australian view seems to be different... One has to be suspicious that if trade representatives are part of a working group to resolve issues on science, what are they doing there?[5]

Chicken:

Peter Barrter, Chairman of Barrter Enterprises (one of Australia's largest chicken meat processors).

> [Commenting on the likely outcome of the establishment of a joint quarantine working group]... I think the USA would just continue to badger; there's 50 per cent of the committee that would always be narking, "we should do away with the quarantine, it's not right, it's not world trade best practice", and a whole heap of other reasons; whereas I think it should be up to the Australians to make up their mind if importation is the right thing to do or not.[6]

The April 2004 Senate hearing into Biosecurity Australia's recommendation that Australia begin importing bananas from the Philippines -- a highly diseased source -- has raised extremely serious questions about the extent to which trade pressures have begun to undermine the scientific integrity of our quarantine system. ***This experience alone is a warning of the economic devastation that awaits us should we allow the politicisation of our quarantine system.***

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[3] AM - Thursday, 12 February, 2004 08:08:56, Reporter: Louise Willis

[4] Cited in 'No Side Deal Over Quarantine With US, Minister Maintains', John Garnaut And Louise Williams, 17 March 2004, The Sydney Morning Herald, 7

[5] AM - Thursday, 12 February , 2004 08:08:56, Reporter: Louise Wiilis

[6] This is a transcript from the ABC National Rural News that is broadcast daily to all states on ABC Regional Radio's Country Hour and in the city on ABC News Radio.

(2) Changes impacting the PBS

Proposed change:
Creation of a new review process to independently assess contested Pharmaceutical Benefits Advisory Committee (PBAC) listing decisions. The PBAC is the body that determines which drugs will be listed for subsidisation with Australian taxpayers' money.

Rationale:
To increase the transparency of the PBAC decision-making process.
The assumption is that due to a lack of transparency on the part of the PBAC:

(a) US drugs are not always judged by the PBAC on their therapeutic and cost-effectiveness merits; and
(b) that as a result, the Australian public is being disadvantaged by delays in the introduction of innovative, life-saving drugs at affordable prices.

It is argued that the creation of a new, independent review process of contested PBAC decisions will act as an incentive for the PBAC to become more transparent in its decision making processes, ensuring that Australian taxpayers funds are efficiently allocated to subsidising the most worthy (i.e. the most therapeutic and cost-effective) new drugs.

Grounds for rejection:
We have no objection to government using Australian taxpayers funds to subsidise the most therapeutic and cost-effective new drugs. In fact, the system in place already makes *Australia the second highest per capita prescriber of 'new' drugs in the world.* In other words, clinicians in Australia are already far more likely to prescribe medicines that have come on to the market in the past five years than their European or Canadian counterparts. This comprehensively undermines any claim that Australians are somehow being denied proper access to new drugs under the current system.[7]

Nor do we object to improving the transparency of the means by which new drugs are selected for listing on the PBS. Indeed, given the finite resources our government has at its disposal to perform this critical task, it is absolutely essential that PBAC decisions are transparent, i.e., based on a swift and objective appraisal of the therapeutic value and cost effectiveness of new drugs.

However, if increased transparency is the aim, the creation of a new review process angled towards pharmaceutical companies' appeals will do nothing to ensure that Australian taxpayer funds will be used to subsidise the most therapeutic and cost-effective new drugs. It is more likely to have the opposite effect.

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[7] Statistics on 'Market Share of New Medicines' in the major developed countries (2001), ranks Australia second highest in market share of new medicines (29.1%) after the USA (32%) and way ahead of the UK (16%) and Japan (14.8%). However while the US leads the world in the prescription of new drugs, Americans also pay far more for their drugs than citizens of any other country, with annual spending on medicines reaching 2.6% of GDP in 2002, more than double that of most other countries (The Association of the British Pharmaceutical Industry, www.abpi.org.uk/statistics/section.asp?sect=1.)

If increased ***transparency*** is the true aim of the proposed agreement, it needs to be based on ***reciprocity.*** We must therefore ensure transparency is built into the PBAC decision-making process from the very beginning, ***starting with the drug costing information*** provided to the PBAC by pharmaceutical companies. As we illustrate below, there is compelling evidence to show that the drug prices of US pharmaceutical companies – the most profitable industry in the country - are hugely inflated and bear little relation to the extent of their actual involvement in the high-risk phase of drug development.

The US argument for public subsidisation of expensive new drugs is that governments and consumers should 'share the burden' of the R&D outlays that pharma companies bear, lest the cost become a deterrent to drug innovation. This claim is greatly exaggerated because the most reliable evidence -- also well rehearsed in US Congressional hearings -- shows that US pharma prices typically reflect ***not*** the costs of innovation, but rather what the market will bear, and what is needed to market the product:

- Spending on R&D is dwarfed by spending on marketing and administration. The world's 15 largest drug companies (of which most are American) spent almost three times more on marketing and advertising (35.3% of revenue on average than on innovation, 12.9%), clearly demonstrating that the high cost of US drugs is due to efforts to sell the drug rather than to create it.
- US pharma companies already receive massive subsidisation of R&D costs from their own government. Between 1965-1992, 15 of the 21 most important drugs developed were based on knowledge and techniques of federally funded research. In most cases, the research had gone beyond concept stage to the molecule level, which means the most risk-intensive phase of R&D is borne by the public sector, the National Institutes of Health (NIH). Indeed, most of the R&D costs for seven of the bestselling drugs for cancer, AIDS, hypertension, depression, herpes and anaemia were funded by the NIH. Moreover, when the NIH in 1995 sought to include a 'reasonable pricing' clause in contractual agreements whereby a drug company agrees to market all drugs developed with tax-payer funded R&D at a reasonable price, the amendment was overturned as a result of pharma lobbying.
- Despite the massive subsidisation, Americans pay the highest prices in the world for their drugs; yet US drug companies *refuse to reveal* their true R&D costs and the basis of their product costing policies. *When the investigative arm of the US congress (the General Accounting Office) sought to force pharma companies to reveal estimates of their research, development, marketing and distribution costs for individual products, US drug companies fought the GAO all the way to the Supreme Court, where GAO's request was finally rejected.*
- ***As such, we currently rely simply on the word of pharma companies that the costings of their medicines are a true reflection of R&D costs.***

Therefore, if increased transparency in PBS listing decisions is the aim of the proposed agreement, ***a mutual obligation*** must be placed on US pharmaceutical companies to provide transparent costing information upon which the PBAC can base their listing decisions.

As a fundamental precondition for accepting any review process that targets PBAC decisions, our government must demand greater transparency in the costing information provided by US pharmaceutical companies to the PBAC in the first place. The government must make every possible effort to ensure that Australian taxpayers are subsidising real, not fictitious costs of innovation.

If transparency is the true aim of the deal, there is no point in targeting only one part (particularly the very end part!) of the decision making process. Rather, for transparency to be meaningful, it must be built in from the very beginning of the process.

If our government agrees to reforms that allow American drug companies to officially question Australian decisions about which US drugs qualify for Australian taxpayer subsidies, but do not compel drug companies to provide transparent costing information to the PBAC in the first place, then Australians will have every reason to doubt the true aim of the proposed changes.

For example, many Australians already suspect that, should the proposed changes be introduced as they stand, reviews conflicting with PBAC recommendations would simply offer US drug companies – through their formidable PR arsenal - greater scope to attack and unsettle the PBS decision-making process. Recall that US drug companies spend at least twice as much on marketing and public relations as they do on R&D (a key reason for the aforementioned inflated pricing of their drugs). Australians have therefore reason to anticipate that US pharma companies will use the review process to crank up their massive PR machine -- using it to sway Australians' opinions about which 'innovative' new US products 'deserve' to be listed on the PBS.

In order to both prove and ensure that improved transparency in PBAC decisions is the outcome being sought by the deal, the Australian government must insist on a mutual transparency obligation on the part of US pharma companies.

(3) Changes impacting Government Procurement

Proposed Change:
To open Australia's government procurement markets to US bidders without conditions – in other words, to outlaw 'industry development programs' (offset requirements) related to government purchasing policy.

Rationale:
By agreeing to open our procurement markets to US bidders, without conditions, we will gain 'national treatment' access to the US government procurement market, resulting in a massive increase in Australian exports to the USA. To cite the Australian Treasurer's rationale for this change: We are getting access to more people (300 million) than the US is gaining access to in return (20 million).

> *'The bigger benefits are going to go to the people who are getting access to the larger market. This is why it's in Australia's interest.'* (Peter Costello)

While at face value, this might sound impressive, closer scrutiny exposes the fundamental flaws.

Grounds for rejection:

(1) First, if the Treasurer's logic were sound, why would Australia have a chronically huge trade deficit with the US (currently c.$9 billion)? The related flaw in the 'bigger market equals more benefits for Australia' logic is that by the same reasoning, in a country of 300 million, Australian firms will find themselves up against proportionately many more US businesses (not to mention other foreign competitors). Moreover, in our own procurement markets, US companies will far outnumber Australian bidders for public contracts.

(2) Similarly, the claim that market access will necessarily translate into increased exports is specious. Australia will merely have the right to compete with other countries and US companies for US government contracts. This simply brings us to a position we would have had if we had signed the WTO's Government Procurement Agreement (GPA) -- which we have so far declined to do for the important reasons detailed below. However, the right to *bid* for contracts is unlikely to improve our ability to compete alongside US firms on their home turf. US companies are famously aggressive in tendering for government procurement contracts both at home and abroad, often undercutting competitors' prices with handsome sweeteners from their own government. So the claim that market access will translate into net gains for Australian firms is premised on faith, not substance.

(3) While more US firms will gain unconditional access to our market, our firms will be faced with increasing hurdles, in the light not only of new US legislation to render waivers of the Buy America Act illegal, but also of the resurgent emphasis on the 'national security' clause, which is being invoked ever more frequently to overturn tenders awarded to foreign companies. Just two examples of foreign tenders recently overturned include a British company which had its contract to supply 10 million berets to the armed forces cancelled because the berets would not be produced in the US, and a German company producing hand guns for use in commercial cockpits.

(4) The fact that the US government frequently assists its firms to win overseas procurement contracts (offering financial subsidies to undercut competitors' prices) means American firms are highly likely to be advantaged over Australian firms in our own procurement market. Australian firms will be up against a famously aggressive US business culture, sponsored by Federal agencies such as the Advocacy Center of the Department of Commerce, which is committed to what the US government proudly calls 'aggressive advocacy' -- promoting US corporations in overseas markets and winning public procurement contracts, often with special incentives thrown in.[8]

(5) The Agreement requires the adoption of onerous new procedures for tenders, designed to allow new grounds for appeal. So, when an American firm fails to win an Australian contract, it will have the right to appeal through the Australian legal system and the courts will have the power to intervene in public procurement decisions and to overturn them. It is worth noting that we have spent years streamlining public procurement procedures in order to deliver 'best value for money' to the Commonwealth 'through open and effective competition'.[9] This will now be overturned.

(6) Under the agreement, Australia will receive a waiver from 'Buy American' legislation which links public purchasing to local industry promotion. However, under new legislative initiatives, the scope for waivers will be dramatically reduced. The aim of the 'Buy American Improvement Act of 2004', introduced into US congress on January 29, is to increase the power of the US government to side step waivers of the Buy American rules. Congressman Sherrod Brown who introduced the bill justified it in the following language:

> The Buy-American Act of 1933 (BAA) is based on the common-sense notion that the federal government's support for domestic manufacturing should begin with federal procurement policy. The BAA requires federal agencies to buy American-made goods, but it gives federal bureaucrats broad authority to waive these requirements. Abuse of BAA waivers has undermined the law's objective of requiring the government to support American manufacturers with its dollars, not just its rhetoric ... The Buy-American Improvement Act (BAIA) reforms the BAA's waiver authority to restore the law's focus on promoting government procurement of American-made products.[10]

In stark contrast, the deal on the table requires our government to abandon industry development programs, which currently deploy Australian tax revenue to maximise business and employment opportunities for Australians and to upgrade skills and

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[8] For example, a press release of the US Office of Public Affairs entitled 'First 100 Days of the Bush Administration International Trade Highlights: Commerce Department' of Friday, April 27, 2001 noted triumphantly: 'Highlighting the Bush Administration's commitment to aggressive advocacy, both Secretary Evans and Secretary of State Colin Powell wrote the first joint Commerce-State advocacy letter of this administration to Cyprus President Glafcos Clerides regarding an aircraft procurement by Cyprus Airways. Cyprus Airways announced shortly thereafter that it had selected a combination of Boeing (Seattle, Wash.) and Airbus aircraft for the carrier's long-planned fleet renewal. Since the January inauguration of President Bush, the Advocacy Center has recorded five advocacy "successes" (i.e., contracts signed) for U.S. companies. The total value of the five projects/procurements is estimated at $185 million, including $60 million in U.S. export content.' http://www.ita.doc.gov/media/PressReleases/100day_42701.htm

[9] Corrs Chambers Westgarth Lawyers, *Government Procurement Brief*, March 2004.

[10] http://www.house.gov/sherrodbrown/buyamerican13004.html

technology. Such programs would have required American firms winning Australian procurement contracts, for example, to employ a certain number of Australians, or to transfer technology, or to source a percentage of their inputs locally. This is why we are yet to sign on to the WTO GPA -- precisely for the reason that we have recognised (until now) the importance of using government purchasing power to encourage domestic innovation and local industry development in this country. As is well documented, this is exactly what the US has done with its own civilian and military procurement programs -- using the power of public purchasing to foster innovation among fledgling companies that have now become its major suppliers – from Boeing to Microsoft.

In sum, the Senate must ask:

- ***how Australian companies will benefit by entering a market geared to promoting US industry development, and indeed to strengthening that outcome under new legislative initiatives;***
- ***why the Australian government has agreed to abolish <u>its</u> industry development programs at the very time when the US is moving to strengthen its own;.***
- ***and, more generally, if it is such a good thing for Australians to have US competition in our government procurement markets, then why not simply join the WTO's GPA and be done with it?***

(4) Changes impacting Intellectual Property Rights

The key question that the Senate must ask in relation to IP is: How does the proposed bilateral agreement with the US differ from the WTO TRIPS Agreement, to which both Australia and the USA are already signatories, and what do these differences mean for Australia?

The TRIPS agreement is a state of the art, eight-year young, internationally ratified IP Agreement. Why does the government believe it is necessary to sign up Australia to an additional, bilateral IP agreement with the US?

We concentrate here on the significance for Australia of four of the smallest, but perhaps most important differences between the proposed bilateral agreement with the US and the TRIPS Agreement. The first two points relate to Patents, and the second two to Copyright.

A. Patents

Proposal 1: to alter the criteria for determining the applicability of patents (Article 17.9.1). This is a virtual replication of TRIPS Article 27.1, but with one important omission, i.e. the TRIPS requirement that 'Patents shall not discriminate either in respect of locality or fields of technology'. This means that one has to apply the same criteria ('invention', 'new', 'inventive', 'capable of industrial application') to ***every*** patent application, regardless of field of technology.

So why is this requirement omitted in our FTA? We suggest that it is omitted because of biotechnology – specifically because of the unresolved issue over whether a gene is an *invention* or a *discovery*, and thus whether genes are patentable.

Grounds for Rejection:
On this issue, no judicial decision has ever been reached in Australian courts or in the Supreme Court of the USA. No isolated gene or gene sequence has ever been legally declared patentable subject matter. But with the provision as it stands in our FTA, ***applicants will be able to secure patent rights that are not currently deemed legitimate*** either under TRIPS or in any other trade agreement – or indeed in the US itself!

By modifying our patent laws in this way, we are ignoring some of the most important subtleties that apply – with good reason -- to the biotechnology sector. The impact of this change will be to destroy our effective and efficient national system, dislocate us from what we have multilaterally agreed, and pre-empt a critical decision that calls for multilateral input.

According to experts in patent law, the FTA changes provide a gift to US lobbyists who are bent on using the Agreement as a trojan horse to get changes back in the United States, which they have so far not been able to achieve. Our government should be aware of the role it is about to play in this process, and be asked how it proposes to account for the consequences.

Proposal 2: To introduce a new provision (Article 17.9.5) which alters the grounds for revoking a patent: 'Each party shall provide that a patent may only be revoked on grounds that would have justified a refusal to grant the patent, on basis of fraud, misrepresentation, or inequitable conduct'.

Grounds for Rejection:
This clause removes important grounds for revoking a patent currently available under Australian law, namely, 'fair basis'. Fair basis requires that patent monopolies be granted in exchange for *disclosure*. Under Australian law, a patent can be revoked if the claims to new know-how overstate or fail to mesh with the details disclosed (for example, if the patent for the Hepatitis C Virus also lays claim to ownership of any potential vaccine, even though this is not disclosed nor indeed discovered). The grounds of 'fair basis' means that property claims which are not laid within the legitimate boundary of the disclosure (such as the HCV example) may be revoked, since the party laying claim to a patent is receiving a monopoly property right under false pretences.

The onus is on the Australian government to explain to the Australian public, word by word, why it is sacrificing such state-of-the art Australian law, and why the TRIPS Agreement is not sufficient to protect Australian IP interests. What are the limitations of TRIPS that are somehow being met with this new Agreement, which need to be reviewed at the next trade round, and which should apply to all members? If such limitations do not exist, then why are we dislocating our current system and adopting such questionable and internationally contentious amendments?

B. Copyright

Proposal 3: To introduce Article 17.4.4, which significantly increases the term of copyright protection from 50 to 70 years (plus the life of the Author).

Grounds for rejection:
This stipulation will have adverse impacts on all educational and research institutions, including public libraries, which will be subject to an additional 20 years of royalty payments.

The only justification for the extension is to increase the profits of *owners* of copyrighted material. Owners will be mainly US *corporations,* not the actual creators of the protected material, because the extension applies to the length of copyright following the death of the creator. The extension was proposed by the United States (justly referred to as the 'Disney clause'!). However, just because a foreign government has decided unilaterally that an extension will be good for its corporations does not mean that it is appropriate for Australia, especially given the potential impact on educational and research institutions.

And again we must ask, why does Australia find the 50 years of protection guaranteed under TRIPS insufficient to protect its national interest? The development of technology (such as downloading from the internet) may be one reason for why

TRIPS may need augmentation. But everything else, including traditional aspects of copyright, are well covered in the TRIPS Agreement.

Proposal 4: The introduction of a new provision (Article 17.4.7) which makes it a *criminal* offence to enable the circumvention of a technology that prevents copying or even viewing what one may have acquired legitimately (eg. CDs or DVDs), merely because this would take place in a different market zone. (Many Australians would be aware that it is impossible to listen to or view many CDs or DVDs made in the US because they are programmed to be incompatible with machinery marketed in Australia.)

Rejection of Proposal

This article has nothing to do with the protection of Copyright. Rather, it is the copyright owners' solution to parallel importing, and reflects the efforts of US producers to divide the world market into different technological zones to expand market share and increase profits. This provision ***has the effect of making a criminal act*** of any attempt to convert for use and enjoyment in one zone what has been purchased in another zone, even by the legitimate owner of that product. It also requires the Australian government to *criminalise* anyone who either directly or indirectly provides (e.g., by importing, distributing, or trafficking in) devices or services that may alter a technology so as to allow enjoyment of a legitimately acquired product.

Again, we ask our government representatives to explain why it is in the Australian interest to be lumbered with these draconian provisions, when their primary objective is to expand market share and monopoly privileges of foreign corporations?

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A concluding explanation of the deal

We have identified just four issues here, out of many that could be discussed. In each case the issue is clear. Our government is proposing to surrender rights or modify rules or undermine institutions that protect Australia's interests and guarantee our future. And what is being granted in return?

In light of this discussion, one must ask how our government came to negotiate our country into this glaringly lopsided, nationally detrimental agreement.

Evidence presented in this section points to the fact that the Australian government's deluded sense of the 'special' nature of its relationship with the US saw it enter into negotiations under a misguided assumption: that the US would modify its publicly proclaimed approach to international trade negotiations (i.e., its 'aggressive advocacy' of US business interests in overseas markets) in order to further the 'special friendship' that our countries are believed to enjoy.

It is a fact that the Australian negotiating team originally anticipated the attainment of a *comprehensive* and *nationally advantageous* free trade deal, *including* a comprehensive deal in Agriculture. This accords with DFAT's understanding of what

actually constitutes an FTA; according to DFAT's webpage entitled 'Free Trade Agreements: What Are Free Trade Agreements':

> The crucial test of an FTA or Customs Union is that it must *eliminate all tariffs* and other restrictions on *substantially all the trade* in goods between its member countries ... this means, at the very least, that a high proportion of trade between the parties - whether measured by trade volumes or tariff lines - should be covered by the elimination of tariffs and other restrictive trade regulations. Australia considers that this must be a very high percentage, and that no major sector should be excluded from tariff elimination.[10]

It is a fact that Australia's negotiators, led by Mark Vaile, believed the attainment of such an agreement would be possible due to our 'special relationship' with the US (as indicated in the quote below).

It is a fact that the Australian negotiating team sold the idea of an AUSFTA to Australian industry constituents (both at home and in the US) on the grounds that the deal agreed to would be *comprehensive.*

It is a fact that Australian business people working in the US and familiar with the US political system believed such a deal was *impossible,* and that the US had no intention of granting substantive market access concessions to Australia in a range of areas in which we are highly competitive (including sugar, beef, dairy, and a range of horticultural industries such as stone-fruit).

It is a fact that US-based Australian business representatives expressed these concerns to Mark Vaile during a visit to the US in 2003 to muster support for the negotiations. It is also a fact that Vaile insisted that a comprehensive agreement would be possible due to our 'special' relationship with the US.

It is a fact that Australia's US-based business people were right and Vaile was wrong. But Australian business people in the US never believed for a moment that the Australian government would actually push ahead with a deal that clearly fell so short of its original goals, and which, as this Submission makes clear, in many ways puts Australia's economic future at risk. As one US-based Australian Senior Executive explained:

> Mark Vaile, assisted by the Department of Foreign Affairs and Trade, organised a breakfast meeting of Australian business leaders in New York last year to enlist our support for the FTA and AAFTAC.
>
> I was highly sceptical that the government could achieve a comprehensive FTA, having experienced the US political system for six years. I actually asked Mark to stop calling the negotiations a "free-trade" agreement as it never would be "free". The government needed to avoid overselling it to the Australian public, otherwise they would make Americans look disingenuous. The Americans had no intention of granting full "free trade".
>
> We were assured at this breakfast by Mark that given the "special" relationship the two governments had, there was a real chance to conclude a comprehensive agreement and we should do all we could to support it.

[10] http://www.dfat.gov.au/trade/ftas_what_are_they.html

> We concluded that if the government was right and it had this "special" relationship, a comprehensive agreement really would be a significant achievement. If the government was incorrect, as the business community suspected, they would find out and back away, opting for traditional multilateral approaches.
>
> These were the two options. Mark found a third and signed an agreement that was not under consideration by the community and was outside the mandate as we understood it and betrayed many of us ... That the government signed the agreement, knowing it is economically damaging to Australians, smacks of disrespect and desperation. *One is left wondering if we need laws to prevent a government making agreements it knows are economically disadvantageous to Australians.*[12] (emphasis added)

The belief that the US would approach its negotiations with Australia any differently from the way in which it negotiates agreements with other countries (i.e. on the basis of 'aggressive advocacy'), bears testimony to the naivety of Australia's negotiators.

This naivety is further illustrated by the insultingly miniscule concessions that our government has tried to sell to Australian agricultural producers as *'wins'*. Avocados are a case in point. Under the Agreement, Australia will have access to US markets for the first time, *but only when Americans themselves aren't producing avocados.* It just so happens that this disqualifies Australians during our peak production period. As such, Chairman of Avocados Australia, Ron Dalton, has conceded that during the times when Australia produces the most, 'We would not expect that much of that fruit would be able to access or be exported to the USA.'[13] The same point applies to Australian citrus. Mid-September is the peak of the Australian export program to the US. But the FTA excludes our citrus after September to protect Florida's crop – hence the tiniest window of export opportunity! On a parallel point about the barriers to market access, the idea that an 18-year phase-in for tariff reductions for beef is acceptable for a developed country is farcical. This is longer than any *developing* country has ever been afforded by the WTO to effect structural adjustment in an industry.

It is widely known that US agricultural producers demanded their negotiators limit or refuse outright concessions in areas in which Australia is most competitive. In the words of the CFBF:

> It is essential that import-sensitive products, recognized as such by Congress on the TPA list and for which Australia has highly competitive industries, should be excluded from tariff reductions. For instance... all types of fresh and process peaches, apricots, pears – whether canned, concentrate, preserved, fruit mixtures, frozen, pureed, etc. And if tariff reduction exceptions are not allowed...should receive an extended tariff phase-out period ---- a minimum of 15 years...as agreed in NAFTA.

Concessions painted by the government as the major 'wins' for Australia - in beef and dairy - are similarly insulting, and designed to have minimal impact on the US economy. The analysis of the impact of the deal by the US industry body makes this quite clear:

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[12] Oliver Yates, 'Betrayed by our own Sycophantic Team', *Australian Financial Review*. February 16, 2004. Yates, is the NY based Executive Director of Macquarie Bank, and Board Member of The American Australian Association. These are his personal views, not the official views of his employer or the American Australian Association

[13] ABC's AM Program, Thursday, 12 February , 2004 08:08:56, Reporter: Louise Willis

> Australian gains are likely to be concentrated in the beef and dairy sectors and relate to changes in the quota system in place in the United States for those two commodities ... It is important to recognize that Australian agricultural gains are heavily dependent on Australia filling the expanded beef quota provided in the Agreement. Australia had only filled its smaller, pre-AUSFTA quota twice in the last seven years. Thus, the idea that they will automatically fill this expanded quota is far from certain. Without this expansion in beef exports, Australian gains from the proposed Agreement drop to $120-220 million, instead of $320-420 million ... On the dairy front, it will be very important to look at the specific products that will be granted increased access. A significant quantity of cheese is anticipated to be more competitive with European cheeses coming into our markets, as opposed to replacing domestically produced product.[13]

Compare this to the kind of access that the US already has to our agricultural markets. Prior to the agreement, Australian tariffs on agricultural imports from the US were already minimal or zero in most areas, apart from a few selected semi-processed, processed, and high-value products. Under the proposed deal, *Australia will immediately eliminate all agricultural tariffs.*

So what point can we extract from all of this? The point is that our government is seeking to paint these puny concessions (and horrendous potential damages) as overall 'wins' for Australia. This is at best naïve and at worst anti-Australian.

Clearly in light of the evidence presented in this document, the costs will dramatically outweigh the benefits and will cause irreversible damage to our economy, our major national institutions, and our enviable status as a disease-free producer.

We call on the Senate to protect the Australian interest by roundly rejecting the deal.

* * *

[13] American Farm Bureau Federation's March 2004 report: 'Implications of an Australian Free Trade Agreement on U.S. Agriculture', p. 2.