

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

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1.0 Executive Summary

This submission is principally an ideological submission, from a centrist perspective.

It argues that the Free Trade Deal is so bad that it should be rejected out of hand by the federal and state parliaments.

There are five principal reasons why the rejection is such an imperative:

1. Vandalism of Australia's intellectual property laws and their replacement with inferior US intellectual property laws.
2. Vandalism of Australia's Westminster system of government, and the replacement with inferior US constitutional arrangements of the Westminster traditions of the states.
3. Sacrifice of the Biblical principle of jubilee and statute of limitations, in particular in relation to intellectual property laws.
4. The free trade deal's lowest common denominator approach to outcomes in relation to culture.
5. The abandonment of hope that reformist left governments have the authority and mandate to govern if given majority support, making Australian elections futile and pointless and a complete waste of time.

Other less important reasons why it should be blocked if possible are canvassed.

For most sections where my opinion can be stated in two or three sentences or so, I will merely state my principal claims. If the committee is interested in further elaboration of these sections I offer to appear as a witness at the Melbourne public hearings projected to be held.

For a few sections where I think my opinion merits elaboration, I will expound in detail as I think some issues are not self-evident and I ask that the committee consider this submission as a whole both the issues left understood and those expounded in detail.

2.0 Cart Before The Horse: Ends and Means

2.1. Outcomes

May I quote John Howard:

"The terrorists can never deliver liberty nor prosperity."

The Australian, 11th September 2003.

This is a statement about ends.

My understanding of the meaning of prosperity is that some of the wealth of society has to trickle down to the ordinary people for prosperity to be spoken of as an end, in

that one is saying that one opposes poverty and values wealth and values wealth getting into the hands of everyone to a greater or lesser extent.

The long and the short of it is that the free trade deal contains clauses that militate against the wealth that trade can generate trickling down to the ordinary people.

Let me suggest another outcome that might be supported as an end:

“That senior partners in law firms and principals of billion dollar software companies should be wealthy enough to live in large mansions with attached tennis courts, extensive gardens, and servants’ quarters for a butler, French chef, illiterate gardeners and illiterate parlourmaids.”

This also is an outcome.

Many people arguing for this free trade deal have put forward essentially bankrupt positions which posit means as ends, and put the cart before the horse.

“Free trade” is a means.

“Competition” is a means.

“Intellectual property laws” are in part means and in part ends. The free trade deal, however, treats them as means, and the free trade deal provisions tend to contradict and undermine the ends that intellectual property laws are intended to promote.

“Commercial law” is generally about means rather than ends.

2.2 Competition

It is part of the business of government to regulate competition, in order to subject the economic processes to human desired ends. Article 14 tends to treat competition as an end in itself, and it is wrong for Australia’s federal and state governments to be hamstrung and unable to engage in legitimate regulation for any number of legitimate public ends such as health, the environment, labour rights, individual natural rights, general prosperity, redistribution of wealth, education, culture.

Given that my opinion is that all of these matters merit precedence over competition, and that that therefore competition policy should be subject to being overridden where necessary by most other considerations about ends if the majority so support as expressed by some democratic form of government, I submit that this is an adequate ground to reject the free trade deal.

This does not mean I am unaware of the use by reformist left governments of competition policy as an occasional publicly stated excuse to make the right but unpopular decision to discontinue some subsidised government program where the real reason is that the program is so ineffective or inefficient in achieving its purpose or any useful purpose that the program needs cutting. By way of explanation about excuses, the Bracks government has made the decision to charge tolls on the Scoresby freeway, the right decision on many grounds including the environment, energy conservation (means), economic efficiency (means), societal long-term survival (the related end to these two means), economic justice, even culture. However this decision is unpopular and the publicly stated reasons for it are pure cant.

2.3 Free Trade

Free trade is likewise a means that finds use as a cant argument by reformist left governments in discontinuing subsidy to programs that merit discontinuance for other reasons. In a world where the general public faced the facts about inherently ineffective government programs, and where the general public tolerated honest debate about programs which fail to achieve any useful purpose, such cant would be unnecessary.

However, if a government has a mandate for some policy and is elected to govern then the fact that implementing one of it's policies contradicts free trade principles mere means in order to attempt to achieve some higher end support by the public, such government should be applauded for standing for something, for standing for the end in question.

The long and the short of it is that most of the arguments published in The Australian in favour of this free trade deal put the cart before the horse, posit ends as means, and are essentially bankrupt positions. I wish the lawyers amongst us would listen to me in this.

3.0 Intellectual Property Laws: Copyright

3.1 Copyright

3.1.1 Outcomes Related to Intellectual Property Laws

The intended outcomes of intellectual property laws are to make available to the general public great literature, theatre, cinema, music and art.

The valuation by an individual of their favourite book is of paramount importance, in particular the emotional attachment of the individual to their personal property, especially books.

A rich, diverse, high quality culture is therefore of the highest importance in terms of outcomes.

Rather than impoverishment of the general public, the enjoyment by the general public of such a rich, diverse, high quality culture as an outcome is about the universal right of all individuals to such enjoyment.

3.1.2 General Remarks About Fifty Year Copyright Periods

The limitation period of fifty years applied to book copyrights promotes great literature by promoting the ease with which members of the general public can bring back into print great works of literature long out of print.

Frequently the neglect by the copyright holder of great literature and their refusal to allow republication within the fifty year copyright period means that a book that would generate sales and be enjoyed by members of the public does not so do.

The necessary limitation of copyright is thus a compromise between the author's rights and the rights of the fans of a particular work.

The right's of the author are means, subject to limitation because of the higher importance of the end of great literature being in print and available for enjoyment by the general public.

3.1.3 Personal Experience Regarding Out Of Print Works

In my forty two years I have ordered about 100 books by special order at bookshops.

Only about half of these orders were fulfilled.

Whether it is a bookshop not wanting to go to the bother of getting a book in, a publisher refusing to supply, a distributor refusing to make an international indent order, an overseas publisher not wanting to export to Australia, or whatever, my experience is that most publishers neglect their duties to keep great works of literature in print and available for bookshop orders.

Increasing the copyright period would only make this situation worse.

3.1.4 The Public Domain

For literature, the public domain of out-of-copyright works is a valued part of our culture.

The public domain has promoted economic development. It helped to fuel the industrial revolution, making so many people so much better off in the long term after the painful period of initial industrialisation.

For software, the public domain of knowledge, software, educational material, and books is an essential resource used by every working programmer. Without it, almost no useful programming could be done as everyone would be hamstrung by paying royalties.

The attempt by some companies to hijack the public domain for private profit must be resisted.

3.1.5 Intellectual Property Laws Ground To Reject Free Trade Deal

The long and the short of it is that the intended outcomes of intellectual property laws are contradicted and undermined by the provisions of this free trade deal.

Adopting the US copyright regime is therefore adopting an inferior patent regime to Australia's.

The free trade deal should therefore be rejected. The Australian Senate has the power to block the free trade deal by virtue of Article 17.1:

"1. Each party shall, at a minimum, give effect to this chapter."

I appeal to the Senate Committee to recommend to the Senate that the free trade deal be rejected, and to the Senate to use its power to block implementation.

3.2 Patent Laws

The US patent regime is noted for its gross maladministration.

Patents are granted that are too general, and that therefore impede economic progress.

Patents are granted where there is obvious prior art or obvious lack of creative invention, on the basis that it is routine to grant patents without adequate investigation, leaving it to the individuals and companies to challenge said patents in the courts. The costs of court action to invalidate such patents mean that meritless patents can be used for extortion from those without the will and means to challenge them.

However, often a creative invention is a substantial improvement of someone else's patent. The US patent regime is noted for unfairly rejecting patents which are improvements of other patents.

And there is inadequate provision in US patent law for court determined royalty rates for patents of basic inventions where for the sake of economic progress compulsory licensing is appropriate but the parties cannot agree on the matter of the royalty rate.

Adopting the US patent regime is therefore adopting an inferior patent regime to Australia's.

3.3 Software Copyright

Were the world different, one could imagine the question of copyright being settled quite differently for books and music on the one hand and software on the other.

Given that software tends to go out of print within ten years, the underlying source code being of use in the building of subsequent versions, my ideal software copyright regime would have software executable's having an ten year copyright term and software source code and software patents having a fifty year copyright term.

As a realist, I do not expect the Americans to ever give in to this.

As such the best achievable outcome is the status quo, fifty year copyright terms.

3.4 Moral Rights

The matter of moral rights is another question entirely.

I think the moral rights of the author or inventor should never expire.

However, where the author or inventor is long dead, or a corporation, then I think that some balance must exist between the rights of the property holder and the rights of the people who value a particular piece of intellectual property.

Take the church. Does not the church own the moral rights to the symbol of the cross? The name Jesus? The copyright in the Scriptures?

Christians under this argument would be entitled to moral rights over the use of this intellectual property, though the period when any royalties were owed would have ended over nineteen hundred years ago.

The church therefore would be entitled to take legal action against such works of art as "Piss Christ", on the basis of breach of moral rights to the integrity of their intellectual property.

If the church splits, then the moral rights have to be shared between the different churches who value such moral rights, requiring balance, discretion, and interpretation.

3.5 The Rich And The Poor

Any copyright or patent regime is imposed by government enactments of legislation.

A legitimate government does not tax the poor and give to the rich.

The free trade deal if implemented involves the government giving unmerited privileges to the rich to levy royalties and therefore means a government involved in taxing the poor and giving to the rich, bringing the status of the Australian government as legitimate into question.

3.6 Shareware And Licence Enforcement

3.6.1 General Remarks Regarding Shareware

My experience with both government and private employers is that something common and routine in commerce and government is breaches of the terms and rights to payment of shareware authors.

Given that shareware authors are typically poor, I think this exposes the hypocrisy of lawyers and managers who pay Microsoft many times the fair price for Microsoft's software because Microsoft is strong and ignore those who lack the resources to enforce their rights.

As someone who has sent in a few donations for shareware, I think that the policy that governments should follow in order to be mindful of their responsibilities to the poor viz-a-viz the rich is to cap the prices of the large software companies that use monopolistic market power, while at the same time treating shareware authors and small companies fairly by facilitating their rights to payment for their work.

3.6.2 Enforcement

There are two models for software licence enforcement: civil and criminal.

Civil enforcement entails private prosecutions by those who are not disinterested in the process. However, the outcomes of such enforcement would be financial damages and not imprisonment.

Criminal enforcement with fines defaulting to prison terms and imprisonment for serious offences requires disinterested administration of justice.

Given the abuses in private prosecutions for copyright infringement that have been reported in the media, disinterested enforcement by the police and directors of public prosecutions would improve matters, but require a body of case law that applied general principles of fairness to copyright. Fairness such as the right to backup. The right to fair use.

The free trade deal envisages the worst of both worlds: private prosecutions for criminal offences by interested parties likely to apply the laws with bias, without general principles of fairness taking precedence.

If the enforcement were given over to disinterested parties then I imagine that shareware authors would benefit. And the large software monopolies would have to learn to live with fair use.

3.7 Intellectual Copyright Laws To Conform To Protocol?

But which protocol? The nineteenth century establishment of intellectual property laws, which my claimed intended purposes are related to worthwhile ends, or the ruthless grab for profits by self-interested parties whose attempts to vandalise the law in the name of private profit bring discredit on trade agreements?

4.0 Biblical Principle Of Jubilee And Statutes Of Limitations

In the ancient world the principle of jubilee of debts being settled or cancelled in the forty-ninth year and the fifty year limit on debts imposed a restriction on commercial law that mitigated against slavery and in the interests of a free citizenry.

In India where debt could be passed on to descendants and heirs the tradition of bonded labour imprisoned in slavery many families.

Slavery is an evil.

A free citizenry where there is opportunity for all irrespective of the accident of birth is a good.

I do not want the idea of statutes of limitations to be eroded by progressive and indefinitely repeated demands for more and more extension of intellectual property rights.

That way leads to de facto slavery of the wage slaves and a widening gap between rich and poor with ever decreasing levels of trickle down of the wealth to the ordinary people.

Some ancient doctrines were adopted for good reason and should not be changed.

I realise this tends to prevent litigation of compensation claims for the expropriation of the land in Australia between the 1790's and the 1850's. However, I do not think that present disadvantage is in any way effectively dealt with by historical grievances of such long standing being prosecuted.

If however black people were to bring compensation claims in the courts for financial compensation for loss of income against - say - the teacher unions and the departments of education for loss of income caused by teachers having low expectations of black pupils, the dumbing down of the curricula having a differential adverse affect on black pupils by making primary and secondary education assessment less exacting and rigorous, and against the Hollywood production companies for loss of income caused by their social engineering of youth culture that adversely and differentially affects black pupils in the crucial years of secondary education, then all I could say is that I would think such claims have substantial merit, could not be rejected by any reasonable person, and if dealt with unfairly by the courts would expose the profession of lawyers as not being serious about compensation. These are matters of present disadvantage being events of the last fifty years.

Whether progress is better served by litigation, or by public opinion being moved by the merits of questions leading to the enactment of legislation to settle such questions I leave as a question for Senators to consider.

5.0 Defence Of the Realm

Although I regard defence of the realm as a means not an end - it serving the ends of the health and public security and peaceful enjoyment of life by individuals - I regard the defence of the realm as of more importance than free trade, intellectual property, or competition.

During world war two, the British scientists breached copyright by translating German physics books which had the equivalent of "the right of reproduction and translation is reserved", pirated German defence patents, and ran networks of spies stealing German scientific secrets. Churchill "set Europe ablaze", Roosevelt and the allies stood that the end of defeating the German regime for the sake of human rights justified the means of achieving same. All manner of treaties and international law were ripped up and ignored for six whole years, whether by German staff spymasters, British intelligence services, or terrorist groups sponsored by the allies.

Defence of the realm's precedence must be upheld.

6.0 Lowest Common Denominator Outcomes For Culture

Without repeating my remarks made above regarding cultural outcomes and intellectual property rights, may I say that it is legitimate for government to enact measures to promote a rich diverse and high quality culture.

Whether this is having a television licence fee to fund the ABC and SBS independently without government review, funding full price tickets to the opera the ballet and the theatre by school students in the name of culture, local content regulation of television, cinema, and pay TV, or prizes for artistic excellence in various fields of culture, a government that did not put culture first and trade second would be derelict in its duty.

7.0 Parliamentary Sovereignty

7.1 Expropriation Without Compensation

7.1.1 Expropriation Without Compensation: Nature Of Government

Expropriation is the nature of the business of government.

In many arenas of government, expropriation without compensation is the only way governments can make a difference.

Article 11.7 mandates that Australian state governments enact constitutional amendments to prevent expropriation measures that only require legislation and perhaps amendments to parliamentary standing orders to allow.

7.1.2 Example, For Explanation: Income Tax

If Article 11.7 is taken literally and enforced by the courts without fear or favour, it tends to make income tax payment of 80% of tax owing optional for wealthy people with particular political persuasion.

If some right wing person who is wealthy, does not use government education or health services and does not believe in them, makes a financial compensation claim in the courts for their income tax liability then I would say that, given article 11.7 of the free trade deal, that they would have a valid case.

If the said person was cross examined in the witness box, then one might find on examination that they regarded defence expenditure as necessary, likewise the police, prisons, court system, and some basic infrastructure such as railways and interstate highways because it is necessary for transport of troops and equipment.

They might on cross examination be forced to concede 20 % of federal and state government expenditure as necessary, leading to cross-claims.

They could therefore be forced to pay 20 % of their taxation liability.

This is not merely hypothetical as one of Margaret Thatcher's sometime speechwriters wrote a book advocating British constitution with a clause in the preamble outlawing confiscatory taxation as a form of expropriation.

If income tax is regarded as a legitimate and lawful form of expropriation without compensation then this problem immediately vanishes, and then people can be compelled to pay.

7.1.3 Federal Government

Australia's federal constitution is a half way house intermediate between the British Westminster system and the American system. It provides for compensation for expropriation.

7.1.4 State Governments

Australia's state governments are constituted as sovereign parliaments following the Westminster tradition, which limits to procedural limitations any attempt by a parliament to bind a subsequently elected parliament. Constitutions therefore can have entrenched clauses requiring a referendum to change, but this is a procedural limitation. It does not allow a parliament to legislate away a subsequent parliament's sovereign right to enact legislation, such as expropriation measures.

Expropriation measures in general in the Westminster tradition require private bills.

7.1.5 Private Bills

"When, in 1943, it was found necessary to apply the enormous funds left by Baron Hirsh for settling Russian Jews in Palestine to another purpose, namely, helping Jews of nationalities other than Russian to settle in Palestine (there being no longer any Russian Jews available for the purpose of the bequest), a Private Bill was promoted in Parliament."

The principle underlying the standing orders of the House of Commons was that expropriation could apply property of any kind to some relevant purpose to the nature of the property or some absolutely necessary purpose.

In California where the American system is upheld there are problems with the idea of expropriation. A cheeky person some years ago left some hundreds of millions to be applied to the purpose of charity to the poor in the wealthiest county of Los Angeles. Under the British system this could have been expropriated without compensation and applied to the purpose of charity in South Central Los Angeles.

However, the American courts are reluctant to defy the public will as expressed in state referenda and some expropriation without compensation occurs because of legislative decisions made by referendum. For example, the Californian state law

imposing price caps on some forms of unprofitable insurance as a requirement of an insurance company doing other business in California could be seen as expropriation without compensation. The American courts decline to defy this measure because it was authorised by referendum. I think this example exposes that the American system of government would benefit by more honesty about government's right to expropriate without compensation where there is clear majority public support, the correct procedures are followed, and the purpose is one allowed to legitimate governments.

7.2 Appeal To Reject Free Trade Deal On Expropriation

Adopting the worst features of both the Westminster system and the American system as envisaged by this free trade deal needs to be opposed.

I appeal to the committee to recommend to the Senate that for the sake of propriety it reject any unconstitutional bill allegedly imposing this provision on the state parliaments. I appeal to the committee to recommend to the Senate to oppose any bill attempting to implement this provision by referenda to amend the Australian constitution to limit the sovereign rights of the state parliaments pursuant to the provision of Section 128 thereof such diminishing of powers and legal limits requiring the majority of electors to vote in favour of such amendment in all of the six states.

8.0 Government's Mandate To Govern

8.1 Questions

If there are social grievances in Australia, should there be a parliament clothed with powers to address them?

Should a free trade deal be approved that enables unelected trade representatives to and unelected lawyers to overrule elected parliamentarians?

Should reformist left parliamentarians that sincerely believe in the right of governments to legislate to address social grievances be allowed to stand for parliament?

Should commitment to the natural right of property be a requirement of public office?

In terms of the standing social contract between the people of Australia assembled in spirit and deliberating by referenda being the Australian constitution, is that constitution and the will of the people of higher precedence than a free trade deal signed by one government but repudiated by some later government?

8.2 Government Should Not Be Hamstrung

Governments should not be hamstrung by a free trade deal that abdicates the necessary powers to address economic management.

That too many governments mismanage their economies is not reason for government to abandon its powers to intervene to address economic underperformance, but is a reason for the lessons of history to be learnt by the parliaments, and for leadership by politicians to educate the public in the necessity for ineffective policies which do not achieve any useful purpose but do give private benefit to stakeholders to be abandoned without compensation as and when necessary in order that more pressing priorities on limited public funds be satisfied.

For example, if there is a long term reduction of rainfall because of climate change then water rights need to be reallocated without compensation because that is the efficient and effective way to manage the water for the benefit of all.

The excessive detail in the free trade deal that proscribes many government policies should be rejected.

8.3 Government Procurement And Unemployment

The federal and state governments obtain most of their funds by expropriation without compensation of money by lawful taxation measures.

These funds are the accumulated proceeds of the labours of the ordinary people, and are therefore the property of the ordinary people.

A fair rate of unemployment for the government to aim for is two per cent frictional short term unemployment.

If governments spend money, they are obligated to spend this money in labour intensive ways so long as the unemployment rate is so much higher than the rate any legitimate government could countenance.

Accordingly, there is a duty of government required for it to be a legitimate government for it to give employment promoting preference to Australian jobs in government procurement.

Agencies and government corporations that do not rely on any taxation but are solely funded by user pays fees and prices paid by their customers are exempt from this requirement imposed by constitutional law theory.

8.4 Appeal To The Senate To Uphold Democracy

My opinion is that the abandonment of hope that reformist left governments have the authority and mandate to govern if given majority support, would make Australian elections futile and pointless and a complete waste of time.

The free trade deal should be rejected on this ground alone.

9.0 Other Less Important Reasons To Oppose the Free Trade Deal

9.1 Agriculture

The status quo on agriculture is maintained, with no meaningful change.

Justice states that an international trading system which overvalues manufactured goods by excessive intellectual property and trademark protections but systematically undervalues raw materials and food, is a system imposing unfair prices on poor countries and is therefore not legitimate.

Whatever the internal merits of intellectual property and trademark protections - they have a role to play in the wealthy countries - the inequality between buyers and sellers in raw material markets and food markets cries out for regulation and worldwide floor prices for such undervalued products in the name of the abolition of slavery and slavlike conditions for poor people in the poorest nations.

This trade deal by protecting US agriculture helps to impoverish the poor.

However, as a measure that maintains the status quo more or less I would say the Howard governments mandate to govern applies and this is therefore not sufficient grounds to bring down a government.

9.2 Animal And Plant Health

There are some reasonable exemptions for nonconforming measures and some specific exemptions for the recognised need for every government to protect animal and plant health from pests.

Provided the Americans are not allowed by the Australian government or courts to stand on inappropriate interpretations, this measure roughly reflects the status quo.

The status quo is that the Australian government already gives too much weight to trade considerations and too little regard to avoiding risk of animal and plant disease epidemics and pests.

However, as a measure that maintains the status quo more or less I would say the Howard governments mandate to govern applies and this is therefore not sufficient grounds to bring down a government.

9.3 Pharmaceutical Benefits Scheme

It is my view that responsible government requires an annual budget process where there is authorisation for all expenditure of any monies raised by taxation.

It is my view that the parliament should be able to exercise absolute discretion in its budget decision making.

It is my view that no company or outside body has any claim on the budgetary process, and that a subsequent parliament elected at an election is under no obligation to give any budget allocation to measures to which it does not agree, even if signed up to by a previous government.

It is my view that a government is entitled to allocate a zero budget to some measure that it does not agree with, provided it forthwith legislates to repeal any legislative enactments requiring the same and legislates to expropriate without compensation any lost profits or lost future sales income or paper profit from corrupt or maladministered programs or legislative loophole subject to the obligation of a government with a parliamentary majority to treat persons and companies fairly during the period from election to the day the subsequent parliament takes office.

Accordingly, my opinion for what it's worth is that the free trade deal provision regarding the pharmaceutical benefits scheme is an attempt by the drug companies to restrict the sovereign right of the Australian parliament to use its absolute discretion in making its own decisions regarding Australia's budget process.

This is not the status quo.

Given the number of unreasonable demands on government, such an attempt is not unusual.

This is grounds for the Senate to block this measure, assuming the Senators involved claimed to have an equal deliberative right on budget matters.

So, in this question, vote according to your conscience.

10.0 Concluding Remarks

This is primarily an ideological submission by someone with very strong views on constitutional law.

My views would no doubt be regarded as cranky by more mainstream opinion.

In regards to the matters of law, I am someone employed to do information technology work. Many years ago I thought of doing law, and transferring to law from science, but my failure at HSC English in sixth form precluded this. I could not understand fiction, at least in the eyes of the English examiners.

I therefore understand law from a non-legal perspective.

At least in regard to the matters of law, therefore, take what I say with a grain of salt.

I appeal to the committee to recommend to the Senate to reject all the measures associated with the free trade deal in order to block the worst features, which I have detailed as a number of independent grounds each sufficient in itself to justify blocking the whole trade deal.