

Submission to the Senate Select Committee on Chapter Eighteen (Labour) of the Draft
Australia – United States of America Free Trade Agreement.

April 30th 2004

By
Jacqueline Adie and Larry Sonder*

*The views in this submission represent the academic opinions of the authors who are employees in the School of Management, RMIT Business, RMIT University of Technology GPO Box 2476V Melbourne Victoria 3001 who can be contacted at that address. The views in this submission should not be taken to represent the views of the School of Management, RMIT Business nor RMIT University of Technology

Submission to the Senate Select Committee on Chapter Eighteen (Labour) of the Draft Australia – United States of America Free Trade Agreement (DAUFTA).

1. In analysis of the proposed agreement the authors of this submission have identified what we believe to be considerable concerns and questions about the potential impact on both the sovereignty of the Commonwealth of Australia and the labour rights of its citizens.

2. Chapter 18 of the Draft Australia – United States of America Free Trade Agreement (hereafter referred to as the DAUFTA) is devoted entirely to labour and is subtitled *Statement of Shared Commitment* (DAUFTA 2004, pp18-1 - 18-5). This Chapter raises important issues, that to date, generally have not been considered in the media, or indeed, by what would be considered the relevant parties, including the labour movements in Australia and the United States of America. Apart from a recent media release of the Australian Council of Trade Unions (ACTU) (ACTU 2004a), the focus of attention has been upon such issues as the impact on the Pharmaceutical Benefits Scheme, Australian culture/media content, the role of the Foreign Investment Review Board and specific export industries such as beef, sugar and manufacturing. The ramifications for the Australian workforce have not been adequately addressed apart from general discussion of the potential for job loss in some industries (ACTU 2004a & b; Davidson 2003; Cameron 2004).

3. So what is the nature of the shared commitments that underline the objectives of Chapter 18? The International Labour Organisation (ILO) has 175 member states and over 180 Conventions. What are the obligations of membership of the ILO generally and specifically under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*? ILO conventions may be ratified but require enabling legislation for governments to demonstrate willingness to enforce such commitments.

4. Often, governments can have legislation that embrace the principles of conventions and enforce them without ratification of the relevant convention. We recognise for, example, with regard to the principle of equality in employment, that the United States of America has not ratified the fundamental ILO conventions on equality yet it has federal laws promoting

equality. In the case of Australia compulsory education laws and occupation-specific minimum age rules prohibit use of child labour (ICFTU 2002).

5. The ILO has identified eight conventions as being fundamental labour rights.

These core rights are:

Freedom of Association

- Freedom of Association and the Right to Organise 1948 (C87)
- Right to Organise and Collective Bargaining 1949 (C98)

The Abolition of Forced Labour

- Forced Labour 1939 (C29)
- Abolition of Forced Labour 1957 (C105)

Equality

- Discrimination (Employment and Occupation) 1958 (C111)
- Equal Remuneration 1951 (C100)

The Elimination of Child Labour

- Minimum Age 1973 (C138)
- Worst Forms of Child Labour 1999 (C182) (ILO 2004b)

6. Of these fundamental conventions according to ILO published data, Australia has ratified 6 and the United States of America has ratified 2 (refer Table 1).

Table 1 Ratifications* of the ILO Fundamental Conventions (as at 30th March, 2004)

	Freedom of Association		Abolition of Forced Labour		Equality		Elimination of Child Labour	
Country	C87	C98	C29	C105	C111	C100	C138	C182
Australia	✓	✓	✓	✓	✓	✓	x	X
USA	X	x	X	✓	X	x	x	✓

* Note: these are as indicated by the ILO. The table does not include recognition of recent progress made towards ratification of these fundamental conventions.

Source: ILO 2004a,b,c&d

7. Ratification of these conventions has occurred over a long period of time and is a consequence of the particular historical, political, economic and social factors in each country. What the draft agreement is attempting is a synthesis of these very complex factors in order to facilitate trade and investment between the two countries. Whilst it can be argued, and it may be arguable, that the two countries share common values in relation to business and commerce, it can also be shown through our distinct histories that there are important distinctions in our laws and values and, not the least, in the areas of labour rights. Ratification of labour conventions is one indicator of what we may have in common but also highlights areas of potential and significant difference.

8. Ratification of an ILO convention does not mean that laws will be enacted to allow enforcement and compliance with the conventions. Here again, there are differences between Australia and the United States of America. According to ILO data Australia has been a member of the ILO since 1919 and has ratified 58 of the ILO conventions of which 48 are in force (ILO 2004c). The United States of America has according to the ILO been a member from 1934 to 1977 and since 1980. It has ratified 14 conventions of which 12 are in force (ILO 2004d). This suggests that between Australia and the United States of America there is a substantial different commitment to international labour rights.

9. The DAUFTA makes explicit its commitment by defining what it means by “internationally recognised principles and rights” (DAUFTA 2004 Article 18.7 p18-4) viz:

- (a) the right to association;
- (b) the right to organise and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labour;
- (d) labour protections for children and young people, including minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health.

10. We note that this list is more extensive (by inclusion of point (e) above) than those provided for in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*.

11. These principles and rights are an integral part of the draft agreement and it could be argued that the in principle commitment to these rights is significant. The focus of debate however has been on other aspects of the whole draft agreement such as the afore-mentioned issues (paragraph 2, page 2 supra) and including, in addition some comment on agriculture and quarantine, investment, government contracts and trade. Even where discussions on these matters occurs it has been couched in terms of very broad opportunities and/or threats depending on where the commentators positioned themselves in the debate, and from which country's or sector's perspective.

12. Whilst all these issues are of significance to both countries, so too are the issues associated with questions of labour rights and their implications for labour standards.

13. This submission questions the nature of commitment to labour standards and the potential for their diminution or being undermined. Concerns arise for a number of reasons.

14. First, the language used is rather passive. For example the first two paragraphs state viz:

“striving to ensure that internationally recognized labour principles and rights ... are recognized and protected by domestic law” (DAUFTA Article 18.1 p18-1).

What does ‘striving’ mean (and the words ‘to strive’ appear three times on the first page of this Chapter)? As government is responsible for domestic law and its enforcement how would government demonstrate in policy, law and practice that it recognised and protected international labour principles and rights in its domestic law?

15. Second, as indicated in Table 1 there is disparity between the ratification of ILO conventions between Australia and the United States of America.

16. Third, there appear to be issues associated with the willingness of the United States of America to ratify ILO Conventions. This concern can also be addressed to Australia although perhaps to a much lesser extent.

17. Fourth, ratification of conventions does not necessarily mean that there are laws to ensure that they are enforced. This brings to the fore the broader question associated with differences between the Constitutions and legal systems and the complexities associated with federal and state legal powers. The agreement appears to be trying to overcome this complexity and clearly focuses on federal laws of the United States of America (Article 18.8.1) and Australia (Article 18.8.2). These articles however do not address our question about enforcement.

18. Fifth, the draft agreement also makes reference to supra State/Government institutional arrangements. In Article 18.4 it refers to the fact that the role of the Joint Committee established under Chapter 21 *Institutional Arrangements for Dispute Settlement* is to include discussion of the matters relating to both the operation of Chapter 18 Labour, and in relation to the pursuit of the labour objectives of this agreement. One assumes that this refers to the recognition and protection in law, of the labour principles and rights referred to in Article 18.1.1,

and striving “to improve those standards consistent with high quality and productive workplaces” (Article 18.1.2).

19. Chapter 18 is intended as a statement of commitment. A statement of commitment needs to be clear, concise and unambiguous showing clearly its spirit so that any consequent law is not merely technically prescriptive. The use of passive language throughout and the disparity between ratification and enforcement of ILO conventions leaves potentially open opportunity for both erosion and undermining of established labour standards in Australia and despite the emphasis placed on recognising the rights of each party to adopt its own labour standards (refer for example to Article 18.1.2 and Article 18.8).

20. The agreement allows for the Joint Committee to possibly establish a subcommittee for Labour Affairs consisting of central government officials from Australia and the United States of America who are primarily responsible for labour or workplace relations and officials of other appropriate agencies to discuss matters associated with the operation of Chapter 18. What does this mean? What are the implications for sovereignty and labour rights? How will such committees be constituted – will they have representatives of management, labour and government consistent with the principles underpinning the ILO?

21. The ILO is a tripartite body and establishes its conventions and recommendations by such process; however, there is no provision for the representation of workers, their unions and employers, apart from reference to the “Parties” on this Joint Committee. In fact the purpose of this committee is primarily to resolve claims that a law or policy of the other country is in breach of the agreement or is in some way prevented from getting benefits from the agreement (Article 21.2). So, to reiterate, who are the parties to this Joint Committee and does it include the ACTU, the American Federation of Labor and the Congress of Industrial Organisations (AFL-CIO), national employer federations of both countries? Surely it should be tripartite commensurate with the ILO.

22. It is also of concern that these meetings, should they occur, would not automatically be public: the wording of the draft agreement states that meetings “shall normally include a public session” (Article 18.4.1) which suggests that they may or may not be public.

23. The draft agreement subsequently refers to labour cooperation and consultative mechanisms for such cooperation (Article 18.5) that would include “considering the views of their respective worker and employer representatives and other persons, as appropriate” (Article 18.5.2). It also refers to labour consultations (Article 18.6) that may be instigated at the request of either government of Australia or United States of America. Despite allowing for many processes, the sections of the agreement dealing with labour consultations are quite prescriptive with regard to timelines for acting on requests for consultation and for the convening of the subcommittee of Labour Affairs should consultations fail (Article 18.6). What are the implications for labour standards of these processes? Could these proposed supra national processes, despite the reassurances in the draft, lead to declarations that a labour law should be changed?

24. An analysis of the number of ratifications as an indicator of commitment to internationally recognised labour principles and rights, and particularly those nominated in Chapter 18, makes it apparent that Australia’s record is substantially different to that of the United States of America. To talk of shared commitment when the United States of America has not ratified the fundamental conventions on freedom of association nor equality raises serious questions about the nature of that commitment. As late as January 2004 the ICFTU expressed its continuing concern over the compliance with internationally recognised core labour standards by the United States of America (ICFTU 2004).

25. These differences between Australia and the United States of America raise questions in our opinion about the possibility of both undermining and erosion of labour standards in Australia.

Jacqueline Adie and Larry Sonder

References

- Adie, J. and Sonder, L. 2000, 'Globalisation, Labour Standards, Trade and Unions – the Asia Pacific Region', in Griffin, G (Ed), *Trade Unions 2000: Retrospect and Prospect*, Monograph No 14 National Key Centre in Industrial Relations, Monash University, Melbourne
- Australian Council of Trade Unions, 2004a, *FTA Flawed and Inadequate says ACTU* <http://www.actu.asn.au/cgi-bin/printpage.p1> accessed 23rd April 2004.
- Australian Council of Trade Unions, 2004b, *FTA Flawed and Inadequate says ACTU* <<http://www.actu.asn.au/public/news/107602841>> accessed 30th March 2004.
- Cameron, D. 2004 *Buy American! After this FTA not much will be made in Australia* <<http://onlineopinion.com.au/print.asp?article+2037>> accessed 30th March 2004
- Davidson, K 2002 'Free trade with America? Read the blueprint and weep *The Age* 1st August <<http://www.theage.co...les/2002/07/31/1027926912818.html>> accessed 30th March 2004.
- Davidson, K. 2003, 'Will the US free trade agreement be good for us? *The Age*, 27th October <<http://www.theage.co...les/2003/10/26/1067103266149.html>> accessed 3rd March 2004.
- International Confederation of Free Trade Unions, 2002 *Internationally Recognised Core Labour Standards in Australia: Report for the WTO General Council Review of Trade Policies of Australia*, ICFTU, and Geneva (23 – 25 September)
- International Confederation of Free Trade Unions, 2004 *Internationally Recognised Core Labour Standards in the United States: Report for the WTO General Council Review of the Trade Policies of the United States*, ICFTU, Geneva (14 - 16 January)
- International Labour Organisation, 2004a *Ratifications of International Labour Conventions (As of 30 Mar 2004)* <http://www.ilo.org/public/d...l-ratif8conv.cfm?hdroll+l&Lang+EN> accessed 30th March 2004.
- International Labour Organisation, 2004b, *Fundamental ILO Conventions - International Labour Standards*, <http://www.ilo.org/public/english...rds/norm/what-are/fundam/index.htm> accessed 30th March 2004.
- International Labour Organisation, 2004c *List of Ratifications of International Labour Conventions: Australia* [http://webfusion.ilo.org/public/d...m?hdroff+1&CTYCHOICE+0040\\$Lang+EN](http://webfusion.ilo.org/public/d...m?hdroff+1&CTYCHOICE+0040$Lang+EN) accessed 30th March, 2004
- International Labour Organisation, 2004d *List of Ratifications of International Labour Conventions: United States* <http://webfusion.ilo.org/public/d...m?hdroff+1&CTYCHOICE=0610&Lang+EN> accessed 30th March 2004.
- Wilson, I. 2004 *Jobs Threatened by One-sided 'Free Trade' Deal* <http://www.actu.asn.au/public/news/1076302841_2294.html> accessed 30th March 2004