SUBMISSION TO THE

SENATE INQUIRY

ON THE

AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT (AUSFTA)

Submitted by:

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Introduction

What is The Grail?

The Grail is an international women's movement active in 20 countries in Europe, Africa, North and South America, Asia, Australia and Melanesia. It is a spiritual, cultural and social movement of women grounded in Christian faith and committed to the vision of a world transformed into a global community of justice and peace. The Grail, as part of civil society, takes its stance in the public arena, collaborating with others with similar values and goals.

2 How does it focus its efforts?

It is a goal of The Grail that women have the opportunity to develop their talents and contribute to the society as fully as they are able. To this end, The Grail focuses on women's education and personal development, on social and cultural critical analysis and organised action grounded in conviction.

The Grail is connected into a number of different networks: women's movements and organisations, Christian churches and other religious communities, justice and peace groups, educational organisations and institutions.

It is out of our desire to see more truth, justice, equity and human dignity in the world that we have identified trade agreements within the World Trade Organisation (WTO), and especially its General Agreement on Trade in Services (GATS) as an international focus for action and reflection. The Australian Government's commitment to pursuing bilateral free trade agreements is a closely related matter.

Submission perspective

In 2003, a Senate Inquiry into the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO) and the proposed free trade agreement (so-called) between Australia and the USA invited submissions. At the time, the USA had already indicated that a number of Australian policies in relation to trade in services, foreign investment, quarantine standards, pharmaceuticals and genetically engineered food, all of which had wide public support, were unacceptable restrictions on trade which should be changed in its favour.

The Grail Global Justice Network was among many who made submissions and raised issues of vital importance for all Australians. Our primary concern was to assert the rights and duties of governments at all levels freely to govern for the health and well-being of all individual Australians, for Australian society, its cultures, land and environment, without being prevented, or constrained, by so-called free trade agreements.

It has been an interesting exercise to review this draft Agreement, in the light of that submission, to see the extent to which the concerns expressed found a response in the Federal Government's negotiations. Unfortunately, there is evidence in several parts of this Agreement that Australian governments (federal, state and territory) will be prevented or constrained from implementing desirable social and cultural policies once this Agreement comes into force.

This submission is based on the premise that the management of the economy (and, therefore, trade) is for the sake of the health and well-being of all individual Australians, for Australian society, its cultures, land and environment. Trade should be servant, not master.
When global, regional and bilateral trade, and trade-related, agreements dictate to democratically elected governments what policies and legislation they may maintain or enact, they threaten present and future realisation of deeply held values. Voices must be raised in protest (millions around the world are doing so) in the hope that national governments will correct their priorities.

We are not opposed to global trade and trade agreements as such. We strongly oppose elements in such trade and agreements that put the increasing of corporate profits above justice and equity for all and care for the richness and diversity of human cultures and the Earth.

SUMMARY CONTENT OF THIS SUBMISSION

This submission addresses the following chapters of the AUSFTA:

2 National Treatment and Market Access for Goods
6 Customs Administration
7 Sanitary and Phytosanitary Measures
10 Cross-Border Trade in Services
11 Investment
15 Government Procurement
17 Intellectual Property Rights
19 Environment
21 Institutional Arrangements and Administration;
together with relevant Annexes and Side-letters.

The key criticisms are:

1 The Australian Government's assertion that the Agreement will not increase the cost of pharmaceuticals is contradicted by US Government statements and by Australian producers of generic drugs.

2 The provisions for 4 separate interventions, by applicant companies seeking listing in the PBS, into the decision-making processes of the Advisory Committee (PBAC) constitutes harassment of the Committee. These provisions should not be enshrined in legislation by the Australian Parliament. Nor should the Medicines Working Group, which provides yet another opportunity for US intrusion into Australian health care policy.

3 'Negative listing' required by this Agreement is a procedure which restricts freedom rather than promotes it.

4 A definition of non-governmental bodies 'delegated' by governments is an essential clarification. *(Trade in Services, 10.1.2(b))*

5 Water and energy – essential public services - are not protected by listing in the *Schedule of Non-Conforming Measures*. Nor are publicly provided cultural services.

6 The Non-Conforming Measures in *Annex 1* lock governments into the status quo on pain of sanctions. This exalts trade above all other considerations (social, cultural and environmental) which may call for change in existing systems.

7 The change to the review requirements for foreign investments exposes a larger range of Australian businesses and commercial land than before to unscrutinised foreign investments and the listing of these requirements in *Annex 1* prevents any future tightening of requirements.

8 The definition and explanation of 'expropriation' in *The Guide to Investment* needs the status of inclusion in the text of the Agreement, as with other definitions.

9 The bias in favour of the complainant investor, and against the relevant government, in Chapter 11, *Investment*, 11.16.1 is quite unacceptable.

10 The protection of desirable social and cultural policies from provisions of the Agreement is not addressed in significant chapters of the Agreement *(eg, Chapters 11 and 15).*

10 The two bodies set up by Chapter 7, *Sanitary and Phytosanitary Measures*, have each been given conflicting objectives and no explicit direction as to which of the objectives should take priority when a conflict arises. Protecting human, animal and plant life and health should take priority over facilitating trade. When there is strong disagreement among reputable scientists on a matter, the 'precautionary principle' should have priority over facilitating trade. If the facilitation of trade dominates the discussion in these two bodies, Australia's capacity to remain free of diseases existing elsewhere will surely be seriously diminished.

11 The additional 20 years extension of copyright to 70 years *(cf. Chapter 17)* is entirely unwarranted and excessive. Instead of encouraging innovation (the prime purpose of recognising intellectual property rights) it encourages monopolistic practices and sustains high prices.

12 The Disputes Settlement provisions of *Chapter 21* are fundamentally flawed.

SUBMISSION

1 PHARMACEUTICALS

(Ref. Chapter 2 Annex 2C and Exchange of Letters on the Pharmaceutical Benefits Scheme (PBS), agreed to be an integral part of the Agreement)

1.1 The Government asserts that the agreement reached will not increase the cost to the Australian purchaser of pharmaceuticals. There is no assurance, however, that the contribution of taxpayers to the PBS will not increase. Furthermore, producers of generic drugs perceive the terms of this agreement to threaten their business of offering their customers effective products at a cheaper price. They are already prevented from doing so by a 20-year patent regime; they should not be further obstructed by this agreement. Costs for medicines will increase if they are so obstructed; and it will be the most needy who will be worst hit. It is clearly the understanding of the US Trade Representative, Robert Zoellick, that Australian prices for medicines will rise as a result of the Agreement *(cf. Sydney Morning Herald, 'Drug costs will rise with deal: US official', 11 March, 2004)*. Who is correct?

1.2 The agreement on the PBS reads as a recipe for harassment of the bodies charged with the administration of the Scheme, especially the Pharmaceutical Benefits Advisory Committee (PBAC). *(Cf. Side-letter, 1-4)*

The agreement provides for four (4) separate interventions into the decision-making processes of the Committee by the applicant company seeking listing with the Scheme – three of these prior to the determination of the PBAC and the fourth an appeal to an 'independent' review after the determination is made. If these provisions are exploited by applicant companies for every drug put before the Committee, the Committee will be grossly burdened. What additional resources will be given the PBAC and PBPA? At what cost?

Fairness and transparency do not require such excessive measures. The Agreement gives pharmaceutical companies focussed on profitable sales an extraordinary power to intrude into the processes of a body focussed rather on public health and making useful medicines available to all who need them.

On top of this, the Agreement requires Australia to make more frequent revisions of the Schedule of Benefits and provide opportunities for companies to apply for adjustments to payments, which we can safely assume will always be adjustments up.

These provisions should not be enshrined in legislation by the Australian Parliament.

1.3 While it is said that the proposed Medicines Working Group will not require a Party to 'change decisions regarding specific applications' *(Annex 2C-2),* the establishment of this Working Group provides yet another opportunity for intrusion from the USA into Australian health care policy. Australian health care provisions, with all their inadequacies, are far more just and equitable than those of the USA and achieve their results at a lower cost for individuals and for the society as a whole. Our PBS, especially, is widely admired by other countries.

There is no need for this joint Working Group: there is already extensive provision in the Agreement *(cf. Transparency, Annex 2C, Article 2),* for thorough communication between the Parties on medicines policy. On the contrary, **we urge that this Working Group not be incorporated in any legislation.**

2 TRADE IN SERVICES

(Ref. Chapter 10, Non-Conforming Measures in Annexes I and II, Exchange of Letters on Education and on National Treatment in relation to trade in services and investment at regional level of government, agreed to be an integral part of the Agreement, and the Guide to Services)

2.1 Contrary to the General Agreement on Trade in Services (GATS), this Trade Agreement required the procedure of 'negative listing', ie, every service sector will be covered by the Agreement except those that are explicitly excluded from it at the time of the negotiations.

This approach restricts freedom, rather than promotes it. If an item is unintentionally not included in the list of non-conforming measures, it may not be later included; and there is no allowance for adding a non-conforming measure to the schedule, should

this be warranted by future changes in circumstances. Not only national government but governments at all levels are constrained by this.

2.2 Chapter 10 follows the GATS in providing for unrestricted market access for US suppliers of all services not listed in the *Schedules of Non-Conforming Measures*; and in ruling that governments may not treat US and Australian suppliers of services differently in any way. It explicitly commits all levels of governments and authorities to its provisions *(Article 10.1.2(a))* and also 'non-governmental bodies in the exercise of powers delegated' by these governments and authorities *(Article 10.1.2(b))*.

No definition is given of these non-governmental bodies with delegated powers. The Guide does not address this question. Are they non-governmental agencies who respond to a government's call for tenders to provide services on behalf of government, eg, employment and other services? Are they non-government bodies who receive substantial funding from government to provide essential services, eg, education, health, etc? Just precisely who these bodies are is a matter of grave concern.

2.3 Water and energy are two major, public, essential service areas that are not included in Australia's non-conforming measures. **This is reason enough for this Agreement to be vigorously opposed.** It is an obligation of government to provide for equitable and affordable access to water and energy resources for all, protecting these from exploitation by foreign private enterprises for the profit of their shareholders.

Whereas Australia explicitly reserved fresh water in the GATS negotiations of 2002-03, there is no explicit reference to water in this Agreement, which means it is included.

This Agreement asserts that it contains nothing that would force governments to privatise. Some water and energy resources have already been privatised by particular governments in different parts of Australia. The national government provides no protections for these in the *Schedules of Non-Conforming Measures*.

It is also stated that all 'services supplied in the exercise of governmental authority' are excluded from the Agreement *(10.1.4(e))*. However, a service supplied in the exercise of governmental authority is defined as one that is provided on a non-commercial basis and not in competition with any other service supplier. Many

services of government in Australia are provided in competition with privately supplied services and could, therefore, also be subject to the terms of this Agreement.

In the light of these facts, **the omission of water and energy from the *Schedule of Non-Conforming Measures* is a grave disservice to the Australian community**.

2.4 The *Guide to Services* states that, because public services, subsidies and grants are explicitly excluded from the Agreement, there is no need for publicly provided cultural services, such as public broadcasting, libraries and archives and publicly sponsored cultural projects, to be listed in the *Schedules of Non-Conforming Measures*. Considering the uncertainty of their status in the light of the above definition of 'services supplied in the exercise of governmental authority', their omission from the Schedules is a cause for concern and the assertion in the Guide fails to reassure.

2.5 Annex 1 of *Schedules of Non-Conforming Measures* is described in the Guide as a 'bound' list, meaning that no governments at any level may introduce more restrictive measures in the future than presently exist. They are also subject to a 'ratchet' mechanism, meaning that any future liberalisation of existing measures cannot later be withdrawn.

Locking governments into the status quo in this way, on pain of sanctions by means of the Dispute Settlement Arrangements, can hardly be called 'free trade'. It exalts trade above all other considerations – social, cultural and environmental welfare – which may call for change in existing systems.

3 INVESTMENT

(Ref. Chapter 11, Non-Conforming Measures in Annexes I and II, Exchange of Letters on Foreign Investment Policy, and the Guide to Investment)

3.1 Among the 'bound' measures in *Annex 1* are the new provisions in this Agreement for US investment in Australian business and industry. The Australian Government promised that this Agreement would not undermine the Foreign Investment Review Board (FIRB) and its processes. However, with listed exceptions (including media, transport, telecommunications and security – defence, the nuclear industry telecommunications security), the Government has excluded from FIRB review all

US investments in Australian businesses and commercial real estate with a value of up to AUSD800 million. This change exposes a large range of Australian enterprises and commercial real estate to unscrutinised foreign investment. Its inclusion in Annex I means that no government in the future can set this limit at a lower level without paying a penalty, irrespective of how this present change is appraised after experience. See concluding comment in 2.5 above.

3.2 The elaboration in the *Guide to Investment* of the Article on *Expropriation and Compensation (11.7)* is very welcome. It seems to be aimed at avoiding the kind of dispute settlement judgments which have made Chapter 11 of the North American Free Trade Agreement (NAFTA) so notorious. **However, the agreed understanding by both Parties of what constitutes direct and indirect expropriation needs to have the status of 'an integral part of the Agreement' and should be included in the text of the Agreement, as are other definitions and explanations.**

3.3 We note that this Agreement has no investor-State dispute settlement mechanism, as exists in NAFTA. However, 11.16 provides for a Government to Government process instead, in which a Government acts on behalf of one of its investors. 11.16.1 states that, in these circumstances, the Parties must enter into negotiations promptly with a view to 'allowing the claim' of the investor. This is an extraordinary provision, offering a bias in favour of the investor-complainant, and against the relevant government, in advance of any consultation. **This measure is totally unacceptable. It is also unnecessary:** investors may make use of the law of the land to take their claims against a government to arbitration.

3.4 The Article on *Performance Requirements (11.9),* which include such things as domestic content and preference for goods produced or supplied in one's territory, allows exceptions for reasons of health protection (human, animal, plant and environmental) and conservation of natural resources. Here, as in other parts of this Agreement and other trade agreements, the protection and maintenance of social and cultural well-being and resources are not addressed.

Another example of this is in Chapter 15, *Government Procurement (cf. 15.12).* Exceptions listed there are concerned with protection of public morals, order and safety; human, animal and plant health; and intellectual property. There are no exceptions covering social and cultural policies.

4 SANITARY AND PHYTOSANITARY (SPS) MEASURES (QUARANTINE)

(Ref. Chapter 7 and Guide to SPS)

4.1 A Committee is to be established with representatives of both Parties. But the objectives of the Committee *(7.4.3)* are not always compatible objectives. On the one hand, it is charged with protecting human, animal and plant life and health and, on the other, facilitating trade between the Parties. Trade between the Parties has the potential of impacting on human, animal and plant life and health. An essential guide to the Committee, as to which of these objectives is to take priority when they conflict, is missing from the Agreement. **Considering the focus of this Chapter, it should be explicit that, when a choice is to be made between the two objectives, the first has the prior claim**. This would seem to be consistent with the commitments of the two Parties to the *Environment* in Chapter 19. **However, the wording in this Chapter suggests that facilitating trade is the dominant objective, in which case the implementation of this Chapter will assuredly weaken Australia's capacity to remain free of diseases, or other undesirable elements in tradeable items in the USA.**

4.2 A Standing Technical Working Group is to be set up with the express aim of 'facilitating trade and, where possible, achieving consensus on scientific issues' *(Annex 7-A, 4)*. The Guide comments that 'each Party understands…. that it may not always be possible to reach agreement on scientific issues', at the same time the Australian Government emphasises that matters affecting quarantine and food safety 'will be based on science'. 'Whose science?' becomes a crucial question when there is strong disagreement among reputable scientists. How will a dispute between the two Parties be resolved? **The Chapter needs to enunciate a clear working principle in circumstances of conflict. The 'precautionary principle' should receive explicit support in such a situation, not the scientific view which supports risking trade.**

5 INTELLECTUAL PROPERTY RIGHTS

(Ref. Chapter 17)

5.1 The additional 20 years extension of copyright to 70 years is entirely unwarranted and excessive *(cf. 17.3.4(a))*. The prime purpose of recognising a regime of intellectual property rights has been to provide a reasonable reward to the innovator and so encourage innovation, from which all may benefit. Prolonging the protected period

to an excessive degree has the opposite effect: it frustrates and discourages innovation, supports monopolistic practices and burdens society with unnecessarily high prices. **We strongly oppose this provision.**

6 INSTITUTIONAL ARRANGEMENTS AND DISPUTE SETTLEMENT
(Ref. Chapter 21)

6.1 As in other trade agreements, this Agreement provides a Disputes Settlement mechanism, which subjects government policy decisions and their implementation to the judgment of panels of 'independent' persons expert and experienced in law and trade matters *(cf. 21.7.5(a))*. There are some welcome provisions for providing information to 'the public' and considering requests for the non-governmental sector to express their views on a matter *(cf. 21.8.1(a), (c) and (d))*. We note also that in matters concerning labour and environment laws, there is provision for including experts in these areas in the disputes panel *(cf. 21.7.5)*.

6.2 However, these procedures are fundamentally flawed, as is the Agreement as a whole, in that they provide the possibility of a country's being heavily penalised when a democratically elected government legislates, or regulates, on behalf of its people, land and resources in a way that a panel of trade and trade law experts considers restrictive to trade.

Conclusion

We have welcomed the opportunity to comment on the Draft AUSFTA and commend this Submission and its recommendations to the Senate Inquiry.

Alison Healey, Sydney, April 2004