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

Chris Nyland
Professor of International Business
Department of Management
Faculty of Business and Economics
Monash University
Melbourne Victoria

Email: chris.nyland@buseco.monash.edu.au
Telephone: (03) 9905 2321

Labour Rights and Trade

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

1. Introduction

1.1 I thank the Committee for providing this opportunity to comment on the Australia-US free trade agreement. My recent academic work has explored how economic, social, and business phenonena associated with globalisation have impacted on human security and how local, national and global agents seek to optimise the level of well-being experienced by individuals confronted by increased market openness. My globalisation-social protection work has focused on food security, the Islamic work ethic, and child labour in Asia. More recently, I have explored the debate surrounding the demand that the World Trade Organisation should adopt a "social clause" that will place some limits on the capacity of firms to compete by denying workers their basic human rights. This work involved testing the claim that this demand has no support amongst the trade unions of the South and explored the strategies the global union movement has embraced to further the demand. The result of this work demonstrated - to the contrary of popular belief - that in fact there is greater support for a social clause amongst Southern unionists than there is amongst their Northern colleagues. I am currently examining the impact of marketisation on social protection needs and provision in China.

1.2 Given my recent academic interests and ongoing work there is one particular chapter of AUSFTA that I will be focusing on in this submission, namely chapter 18 which covers labour rights. The inclusion of a labour chapter in an Australian trade agreement is welcome and long overdue, it is to Australia's shame that a democratic country with a long history and deep involvement in United Nations human rights bodies and with the International Labour Organisation has had to be forced into accepting a trade-labour link by the most conservative US Administration in recent history. However, while

recognizing the precedent created in the AUSFTA as a step towards the establishment of a more appropriate and binding model, I wish to raise concerns about problematic nature of the draft labour chapter of the AUSFTA.

2 Background

2.1 As many committee members are aware there has been a long running debate concerning the inclusion of basic workers rights into international trade agreements. However, this debate and opposition to a trade-labour linkage is of modern origin, the initial post-war charter (the Havana Charter) for the creation of what can be referred to as the precursor to the WTO, the International Trade Organisation (ITO) – signed by Australia in 1948 - included comprehensive labour and full employment provisions. Indeed, it was H C 'Nugget' Coombs' effective advocacy that saw the inclusion of measures to support full employment and economic development included in the failed ITO demonstrating that Australia can take a leadership role when the political will permits.[1] According to Capling the Havana Charter "remains to this day the most comprehensive international economic agreement in history", able to balance the needs of capital with the rights of workers and responsibilities of governments regarding full employment and development, and achieve a rational compromise between domestic interventionism and unfettered economic liberalism.[2] The ITO failed to materialize due to the failure of the US Congress to ratify it in 1950. The history of the ITO is important to current trade issues as in contrast to recent debates, during the negotiations surrounding the Havana Charter and the ITO, the countries of the world rejected the minimalist narrow economic approach to trade and the view "that it was possible to maintain a firewall between trade, development, employment standards and domestic policy".[3]

2.2 Chapter II of the Havana Charter covered employment and economic activity, it contained 7 Articles beginning with a statement that Members recognize that the avoidance of unemployment or underemployment is a necessary condition

[1] Ann Capling (2001) *Australia and the Global Trade System: From Havana to Seattle,* Cambridge University Press, p 213.
[2] Ibid p 15
[3] Daniel Drache (2000)

for international trade and depends primarily on internal measures implemented by national governments, supplemented by concerted action under the sponsorship of the Economic and Social Council of the United Nations. Article 3 required Members "to take positive action designed to achieve and maintain full and productive employment" appropriate to their political, economic and social institutions. It also recognized that there was a universal common interest in the achievement and maintenance of fair labour standards. The false distinction between trade and 'social concerns' or 'non-trade' issues was not present during the post-war negotiations nor was there a separation between international trading or economic bodies and United Nations human rights bodies or the ILO as exists in the current trading regime.

2.3 Since the demise of the ITO there have been numerous attempts to incorporate labour provisions in trade and economic agreements. Many international commodity agreements, involving both developed and developing countries contain references to fair labour standards and/or workers' rights,[4] and various US trade related Acts, such as the *Trade Act of 1974,* the *Caribbean Basin Economic Recovery Act of 1983,* the *Trade and Tariff Act of 1984,* the *Generalised System of Preferences Renewal Act of 1984,* and the *Omnibus Trade and Competitiveness Act of 1988* also contain provisions covering workers' rights. The point to this historical outline is to demonstrate that the inclusion of a chapter on workers' rights is not new or particularly novel. However, after 50 years, while becoming more substantial, the rights of workers still do not have parity with the rights of capital under trade and economic agreements. While welcoming the inclusion of a labour chapter in the AUSFTA, there are a number of significant problems that need to be addressed and remedied.

3. AUSFTA Labour Chapter

3.1 The AUSFTA labour chapter while comprehensive on a superficial level, offers no substantive protection of workers' rights. There are eight Articles in

[4] International Sugar Agreement of 1953, the International Rubber Agreement of 1979 and the second International Tin Agreement 1960.

the chapter but only one that is enforceable namely Article 18.2: Application and Enforcement of Labour Laws, which states:

(a) A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

(b) The Parties recognise that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources of enforcement with respect to other labour matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

Article 18.2(b) by providing a defence or discretion effectively renders Article 18.2(a) meaningless, this means that in any practical sense no provision in the labour chapter is enforceable.

3.2 In addition, the requirement to 'effectively enforce' one's own labour laws is highly problematic. Professor Weiss of the University of Maryland, School of Law, highlights the limitations of this provision stating that:

> When a country starts out lacking adequate legislation to cover the substantive labour law areas, …[or] where there is legislation and it is weak and not up to international standards, a promise to "effectively enforce" that law, however binding, is not very meaningful, unless the promise is buttressed by one to implement an international labor law standard.[5]

This provision does nothing to improve labour protections for either Australian or US workers. In effect, a signatory country can be in breach of its obligations under various ILO conventions, - as is the case currently with

[5] Marley S Weiss (2003) 'Symposium Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America and Beyond', 37 *University of San Francisco Law Review* 689

Australia which has been found in breach of a number of conventions since the enactment of the *Workplace Relations Act* 1996, (WRA) - and not be required to improve its standards in line with its international obligations, only to enforce the current defective standards. This means that the various industrial relations and workplace related Bills presently planned to go before the House, irrespective of whether they are in breach of international standards or not, could not be challenged under these labour provisions nor could they be found in breach of the Agreement as one only has to enforce its current labour laws.

3.3 The Senate Committee should take note of the fact that many of the restrictions imposed under the WRA – pertaining to collective bargaining, right to strike, freedom of association and anti-union discrimination in violation of ILO Convention 98 – have been repeatedly criticised by the ILO which has requested that the Australian government rectify the laws, criticism has also been forthcoming from the International Confederation of Free Trade Unions and the US State Department. It's incongruous that intellectual labour can be strictly protected in the form of intellectual property rights but manual or office labour does not afford the same right of protection under trade agreements. The Senate Committee should recommend that the rights of labour including enforceability achieve parity with the rights of investors and intellectual property rights holders.

4. Child Labour and Forced Labour

Chile and Singapore during free trade agreement negotiations with the US were required to ratify ILO Convention 182, Worst Forms of Child Labour, before the final signing of the agreements. Ratification of this Convention should not be problematic for a democratic country like Australia, yet the Australian Government, - unlike Chile and Singapore, - has refused to do so on the basis that it provides labour protections for children and young people primarily through laws and regulations that regulate age levels for compulsory education. This justification has very little merit. First, it does not address child labour in itself, irrespective of whether a child is in school or not, this does not mean that child labour does not exist in Australia after school hours or on weekends. Even if it does not exist this is not a justification for failure

to ratify Convention 182. Secondly, it is injurious to Australia's reputation as a democratic country when countries with a less democratic tradition ratify these conventions and Australia does not. Finally, it means that the labour chapter under AUSFTA is a weakening of the labour chapters under the Chile and Singapore trade agreements. Labour protections should be ratcheted-up when two democratic countries such as Australia and the US negotiate an agreement, rather than a downward or weaker agreement than that achieved with developing countries.

5. Recommendations

5.1 The labour chapter under AUSFTA needs real implementation and enforceability. Specifically I recommend that:

- Remedies for labour violations need to be implemented and enforced in the agreement and given the same treatment as breaches of investor-rights and intellectual property rights holders;
- Private committees or non-enforceable adjudication processes do not work, and will discourage employees from pursuing their rights, the core labour standards set out in the agreement should be binding and employees should have access to domestic courts to ensure compliance, - political appointees, bureaucrats or diplomats should have no role in the determining of complaints under the labour chapter;
- The Australian government should in good faith ratify ILO Convention 182;
- That the labour provisions be enhanced, the precedent should be sustained and indeed, should be included in any future preferential bilateral trade agreements, and in future multilateral agreements. I emphasis this point as I note that Mark Vaile has declared his intention to negotiate a preferential trade agreement with China – a country in which workers' rights are consistently abused. I recommend the Senate Committee examine the work on China and labour rights undertaken by Anita Chan of the ANU, specifically:

    - 'Globalization, China's Free (Read Bonded) Labour Market, and the ChineseTrade Union', in *Asia Pacific Business Review* 6(3 & 4) (Spring/Summer 2000):260-81.

- *China's Workers Under Assault: Exploitation and Abuse in a Globalizing Economy*, Armonk, NY: ME Sharpe, 2001, 244 pp.
- 'A "Race to the Bottom": Globalisation and China's Labour Standards', *China Perspectives* 46 (March-April 2003): 41-49.

I strongly advise that the labour provisions in AUSFTA be ratcheted-up in order that it be used as a minima for future preferential agreements such as that proposed with China.

5.2 I strongly support the position advanced by Weiss, that genuine recognition of workers role in the international trading system and substantive protection of their rights means that "FTAs must provide meaningful enforcement mechanisms, realistic remedies, and an interpretation of effective enforcement that obligates the actual delivery to workers of the rights purportedly provided in the domestic labor law system".[6] More importantly, given the lack of success with recent trade meetings, both multilateral and regional (WTO and FTAA), the question of legitimacy of the trading system needs to be addressed, the increasing anxiety surrounding free trade is connected to the perceived lack of social issues, worker and environmental, small farmers and bias towards powerful countries and actors. Consistently refusing to address these issues will allow the stalemate at the multilateral level to continue as:

> Free trade unmoored from effective, enforceable labor rights provisions will eventually lose public support in all participant countries, for continued integration of regional economies. Morally, politically, and economically, it will become a form of unsustainable development.[7]

6. Conclusion

6.1 I hope after careful examination of the text and the unequal treatment of the rights of workers in comparison with the rights of employers and investors, the Senate Committee is able to recommend in its report that the labour chapter needs to be remedied in order to provide substantive protection of workers rights.

---

[6] ibid, p 711
[7] ibid.