

Liberty Victoria - Victorian Council for Civil Liberties Inc

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

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Inquiry on the Free [Preferential] Trade Agreement between Australia and the United States of America

1. Introduction

1.1 Liberty Victoria - The Victorian Council for Civil Liberties Inc is an independent non-government organisation which traces its history back to the first Australian civil liberties body established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the rights and freedoms recognised by international law.

1.2.1 We welcome this opportunity to comment on the text of the Australia-United States Free Trade Agreement (AUSFTA). Liberty Victoria has presented a number of submissions on international trade to various Senate and Joint Committee inquiries on international trade agreements and appeared before the Senate Foreign Affairs, Defence and Trade References Committee during its inquiry into the then proposed AUSFTA. As stated in earlier submissions on this topic, Liberty does not oppose free trade per se, however, we believe that trade does not operate in a vacuum but that trade agreements ought to be seen as an elaboration of the economic provisions in the international human rights agreements, not a repudiation of them.

1.3 Liberty fully supports the trade framework established by the United Nations High Commissioner for Human Rights which sets out the relationship between human rights and trade. As Australia is a signatory to the major international human rights instruments we believe that this guideline should be considered by any Australian government undertaking trade negotiations with other countries. This guideline states that a proper balance between economic and human interests:

- (a) sets the promotion and protection of human rights among the objectives of trade liberalization;

- (b) examines the effects of trade liberalization on individuals and seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals and groups;
- (c) emphasizes the role of the State in the process of liberalization – not only as negotiators of trade law and setters of trade policy, but also as primary duty bearer for the implementation of human rights;
- (d) seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;
- (e) requires a constant examination of the impact of trade liberalization on the enjoyment of human rights; and
- (f) promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization.¹

1.4 Having read the draft text we note that many of the concerns we raised in our first and supplementary submissions have been ignored as have significant recommendations by the Senate Foreign Affairs, Defence and Trade References Committee. Our submission will focus on the following areas: dispute settlement and the role of adhoc tribunals and domestic constitutional courts, Parliamentary scrutiny of trade agreements and treaties, the investor–state provisions, obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), and workers rights and environmental standards.

2. Dispute Settlement, Tribunals and Domestic Courts

2.1 In our first submission, Liberty raised serious concerns about the use of dispute settlement bodies such as the International Centre for the Settlement of Investment Disputes (ICSID), the ICSID Additional Facility, and the United Nations Centre for International Trade Law, all bodies which derive from a commercial arbitral model. We approve the fact that these bodies have not been listed as dispute bodies in the agreement as, pointed out in our earlier submission, they are adhoc, they lack the fundamental principles of transparency, they do not have open hearings nor is there any requirement to

¹United Nations – Economic and Social Council, ‘Economic, Social and Cultural Rights: Liberalisation of Trade in Services and Human Rights’, Report of the High Commissioner, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fourth Session, E/CN.4/Sub.2/2002/9 25 June 2002

factor in public interest issues as found in domestic administrative law. However, we are concerned that the dispute settlement mechanism in the draft agreement is equally worrisome. Article 21.7, Establishment of Panel, outlines a similar process as the panel selection under ICSID, three panelists, one chosen by each Party from a contingent list, the third chosen by agreement between the Parties or by the Chair if the Parties fail to agree (A. 21.7, 3(b) & (d)). The Parties shall establish a contingent list of ten individuals for a minimum term of three years, and remain on the list until the Parties constitute a new contingent list (A.21.7 (4)). Individuals on the list are to be chosen on the “basis of objectivity, reliability and sound judgment and have expertise or experience in law, international trade, or the resolution of disputes arising under international trade agreements”, be independent of the Parties and not have a conflict of interest and follow the code of conduct established under the Joint Committee (A.21.7, 5 (a) and (b)).

- 2.2 There are a number of aspects of this procedure that Liberty is concerned about. This Panel according to the agreement presents the Parties with an initial report, after written comments by the Parties may modify its report, a final report is then presented made public after 15 days, if the Respondent Party fails to agree, it must enter into negotiations to develop mutually acceptable compensation, if the Respondent Party does not meet the terms agreed upon, the complaining Party pursuant to A.21.3 notifies that it intends to suspend the application to the other Party of benefits of equivalent effect. In addition, non-implementation in certain disputes enables the Panel to impose an annual monetary assessment on the other Party. All of this procedure conducted outside the Court system is highly problematic.
- 2.3 First, it is not clear who appoints the panelists, the government or officials from the Department of Foreign Affairs and Trade? Nor is it clear what the code of conduct will be, any dispute panel mechanism must follow the principles of the rule of law, and the conduct required must be analogous to that required of judges, Liberty believes that a more transparent process of appointment is needed. Secondly, given the broad scope of this agreement and its likely impact on a number of non-trade areas, such as health, culture, environment, and services such as education, panelists need a broader knowledge of law other than that of commercial and trade law. Public interests requirements such as

considered in administrative law must be part of the considerations in determining whether a breach has occurred. Unlike Australia, the US has not ratified the ICESCR. The ICESCR imposes a number of obligations on Australia, obligations concerning affordable health and education. These are considered rights in Australia, by contrast, in the US, economic and social rights are not recognized, regulations or laws that place limitations or requirements on property are viewed as 'takings' and generally compensable. Liberty recommends that the Government require the Parties to attach or append an Interpretive Note to the agreement clarifying what human rights and other international obligations the Parties are under, specifying in the case of Australia that obligations under the ICCPR and the ICESCR cannot be traded away under a preferential trade agreement. In addition, differing international obligations and dissimilar perspectives on governments' intervention into the economy need to be clarified as one country's human right can also be another country's non-tariff trading barrier. The Interpretive Note needs to clarify different understandings of property rights, the public interest and non-tariff trading barriers regarding the different political constructions in the context of two distinct social systems.

- 2.4 Fourthly, this Panel is empowered to impose compensatory measures and annual fines, and its decisions not open to appeal. It is, in essence, a court without the usual safeguards, we see no reason why these disputes cannot be conducted in domestic courts. Liberty opposes the ambiguous and adhoc nature of the dispute panel bodies under trade agreements and recommends that the Senate Committee inquire of the government why there needs to be a different legal process for disputes in a bilateral preferential trade agreement? Why not appoint 5 judges from each country, judges with tenure, the rules of procedure and code of conduct can be taken from the two legal systems which in respect to Article III and Chapter III courts are very similar, this way it keeps the adjudication system transparent and accountable and in line with the principles of the rule of law.
- 2.5 Finally, Article 21.1.4, states that where 'both Parties are party to the WTO agreement, the complaining Party may select the forum in which to settle the dispute'. Liberty would like some clarity as to what this provision means. Noting that ICSID is not mentioned in the draft text, does this mean that the

Parties can select this body if they wish to do so? If so, then the role of ICSID and its jurisdiction in relation to Chapter III courts needs to be clarified. Liberty reminds the Senate Committee that no international adhoc tribunal should be able to over-ride a constitutionally created domestic court.

3. The Treaty Process and Parliamentary Scrutiny

- 3.1 In our earlier submissions, we raised concerns regarding parliamentary scrutiny of the Treaties process. Liberty notes that the Senate Committee on Foreign Affairs, Defence and Trade References Report, *Voting on Trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement*, Recommendation 2 (a) to (f) made similar recommendations to that of Liberty. Liberty fully endorses the recommendations in Chapter 3, *Treaties and the parliamentary process* and suggests that once again the Senate Committee include these recommendations in the current inquiry report and supports the Senate Committee's call for the government to implement legislation for parliamentary scrutiny and endorsement of proposed trade treaties.

4. Investor-State Provisions

- 4.1 Liberty notes that at present the draft text states that the Investment Chapter does not establish an investor-state dispute settlement mechanism, however, it states that "Article 11.16 provides that the Parties may consider establishing such a procedure to hear a claim by an investor, if there is a change in these circumstances regarding the Parties' economic and legal environments". We wish to draw the Senate Committees attention to their first report, particularly Recommendation 17(b) "no investor-state provisions be included in the Australia-US Free Trade Agreement". Article 11.16 provides a means whereby an investor-state provision can be brought in via the back door at some future stage, for the reasons outlined in our first submission Liberty remains opposed to the inclusion of investor-state provisions and recommends that the Senate Committee advise the government to delete Article 11.16 from the agreement.
- 4.2 As with the NAFTA agreement investment is given a broad definition though basing it on international law is an improvement on American law. The latter is too broad and would catch much of Australia's public interest legislation as a form of expropriation. We suggest that the legal test used to determine whether

expropriation has occurred be based on international law as reflected in the decisions involving the Iran-US Claims Tribunals and decisions in the European Court of Justice and not that under US domestic takings law. Furthermore, footnote 11-7, in the investment chapter states that the “term “investment” does not include an order or judgment entered in a judicial or administrative action”. This footnote suggests that the negotiators failed to understand where the problem concerning ‘judicial or administrative action” under NAFTA occurred, it was not in reference to investment but expropriation and compensation. The part that needs to have a reference to ‘judicial and administrative action” is Article 11.7 which states “Neither Party may expropriate or nationalize a covered investment either directly or indirectly through *measures* equivalent to expropriation or nationalization”, *measures* needs a footnote excluding judicial and administrative actions from its definition. Unless excluded adhoc tribunals will be able to include judicial decisions as a form of expropriation, a situation contrary to the rule of law.

5. ICESCR and the Pharmaceutical Benefits Scheme

- 5.1 As stated in our earlier submission, The PBS ensures that low-income individuals, families – irrespective of income, and pensioners are able to afford basic medicines at a reasonable cost. This is not the case in the US, the lowest price pharmaceuticals cost around \$60.00. Indeed, many individuals and states in the US are beginning to buy their medicines from Canada as a means to get around the exorbitant price of prescriptions in the US.² This has caused considerable debate in the US with the Bush administration threatening the states with legislation to stop them importing cheap generic drugs from Canada. The US has also recently threatened to obstruct low-income countries’ access to generic HIV/AIDS drugs approved by the World Health Organisation (WHO). The drugs in question have met the standards of the WHO’s technical review, have been endorsed by Doctors Without Borders and other health practitioners, they cost \$140 per year per patient as against the brand name equivalent of \$600 per year per patient, yet the US opposes the plan to the poor in Africa and has

² Louise Schiavone (2003) Governments eye Canada for cheap drugs, CNN October 16

said it will challenge WHO's approval of generic copies.³ In 2003 a new Medicare Bill was passed by Congress which included a provision to scrutinize "protectionist" medical program such as low-price schemes like the PBS in foreign countries, and to negotiate to eliminate them through free trade agreements.⁴ An examination of the text in relation to the PBS tends to support the conclusion that the requirements under the US Medicare Act are being put into effect through the preferential trade agreement.

5.2 The proposed agreement will allow US pharmaceutical companies to seek reviews of PBS decisions (Annex 2-C, 2(f)). This provision along with the establishment of a Medicines Working Group to promote discussion and mutual understanding of the issues will allow the US pharmaceutical companies to have more influence over the provision of cheap medicines in Australia. The Side Letter on Pharmaceuticals indicates that a further opportunity to apply for upward adjustments in prices once the drug is listed will be available to the US pharmaceutical companies. This coupled with the strict requirements of US intellectual property rights protection is in conflict with Australia's obligations under the ICESCR, which states in Article 12:

1. The States Parties to the present Covenant recognize the right of everyone to enjoyment of the highest attainable standards of physical and mental health.
- 2 The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Further, the UN Committee on Economic, Social and Cultural Rights, in General Comment No 14 on the Right to Health stated that:

..obligations to respect [the right to health] include a State's obligation to *refrain from prohibiting or impeding traditional preventative care, healing practices and medicines*, [emphasis added].

5.3 Australia must adhere to its obligations under international human rights conventions and retain its right to buy cheaper generic medicines affordable no

³ Human Rights Watch, (2004) *US: Access to Generic HIV/AIDS Drugs at Risk*, <http://hrw.org/english/docs/2004/03/25/usint8234.htm>

⁴ David Fickling (2004) 'The Big US Pharmaceutical firms are using Australia's public medicine supply scheme for target practice', *The Guardian*, London, Tuesday January 20

matter what the person's income level. Liberty recommends that the provisions relating to the Pharmaceutical Benefits Scheme be deleted from the agreement.

6. Labour rights and environmental standards

- 6.1 Liberty welcomes the inclusion of labour rights and environmental standards in the text of AUFTA. We have always supported the inclusion of human rights and public interest issues into trade agreements, we hold to the view that trade does not operate in a vacuum but that trade agreements ought to be seen as an elaboration of the economic provisions in international human rights conventions, and should not override human rights concerns or conventions. Labour is intrinsically connected to trade and we welcome an end to the fiction that trade and the so-called non-trade issues are no longer separated. However, we feel that the labour rights do not go far enough. There should be complete parity between the enforceability of labour rights and those of investors and intellectual property rights holders. Both are either legitimate or both are protectionist, there is no justification for treating labour rights as less important than the rights of capital.
- 6.2 There is only one provisions in the labour chapter that is enforceable. 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.

However, as the Senate Committee will note, Article 18.2(b) effectively renders Article 18.2(a) meaningless, this means that in any practical sense no provision in the labour chapter is enforceable.

- 6.3 It 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 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.
- 6.4 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 time that the international core labour standards of the ILO – which have been ratified by Australia – be properly recognized by Australia and that trade agreements give equal treatment to the enforceability of such rights. The Senate Committee has an opportunity to send a message to the government regarding trade and human rights. The Australian government has signaled its intention to commence negotiations with China for a preferential trade agreement. China has one of the worst records in relation to forced and cheap labour and the labour in the AUSFTA needs to be ratcheted-up to establish a precedent for the China trade agreement.
- 6.5 The environmental chapter contains the same flaws as the labour chapter. Article 19.2(a) uses the same term regarding the failure to 'effectively enforce' its own environmental laws. As with the labour chapter, both need to be

connected to international standards, in the former ILO standards and in regards to the latter, multilateral environmental agreements. Article 19.2(b) is the same as Article 18.2(b) of the labour chapter and provides a defence or discretion in the event that a Party fails to enforce its domestic law. As with the labour provisions, the environmental provisions are also meaningless. We welcome the inclusion of environmental standards and recognize that – as with labour rights – the precedent of inclusion has been set and it will be difficult to exclude labour and the environment from future trade agreements. We recommend that the environmental provisions also be ratcheted-up and given the same enforceability mechanisms as the rights of capital and intellectual property holders.

7. Conclusion

- 7.1 We thank the Senate Committee for the opportunity to comment on the text of AUSFTA and wish to notify that Liberty Victoria wishes to appear before the Senate Committee at the public hearings in Melbourne.

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