



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

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Summary

This submission opposes the FTA on the grounds that a number of provisions undermine significant areas of Australian public policy and that the regulation impact statement is inadequate and leaves the Parliament without an adequate basis to assess its wide-ranging effects.

UnitingCare NSW.ACT expresses its concerns about the proposed USAFTA in two main sections: particular policy concerns and concerns with the regulation impact statement.

The submission was prepared by Rev Dr Ann Wansbrough, based on discussions with the UnitingCare board over the last eighteen months and the extensive resolution on trade adopted by the NSW Synod of the Uniting Church in Australia in September 2003.

Particular Policy Concerns

UnitingCare NSW.ACT believes that the provisions in the proposed free trade agreement are unacceptable on the following matters.

The dispute resolution process

It is inappropriate to leave all disputes to resolution by trade experts. It is not in Australia's interest to accept a dispute resolution process that may see social policy as a barrier to trade.

Pharmaceutical benefits scheme

The inclusion of the PBS is inappropriate, undermining a cost effective and worthwhile scheme and opening the way to decisions being based on the interests of pharmaceutical companies rather than Australian patients and the taxpayer. This is because of changes such as a review of PBAC decisions, and the principles on which the Medicines Working Group will base its work; also, the changes to patents.

Extension of copyright

There is no public benefit from the extension of copyright. This provision should not be accepted.

Restrictions on the regulation of investment

The restrictions on the regulation of investment reduce the flexibility available to the present and future Australian governments. The restrictions go beyond providing national treatment to US corporations. Problems include increasing the threshold for review of investment by the FIRB to \$800 million, and prohibiting certain performance requirements.

Restrictions on the regulation of services

There is inadequate exclusion of public services, since it could be claimed that many are provided in competition with commercial providers. At the very least, the definition of public services should include all services provided by government, whether or not in competition with commercial providers.

There should be a general exemption for health, education, social security, community services (including but not restricted to aged care, child care, child protection, unemployment services, and disability services) no matter who provides them or for what purpose, so that Australian governments are able to regulate them in the public interest.

Other essential services such as water, energy, public broadcasting and blood products should also be explicitly excluded, as should the question of Telstra privatization.

Quarantine

Annex 7-A provides for the establishment of a standing technical working group on animal and plant health measures, protecting “animal or plant life or health in their respective territories and respecting the regulatory systems, risk assessment and policy development processes of each Party” should be clearly designated as the primary objective to which all other objectives are subordinate.

Technical barriers to trade

The section on technical barriers to trade is unacceptable, as it assumes that homogeneity of regulation is a good thing across countries. It does not acknowledge that there are different values underpinning policy differences. Australian standards on a number of matters appear to be put at risk by the commitment to adopt the regulations of the other party, or internationally agreed regulations. This has implications for design standards, consumer rights, and sensitive areas such as GE food labeling and crop regulation. The move towards uniform regulation could be seen as anti-competition, since it undermines the need for companies to respond to different consumer wants in the two countries.

The provision to include the other party in the development of standards and regulations is unacceptable, as it does not serve local consumer interests and confuses the rights of foreign companies with the rights of citizens. Also, it undermines democracy by intruding one government’s interests into another government’s work.

The provision for parties to recommend that non-government organisations allow representatives of the other party in their deliberations on standards is unacceptable, intruding government into the work of civil society.

Environment

Article 19.4 commits both governments to “flexible, voluntary and market based mechanisms” for environmental protection. Much environmental regulation cannot be voluntary or based on the market.

Australian content in media

There are restrictions on regulating Australian content for multi-channelled free-to-air commercial TV, free-to-air commercial radio broadcasting, subscription TV and interactive audio and video services. Given the huge difference in the size of the media industry in the USA and Australia, Australia must retain the right to determine the level of Australian content in media.

Public broadcasting

Public broadcasting should be listed as an exemption to the agreement, since US corporations could argue that it is provided in competition with commercial services.

Changes to government purchasing rules

These are unacceptable to the extent that they limit the ability of government to use purchasing to increase employment and achieve other social goals.

Regulation impact statement

The Regulation Impact Statement fails to fulfill the requirements set out in the Productivity Commissions *A guide to regulation*. It fails in four significant ways.

1. It is an inadequate statement even in its own terms, as a macro assessment of the FTA. It simply fails to follow the required template and provide the required analysis. It fails to acknowledge objectives that have not been achieved, fails to consider an appropriate range of benefits and costs, and how they impact on particular stakeholders, and fails to provide any alternative options.
2. It fails to recognise that the FTA impacts on numerous areas of policy, each of which requires a separate RIS. Important areas that should have an RIS include all those outlined in our section on policy concerns.
3. It pays no attention to the fact that the FTA is a negative list that will encompass areas of policy not yet known. The impossibility of providing an RIS for these areas is not acknowledged.
4. It fails to recognise that the FTA is a new regulation on governments, not business, and that there needs to be an RIS from this perspective, looking at matters such as the compliance costs imposed on government and the community from new administrative requirements, and the reduction in regulatory and policy flexibility.

The RIS appears to have been prepared in total ignorance of the range of regulatory areas involved in the FTA provisions. This means that the FTA has been negotiated without any idea of its wide-ranging policy, economic and social implications. No thought appears to have been given to the regulatory implications of a negative list agreement which includes everything which is not excluded.

Conclusion

The policy concerns expressed in this submission make the FTA unacceptable. Significant areas of policy have not been appropriately handled in the FTA. It should therefore be rejected.

The inadequate RIS means that negotiators and government have been unaware of the implications of the FTA they were negotiating. The failure to provide an RIS on each relevant policy area means that Parliament has no basis on which to evaluate the agreement in an objective or responsible way. The FTA should therefore be rejected on this ground also.

The USAFTA – Submission from UnitingCare NSW.ACT

UnitingCare NSW.ACT welcomes this opportunity to comment on the proposed free trade agreement with the USA. UnitingCare NSW.ACT is an agency of the NSW Synod of the Uniting Church in Australia, and is mandated to address public policy issues on behalf of the synod. The issue of free trade was discussed at the annual meeting of the synod at the end of September 2003, and a lengthy resolution was adopted setting out a number of principles and concerns. This resolution provides the framework within which UnitingCare NSW.ACT addresses the issues in this submission. (The resolution is available at <http://unitingcarenswact.org.au>).

In summary, it is the view of the NSW Synod of the Uniting Church that trade agreements should not limit the ability of government to regulate in the interests of human rights, labour rights, and the environment. Trade negotiations should not circumvent or undermine proper public policy formation processes and public debate about policy matters. Democracy requires that Australian governments retain the ability to regulate business, and in particular foreign corporations operating or exporting to Australia, in the public interest. In addition, there are a number of areas of public policy that the USA is seeking to change through the FTA where the public interest in Australia requires that current policies and approaches be retained. In these areas, the Australian government has a responsibility to protect Australian interests and the freedom of future governments to take account of the wishes of the Australian people.

The synod resolution included theological reflection on these matters. Our views are a reflection of the God in whom we believe, and the understanding of life that flows from this.

It is also the view of the NSW Synod that the government should not take account only of economic matters in assessing the impact of free trade agreements. The Australian Government has a responsibility to ensure that it protects all areas of Australian life from inappropriate intrusion by foreign corporations and governments. From a Christian point of view, life is about more than the size of the GDP or the number of consumer products that Australians can purchase.

In addition to these general concerns, the synod expressed particular concern about a number of policy areas affected by free trade. The resolution supported UnitingCare's work on this matter.

These views about how to approach the issue of free trade and its effects are not unique to the Uniting Church. Indeed, the original economic study commissioned by DFAT itself drew attention to the limits of its own report, noting that there were many factors to consider that were beyond the scope of an economic study. Regulation Impact Statements according to *A guide to regulation*, must consider a range of impacts, both costs and benefits, on a range of groups, and not merely overall economic benefit.

As both the CSIRO and the Australian Bureau of Statistics now recognise, measuring Australia's progress depends on matters such as social capital, democracy and human rights, and not only on economic growth. This is illustrated by the ABS publication *Measures of Australia's Progress*.

We provide our comments in sections:

- Concerns based on church policy statements about appropriate trade policy
- Concerns with the Regulation Impact Statement, which does not fulfil the requirements set out in the Productivity Commission manual *A guide to regulation*.

Particular Policy Concerns

UnitingCare NSW.ACT believes that the provisions in the proposed free trade agreement are unacceptable on the following matters.

The dispute resolution process

Under the procedures set up in Chapter 21, disputes will be resolved by trade law experts, without expertise on matters other government responsibilities related to human rights, environment and eliminating or removing social harms such as unemployment and problem gambling. The FTA recognizes that in the area of labour and environment it may be appropriate to have panelists with expertise in those specific areas, but it does not recognise that this agreement will affect many other areas where the primary policy issue is not trade but human rights and social policy. The dispute mechanism is inappropriate, as it fails to provide the expertise to deal with the range of government responsibilities that legitimately compete with trade concerns. It is not in Australia’s interest to accept a dispute resolution process that may see social policy as a barrier to trade.

Pharmaceutical benefits scheme

The FTA in Annex 2-C includes changes to PBS mechanisms. This is unacceptable and contrary to the national interest. The PBS is a cost-effective scheme for providing medicines to Australian consumers. USA pharmaceutical companies have the same market access as Australian pharmaceutical companies. There is no free trade issue. It is entirely appropriate to market economics that pharmaceutical companies be required by purchasers (in this case the Australian government) to compete on the basis of effectiveness of treatment and price. The Australian government has claimed that the FTA will not lead to an increase in the price of pharmaceuticals. This lacks credibility.

- 1 US evidence does not support the Australian government’s claim. US pharmaceutical corporations have made clear that they want higher prices for listed drugs and want more drugs to be listed. It would have been pointless for the USA to insist on these provisions being included unless they believed that they were a means to that end. Robert Zoellick, US Trade Representative, has reported to the US congress that the prices that Australia pays for pharmaceuticals will rise.
- 2 Annex 2-C Article 1 sets out principles that promote the interests of pharmaceutical companies. They are all about ensuring that company products are “valued” and not at all about patients getting affordable medicines or taxpayers getting an affordable PBS that is value for money. These principles omit the established principles on which the PBS is based, such as public interest, affordability, comparative pricing, effectiveness and value for money.

The purpose of the principles in Article 1 is clearly to provide a congenial environment for pharmaceutical companies, rather than forcing them to operate on a normal commercial basis of providing products at the price the buyer (the Australian government) is willing and able to pay. These principles are the sort of thinking that leads to the high prices for medicines in the USA, giving pharmaceutical companies large profits but making treatment unaffordable or impoverishing for large numbers of people.

- 3 Under the heading of transparency, the FTA includes provisions for information, input and review of PBAC processes. There seem to be a number of changes from the present process that will give commercial interests undue influence over their decisions as to whether or not to list a particular product, and at what price. The provisions will also involve extra administration, thus increasing the cost of the scheme.
- 4 The FTA includes a provision to set up in Australia a Medicines Working Group. While the group will be made up of government officials, its role is to discuss matters related to the principles in article 1, the transparency of the PBS as set out in article 2 and the provisions in article 5 for pharmaceutical companies to provide public information on their products on the internet, to consumers as well as health professionals.
- 5 The FTA in article 17.10 changes the patent regime as it applies to pharmaceuticals. Under some circumstances, this will delay availability of cheaper priced generics, keeping medicine prices higher than they would otherwise be.

Extension of copyright

Article 17.4.4 increases copyright to authors, composers, and producers of phonograms to lifetime plus 70 years (previously 50 years in Australia). This will increase costs to libraries and educational institutions. It also restricts the ability of the general public to perform works. There is no public benefit from the extension of copyright.

Restrictions on the regulation of investment

- 1 The FTA restricts the ability of the Australian government to regulate investment in the public interest.
- 2 The FTA requires that US companies be given national treatment. Article 11.3.
- 3 ARTICLE 11.9: PERFORMANCE REQUIREMENTS states that companies of either party, or of a non-party, cannot be required to use local products, transfer technology, or contribute to exports or fulfill a number of other conditions.

Neither Party may, in connection with, the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any of the following requirements, or enforce any commitment or undertaking¹¹⁻³: (followed by a number of clauses setting out the commitments that are prohibited).

While some conditions are specifically allowed, the prohibition of a number of performance requirements restricts public policy options and could significantly undermine the benefits Australia derives from overseas investment and ability to regulate companies.

This provision seems to restrict what the Australian government may require of Australian investors and also of investors from non-parties. If this is what this somewhat impenetrable language means, it seems inappropriate; it goes beyond providing fair and equitable treatment to US corporations, to prohibit certain forms of public policy, and it goes beyond the parties to the agreement and prohibits those public policies being applied to investors from non-parties. This is a clear restriction of Australia's public policy options. Article 11.9.2 seems to breach the principle of mutual obligation, in that it prohibits certain performance requirements even if they are in return for some particular advantage offered to the investor.

- 4 The FTA increases the threshold for review of investment by the Foreign Investment Review Board from \$50 million to \$800 million. (Annex 1). In many sectors, companies investing \$50 million can have a significant impact. Australia should retain the lower threshold.
- 5 The FTA (article 11.16.1) requires that if there is a change in circumstances, an investor can request consultations with the other government to make a complaint. The government would then have to enter into consultations with a view to allowing the complaint and establishing procedures. This opens the way to US corporations challenging Australian laws and regulations. The operation of the NAFTA has shown how complaints mechanisms can be used to sue governments and undermine their right to regulate on environment and other significant matters.

Restrictions on the regulation of services

Annex II-4 includes the following exemptions:

ANNEX II-4

Sector: Social services

Obligations Concerned:

National Treatment

Most-Favoured Nation Treatment

Local Presence

Performance requirements

Senior management and Boards of Directors

Market Access

Description: Cross-Border Trade in Services and Investment. Australia reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health and child care.

In addition, Annex 2 makes a reservation with regard to primary education (that is, primary education not covered by the term "public education") on these same matters.

- 1 The FTA at 10.1.4 (e) specifies that chapter 10 on cross border services does not apply to (e) services supplied in the exercise of governmental authority within the territory of each respective Party.
A service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

This significantly limits the exemption, since many public services could now be considered to be supplied in competition with commercial services. The definition of what is exempt is therefore inadequate.

2. The provisions of Chapter 10 go beyond according national treatment to US companies supplying services. They restrict Australian public policy options.
3. The FTA requires that US companies have full market access, which is defined as exclude requirements such as joint ventures with local firms, limits on service providers, and requirements of staffing numbers for particular services. Regulation of services is bound at current levels. Services such as health, education and child care are exempt only “to the extent that they are established or maintained for a public purpose”. There are several problems with this.
 - a. Many health, education and child care services are provided by commercial or not for profit organisations as well as government, and US corporations could argue that they are therefore excluded from the exemption provided in 10.1.4 (e).
 - b. A number of community services are not mentioned anywhere in the FTA, and are therefore included, whether or not the government has considered the implications of doing so.
 - c. There needs to be a general exemption for health, education, social security, community services (including but not restricted to aged care, child care, child protection, unemployment services, disability services) no matter who provides them or for what purpose, so that Australian governments are able to regulate them in the public interest. While 10.7.2 provides for regulation with regard to basic standards of competence and quality, this is insufficient. In a number of these areas of community services, Australia currently limits the number of service providers, limits the fees that can be charged, and sets minimum staffing levels, matters prohibited by this chapter. While we support regulation of community services to ensure quality, affordability and other matters in the interests of service users and the public, this does not mean that we accept all current regulations. In many cases, there is need for substantial change. The FTA must not prevent this. Any requirement that restricts the ability of Australia to impose or change regulations in these areas must be rejected.
4. Other essential services such as water, energy, public broadcasting and blood products have not been exempted. These services must be exempted, so that Australian governments are free to regulate them in the public interest.
5. Telstra privatization. Given the debate in Australia about the privatization of Telstra, it is inappropriate that Telstra be part of the FTA. While the Government has a particular view on this matter, the Parliament has not adopted that view. The privatization of Telstra should be a matter for the Australian people to decide for or against through proper debate, consultation and parliamentary processes.
6. Full market access for US commercial corporations in community services

- a. It would not be the public interest to allow the intrusion of large US corporations in to the community sector without Australia having the ability to regulate them. There are real conflicts of interest when services such as aged care, child care, disability services, child protection and services to the unemployed are provided on a commercial basis. These services need to be responsive to community and cultural values. Also, in Australia in recent years, a number of companies who thought they could make profits from the aged care sector have found that it is less profitable than they expected and have left the sector. This could happen in other sectors. This is contrary to the interests of service users, as they need continuity of service over time.
- b. In the USA, Lockheed and other companies are involved in administering a number of government welfare programs. The welfare of vulnerable Australians should not be subject to the commercial interests of boardrooms overseas where such services are seen as just another profit-centre.

Quarantine

Article 7.4 provides for the establishment of a committee on sanitary and phytosanitary matters. It states:

The objectives of the Committee shall be to enhance each Party's implementation of the SPS Agreement, protect human, animal, or plant life or health, enhance consultation and cooperation on sanitary and phytosanitary matters, and facilitate trade between the Parties.

Annex 7-A provides for the establishment of a standing technical working group on animal and plant health measures,

"with a view to facilitating trade to the greatest extent possible, while preserving the rights of the Parties to protect animal or plant life or health in their respective territories and respecting the regulatory systems, risk assessment and policy development processes of each Party."

There are at least two problems with these provisions.

1. Protecting human, animal or plant life or health is not the primary objective of the either the committee nor the working group. This means that there will be competing objectives, and interpretation of scientific evidence is likely to be skewed to fit other objectives. This is contrary to Australia's objectives that its policy be based on objective scientific evidence.
2. The US and Australia will seek to reach agreement on specific measures in a situation where the partners are far from equal. This is a dangerous situation, given that there are many quarantine matters where US interests are different from those of Australia, since Australia at present is free of many diseases and our food is not contaminated by GE crops.

Technical barriers to trade

Article 8.5

This article provides that

1. The Parties shall give positive consideration to accepting as equivalent technical regulations of the other Party, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.
2. Where a Party does not accept a technical regulation of the other Party as equivalent to its own technical regulation, it shall, at the request of the other Party, explain the reasons for not accepting the technical regulation of the other Party as equivalent. The Parties may agree to further engagement on accepting equivalence of particular technical regulations, including through the possible establishment of an *ad hoc* working group, as provided for in Article 8.9.3.

This is problematic, given the differences in US and Australian economic power, interests and values. There are a number of areas where Australians want something different from what is acceptable in the USA. The question is how will Australia ensure that high Australian design standards and consumer safeguards are maintained.

An example of where there is a clash in regulations because of a clash in values is genetically modified food labelling and regulation of crops. The USA has already challenged EU food labeling requirements and identified Australian regulations in this area as a barrier to trade. This is evidence that Australia should assume they will use article 8.5 of the FTA to seek a change to Australia's food labeling requirements and crop regulation to fit with the US situation. This is unacceptable. Market mechanisms require that consumers have access to all the information that they want so that they can make informed decisions based on their perception as to whether the goods that they are offered are what they want. The US refusal to label food products that contain GE foods is anti-competition and anti-consumers.

Article 8.7 transparency

(a) Public policy processes

Article 8.7 provides that

1. Each Party shall allow persons of the other Party to participate in the development of standards, technical regulations, and conformity assessment procedures on terms no less favourable than those accorded to its own persons.

This article appears to allow US corporations to participate in Australian policy formation processes on the same basis as Australian citizens and corporations. This would allow the US an unreasonable intrusion in Australian policy processes, given the greater size and economic power of the USA.

Again, GE foods can be taken as an example of the problems. The USA has failed to provide adequate crop regulation. As a result non-GE crops have become contaminated. The US allows companies such as Monsanto to sue farmers whose crops have been contaminated, for unauthorized use of genetic material, instead of holding those who cause the contamination

accountable. It is clear that the USA has a very different and quite unacceptable view of what constitutes reasonable law in this area. It would be inappropriate for Australian producers of clean green seed, for example, to have to compete against the views of US corporations in developing Australian standards for crop regulation.

(b) Non-government processes

Part 2 of article 8.7 states

2. Each Party shall recommend that non-governmental bodies in its territory observe paragraph 1 in relation to the development of standards and voluntary conformity assessment procedures.

This requires the Australian government to recommend to non-government organisations that they allow representatives of the US government to participate in their development of standards and codes of practice.

This is a matter of some interest to UnitingCare as we are a provider of community services and involved in a number of peak bodies of service providers which from time to time address the question of standards for our service sectors. The Uniting Church was also involved in the Mineral Policy Institute’s project to develop a code of conduct for mining companies. These would appear to be the types of situations to which this article 8.7 (2) applies.

Both the Australian government recommendation and the presence of representatives of the US government in Australian civil society organisations would be an intrusion of government into a sphere in which it does not belong. It is problematic in terms of

- democratic freedoms: civil society has the right to operate without government intrusion
- countervailing power: government power is kept in check by a strong civil society as a separate entity from government, and
- the power differential involved when US government representatives participate in Australian civil society.

Environment

Article 19.4 commits both governments to “flexible, voluntary and market based mechanisms” for environmental protection. Much environmental regulation cannot be voluntary or based on the market. There have in the last few years been a number of scandals where Australian companies have polluted the environment in Papua New Guinea, the Solomon Islands, and other places. Some of these have been documented by the Mineral Policy Institute, including the pollution from Ok Tedi mine, in which BHP was involved. The evidence is that Australian and US companies cannot be relied on to care for the environment through “flexible, voluntary and market based mechanisms”.

Australian content in media

The FTA contains restrictions on regulating Australian content for multi-channelled free-to-air commercial TV, free-to-air commercial radio broadcasting, subscription TV and interactive audio and video services. Given the huge difference in the size of the media industry in the USA and Australia, Australia must retain the right to determine the level of Australian content in media.

Public broadcasting

Public broadcasting should be listed as an exemption to the agreement, since US corporations could argue that it is provided in competition with commercial services.

Changes to government purchasing rules

The Uniting Church and other Australian churches, along with a number of other community organisations and academics have argued over many years that Australian governments should use their purchasing to support local, especially regional, industry. The FTA may prevent federal, state and local government putting conditions on contracts for the purchase of goods and services, such as requiring foreign contractors to give preference to local products or form links with local firms to support employment. This is unacceptable.

Regulation impact statement

This section is based on the question: does the RIS available on the JSCOT website fulfil the Government's own requirements for an RIS and give Parliament and the public an adequate basis (as defined by the standards of the Productivity Commission) for assessing the impacts of the FTA?

Government regulators in all Australian Government departments, agencies, statutory authorities and boards are required to use Regulation Impact Statements (RISs). The Guide sets down the major elements of a RIS - including analysis of the costs, benefits and impacts of regulatory proposals, identification of alternative approaches and consultation - all of which underpin sound policy formulation. (<http://www.pc.gov.au/orr/reports/guide/reguide2/index.html> accessed 27/04/04)

A guide to regulation explains

Determining whether regulation meets the dual goals of 'effectiveness' and 'efficiency' requires a structured cost-benefit approach to policy development. The relevant problem to be addressed and subsequent policy objective should be identified as a first step in the policy development process, followed by consideration of a range of options (including no action) for achieving the objective. The benefits of any regulation to the community should outweigh the costs. (Productivity Commission: *A Guide to Regulation*)

This structured approach requires, according to *A guide to regulation* that the following be set out in the RIS

- the problem or issues which give rise to the need for action;
- the desired objective(s);
- the options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s);
- an assessment of the impact (costs and benefits) on consumers, business, government and the community of each option;
- a consultation statement;
- a recommended option; and
- a strategy to implement and review the preferred option.

To fulfil the Government’s own policy of regulation impact statements, in accordance with the normal standards required for any other area of policy, there would need to be a series of regulation impact statements, at least one for each policy area that will be affected by the FTA. There then needs to be an overall RIS, which incorporates those separate statements and then assesses the overall impact. Since the FTA operates on the basis of a negative list, there needs to be an RIS for all areas of government policy that might conceivably be affected, including some consideration of potential future areas of policy that will be automatically included.

The Regulation Impact Statement for the FTA, as downloaded from the JSCOT website, is superficial and fails to fulfil the requirements set out in the Productivity Commission *A guide to regulation*. The RIS appears to have been based on a very limited understanding of the RIS requirements, the range of matters that will be affected by the FTA, and the sort of consequences that will flow from the FTA. This is in spite of the fact that *A guide to regulation* explains in considerable detail the concepts and processes involved.

The inadequacy of the RIS is an example of why these matters cannot be left to experts in trade who lack understanding of other dimensions of public policy

The fact that this would be a large and perhaps unmanageable task should alert members of the Committee, and the Government, to the fact that the FTA is a dangerous document, the implications of which are not fully understood and not easy to assess. The fact that a full RIS cannot be prepared should in itself be a sufficient reason for rejecting the FTA.

However, the difficulty of preparing a fully comprehensive RIS does not excuse the failure to address major and obvious issues that could and should be assessed.

Regulatory costs

Problems with the regulatory impact statement for the USAFTA include the following:

Issues Identification.

1 The problems the FTA are intended to solve are not well-defined. There is a description of the current trade situation, but no listing of specific trade problems that need to be addressed. There is an assumption that free trade is necessarily better, as if any alternative lacks rationale.

2 The RIS does not provide a list of the problems in each area of policy affected by the FTA.

- 3 The failure to name the problems to be solved by the FTA means that changes are proposed to areas of policy which are already cost efficient and effective, such as the Pharmaceutical Benefits Scheme.
- 4 The failure to define the specific problems (from an Australian perspective) that the FTA is intended to solve in each policy area means that the interests of Australians as taxpayers and citizens are confused with the interests of corporations.

Objectives

- The RIS refers to the original statement of Australia's objectives (provided at http://www.dfat.gov.au/trade/negotiations/us_fta/ris/annex2.html.)
- The RIS does not work its way through the list of objectives in the way required by the RIS process. The RIS does not evaluate which objectives have been achieved, which have not been achieved in the sense of not making progress, and which have failed in that the FTA provisions are inconsistent with the original objectives. The objectives section of the RIS thus gives a misleading appraisal of the original objectives and the final outcome.
- The RIS fails to identify some government objectives that are outside what the FTA was intended to cover. For example, the government stated that it had an objective of preserving the PBS and affordable medicines. The RIS is written as if inclusion of PBS-related matters does not breach the original objective.
- The RIS also fails to consider whether the FTA is, in its present form, the best way of achieving the original policy objectives.

The RIS fails to examine, for example, whether a 20 year extension of patents and copyright achieves the original objective listed under intellectual property rights.

Ensure that Australia remains free to determine the appropriate legal regime for implementing internationally agreed intellectual property standards, maintaining a balance between the holders of intellectual property rights and the interests of users, consumers, communications carriers and distributors, and the education and research sectors.

The FTA seems to upset the previous balance and to increase the benefits for holders of intellectual property rights at the expense of users, consumers, etc.

Similarly, it is unclear how increasing the threshold for investments to be reviewed by the FIRB fulfils the objective

Ensure that the negotiations take account of Australia's foreign investment policy, and the need for appropriate policies to encourage foreign investment, while addressing community concerns about foreign investment.

No case is presented to show that the restriction on regulating for Australian content in electronic media fulfils the original objectives for media such as:

Ensure that the negotiations take account of Australia's cultural and social policy objectives, and the need for appropriate regulation and support measures to achieve these objectives in areas such as audiovisual media.

The changes in quarantine appear to move away from, rather than towards the scientific based quarantine measures as set out in the following Australian objective:

Seek to reinforce mutual commitment to the development and application of science-based quarantine measures, consistent with the WTO SPS Agreement.

These examples are illustrative of the problem, and do not exhaust the areas in which the discussion of objectives is inadequate in the RIS

Options

No options are addressed under the heading of “options”.

As the RIS itself states, it provides, under the heading of “options”, a summary of the “outcomes”. Options and outcomes are very different matters. An RIS that satisfied statutory requirements would have to look at alternatives to an FTA, including the option of the *status quo*, for each area of policy affected by the FTA. There is no attempt in the RIS to do this.

This is an extremely serious failure. It means that the Government has no way of assessing the worthwhileness (costs versus benefits) of the FTA in particular areas of policy.

The problem of a negative list is also evident here. How can options be prepared now for policy areas that will only emerge in the future? It requires a huge leap of faith to assume that all future policy matters will be best dealt with by the provisions of the FTA.

Assessment of the impact (costs and benefits) on consumers, business, government and the community of each option

(a) Macro effects

- The RIS relies on evaluations of the macro effects of the FTA, some of which were done before the FTA was actually negotiated and do not reflect the actual provisions of the FTA. The new study commissioned by the Government is not yet available.
- The economic impact study assumes that the welfare of Australians can be equated with increased consumption. This assumption is not consistent with studies by the CSIRO and the ABS which show that increases in consumption do not necessarily increase wellbeing. As the ABS publication *Measures of Australia's Progress* documents, there are a range of variables that must be considered in determining the overall welfare of the population. For example, many people would prefer more sense of control over their life, better public health care and education, and a healthier environment, rather than increased economic consumption.

- The committee should reject any economic impact study that equates increases in GDP or consumption with increases in the welfare of Australians. Conclusions about the welfare of Australians would require very different types of studies.
- The requirements of the RIS set out in *A guide to regulation* recognise the importance of non-financial costs and benefits and is consistent with the above concerns.

However, the analysis should not be restricted to tangible or monetary items and, where applicable, should also include possible changes in environmental amenity, health and safety outcomes, and other non-monetary outcomes.

Effects on particular policy areas

The economic impact study appears to have assessed the impact of reducing barriers to trade, but not the effect of other changes required by the FTA.

Example 1. The pharmaceutical benefits scheme will be changed to provide increased information to pharmaceutical companies, a review process for decisions and a medicines working group. Changes to patents will also have an effect. There is no analysis of the costs (or benefits) of each of these changes. Such analysis should be done on the basis that the USA intends to derive substantial benefits for US pharmaceutical companies from these changes. This is not evaluated in the RIS. An analysis would include consideration of the impact on patients, budget for the PBS, and the workability of the PBS.

Example 2. The section on state and regional impacts refers only to benefits, but makes no comment about the cost to jobs of tariff cuts or changes to government purchasing rules. This involves personal, social and economic costs.

Example 3. There is no consideration of the economic and social impact of the 20 year extension of copyright and patents required by clause 17.4 of the FTA. This question is particularly important since the economic modelling that has been done assumes the removal of barriers to trade, whereas extension of patents and copyright constitutes an additional barrier to trade and competition. The following paragraph from *A guide to regulation* would therefore seem to have been breached:

The RIS should not recommend an option which restricts competition unless it is demonstrated that the benefits of the restriction to the community as a whole outweigh the costs; and the desired objective can be achieved only by restricting competition.

The RIS fails to evaluate the financial and social costs of each of the legislative changes listed in Annex 8 to the RIS.

Failure to identify particular groups that will be affected

The RIS section on costs and benefits is inadequate partly because it fails to identify all the groups that will experience the impact of the particular areas of the FTA. *A guide to regulation* lists the following possible groups; the FTA is so wide ranging that all such groupings need to be considered in assessing the FTA as a whole; not all groups will be equally affected by particular sections.

The groups likely to be significantly affected by the regulatory initiative should be separately identified. These groups should be broken down into sub-groups where the initiative will have different effects on those sub-groups. Group and sub-group distinctions may include:

- government, business and consumers;
- within the government category, Commonwealth, state/territory, or local governments;
- within the business category, big, medium and small businesses, and importers, exporters and/or firms supplying the local market;
- within the consumer category, groups with different levels of information and/or abilities to process information;
- groups in different geographical areas (eg urban/rural) or different states/territories; and groups with different age, language, physical, cultural, gender, family or income/wealth characteristics.

Example 1: The RIS recognises that there will be some reduction in regulatory flexibility at the various levels of government, but fails to identify the problems that this may cause or the groups who may be adversely affected, ie the social impacts.

Example 2: The RIS fails to analyse how the inclusion under FTA arrangements of community, education and health services provided on a commercial basis or by the not-for-profit sector will affect both providers and service users. It assumes liberalisation is a benefit, rather than assessing costs and benefits. Since individuals have little choice about their use of some services such as nursing homes or unemployment services, it is crucial that a proper analysis be carried out, based on realistic assumptions and actual data.

Example 3: The RIS fails to provide an analysis in support of its claims that consumers will benefit from the FTA. No attempt is made to identify any areas of the FTA where any group of consumers might not benefit eg the effect of the chapter on barriers to trade on GE food labelling and crop regulation.

Example 4. The RIS fails to examine how the prohibition of certain conditions being imposed on investors will affect actual government regulation or particular groups who have in the past benefited from such conditions.

Distribution effects

A guide to regulation requires that the RIS pay attention to distribution effects. No attempt to examine distribution of costs and benefits is made in the RIS economic study. The economic study identifies a probable overall increase in Australia's GDP and in consumption, but fails to identify how those benefits will be distributed and whether there will be losers as well as winners.

Consultation.

- We acknowledge that there has been extensive consultation. UnitingCare has been involved in some meetings between AFTINET and DFAT. The consultation statement, does not, however, appear to satisfy the requirements in *A guide to regulation*, which requires that it not only explain the consultation processes, but also report "the views elicited from the main affected parties". The RIS does not provide an adequate summary of the views

presented in consultations. It also does not include a response to those views which questioned provisions that are now in the FTA. For example, there is a long list of the ways that other levels of government were consulted, but only one or two issues raised by other governments are listed. The concerns of civil society are covered in a couple of brief sentences, in which the focus is not on their specific concerns, but on the claim to have satisfied them. The ongoing concerns of AFTINET, UnitingCare and other NGOs is evidence that adequate attention has not been paid to what was said in these consultations. The consultation process is not merely a political process, but a matter of obtaining essential information, as *A guide to regulation* explains.

The cost-benefit analysis should document the likely impact of each option on each group, followed by an overall assessment of the impact of each option on the community.

The purpose of consultation is to examine the costs, benefits and appropriateness of each option. (Productivity Commission, *A guide to regulation*)

Example. There has been no consultation with not for profit providers of community services about the impact that the FTA may have on that sector or on service users.

Recommended option

One of the signs of the inadequacy of the RIS is that it does not identify a preferred option from a list of options – the preferred option is the only option presented. This applies not only with regard to the FTA as a whole, but also to each policy area affected. At the very least, the option of not having an FTA should have been considered. For particular areas such as the PBS, options would have included excluding them from the FTA and dealing with them in the FTA, but in a different way from those in the current text.

A guide to regulation requires that reasons be given as to why alternative options were rejected. This has not been done, since the options have not been considered.

A strategy to implement and review the preferred option.

- The RIS indicates the formal process for the FTA entering into force.
- It fails, however, to indicate what other actions will be required to implement the FTA, such as provision of budget for new administrative structures; eg the medicines working group and the quarantine-related committees, and the structures, processes and policy changes that state and local government will need to adopt to ensure that they comply with the agreement.
- The RIS refers to how the FTA has been and is being reviewed before being signed; it does not refer to any future reviews that might be needed to assess whether the FTA is achieving for Australia the intended outcomes. For example, it fails to provide any mechanism to assess the impact of the changes to the PBS, the new structures set up in relation to quarantine, standards related to GE modified food labelling and crop regulation, the effects of the FTA on government ability to regulate services in the

national interest, the effects of a more liberal investment regime, or the levels of Australian content in media where ability to require Australian content is limited by the FTA.

Anonymity

The RIS on the JSCOT website is undated and no department or person is named as being responsible for the RIS. This lacks transparency. There is also no evidence that the RIS was submitted to the Productivity Commission for advice or approval of its format.

Timing

There is the further issue of when should an RIS be prepared. *A guide to regulation* says:

A.4 At what stage should a RIS be prepared?

In order to obtain the maximum benefit from the RIS process, for new regulation (including amendments to existing regulation) the RIS should be prepared by officials once an administrative decision is made that regulation may be necessary, *but* before a policy decision is made by the Government or its delegated officials that regulation is necessary. Where consultation is not possible before regulation is made, consultation should occur afterwards.

The analytical framework underpinning a RIS should be used throughout the policy development process. It is important to note that for reviews of existing regulation, the terms of reference should reflect the key elements of the RIS, with any reports, studies, reviews or discussion papers using a RIS framework. This requirement ensures that the RIS framework is incorporated at an early stage in regulation reviews and is used until a final RIS is prepared, prior to a policy decision being made.

In the case of treaties that involve regulation, a RIS should be prepared before the formal policy decision to pursue treaty negotiations, again prior to Australia signing a treaty and, finally, when the treaty is tabled in the Parliament with the National Interest

The inadequacy of the RIS provided on the JSCOT website is evidence that this advice has not been followed and that the Government has negotiated the agreement without adequate review of the impact that it will have. We suggest that the discussion papers and financial analysis provided on the DFAT website do not fulfil the requirements set out in the middle paragraph of the quote – that is, they do not follow the RIS framework, either at the macro level or with regard to the particular policy areas.

Regulating government

The RIS, National Impact Assessment and economic study assess only economic activity. Essentially, they look at what are the benefits for business and the GNP. Welfare is falsely equated with increased GNP. They fail to look at the issues from another perspective that is at least equally important, namely the effect on government activity, its ability to make laws, provide services, improve human development and equity, and to enhance the internationally recognized human rights of people. This section argues that there is need for a totally different

RIS from that provided – a second RIS that assesses the impact of the FTA on the government’s ability to fulfil its constitutional responsibilities and respond to public concerns.

The Free Trade Agreement is a way of regulating government. Since government is a provider of goods and services (such as health, education, law, and consumer protection), it must be assumed that regulating government can have costs and limit its ability to deliver the goods and services that are its responsibility, just as regulating business may.

While *A guide to regulation* at first sight requires an even-handed approach and looking at the issue from the perspective of all stakeholders, it still includes the assumption that less regulation is generally better than more regulation and regulation has to be justified.

A significant part of the government’s role is about ameliorating social costs of economic activity and ensuring that, in accordance with human rights concerns, all Australians share in economic prosperity. The FTA reduces the ability of government to do this. The regulatory impact statement needs to assess what effect FTA restrictions on government policy have on what the Australian Bureau of Statistics now calls “Australia’s progress”.

If it is unacceptable to assume that regulating business is the best way of achieving desired outcomes, then it should also be unacceptable to assume that regulating government through an FTA is the best way to achieve desired outcomes. The goods and services for which government is responsible are more varied and complex than those of any business, even very large ones. This is evident from the policy portfolios and range of departments, statutory authorities, public corporations, body of legislation and so on. It is therefore essential that the RIS take seriously the fact that the FTA, even as it reduces regulation of business, increases the regulation of government. The standards for justifying regulation of government in each area affected by the FTA must be at least as high as the standards required when government seeks to regulate business.

For example, *A guide to regulation* spells out in some detail the way of assessing compliance costs when there is a new regulation on business. Yet the RIS fails to provide an equivalent assessment of the compliance costs of the new mechanisms required of government under the FTA in the areas of the PBS, quarantine, and the many areas that are affected by provisions governing the development of standards (eg GE food labelling and crop regulation) in the chapter on technical barriers to trade.

A guide to regulation stresses the importance of carefully identifying problems without prejudging them, and carefully considering options, including non-regulatory options. The option of not regulating government is not canvassed in the RIS that has been provided. The FTA is assumed to be the only way to go on all matters.

A guide to regulation sets out criteria that solutions to problems should meet.

In all cases, the methods adopted to deal with a perceived problem should have the following characteristics:

- administrative simplicity;
- flexibility;
- efficiency and equity.

In some cases, a mix of alternatives listed above may be most suitable.

The material in the RIS admits that the FTA reduces flexibility in all areas of government. The changes to the PBS are likely to reduce efficiency and any increased costs of medicines will reduce equity. And so on.

That is, there is a need for a second type of RIS, which is as stringent in assessing the regulation of government as the normal form of RIS is in assessing the regulation of business. Can government adequately fulfil its role in all necessary area when limited by the FTA? What will happen to Australia's progress? Who will bear the costs?

Conclusion

The policy concerns expressed in this submission make the FTA unacceptable. Significant areas of policy have not been appropriately handled in the FTA. It should therefore be rejected.

The inadequate RIS means that negotiators and government have been unaware of the implications of the FTA they were negotiating. The failure to provide an RIS on each relevant policy area means that Parliament has no basis on which to evaluate the agreement in an objective or responsible way. The FTA should therefore be rejected on this ground also.