

CLAYTON UTZ



Free Trade Agreement Report

March 2004

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Introduction

Australia and the United States of America completed negotiations to enter into their Free Trade Agreement (“FTA”) on 8 February 2004 and signed it on 18 May.

Comprehensive treaty arrangements are very complex to negotiate, implement and interpret. A full understanding of such treaties, their effects and the full extent of the opportunities and challenges they create take some time to become fully apparent.

This is Clayton Utz’ initial analytical overview of the FTA after carefully reviewing the actual text of the FTA. Key findings include:

Agriculture and services

Significant increases in trade flows are expected in these areas in the medium to long term.

Government procurement

The FTA in practice represents a move by Australia towards the requirements of the WTO Agreement on Government Procurement. Provision of non-defence material and normal commercial goods and services to the defence forces is liberalised and important opportunities are likely in these areas. Some change to the Commonwealth Government Procurement guidelines and departmental practices will be required.

Manufacturing

Manufactured products other than clothing will receive immediate benefit from the FTA with tariffs on most products, other than apparel, being set at zero upon the FTA coming into force.

Customs administration

The winners appear to be importers and exporters and the Parties who benefit from being able to challenge customs decisions, while the losers appear to be companies who benefit from the non-tariff protection implicit in the current customs administration.

Competition/anti-trust law

Although there is no direct impact upon business, the FTA's competition provisions will mean greater co-operation between the two countries' regulators in anti-trust and consumer protection enforcement.

Investment protection

All dispute settlement will take place at a state to state level with no direct involvement by the investor - but there does not appear to be anything to prevent an investor from entering into a specific arbitration agreement with a host state.

Intellectual property

IP rights owners will be the winners and consumers may find that prices on some products will increase. Alignment of US and Australian IP regimes may benefit Australian industry through a more certain environment for the export of IP to the US, and increase US understanding and confidence in Australia's legal system.

Electronic commerce

There will be opportunities for US companies to supply digital products in Australia and Australian companies to supply digital product in the US as there will be no duties, fees or charges on or in connection with the importation or exportation of digital products.

Environmental litigation

Unlike other FTAs made by the United States, this one does not include “investor-state” provisions under which private companies have brought claims against the Mexican, Canadian and US Governments in relation to regulatory decisions on environmental grounds which have resulted in commercial losses to those companies.

Broadcasting and telecommunications

The FTA's immediate impact on broadcasting and other forms of audio and/or visual media is minimised by the reservation of existing restrictions on foreign investment and control and quotas for Australian content and the reservation of rights to extend content restrictions, including to emerging services. It also raises a number of issues in telecommunications, including consistency with the principles that underlie Australia's existing legislative regime and the GATS, but does not deal with internet charging, a major concern for Australia.

Clayton Utz will continue to monitor developments in the FTA. If you are interested in being informed of these developments, whether in general or in relation to specific topics, please register by emailing Phillipa Birkett at pbirkett@claytonutz.com.

Making the FTA into law

by Paul Armarego and Holly McAdam

The general position under Australian law is that most treaties which Australia has joined are not directly incorporated into Australian domestic law.

For the FTA to enter into force domestically it will have to pass through approval processes and necessary legislation (Federal, State and Territory) will need to be in place, as will any changes to the practices of Departments and agencies necessary to conform to the FTA. The FTA has been tabled in both Houses of Parliament and is being reviewed by the Joint Standing Committee on Treaties (JSCOT) and the Senate Select Committee on the Free Trade Agreement between Australia and the US. The Committees will report to Parliament on the FTA on 24 June 2004 and may request submissions on the FTA to be made by the public. Executive Council authorisation for signature must also be obtained. If you would like to know more about Australia treaty practice contact Paul Armarego at parmarego@claytonutz.com.

Similarly, the US Congress will be required to approve the Agreement and pass necessary legislation. The USTR Trade Advisory Committee reported to the President on 12 March 2004. Copies of all 32 of these reports, all but one in favour of the FTA, are online at <http://www.ustr.gov/new/fta/Australia/advisor/index.htm>. The US' principal concerns were the unfavourable precedent for future FTAs the exclusion of sensitive industries such as the sugar exclusion created and the absence of a dispute mechanism that would enable US investors to settle investment disputes with the Australian government by arbitration.

Once necessary approval processes have been completed, a date for entry into force may be agreed, which would occur through an exchange of diplomatic notes. The Agreement is expected to come into force around 1 January 2005. Once in force, the Agreement will apply to activities throughout Australia (excluding the Australian Antarctic Territory) and 50 states of the US, the District of Columbia and Puerto Rico.

Structure of the FTA

The FTA is composed of the Agreement itself, several annexes and a range of side letters. The annexes and any interpretative footnotes in the chapters or annexes form part of the text of the Agreement and will, accordingly, become legally binding once the above processes have been completed. The various side letters may constitute part of the Agreement, be stand-alone instruments that are legally binding or they may have no legal standing. The status of a side letter will depend on the language used in the letter. Side letters are utilised in the Agreement in three ways:

- to provide additional clarification on how a particular provision of the Agreement will apply to either the US or Australia;
- where either the US or Australia wishes to make additional commitments that apply to that particular country; or
- where either the US or Australia wishes to confirm to the other country how its current policies or systems operate.

The first two categories of side letter are an integral part of the Agreement and, accordingly, are legally binding in public international law. The final category is not an integral part of the Agreement and, therefore, is not legally binding in public international law. This category of side letter would be used as an interpretative tool if there was a dispute between the Parties.

The FTA does not prevent Australia or the US from enacting laws, regulations or policies necessary to protect security interests, public morals or public order, human, animal or plant life or health, national treasures of artistic, historic or archaeological value and to conserve exhaustible natural resources. Further, the Agreement replicates WTO protection against discriminatory taxes on goods and prohibits export taxes on goods.

The Agreement can be amended at any time by agreement between the Parties and may be terminated by either Party giving six months notice to the other. To amend the treaty, the Parties would need to implement domestic measures. The Agreement does not include a review requirement. However, a Joint Committee will be established to continuously review the operation of the Agreement and will meet annually at a Ministerial level to discuss its operation.

Government procurement: Some changes ahead

by Paul Armarego and Richard Morrison

Chapter 15 applies the principle of non-discrimination in the conduct of Government procurement to “procuring entities”. These are all Federal Departments and agencies covered by the *Financial Management and Accountability Act 1997* (FMA Act) and the 33 listed entities under the *Commonwealth Authorities and Companies Act 1997* (CAC Act). It may be expanded to include State Governments and agencies but not local Government in both Australia and the US, but this is not yet settled. There are various exclusions. Various thresholds have to be met before the Chapter operates. The general goods and services thresholds for Federal entities for Australia and the US are A\$81,800 and US\$58,550 respectively.

In general, much of the Chapter appears, in practice, to represent a move by Australia towards the Government procurement requirements under the WTO Agreement on Government Procurement. It is expected to create opportunities in the government sector for the nationals of both the US and Australia. Despite the carve outs for the acquisition of strategic defence materiel that are essential for national security, the provision of normal commercial goods and services to the defence forces is liberalised by the FTA and important opportunities are likely in these areas, especially in the large US defence market.

Chapter 15 requires that procuring entities of either Party do not discriminate against suppliers of the other Party in their procurement of goods and services above specified thresholds. Under the FTA, Australia will become a “designated country” under US law. Accordingly, US Federal and most State Government purchases of goods will become open to Australian industry and the six per cent penalty applicable to Australia under the *Buy America Act* will be waived. In return, most Australian requirements for industry development programs will be abolished. Offsets such as local content requirements are also specifically prohibited under Chapter 15. In the past, there have been differences between the US and Australia on the purpose and effect of policies such as the endorsed supplier programs. It is likely that some modification of the Endorsed Supplier Arrangements and Model Industry Development Criteria will be required. However, specific exceptions to this general prohibition have been conceded by the US, most notably, defence-specific offsets such as the Australian Industry Involvement and Australian preference programs for SMEs in local development areas. The US has also maintained its ability to afford preference to small and minority businesses, including the exclusive right to provide a good or service and price preferences.

Most of the requirements under Chapter 15 focus on transparency of process, fairness and other due procedure considerations. Chapter 15 may result in legislative changes to the FMA Regulations and will certainly require some amendments to the *Commonwealth Procurement Guidelines and Best Practice Guidance* (“CPGs”) and some internal department policies and practices. Particularly noteworthy is the expected removal of the discretion under the FMA regime to depart from the CPGs in some circumstances. The other major practical consequence would appear to be that Departments and agencies will need to publish their Chief Executive Instructions and any other documents that might be considered to be procedures and administrative rulings of general application. Governments and individual Departments will need to review their policies and practices for compliance should the FTA come into effect on 1 January 2005.

Chapter 15 establishes the presumption that open tendering procedures will be adopted in all Government procurements to which the Chapter applies. However, selective and limited (or sole source) tendering will still be permitted in certain limited circumstances. In all tender processes, the procuring entity is required to limit participation eligibility to those factors that ensure a supplier has the legal, commercial, technical and financial abilities to fulfil the requirements. Further, the evaluation of a supplier's conformity with these requirements cannot be based on whether the supplier has past experience in Australia. Minimum standards and times for public notices of procurement requirements are imposed. Government Departments and agencies will need to review their policies and practices for compliance should the FTA come into effect on 1 January 2005.

A requirement has been imposed that, on request, a procuring entity must provide to tenderers all criteria to be considered in awarding the contract. This may increase the importance of procuring entities' fully developing a defensible set of evaluation criteria prior to tender release, ensuring that criteria are appropriately and transparently applied and fully considering the content of tenderer debriefs. There is also a requirement in two stage tender processes where a tenderer does not make it through to the second stage that reasons for tender decisions be given in writing. In circumstances other than this oral briefings will remain acceptable. The sufficiency of current Australian law following the *Hughes* line of cases is confirmed in a side letter. The benefits for many Government Departments and agencies in more fully integrating their evaluation, evaluation report and debrief documentation will apply with even more force should the FTA be implemented into Australian law.

A further practical issue is that there is likely to be benefit for Government Departments and agencies through greater use of online electronic methods of tendering, a process that has been developing for some time.

Special provisions apply to blood plasma products and blood fractionation services under a side letter.

A more detailed description and analysis is available at http://www.dfat.gov.au/trade/negotiations/us_fta/guide/15.html.

Transparency: Business as usual?

by Paul Armarego and David Moore

Chapter 20 aims to promote transparency in the making and implementation of laws and to ensure that mechanisms for review of decisions and consultation between the US and Australia are implemented. Chapter 20 is not expected to result in any significant legislative or practical changes for Australia.

Australia and the US are required under Article 20.2 to ensure that laws, regulations, procedures and administrative rulings of general application are made publicly available and, to the extent possible, to publish for comment any proposed laws, regulations or procedures. This requirement is already in place in Australia by virtue of the *Legislative Instruments Act 2003*. There may be some processes and procedures that Government Departments have considered internal that may need to be made public and published for comment such as Commonwealth Departments' Chief Executive Instructions. Both Parties are also required to notify and provide information to each other on any measure that might materially affect the operation of the FTA.

The majority of Articles in Chapter 20 relate to the processes for application of the FTA and for the review and appeal of administrative actions or decisions regarding matters covered by the FTA. The processes prescribed retain the review and appeal processes (including the concepts of natural justice and due process) that currently exist in Australian law and, accordingly, are not expected to be controversial.

Standards and technical regulations: An important part of the FTA's effectiveness

by Paul Armarego and Gonzalo Villalta Puig

Chapter Eight of the FTA aims to ensure that the standards, technical regulations, and conformity assessment procedures of each Party are as similar as possible so that the Parties do not find it difficult and costly to meet them. How these provisions are actually implemented in practice will be a very important part of how effective the FTA will be. As tariffs are lowered or eliminated, these measures become more important to encouraging free trade. Existing obligations under the WTO Technical Barriers to Trade Agreement are affirmed. State level Governments are not specifically covered but the Parties agree to encourage adherence by such Governments.

To achieve this goal, the Parties are required to:

- affirm and aspire to the implementation of international standards where possible rather than domestic standards as is common in the US;
- agree to give positive consideration to accepting, as equivalent, the other's technical regulations provided they adequately fulfil the objectives of their own regulations;
- facilitate the acceptance of each other's conformity assessment procedures. Where these are rejected detailed reasons for the refusal must be given;
- allow persons from the other Party to participate in the development of standards, technical regulations and conformity assessment procedures; and
- exchange and publish relevant information to ensure processes are transparent.

The Parties also agree to:

- establish dispute resolution entities (called the Chapter Co-ordinator), which will be allocated the role of addressing the issues raised by the other in relation to standards, technical regulations, and conformity assessment procedures; and
- encourage State Governments and other relevant bodies to adhere to the commitments outlined in the Chapter.

Customs administration

by Anthony Field

In context

Chapter 6 of the FTA deals with non-tariff barriers to trade and obliges Australia to undertake its customs operations in a way that does not obstruct international trade.

To achieve a net benefit to trade and the community, the FTA must allow the US and Australia to discharge their proper customs responsibilities while, at the same time, leading to a reduction of the administrative barriers and costs for legitimate traders. Whether the FTA will do this is yet to be seen. What does appear to be likely is that, at least in the short term, the new obligations imposed by the FTA will lead to an increase in the cost of customs administration. If this occurs there will be a transfer of the costs of customs administration from traders to the Government.

The winners from the FTA would appear to be importers and exporters and the Parties who benefit from being able to challenge customs decisions. There may also be more work available to those persons who provide customs administration services.

The losers from the FTA appear to be the Australian or US companies who benefit from the non-tariff protection implicit in the current customs administration. The Government of each country will also bear any increased cost of providing their customs administrations.

The approach in the FTA

The principal role of Australia's customs administration is to:

- facilitate trade and the movement of people across the Australian border while protecting the community and maintaining compliance with Australian law; and
- collect customs revenue efficiently.

In view of this role, the approach adopted in the FTA is to:

- impose the core obligation that customs administration must be impartial and not obstruct trade. The clearance of goods must be speedy with separate expedited procedures for express shipments;
- provide mechanisms for the disclosure of information and the making of administrative rulings;
- provide for the enforcement of the provisions of the FTA and for the administrative and judicial review of a number of customs decisions; and
- require ongoing consultation and co-operation.

Obligations

The FTA imposes an obligation to:

- administer in a uniform, impartial and reasonable manner all laws, regulations, decisions and rulings relating to customs matters (Article 6.2);

- ensure that each Party's laws and regulations are not prepared, adopted or applied with a view to or with the effect of creating arbitrary or unwarranted procedural obstacles to international trade (Article 6.2);
- adopt and maintain procedures for the release of goods within no greater a time than is required for compliance with the customs laws. For example, where possible goods are to be released within 48 hours of arrival (Article 6.8);
- minimise the impact of the taking of securities by dealing with when securities can be taken, the amount of securities to be taken and the form and discharge of securities (Article 6.8); and
- adopt and maintain separate expedited customs procedures for express shipments. This element of the FTA appears to accommodate the proposed outcomes of Australia's Cargo Management Re-engineering Project.

The disclosure of information

A number of the Articles of Chapter 6 promote transparency and co-operation by imposing obligations on the Parties to disclose information.

Article 6.1 requires each Party to ensure that its laws, regulations, guidelines, procedures and administrative rulings are promptly published on the internet and in print form. However, some law enforcement and other documents are not required to be published.

A most significant obligation is imposed by Article 6.5(3) which requires the exchange of information where there is a reasonable suspicion of unlawful activity in relation to an importation. The obligation imposed is to respond by providing the available information that is material to the request. Information going as far back as five years can be required to be provided and the Article specifies the classes of information to be provided in some detail. The information can include details of the Parties involved in the importation, the nature of the goods and information about its classification, customs value and tariff classification.

Article 6.5 requires each Party to endeavour to provide the other Party with advance notice of any significant modification of its administrative policy or other similar developments relating to its laws or regulations that have a substantial effect on the operation of the FTA.

Article 6.57 contains a catch-all disclosure obligation that Parties provide any information that would assist in determining whether imports or exports comply with applicable laws.

Advanced rulings

Article 6.3 requires each Party to provide a mechanism for written advance rulings to be issued on tariff classification, valuation, country of origin and whether goods obtain the benefit of the FTA. The FTA details the requirements in relation to the adoption and maintenance of the advanced rulings system. The rulings are to be provided before the goods arrive and must be provided with reasons within 120 days of the receipt of all necessary information. Importers, exporters and producers may request advanced rulings, Australia or the US can seek a review of a ruling, and rulings can be revoked on the basis that they contain an error of fact or law.

Confidentiality

Article 6.6 makes it clear that information provided under the obligations in relation to customs administration are subject to the confidentiality provision in Article 22.4 of the FTA. That Article ensures that neither Party is obliged to furnish or allow access to confidential information when disclosure would impede law enforcement, be contrary to the public interest or would prejudice legitimate commercial interests. Article 22.4 also imposes an obligation on the Party receiving the information not to disclose or use the information for a purpose other than the purpose for which it was disclosed if information is identified as confidential information.

Enforcement law review

The FTA imposes a number of requirements in relation to enforcement of the agreement in administrative review that appear to have significant implications for the operation of the Australian and US customs administrations. Although Australian Customs currently has a number of review mechanisms in place, including a system for the provision of customs rulings, the FTA appears to extend those obligations and require even more decisions to be subject to administrative merits review.

The approach adopted appears, possibly by chance, to be in accordance with the broad thrust of the Administrative Review Council's recent report on "What decisions should be subject to merits review". Article 6.7, entitled "Penalties", requires that each Party must maintain measures that provide for the imposition of civil or administrative penalties and, where appropriate, criminal penalties for violation of its customs laws and regulations governing valuation, country of origin, and eligibility for treatment under the FTA. More significantly, Article 6.4, entitled "Review and Appeal", imposes the obligation that Australia and the US must provide importers with access to at least one level of administrative review and judicial review of determinations relating to customs matters. What is a "determination" is not defined but "customs matters" is defined in Article 6.11 to mean a broad range of customs matters but not to include anti-dumping or countervailing duties. It includes matters pertaining to classification and valuation of goods, rates of duty, countries of origin and eligibility under the FTA as well as "all other procedural and substantive requirements, restrictions and prohibitions on imports and exports.

It appears that the breadth of Article 6.4 and the propensity for US companies to engage in litigation may well lead to increased review of decisions made by the Australian Customs Service both in administrative fora and before the Federal Court.

Co-operation and further agreement

The Parties are also obliged to co-operate in achieving compliance with their respective laws (Article 6.5) and to consult to resolve any technical or interpretive difficulties what may arise under the FTA or ways to improve the effectiveness of their co-operative efforts (Article 6.5(8)). Note: this only relates to difficulties under Article 6.5).

Textiles and apparel: Some opportunities and challenges

by Paul Armarego

The FTA provides for liberalisation of the tariff rules of both countries for textiles and apparel. This is particularly important given that the US has, to date, tended to maintain a position which ensures that its textile and apparel industries are able to obtain the maximum benefits from the provisions in the World Trade Organisation's Agreement on Textiles and Clothing ("ATC"). While the aim of the ATC is to eliminate over time the use of quotas to protect a country's domestic textile and apparel industries, it does provide mechanisms to enable countries to select the manner and time in which they do this and the US has essentially made decisions to "back end" the change required of it.

Australia has eliminated quotas and also has a program for the reduction of the tariffs on all textile clothing and footwear to no more than 5 per cent by 2015.

The FTA provides for the tariffs on all textile and apparel products which, according to the Rules of Origin in Chapter 5 of the FTA, have been manufactured in the respective countries, to be eliminated by 2015. The reduction is not uniform across the various product classifications. Given that the tariffs on comparable classifications tend to be higher in the US than in Australia, then the US will be providing a higher level of tariff reductions than Australia during the course of the tariff reduction program.

The provisions of the FTA ensure that all goods entitled to seek tariff relief under it must meet stringent conditions as to origin, and to this extent the FTA is more restrictive than the provisions of the WTO Agreement on Textile and Apparel.

This will, for example, pose problems for some products which are manufactured in Australia from materials which have entered Australia utilising the provisions of the Expanded Overseas Assembly Program to manufacture goods. The key here is that the US did not move on the application of the yarn forward rule.

The FTA provides for emergency actions on textiles and apparel if, as a consequence of the preferential tariffs applying, the level of imports increase in such quantities in absolute or relative terms so as to cause serious damage or the threat of serious damage to a domestic industry producing a like or directly competitive product. In these cases, the country receiving those imports may impose additional duties for a period up to four years in certain circumstances. There are a limited number of Australian products that would have the potential to pose such a threat in the US market.

There are opportunities to export products made from speciality fabrics which are not normally manufactured in the other participating country.

Manufacturing: Some opportunities

by Paul Armarego and Anthony Field

Manufactured products other than clothing will receive immediate benefit from the FTA with tariffs on most products, other than apparel, being set at zero upon the FTA coming into force.

Another change which will provide mutual benefits is the commitment to the elimination of technical barriers to trade. The Parties are committed to using to the maximum extent possible relevant international standards and also giving positive consideration to recognising the technical regulations of the other Party as being equivalent.

This commitment also extends to conformity assessment, including recognising the other Party's conformity assessment bodies.

Additionally, the products which are sent to one country from the other for repair or alterations will not have duty imposed on their return. This includes ship repairs. This change will provide opportunities for a wide range of manufacturers in each country.

Agriculture

by Paul Armarego and Anthony Field

Agriculture has been the most sensitive of trade related issues for both Australia and the US and it is therefore not unexpected that it is the most complex of the major elements of the FTA.

The US agriculture market has to date been controlled by both quotas and tariffs. Additionally, the US Government has provided a range of subsidies for domestic agriculture producers. This has presented difficulties for Australian agriculture producers seeking to export to the US market. It has also created difficulties in some other export markets (especially with some dairy products).

The FTA provides for the elimination of US tariffs on all agricultural products by year 18 except for dairy products and sugar. The US tariffs on existing “in quota” tariffs will be eliminated and the quotas for Australian dairy exports to the US will be increased. Tariff rate quotas also apply to beef, cotton, peanuts and avocados. There is no change to the US tariffs on sugar or sugar products.

The Australian tariffs on agricultural products will be eliminated immediately on the FTA coming into force. Most are already at zero. Some products such as dairy, flour and processed meat currently have a 5 per cent tariff.

Agriculture products have been divided into five main staging categories to determine the rate and time at which tariffs will be eliminated:

Confirmation of pre-existing zero tariff	E
Immediate tariff elimination	A
Elimination of tariffs in equal annual instalments over 4 years	B
Elimination of tariffs in equal annual instalments over 10 years	D
Elimination of tariffs in equal annual instalments over 18 years	F

Generally, without going to the extent of identifying each individual agricultural product, the higher the present US tariff rate on a product, the later it will be that the tariff will be eliminated.

The FTA provisions on agricultural products also provide for substantial safeguard measures both in relation to increased market penetration and prices of products.

The FTA has a schedule of what are called “trigger prices” (expressed in US dollars) which, if the unit price of the import is less than the trigger price, then an additional duty can be applied. The level of duty to be imposed is determined by the differential between the import and “trigger price”. These safeguards only apply to a limited range of horticultural products.

Additionally, as in other areas, the FTA provides for the suspension of the rate reduction of tariffs, if as a consequence of the preferential tariffs applying, the level of imports increase in such quantities in absolute or relative terms so as to cause serious damage, or the threat of serious damage, to a domestic industry producing a like or directly competitive product.

The country receiving those imports may impose additional duties on imports in these circumstances for a period up to four years in certain circumstances.

Given that Australia has to date not filled its existing quotas in most areas of agricultural products, it is not expected that measures such as this will be a problem in the short to medium term. However, as Australia's agricultural industry increases its capacity in future years then the measure, in conjunction with the price safeguards in the FTA, may possibly present some difficulties for some agricultural producers.

The FTA also requires compensation to be provided in the form of concessions where safeguard measures as outlined above are applied. This is likely to be a very complex and difficult area as the adversely affected exporters will want to ensure they benefit from any concession which may not always be the case.

It is expected, given the sensitivity of this area for both nations, that it will be one in which there will be substantial activity both in protecting interests and developing market opportunities.

Australia and the US have also committed to working together in World Trade Organisation agriculture negotiations including in developing disciplines that eliminate restrictions on any individual's or corporation's right to export as part of an overall package covering increased market access and reduced levels of domestic support and export subsidies.

Environment: Key concerns not realised

by Peter Briggs

One of the key concerns of environmental groups in relation to NAFTA and other US free trade agreements was the inclusion of “investor-state” provisions which allow private investors in one country to bring a claim directly against the Government of another state for harmful Government actions in breach of the agreement and for the resolution of disputes by international arbitration. Such provisions resulted in claims brought by private companies against the Mexican, Canadian and US Governments in relation to regulatory decisions on environmental grounds which have resulted in commercial losses to those companies.

No provisions of that kind are included in the FTA. Instead, disputes under the FTA are to be handled at a Government level (through the institutional arrangement and dispute settlement procedures in Chapter 21 and Party-Party environmental consultations under Article 19.7). The core obligation under Chapter 19 (Environment) aims at ensuring that neither Party fails to enforce its environmental protection laws in a manner affecting trade between the Parties. This primary obligation is reflected in Article 19.2.2 which provides that:

“... it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment within its territory.”

Both Parties commit to enforcing their existing domestic environmental laws and to ensuring that those laws provide for and encourage high levels of environmental protection. The commitment not to weaken or reduce existing environmental laws in order to attract increased trade or investment is reinforced by Article 11.11. This Article makes the free trade rules on investment subject to a Party adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that investment activity (eg. investment in property, an enterprise or a construction project) in its territory is undertaken in a manner sensitive to environmental concerns.

The Parties recognise the importance of strengthening capacity to protect the environment and promote sustainable development in bilateral trade and investment relations and thorough joint bilateral, regional and multilateral environmental activities. To this end, Australia and the US intend to negotiate a “United States-Australia joint Statement on Environmental Co-operation” (Article 19.6). The Parties also recognise the importance of multilateral environmental agreements (Article 19.8). This Article is, notably, limited to agreements “to which they are both Parties”, leaving room for the current Australian and US position on the UN Convention on Climate Change and the Kyoto Protocol in relation to which neither country is a Party.

The Parties also agree to support and encourage the development of “flexible, voluntary and market-based mechanisms” for the protection of natural resources and the environment. This may provide an impetus for the development and use of economic instruments for environmental regulation in Australia. While load-based licensing schemes are commonplace, schemes for tradeable pollution rights and resource rights (for example, in carbon emissions/credits and water), environmental charges/taxes and other financial instruments for environmental protection and improvement are only at early stage of development in Australia.

Cross-border trade in services: Building on a strong foundation

by Paul Armarego and Wal Jurkiewicz

Trade in services between Australia and the US is already very significant and balanced, and the FTA allows this to be built on.

Chapter 10 aims at removing a range of market access restrictions affecting cross-border trade in services to assist in ensuring that domestic regulation of the cross-border services market is non-discriminatory. It requires that service providers in Australia and the US are treated no less favourably than each other (national treatment) and no less favourably than the service providers of other countries (most favoured nation) in the ways they are regulated. The provisions apply to a wide range of sectors.

They do not apply to financial services, Government procurement, some air services, subsidies or grants provided by a Party, or services supplied in the exercise of a Governmental authority (ie. services not supplied commercially or in competition with other service suppliers). It also does not apply to service providers who have a commercial presence in the other country. The Chapter does not oblige either Party to do anything for natural persons seeking access to their employment markets or who are employed permanently in their territory.

Article 10.4 prohibits, both regionally and territorially, certain restrictions being placed on market access, including on the number of services suppliers and the number of employees in a particular industry.

Each Party has maintained certain exceptions to the equal treatment principles and market access provisions referred to as “non-conforming measures”. For example, the residency requirement for patent attorneys and transmission quotas for local content on Australian TV remain. Non-conforming measures are divided into two categories, those which each Party is prohibited from making more restrictive and those which are able to be further restricted. Those non-conforming measures which are unable to be further limited are also subject to a ratchet mechanism ensuring that, if and when these measures are liberalised, they cannot subsequently be made more restrictive.

While there are no significant specific market access gains, a framework for increased liberalisation of services has been agreed.

A formal mechanism has been established through which Australia and the US will be encouraged to recognise the authorisation, licensing or other qualifications of service providers obtained in the other country. To facilitate this, a Professional Services Working Group will be established to work with the professional bodies of both countries to ensure that standards are maintained, and that unreasonable impediments to providing services in the other country are removed. This group must report to the Parties within two years of the entry into force of the FTA.

Transparency in the development and application of regulations on trade in services is a key principle.

Service suppliers interested in providing cross border services should be able to access information on the regulatory requirements from the other country when the FTA enters into force. Where service suppliers need to be licensed, safeguards will be put in place to ensure that application for licenses etc will be dealt expeditiously and applicants are informed of the status of their application.

In keeping with the provisions on labour there was no liberalisation of business travel or visa arrangements between the two countries.

Labour: Was it worth the hard yakka?

by Joe Catanzariti

In order to answer this question, it is necessary to examine a few issues in greater detail.

Does the FTA affect the ability of US citizens to work in Australia, and vice versa?

The FTA has the potential to do so, but the impact on the job market is unlikely to be great.

The FTA makes no provision for relaxing the current immigration policies of either country. Thus there will be no increase in the number of US nationals allowed to work in Australia or Australian nationals in the US. However, the FTA does provide a mechanism whereby the countries may recognise educational and other qualifications of service suppliers obtained abroad.

This could have an effect on both employers and employees. First, it might make it easier for US workers in Australia, and Australian workers in the US, to obtain skilled employment. It also has the potential to save employers money by substantially reducing the time and costs incurred in ensuring that the employee has met the domestic standards or criteria.

Will it be easier for US companies to set up and operate businesses in Australia, and vice versa?

If the deal goes through, US enterprises will be able to operate largely unburdened by protectionist regulations.

The Australian Government will be obliged to:

- ensure US enterprises operating here do so on a level playing field;
- afford US enterprises non-discriminatory protection for loss due to “armed conflict or civil strife”. This might take on a new level of importance given the current war on terror and both Australia’s and the US’ strong support of it; and
- free and expeditious transfer into and out of the country of, for example, capital contributions to the enterprise and the repatriation of profits from it.

These initiatives are likely to attract US enterprises to Australia, which will result in increased competition with domestic enterprises, delighting consumers. However, it will undoubtedly force Australian companies to cut costs in order to remain competitive, leading to possible redundancies. On the upside, the establishment and operation of US businesses will create greater employment opportunities for Australian employees.

Does the agreement promote, or derogate from, workers’ rights?

The FTA appears to promote the maintenance of a high standard of workers’ rights. The countries will strive to ensure that their respective labour laws are consistent with internationally recognised labour principles. They will also endeavour not to derogate from labour laws in a manner that would weaken adherence to such principles, in order to attract investment or trade.

This is very good news for current and prospective Australian workers, but it is conditional, of course, upon them obtaining or retaining their employment.

Competition

by Michael Corrigan

The FTA contains a number of provisions in respect of regulation of anti-competitive conduct. The substance of these provisions is dealt with in Chapter 14, although Chapter 12 (Telecommunications) also refers to anti-competitive practices in the telecommunications sector. The anti-competitive conduct provisions contained in the FTA are unlikely to have a significant impact on Australian industry in a direct sense. The main features are:

- closer consultation by the ACCC and its US counterparts may result in increased scrutiny of companies whose activities span both countries;
- some requirements are to be imposed on private monopolies, although these apply only to private monopolies created or designated after entry into effect of the FTA. It is unlikely that many, if any, more monopolies will be designated in Australia given its commitment since 1995 to National Competition Policy;
- public monopolies controlled or owned by the Federal Government will be subject to rules preventing discriminatory conduct in the sale or purchase of the monopoly good or service (however, the FTA notes that different prices do not necessarily amount to discriminatory conduct), preventing use of delegated power in contravention of the FTA, and preventing the monopolies from using their monopoly power to engage in anti-competitive practices in another non-monopolised market in its territory;
- state-owned or controlled enterprises (whether or not monopolies) at both Federal and State or Territory level will be subject to rules preventing discriminatory conduct in the sale of the monopoly good or service and preventing the use of delegated power in contravention of the FTA; and
- finally, there is some movement towards US and Australian courts recognising restitutionary judgments awarded to consumers in the other country who have suffered damage as a result of the fraud or deceit of a person against whom the judgment is ordered. However, this provision would not be legally binding and would only provide guidance to courts as to whether to exercise their discretion and enforce the judgment.

Affirming existing prohibitions and agreements on anti-competitive business conduct and consumer protection legislation

The Articles relating to competition law are deliberately general to recognise the differences in legal and institutional competition frameworks between the two countries. These do not require any legal or regulatory change, although a working party is proposed to examine the scope for improving effective enforcement of both countries' competition policies. Article 14.2 affirms the requirement for both the US and Australia to:

- proscribe anti-competitive business conduct and ensure natural justice for persons accused to have breached any laws proscribing anti-competitive conduct;
- maintain an authority responsible for enforcing national competition laws, which treats non-nationals no less favourably in like circumstances; and

- co-operate in the enforcement of competition laws, including through mutual assistance, notification, consultation and exchange of information. This includes recognising existing mechanisms for co-operation, namely the 1982 Mutual Assistance on Antitrust and the 1999 Mutual Antitrust Enforcement Assistance Agreements. These agreements and therefore the FTA encompass and affirm international cartel investigation assistance.

Article 14.6 requires Australia and the US to co-operate in the area of consumer protection. This includes affirming the existing mechanisms for co-operation in relation to consumer protection, including the 2000 Agreement and the 2003 OECD Guidelines, as well as the International Consumer Protection and Enforcement Network.

Transparency: Article 14.8 requires each Party to make available public information about exemptions and immunities to its measures proscribing anti-competitive conduct, including information about how the matter affects trade or investment between the Parties.

Article 14.2 also provides for consultation on existing laws and enforcement, and scope for reform of these laws where feasible and appropriate. In this vein, it requires the US and Australia to establish a joint working group to examine the scope for strengthening support for effective enforcement of Australian and US competition laws and policies.

Article 14.6 requires the ACCC and the US Federal Trade Commission to co-operate in areas covered by their consumer protection laws, particularly in relation to fraudulent and deceptive commercial practices against consumers, and in detection, investigation and enforcement of violations of consumer protection laws, both within states and in the case of violations which have a cross-border dimension.

Article 14.6 states the agreement of the US and Australia to identify obstacles to effective cross-border co-operation in the enforcement of consumer protection laws and to consider changing domestic frameworks to enhance the ability of the Parties to co-operate, share information and assist in the enforcement of their respective consumer protection laws.

Implications:

- Enhanced investigative powers of the ACCC and its US counterpart as a result of co-operation, consultation and possible reform mean that persons carrying on business in both countries may come under higher levels of scrutiny in relation to both anti-competitive conduct and consumer protection.
- Consultation and review of competition laws and consumer protection policy give rise to the potential for Australian competition policy to more closely approximate US antitrust law.

Preventing anti-competitive conduct by designated monopolies and state enterprises

The FTA creates obligations on both the US and Australia to ensure that the activities of both privately and publicly owned monopolies as well as state enterprises do not create obstacles to trade and investment.

Designated monopolies: Under the FTA, “designate” means to establish, designate or authorise a monopoly, or to expand the scope of a monopoly to cover an additional good or service, whether formally or in effect. Further, the agreement only applies to public monopolies at the central Government level and private monopolies created or designated after the agreement comes into force. Therefore single-desk arrangements and other private monopolies which are already in existence are not subject to the FTA. Additionally, the provisions relating to designated monopolies do not apply to Government procurement.

Designated monopolies falling within the application of the agreement would be required under Article 14.3 to:

- act consistently with the obligations of the Government under the FTA wherever the monopoly exercises any delegated legislative power with respect to the monopoly good or service;

- act solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market;
- provide non-discriminatory treatment to covered investments, goods and service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and
- not to use its monopoly position to engage in anti-competitive practices in a non-monopolised market in its territory, affecting investments by investors of the other Party in the territory of the Party.

State enterprises: “State enterprise” is defined in the FTA as “an enterprise owned, or controlled through ownership interests, by the state or a regional level of Government”, where “enterprise” includes any entity constituted or organised under applicable law, whether or not for profit, such as corporations, trusts, partnerships, sole proprietorships, associations or joint ventures. Article 14.4(2) requires US sub-federal state enterprises to be covered by antitrust laws.

Australia and the US have agreed in Article 14.4 to ensure that any state enterprise any Party establishes or maintains:

- acts consistently with each Party’s obligations under the Agreement in the exercise of any legislative power delegated to it; and
- accords non-discriminatory treatment in the sale of its goods and services.

Australia affirms its “competitive neutrality” policy and ensures that competitive neutrality complaints offices treat complaints lodged by the US or persons of the US are treated no less favourably than those lodged by Australians.

Transparency: Article 14.8 requires each Party to make available public information concerning state enterprises and designated monopolies, whether public or private.

Implications: The limited application of Article 14.3 means that private monopolies which already exist are exempt from the provisions. All public monopolies created (and owned or controlled through ownership interests) by the Federal Government would be bound by this Article. This might include for example (51 per cent Government owned) Telstra’s monopoly over the local loop and Australia Post (in relation to domestic mail services). It might also cover ARTC (Austrack).

There requirements arising out of the FTA on state enterprises are less onerous, although broader in their application, since both Federal and State enterprises, whether monopoly or otherwise, would be covered. Hence Telstra and Australia Post, as well as state-owned enterprises, such as some port authorities and electricity generators, and airports would be subject to the requirements.

Charging of different prices not necessarily inconsistent with Articles 14.3 or 14.4: Different prices may be charged by designated monopolies or state enterprises in different markets or within the same market in accordance with Article 14.5, as long as the basis for the differential pricing is normal commercial considerations such as supply and demand considerations.

Recognition of monetary judgments

At common law, civil monetary judgments are usually not enforceable in Australia on the basis that they are penal or revenue in nature and therefore Australian courts would be upholding foreign countries’ public policy. This Article applies only to judgments requiring *restitution* (rather than, for example, penalties) which have been obtained by the ACCC or its US counterpart for consumers who have been deceived, defrauded or misled.

The language of Article 14.7 is not framed in mandatory language, so this Article is not binding. In essence, the Parties recognise the importance of provision of monetary restitution to consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded or misled and the importance of recognising monetary judgments obtained for restitution.

Article 14.7 indicates that both Parties believe it is desirable for a civil monetary judgments (whose purpose is restitution) not to be disqualified as penal or revenue in nature or based on other foreign public law.

Co-operation and consultation

Article 14.9 reiterates the requirements for co-operation in the areas of anti-competitive business conduct and consumer protection set out in Chapter 14.

Since most of the Chapter (except the section dealing with monopolies and Government enterprises and Article 14.8 above) is not subject to dispute settlement (Article 14.11), Article 14.10 provides recourse to the Parties to enter consultations regarding representations made by either Party and their impact on trade and investment. Article 14.10 is an article which is subject to dispute settlement.

Broadcasting

by Jane Forster

The immediate impact of the FTA on broadcasting and other forms of audio and/or visual media is minimised by the reservation of existing restrictions on foreign investment and control and quotas for Australian content and the reservation of rights to extend content restrictions including to emerging services.

Although the reservations are generally clearly identified, some existing restrictions such as the moratorium on the number of commercial television broadcasting licences are not clearly identified as being reserved.

The FTA obligations will ensure that foreign ownership and investment limits such as those that apply to commercial television and subscription broadcasting licences will not be extended to new forms of audiovisual media. This is consistent with the Government's attempts, so far unsuccessful, to remove existing foreign ownership and control limits on broadcasting services.

The FTA provisions

The provisions of Chapter 10 of the FTA apply to cross-border trade in services, primarily the supply of a service from the territory of one Party into the territory of the other. This would cover, for example, the supply of a television broadcast from the US to Australia. The provisions of Chapter 11 apply to investment by an investor of one Party in the territory of the other Party, for example, the acquisition of shares by a US national or enterprise in an Australian broadcaster.

Chapters 10 and 11 of the FTA require each Party to accord to service suppliers and investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own service suppliers and investors (national treatment). A Party is also prohibited from adopting or maintaining limitations on the number of service suppliers or service operations or on the types of legal entity that may supply a service (market access), from requiring a service supplier to establish or maintain a representative office or to be resident in its territory as a condition for cross-border supply (local presence), from giving service suppliers or investors from any other country more favourable treatment (most favoured-nation treatment) and from requiring investors of the other to meet performance requirements such as achieving given levels of domestic content (performance requirements).

The Broadcasting Services Act – Reservation of existing restrictions

The *Broadcasting Services Act* 1992 (BSA) contains provisions which do not conform to the FTA obligations. Under the BSA, foreign persons are prohibited from being in a position to exercise control of a commercial television broadcasting licence and there are limits on foreign ownership in subscription television broadcasting licences. The BSA also imposes transmission quotas for local content on commercial television broadcasts and, in the form of expenditure quotas, on subscription television broadcasts. These limits and quotas are contrary to the national treatment obligations as well as the market access and performance requirements obligations under the FTA. However, because they are identified as non-conforming measures in one or other of Annexes I or II of the FTA, the FTA obligations do not apply to them. The most favoured nation treatment obligation is also excluded to the extent of Australia's equal treatment of New Zealand programmes for the purposes of local content requirements in the BSA. In the case of subscription television broadcasting, Australia has reserved the right to increase the expenditure quota for local content.

A number of other provisions in the BSA which do not conform to the market access obligations in the FTA are not specifically identified as non-conforming in the Annexes to the FTA. For example, the moratorium until the end of 2006 on the allocation of any new commercial television licences and the requirement that certain licences including commercial television and subscription broadcasting licences and international broadcasting licences only be issued to Australian companies. It may be that a general reservation concerning Australia's obligations under Article XVI of the GATS (which deals with market access) may protect these provisions.

Under the GATS, Australia has excluded from the basic telecommunications sector services covered by the BSA. Audiovisual services are not otherwise covered by the GATS and are the subject of new service negotiations which commenced in 2000 (but have not been agreed). Therefore, the various restrictions and limits contained in the BSA are not covered by Australia's obligations under the GATS including its obligations in relation to market access.

Under the GATS-related reservation in the FTA, Australia reserves the right to adopt or maintain any measure with respect to the supply of a service by a service supplier of the US, through the presence of natural persons of the US in Australia, that is not inconsistent with Australia's obligations under Article XVI of the GATS. Generally speaking, the exclusion of services under the BSA from the FTA would not be inconsistent with Australia's obligations under the GATS given the exclusion of such services from the GATS. However, the reservation in the FTA is expressed to be limited to services in Australia which are supplied "through the presence of natural persons of the US in Australia". These words may limit the extent of this general reservation and the extent to which the moratorium on commercial broadcasting licences and the requirement that certain licences be held by Australian companies are protected measures. Interestingly, the matching US reservation is not so limited and simply applies to any measure that is not inconsistent with the US obligations under Article XVI of the GATS.

The BSA – Reservation of restrictions for emerging and new media

Australia has acted to reserve its right to extend content restrictions to emerging and new audiovisual services. It has reserved the right to extend the existing Australian content quotas which apply to the free-to-air commercial television broadcasters, to multichannelled free-to-air services. The ability of the current free-to-air commercial broadcasters in Australia to multichannel is limited to programs which are incidental to or directly linked to the main broadcast or to deal with overlaps. However, this situation is likely to change in the future and, when it does, the Government will be able to extend the content quotas beyond one channel without breaching its obligations under the FTA.

Given the significance placed on the content quotas which currently apply to the commercial television broadcast services, this is a significant reservation in relation to future regulation.

A similar right to address future content issues is reserved in relation to interactive audio and/or video services. The reservation in this case is not as clearly expressed. It is a right to take measures to ensure that access to Australian content is not "unreasonably denied" to Australian consumers following a finding that Australian content is not readily available on interactive audio and/or video services. The significance of this reservation (and concerns as to its scope and interpretation) will depend on the future direction of audiovisual services in Australia.

No reservation has been made for restrictions on foreign investment and control such as those which currently apply to commercial television and subscription broadcasting to be extended to new forms of broadcasting and audiovisual services. This is consistent with the Government's so far unsuccessful attempts to amend the BSA to remove existing foreign ownership and control provisions (on commercial television and subscription television broadcasting services).

Investment protection

by Jonathan Hoyle

What rights do investors have under the FTA?

Chapter 11 deals with investment. Articles 11.3 to 11.7 set out a number of familiar ways in which foreign investors in either country will be protected under international law:

- national treatment (treatment no less favourable than that received by a domestic investor);
- most favoured nation treatment (treatment no less favourable than that received by an investor from a third country)
- minimum standard of treatment (which incorporates fair and equitable treatment and full protection and security);
- protection from expropriation (by means of prompt, adequate and effective compensation); and
- civil strife (losses to be treated on a national and most favoured nation basis).

What types of activity or assets does the FTA protect?

The types of activity or assets that qualify as investments are quite wide. Any asset that is directly or indirectly owned or controlled may qualify as long as it has the “characteristic of an investment” (Article 11.17) including commitment of resources, the expectation of profit or the assumption of risk. Examples listed in the treaty include turnkey, construction, management, production, concession, revenue-sharing and similar contracts, as well as the more familiar types of investment such as equity participation, company acquisition and traded items including derivatives.

Normally, commercial activity such as sale/supply agreements are not protected and they would not appear to come within the definitions currently in the draft (although the references to construction and concession arrangements suggest a possibly wider scope than under many other treaties).

How investment protection is usually enforced

Under many of the free trade investment regimes (as well as bilateral investment treaties or BITs) investors are given the opportunity to seek redress against the host Government directly under a treaty by means of international arbitration. This has a number of potential advantages to an investor, including:

- access to a neutral international tribunal applying international law;
- direct access to arbitration without the need for an express arbitration agreement - the offer to arbitrate is set out in the treaty itself and can be accepted by the investor commencing arbitration proceedings;
- avoidance of domestic courts and the limitations potentially imposed by domestic law (particularly where seeking remedies against Government Parties); and
- avoidance of the sometimes more cumbersome and protracted state to state dispute resolution regimes traditionally used to resolve trade disputes.

Such investment arbitration has been included in all of Australia's BITs and free trade arrangements (as well as those of the US, most notably under NAFTA).

FTA gives no access to investment arbitration

Both Governments agreed that there would be no access to investor-state arbitration. Investors will have no ability to challenge host Government action directly under the treaty. However, the door has not been completely closed on that possibility. Under Article 11.16, if either Government considers that there has been a "change in circumstances affecting the settlement of [investment] disputes" then it can request consultation with the other Government over the possibility of developing "procedures that may be appropriate" to allow an investor to take direct action.

It is not clear whether this contemplates a purely *ad hoc* arbitration procedure drafted for the purposes of a particular dispute or a more general change allowing for investment arbitration in the future in relation to all investment disputes.

Investment protection will be enforced only at a state to state level

Under Article 21 of the FTA, all dispute settlement will take place at a state to state level with no direct involvement by the investor.

The treaty envisages a tiered dispute procedure. A Joint Committee will be set up to oversee the progress of treaty implementation and compliance as well as facilitating the settlement of disputes. Should a dispute remain unresolved then either Government can request consultation over the issue. If the dispute remains unresolved within 60 days then a three member panel will be appointed to reach a determination (the panellists coming from an agreed list of individuals).

In practice what this means is that the investor will be required to go through Government channels (usually the trade representative) in the event that the investor considers that Chapter 11 has been breached.

Investment arbitration is still an option under the FTA but you have to draft for it

Investors can still take advantage of the investment protection regime under the FTA. There does not appear to be anything to prevent an investor from entering into a specific arbitration agreement with a host state. Both Australia and the US are signatories to the Washington Convention making arbitration pursuant to the International Centre for the Settlement of Investment Disputes ("ICSID") possible. In order to do this, an investor and the state Party would have to have an arbitration clause included as part of any contractual arrangements. By doing so, an investor could potentially take advantage of the different range of remedies contemplated under Chapter 11.

There appears to be an acknowledgement of this in paragraph 2 of Article 11.16 which states that "nothing in this Article prevent[s] an investor... from submitting to arbitration claim against the [State] Party *to the extent permitted under that Party's law*" (emphasis added). It is not entirely clear what the italicised part of the sentence refers to but it arguably contemplates the availability of ICSID arbitration in the event that the host Government is a Party to the ICSID Convention.

Financial services

by Lloyd Nash

The FTA provisions extend to all insurance and insurance-related services in addition to banking and other financial services and services incidental or auxiliary to services of a financial nature.

The financial services provisions endeavour to provide Parties with open and non-discriminatory ways in which the supply of financial services may occur. It also provides financial institutions and their investors with an open and protected environment for investment. Several obligations are placed on financial service suppliers and investors in financial institutions, in an aim to, while creating opportunities, establishing additional disciplines and safeguards that are specific to the financial services industry. These obligations include:

- non-discriminatory treatment - where each Party accords national treatment or most favoured nation treatment to the other Party;
- market access for financial institutions - where Parties are limited in the restrictions or requirements they are able to place on financial operations;
- cross-border trade;
- new financial services - where new financial services of the first Party may be adopted by the second Party without additional legislative action being taken;
- senior management and boards of directors - a Party may not require certain ratios of top level management and boards of directors be from particular nationalities; and
- non-conforming measures are provided for which can allow the Parties to maintain and adopt measures in certain circumstances that are not consistent with obligations set out in this Chapter.

The FTA also promotes regulatory transparency and expedited availability of insurance services.

A new body, called the Financial Services Committee, will be established to supervise the implementation of the relevant provisions.

In general, the provisions provide opportunities for financial institutions in both Australia and the US. It allows for an open forum in which both countries may benefit from each other's experiences and expertise in this industry. The supply of financial services and domestic and international investment should benefit from the open and protected environment this Chapter creates.

Electronic commerce

by Mark Sneddon

No duties and no discrimination re digital products

Article 16 will provide opportunities for US companies to supply digital products in Australia and Australian companies to supply digital product in the US as there will be no duties, fees or charges on or in connection with the importation or exportation of digital products, whether they are transmitted electronically (for example via the Internet) or are fixed on a carrier medium (such as a CD-ROM). Digital products means the digitised form or encoding of computer programs, text, video, images, sound recordings and other products.

Digital products created, published, stored or first made available outside a Party's territory must be afforded no less favourable treatment than digital products from within the Party's territory. For example, no product can be afforded less favourable treatment on the basis that it is created overseas, the developer is from overseas or the product is first made available overseas. This should lead to increased competition and opportunities for both US and Australian companies.

Legislation to facilitate electronic authentication

Each Party must maintain domestic legislation to permit Parties to an electronic transaction to determine the appropriate authentication solutions and implementation models for their electronic transactions, and recognise technologies and implementation models as they are developed. The Australian *Electronic Transactions Act* and the US's *Global E-Sign Act* probably satisfy this obligation.

Cross-recognition of digital certificates

Australia and the US have agreed to work towards recognition at the national level of Government of each other's digital certificates. There will need to be cross recognition of public key infrastructure trust structures. The new Office for the Information Economy will need to negotiate a recognition framework with the corresponding US Government office. The former National Office for the Information Economy has Australian cross-recognition guidelines in place.

Facilitate electronic trade administration

Each Party shall endeavour to accept trade administration documents transmitted electronically as the legal equivalent of paper documents. Australian Customs is already a long way down this path with its Cargo Management Re-engineering Project.

Intellectual property

by Paul Armarego, Jamie Doran and Holly McAdam

The intellectual property (IP) provisions in Chapter 17 of the FTA aim to build on Australia's domestic IP laws and incorporate some aspects of US law, particularly provisions associated with Internet Service Provider liability, term of copyright, technological protection measures, criminal standards for copyright infringement and possibly some limited aspects of US patent law. The Chapter is expected to result in a number of legislative and practical changes to the current Australian IP regime. Some of these amendments may have controversial implications for Australian industry, especially for user groups and research and educational institutions. This appears to be one area where some concessions had to be given to obtain gains in other areas.

In general, the alignment of US and Australian IP regimes may provide benefits to Australian industry through a more certain environment for the export of IP to the US and a greater familiarity with the protection available. Further, the ability of Australian innovators to attract US investment may be increased as US understanding and confidence in our legal system will be enhanced. This area, in particular, has caused some practical problems in the past, often through perception rather than reality.

For example, a regime is to be implemented that requires ISPs to comply with copyright-holders' 'take down' notices if they are to avoid liability for their subscribers' activities which infringe copyright. Broad limitations on the liability of an ISP are specified in Article 29 and the scope of relief available has been limited regarding copyright infringements that the ISP does not control. The Articles do seem to have been negotiated in such a way as to allow for the avoidance in Australian domestic implementation of the practical problems that have been experienced with some aspects of these notices in the US under the *Digital Millennium Copyright Act*.

The duration of copyright protection is to be extended by 20 years for all subject matter protected when the FTA comes into force or that is entitled to protection in the future. In general, the duration of copyright will become the life of the author plus 70 years. This measure is not required to operate retrospectively for subject matter already in public domain, however, it may result in increased costs for users of copyright works such as Australian educational and research institutions, with possible flow-on effects for consumers.

New measures preventing the use, manufacture, import and sale of circumvention devices and the decoding of encrypted satellite data are to be implemented. As opposed to the current Australian regime, the FTA has a broader scope of potential liability for Australian nationals, as Article 17.4.7(a)(i) provides that it is an offence to circumvent an effective technological protection measure or to receive and make use of an encrypted signal. Article 17.4.7(e) sets out a number of exceptions to Article 17.4.7, including a general provision which gives the Government scope to determine additional exceptions. The main limitation on this provision is that any new exception must be for a non-infringing use and it must be credibly demonstrated in a legislative or administrative review that the FTA has an actual or likely adverse impact upon that non-infringing use.

As reverse engineering for interoperability of computer programs, good faith research, lawful Governmental activities and access by non-profit libraries are all express exemptions within Article 17.4.7(e), it is difficult to see where the immediate lobby for additional exemptions will come from. Nevertheless, the inclusion of a provision such as Article 17.4.7(e)(viii) appears to demonstrate the

awareness of both Parties to the difficulties in legislating for technology which is constantly evolving and the need for some level of continuing flexibility.

Legislative changes are also expected in relation to agricultural test data protection. However, these changes are in line with the regime proposed to be implemented in Australia under the *Agricultural and Veterinary Chemicals (Administration) Amendment Bill 2004* currently being considered by Parliament.

Further, Australia will be required to maintain its existing laws and policies requiring Federal Government agencies not to use infringing computer software and only use computer software as authorised in the relevant licence. These measures are required to regulate the acquisition and management of software for Government use.

In the area of patent law, the FTA primarily affirms existing Australian principles. However, a number of changes to the status quo may be required, including:

- a new means for extending the term of a patent may need to be created; and
- a patent holder's rights will be defined by reference to exceptions to these rights. At present, rights are positively proscribed.

It is difficult to predict the changes the provisions will introduce in situations where requirements for patentability adopt US terminology. Such terms are well understood in the US domain but are yet to be interpreted in the Australian judicial context.

Some minor legislative change may also be required relating to the administration of geographical indications in Australia. A more detailed description of Chapter 17 is available at http://www.dfat.gov.au/trade/negotiations/us_fta/guide/17.html.

Sanitary and phytosanitary measures

by Paul Armarego and David Moore

Chapter Seven of the FTA relates to sanitary and phytosanitary (“SPS”) measures, with the stated objectives of:

- protecting human, animal or plant life or health in the Parties’ territories;
- enhancing the Parties’ implementation of the WTO SPS Agreement;
- providing a forum for addressing bilateral SPS matters; and
- resolving trade issues and expanding trade opportunities.

In essence, Chapter Seven:

- recognises the Parties’ existing rights and obligations under the WTO SPS Agreement;
- establishes a Committee on SPS Matters to enhance the implementation of the FTA and the WTO SPS Agreement; and
- creates a Standing Technical Working Group on Animal and Plant Health Measures to facilitate trade and develop specific work plans.

As such, the FTA neither creates nor displaces any of the Parties’ existing rights and obligations in relation to the introduction and maintenance of sanitary and phytosanitary measures. The principle that matters affecting quarantine and food safety are to be decided upon the basis of scientific assessments of risk will continue to govern Australian and US decisions in this regard.

This does not mean, however, that this scientific basis for a sanitary or phytosanitary measure will always be accepted by both Parties. Indeed, the American Farm Bureau Federation considers that current Australian quarantine restrictions on pork, stonefruit apples, Florida citrus and poultry may constitute a market barrier to trade rather than a valid scientific measure, which is the stated Australian rationale for the restrictions.

Disputes like this will presumably continue to arise after the FTA’s implementation, and the consultative and review mechanisms established by the Agreement will play an important role in ascertaining that neither Party is using SPS measures to protect industry instead of animal or plant life or health. As such, the real impact of the FTA on SPS measures and the maintenance of Australian quarantine standards will only be measured once (and if) the Agreement is signed and ratified.

Health and pharmaceuticals

by John Carroll

Australia presently does not impose tariffs on human pharmaceuticals or the active ingredients of human pharmaceuticals. The pharmaceuticals industry however considers that there are non-tariff barriers to trade and these to an extent have been addressed in the FTA, particularly from the Australian side.

The provision of pharmaceuticals in the US is essentially through the private market whereas in Australia the bulk of the market for pharmaceuticals is through the Government-funded Pharmaceutical Benefits Scheme ("PBS"). What pharmaceuticals are made available through the PBS is determined by the recommendations of the Pharmaceutical Benefits Advisory Committee ("PBAC") to Government. Unlike most other Australian Government decision making processes there is no appeal from the decision of the PBAC to bodies such as the Administrative Appeals Tribunal.

The FTA now provides for an as yet undefined review mechanism of the decisions of the PBAC. In addition, pharmaceutical companies can seek to have a hearing before the PBAC and more interaction with relevant officials during the process of consideration for listing on the PBS.

At present, there are significant restrictions on the marketing of prescription pharmaceuticals to the public in Australia. This has included the restrictions on the information provided on companies' internet sites. As well, Australian branches of international pharmaceutical companies have to delink their domestic websites from their parent companies' sites in order to conform to Australian regulatory requirements. Upon the FTA coming into force, they will have an extended ability to provide information from their Australian websites, including providing more information to the public on medicines which are approved for marketing in Australia.

There are conditions on the information which can be provided so companies must carefully consider the information they provide to ensure they do not breach legislative and regulatory requirements.

Additionally, the FTA provides for the continued advancement of the co-operation which has been occurring between the US Food and Drug Administration and the Australian Therapeutic Goods Administration which, given other aspects of the FTA such as the reduction of technical barriers, is likely to see further recognition of each other's decisions and the way in which they both regulate pharmaceuticals to ensure greater harmonisation between the two nations.

This is further illustrated by the side letters on Bovine Spongiform Encephalopathy under which the Parties will work together to establish agreed international standards and guidelines that address food standards and animal-related BSE health risks.

Interestingly, at the same time as the FTA is being introduced the Australian Government is working with the New Zealand Government to establish a single trans-Tasman agency to regulate therapeutic goods in 2005. The New Zealand regulatory regime has a number of similarities to the US (they both allow advertising of prescription pharmaceuticals to the public), and the opportunity exists to create a new regulatory environment which has a greater degree of harmony between the three nations.

Telecommunications

by Jane Forster

In the area of telecommunications, in particular interconnection, the FTA raises a number of issues, including consistency with the principles that underlie Australia's existing legislative regime and the GATS. Disappointingly, a major issue for Australia which was taken to the negotiating table - internet charging - is only dealt with in an exchange of side letters indicating that the issue will be discussed under a consultative process to be established.

Interconnection issues

The FTA in Articles 12.3(1) and 12.11(1) requires interconnection services to be provided to US suppliers at any technically feasible point in a major Australian supplier's network, under non-discriminatory terms, conditions and rates, and, upon request, at points in addition to the network termination points offered to the majority of users.

Under Australian legislation as it currently operates, interconnection per se is not required to be given. Interconnection obligations arise, generally, in association with declared services. Once a service is declared, an access provider must provide access to the service on request and must permit interconnection as may be necessary to enable the declared service to be supplied. Transmission between Sydney and Brisbane is not a declared service (as this service is considered to be competitive) and any service provider wishing to access this service must reach commercial agreement with one or other of the providers of such service. In this situation, interconnection in order to use the service is part of the commercial negotiation.

Is interconnection to be provided in accordance with the FTA even where there is no declared service involved? Are various interconnection services to be declared? This is not clear. What is clear, however, is that an obligation to provide interconnection, in the absence of sound competitive reasons for doing so, is a matter that Australian regulation does not currently provide for and which would be at odds with the objects and regulatory policy that underlies current legislation.

Lack of clarity is also an issue. The interconnection provisions mirror, to a significant extent, principles contained in the GATS and statements contained in the WTO Reference Paper on Telecommunications. This is curious given that the Reference Paper has been criticised in the past by the Australian Government as lacking clarity. In detailed comments given at the Council for Trade in Services Special Session on Telecommunications Services in June 1999, Australia noted that the Reference Paper does not define "technically feasible point" and that this creates opportunities for a wide range of disparate interpretations and applications. In a third party submission by Australia (22 November 2002) in relation to a WTO dispute between Mexico and the USA concerning cross-border supply of basic telecommunications services, Australia again raised the importance of developing greater clarity in relation to section 2 of the Reference Paper, in particular, the meaning of the term "cost-oriented rates" used in section 2.2 (and in Article 12.11(1)(d) of the FTA.

Further, it is not entirely clear whether the interconnection provisions of the FTA - and the Reference Paper on which it is based - include international interconnection. In its third party submission in relation to the WTO dispute between Mexico and the USA concerning cross-border supply of basic telecommunications services, Australia noted that the dispute raises the issue of the scope of the term "interconnection" used in section 2 of the Reference Paper, in particular whether it applies only to in-country interconnection. Australia expressed its view that the Reference Paper obligations apply to

international interconnection and that, consequently, "accounting rates" are specific sets of arrangements for the pricing of a subset of interconnection arrangements (international interconnection) which must be consistent with the Reference Paper obligations.

No opportunity has been taken in the FTA to provide clarification of these issues.

The FTA and the GATS

Perhaps the difficulties created by a bilateral agreement in an otherwise multilateral environment are best summed up by the Australian Government in its detailed comments of June 1999 on the interconnection sections of the Reference Paper on Telecommunications:

"Interconnection should occur on the basis of MFN and National Treatment, according to the agreed trading rules established by the GATS and Agreement on Basic Telecommunications. Australia considers that reciprocity requirements on interconnection may undermine the non-discriminatory MFN principle by introducing barriers that could adversely affect a service provider's ability to enter the market...

"Instead of bilateral reciprocity, however, competition can be safeguarded through multilateral agreements and through competitive safeguards contained in domestic regulation....In any event, bilateral reciprocity can only be an effective strategy where the regulator controls a significant market and maintains an interventionist, ex ante control of market entry. This is contrary to a light touch regulatory approach, where commercial factors are allowed to determine as much as possible market conditions."

This issue is that the converse of giving MFN status to US providers is that such treatment need not be given to persons other than US providers. However, there is no specific provision in the telecommunications chapter of the FTA which is inconsistent with the GATS and the FTA does not require that non-US providers be given less favourable treatment. As both Australia and the US continue to be bound by their existing obligations under the GATS, this issue may be more one of perception than reality. The more significant issue is that referred to above - legislating to provide for obligations which do not fit neatly into the existing legislative regime and light-handed regulatory environment. This is where there is potential to derogate from the competitive principles which underlie the Australian legislation and the GATS.

The FTA and internet charging arrangements

It is difficult to identify the benefits for Australian service providers under the FTA in the absence of a detailed analysis of existing US barriers to Australian telecommunications services and service providers.

However, in its submission to the Senate Foreign Affairs, Defence and Trade Committee Inquiry into the GATS and the FTA, the Department of Foreign Affairs and Trade identified the principal US barriers affecting Australian services and investment. In telecommunications, the application of pro-competitive regulation to the transport layer of the Internet was identified as a major issue (see Table A-2 in Annex A). Under current charging arrangements, non-US Internet providers pay all costs of two-way international links with the United States backbone. These arrangements favour US carriers, consumers and service providers. DFAT estimated that the additional direct costs incurred by Australian ISPs in the 1998-99 financial year as a result of these arrangements was A\$133 million, with the indirect cost to Australia as a whole in excess of A\$500 million over the same period. Australia's objectives for the FTA were also outlined in the submission. The promotion of international internet charging arrangements that are applied on a fair, non-discriminatory and pro-competitive basis was listed as one of three objectives in relation to telecommunications.

This was clearly a significant issue for Australia in its FTA negotiations. The issue is not dealt with by the FTA. It is identified as an issue for discussion at the initial consultation as part of the agreed consultative process on communications and information technology issues (see exchange of side letters in this associated with the FTA).

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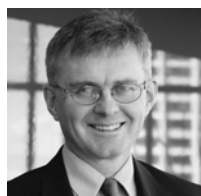
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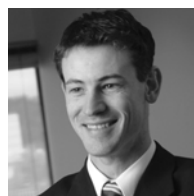
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