

THE IMPACT OF THE AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT ON THE PROVISION OF HEALTH SERVICES IN AUSTRALIA

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I. INTRODUCTION

In February 2004, Australia and the United States successfully concluded negotiations for the *Australia–United States Free Trade Agreement (AUSFTA)*.¹ Upon taking effect, the *AUSFTA* will immediately eliminate tariffs on 99.5 percent of all trade between the two countries, making the agreement one of the most significant, in terms of the reduction of two tariffs, ever achieved in a bilateral framework.² Economic modeling anticipates that Australia stands to gain more than six billion from the *AUSFTA*,³ and the agreement has the support of every state premier, every large business association,

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1. *Australia–United States Free Trade Agreement* (May 18, 2004) (available at <http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/Final_text_ausfta.pdf> (accessed Mar. 17, 2005)) [hereinafter *AUSFTA*]. Australian Trade Minister Mark Vaile and United States Trade Representative Robert Zoellick signed the *AUSFTA* on May 18, 2004. Australian Govt. Dept. of For. Affairs & Trade, *Vaile and Zoellick Sign Free Trade Agreement* [¶ 1] (May 18, 2004) <http://www.trademinister.gov.au/releases/2004/mvt034a_04.html> (accessed Mar. 17, 2005); Off. of the U.S. Trade Rep., *United States and Australia Sign Free Trade Agreement* [¶ 1] (May 18, 2004) <http://www.ustr.gov/Document_Library/Press_Releases/2004/May/United_States_Australia_Sign_Free_Trade_Agreement.html> (accessed Mar. 17, 2005).

2. Free Trade Agreements (FTAs) were once relatively straightforward and simply set out commitments to remove tariff and non-tariff barriers to trade in goods. Today, they cover much more than trade in goods, with services and investment now arguably the more important part of any agreement. So, while agriculture has been the key to the *AUSFTA*, agricultural exports represent less than 15% of Australia's total trade with the United States. Over time, the most substantial economic benefits of the *AUSFTA* are likely to come in investment and services.

3. Ctr. for Intl. Econ., *Economic Analysis of AUSFTA: Impact of the Bilateral Free Trade Agreement with the United States*, Australian Govt. Dept. of For. Affairs & Trade ch. 7 (Apr. 2004) (available at <http://www.dfat.gov.au/trade/negotiations/us_fta/economic_analysis_report/ausfta_report_040428.pdf> (accessed Mar. 27, 2005)). Australia and the United States already have close economic ties. The United States has recently become the number one destination for Australian foreign direct investment, receiving around twice the level of Australian investment as the United Kingdom. Australian companies own over \$61 billion in assets in the United States, making Australia the eighth largest foreign asset-holder in the United States. The Trade Partn., *Partnership for a Stronger Future: U.S.–Australia Free Trade Agreement* 5, 16 (July 2003) (available at <<http://www.aaftac.org/>> (accessed Mar. 8, 2005)); The Australian APEC Study Ctr., Monash University, *An Australia-USA Free Trade Agreement: Issues and Implications* 9 (Aug. 2001) (available at <<http://www.apec.org.au/docs/usfta.pdf>> (accessed Mar. 27, 2005)). Australian investment employs over 84,000 Americans. Spread throughout many industries, Australian investment is particularly high in the areas of broadcasting, mining, minerals, building materials, steel manufacturing, and real estate. *Id.* at 16-17. Australian investment accounts for 1.7% of total foreign direct investment in the United States. *Id.* At 15. The United States is also the largest foreign investor in Australia, with investments of over \$110 billion directly responsible for the employment of nearly 300,000 Australians. The Trade Partn., *supra* at 16-18 (July 2003) (available at <<http://www.aaftac.org/>> (accessed Mar. 8, 2005)). Australia is also a large importer of American products and services. American exports accounted for 18.2 % of total Australian imports in 2001. In 2002, the United States exported \$12.3 billion worth of goods to Australia, making Australia the 12th largest United States export market. *Id.* at 5. The United States has a large trade surplus with Australia (exceeding \$3.5

every major industry association, and most trade economists.⁴

However, the agreement has not been universally supported, as some argued that the negotiations signaled Australia's intention to abandon multilateralism while others simply argued that the agreement was not in Australia's best interests.

The agreement resulted from eleven months of complex negotiations in which both sides were forced to compromise and withdraw from their initial positions. As a result, the *AUSFTA* negotiations sparked much debate in Australia on the potential impacts of the agreement on many important areas, including the sensitive issue of health services.⁵ Throughout the negotiations, the Australian government vehemently and repeatedly stated that it would not allow the *AUSFTA* to compromise its capacity to deliver key objectives in health and other domestic policy areas. At the outset of the negotiations, United States negotiators took a tough line on sensitive health issues and, conversely, Australian negotiators worked hard to uphold Australia's position that some areas, including the structure of the Pharmaceutical Benefits Scheme (PBS), would not be lost or otherwise bargained away for a gain in another area, such as agriculture or services.⁶

Nevertheless, the agreement contains specific provisions relating to the PBS, pharmaceutical intellectual property, plasma fractionation arrangements and professional services, and appears to be the first free trade including measures affecting a country's pharmaceutical scheme that have been specifically included in a trade agreement.⁷ Speculation that the agreement will weaken Australia's

billion every year since 1989)—the surplus, including investment, reached \$5.9 billion in 2002. *Id.*

4. See e.g. Peter Beattie, *Blueprint for Boosting Profits and Jobs*, Australian Fin. Rev. 55 (July 28, 2004); Steve Bracks, *Forging Stronger Links with the US—It's a Fair Trade*, Australian Fin. Rev. 87 (July 30, 2004); Mark Davis, *ALP Urged to Sign Trade Deal*, Australian Fin. Rev. 4 (July 27, 2004); Steve Lewis, *Costello Urged PM to Retire*, Australian 5 (July 28, 2003); Hugh Morgan, *FTA: The Change We Have to Have*, Australian Fin. Rev. 55 (July 28, 2004). An example of the gains to be made from the *AUSFTA* can be seen in the case of Dairy Australia. Paul Jarvis, *Dairy Australia Pushes for FTA*, Countryman (Western Australia) 12 (June 24, 2004). Chris Phillips, General Manager for International Trade and Development, stated that the FTA allowed for significant and immediate expansion in Australian dairy access and improved trading arrangements on existing quota sales to the United States. He further stated that farmers with an average herd size of 200 milkers could expect a rise in their gross income of between \$2,000-\$3,000 per season and that key benefits would also include new product sales valued at more than \$60 million per annum (potential premiums from United States market sales relative to alternative market outlets were estimated to be \$18–25 million per year and rising over time) and wider product coverage which would enable a broad cross section of Australian milk producers to participate. *Id.*

5. An unfortunate by-product of the increased attention on the *AUSFTA* negotiations was the amount of misinformation stemming from the media. There are literally hundreds of misleading or incorrect articles that can be found. See e.g. Jeremy Calvert, *Free Trade Deal is Bad Medicine*, Herald Sun (Melbourne, Australia) 2, [¶¶ 1-2] (July 18, 2003) (asserting that drug prices could surge without any evidence to substantiate the claim); Gabriella Coslovich, *Trade Fight Hangs over AFI Night*, The Age (Melbourne, Australia) 1 (Nov. 21, 2003) (available at <<http://www.theage.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2003>> (accessed Apr. 11, 2005)) (stating that “[f]ilmmakers . . . confirmed that local content regulations for TV and new media will be traded-off”); Jane Drake-Brockman, *The Yanks are Coming and There are Big Changes in Store*, Sydney Morning Herald (Sydney, Australia) [¶ 12] (Feb. 10, 2004) (available at <<http://www.smh.com.au/articles/2004/02/09/1076175100015.html?oneclick=true>> (accessed Mar. 27, 2005)) (stating that Australia will have “fewer Australian and more American [television] programs to choose from over the years,” even though the *AUSFTA* allows Australia to maintain local content rules); Patricia Ranald, *Free Trade Comes at Unacceptable Price*, Australian Fin. Rev. 71, [¶3] (Aug. 22, 2003) (claiming the United States was “demanding the immediate removal of the reference wholesale pricing scheme” in the Pharmaceutical Benefits Scheme (PBS)).

6. Chief Australian negotiator Stephen Deady stated that Australian negotiators went into negotiations with “an absolutely clear mandate to protect and preserve the fundamentals of the PBS.” Sen. Select Comm. on the Free Trade Agreement Between Australia and U.S. of Am. Transcr. 12 (June 21, 2004) (available at <<http://parlinfoweb.aph.gov.au/piweb/Repository/Committee/Commsen/Linked/3486-g.pdf>> (accessed Mar. 17, 2005)) (statement of Mr. Stephen Deady) [hereinafter Sen. Select Comm. Transcr. (June 21, 2004)].

7. Deputy United States Trade Representative Josette Shiner stated that the *AUSFTA* is “the first to include special provisions addressing market access for pharmaceuticals.” Sen. Intl. Trade Subcomm., *Joint Hearing on International Trade* (Apr. 27, 2004) (available at <<http://www.finance.senate.gov/hearings/testimony/2004test/042704jste.st.pdf>> (accessed Mar. 17, 2005)) (testimony by Dep. U.S Trade Rep. Josette Shiner).

ability to regulate for public purposes, including in relation to areas such as health, is rife in both the media and the political opposition. The importance of the issue in Australia cannot be understated. In fact, the Final Report of the Australian Senate Select Committee on the Free Trade Agreement between Australia and the United States of America stated that the impact of the *AUSFTA* on the PBS “has been a critical issue” in its inquiry.⁸

With that background in mind, this article sets out to evaluate the provisions in the *AUSFTA* regarding what can broadly be described as health services. Part II introduces the reader to Australia’s Pharmaceutical Benefits Scheme. Part III forms the main part of this paper by detailing, evaluating, and critically analyzing the eight provisions relating to health services and the PBS in the *AUSFTA*. Part IV concludes the paper by reminding readers that the *AUSFTA* is the product of complex negotiations and by stating that while the agreement may result in uncertainty and discontent among some in the Australian academic and health services professions, there is nothing in the *AUSFTA* that will lead to the dismantling of the PBS. The paper also concludes that it is unlikely for a dispute resolution panel convened under the *AUSFTA* to restrict Australia’s ability to make key public health decisions.

8. Parliament of Australia, Sen. Select Comm., *Final Report on the Free Trade Agreement between Australia and the United States of America* ¶ 4.1 (Aug. 5, 2004) (available at <http://www.aph.gov.au/Senate/committee/freetrade_ctte/report/final/report.pdf> (accessed Mar. 17, 2005)) [hereinafter *Sen. Select Comm. Rpt.*].