

Australia – United States
Free Trade Agreement

Guide to the Agreement

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This publication is based on the draft text of the Australia-United States Free Trade Agreement as at 1 March 2004. That text is subject to legal review for clarity and consistency.

This publication is a guide intended to provide general information only. Views offered herein are without prejudice to any legal interpretation of the Agreement by the Australian Government.

Before entering into any particular transaction users should:

1. rely on their own enquiries, skill and care in using the information;
2. check the final text of the Australia-United States Free Trade Agreement and all corresponding legislation;
3. check with primary sources in respect of third party submission; and
4. seek independent advice.

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Guide to the Agreement

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Introduction

This is a guide to the agreed text of the Australia-United States Free Trade Agreement (Agreement) that was concluded by Trade Minister Mark Vaile on 8 February 2004, in Washington D.C. with his US counterpart, Trade Representative Bob Zoellick. The text is the result of an intense period of negotiations that began with a joint announcement by the Prime Minister, Mr Howard, Mr Vaile, and Mr Zoellick on 14 November 2002. The text of the treaty – and future updates – can be found on the DFAT website (www.dfat.gov.au).

In all, five rounds of negotiations were held with the fifth extended from the original negotiating timetable of 1 to 5 December 2003 through the Christmas period to finish on 8 February 2004. The dates and location of each negotiating round are listed below.

Date	Location
17 – 21 March 2003	Canberra
19 – 23 May 2003	Honolulu, USA
21 – 25 July 2003	Honolulu, USA
27 – 31 October 2003	Canberra
1 December 2003 – 8 February 2004	Washington D.C., USA

The Consultation Process

In November 2002, prior to the commencement of negotiations for a FTA between Australia and the United States, the Department of Foreign Affairs and Trade invited public submissions on issues relevant to the negotiations. The deadline for submissions was 15 January 2003.

Approximately 200 submissions were received from industry, professional and non-government bodies, companies, unions and individuals. Almost 60 of these came from peak industry and business organisations, representing the full range of agriculture, services and manufacturing industry sectors.¹

The public submissions were a key aspect of the consultations that informed the Government's consideration of its objectives for and approach to the Agreement negotiations. On 3 March 2003, Mr Vaile released a statement of Australia's negotiating objectives following detailed consideration of Australia's interests by the Government and

¹ A list of private sector, professional and non-governmental organisations which made submissions (and which agreed to being listed), can be found on the DFAT website at http://www.dfat.gov.au/trade/negotiations/us_public_submissions.html

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an extensive consultation process with industry, the community and State and Territory governments.

The government continued to consult State and Territory governments, business and the general public extensively in developing and negotiating the Agreement. The DFAT website was continuously updated with Agreement media transcripts, background documents and answers to frequently asked questions, as well as a newsletter distributed to Federal and State MPs and over 1,000 e-mail subscribers.

The negotiating team had also meetings with over 200 industry groups, businesses, state government departments, consumer groups, unions and NGOs. State and Territory governments were briefed before and after each negotiating round. The Minister for Trade, Mark Vaile, discussed the Agreement with his Trade Policy Advisory Committee and WTO Advisory and Agricultural Trade Consultative Groups.

The Approval Process

This guide to the Agreement has been released following the publication of the first draft of the treaty text. Such early publication is a departure from Australia's normal practice which has been to release the text of a treaty only after signature. The text will still be subject to editing for legal accuracy prior to signature.

The text of the Agreement will be tabled in both Houses of Parliament, and referred to the Joint Standing Committee on Treaties (JSCOT). JSCOT will examine and report to Parliament on the FTA. JSCOT may hold public hearings and call for public submissions on treaties under consideration.

The date on which the two governments sign the treaty is yet to be decided, but will probably occur soon after the 90-day period for US Congressional notification elapses in mid-May 2004. Signature does not mean that Australia becomes bound at international law to the terms of Agreement. That only happens once it has entered into force (i.e. comes into effect).

Before the Agreement can enter into force and become binding under international law, both Governments must complete their respective domestic approval processes and the Australian Parliament and US Congress must pass any necessary legislation. Once these processes have been completed, the two governments can agree on a date for entry into force, which would occur via an exchange of diplomatic notes. On present indications, the Agreement is unlikely to come into force before 1 January 2005.

Legal and Institutional Framework (incorporating Chapters 1, 22 and 23)

1. Structure of the Agreement

The Australia-US Free Trade Agreement (the Agreement) consists of 23 Chapters, several Annexes and a range of side-letters (exchanges of letters).

A common cross-referencing system applies. Individual Articles are referred to as Article (Chapter Number).(Article Number). For example, Article 22.3 is actually Article 3 of Chapter 22. The same system applies to paragraphs and subparagraphs of Articles. For example, Article 22.3.1 refers to paragraph 1 of Article 3 of Chapter 22. Annexes are referred to as Annex (Chapter Number)-(Letter). For example, Annex 2-A is the first Annex of Chapter 2.

2. How is the Free Trade Agreement legally binding?

The Agreement will only become part of Australian domestic law to the extent that the Australian Parliament amends or adopts legislation implementing the Agreement. Only a small number of legislative changes are likely to be needed.

However, once it enters into force, the Agreement will be binding on the Australian Government in international law.

3. What parts of the Free Trade Agreement are legally binding?

The Annexes and any interpretative footnotes in the Chapters or Annexes are part of the text of the Agreement and are legally binding.

The various side-letters may represent stand-alone, legally binding, treaty-level agreements; constitute part of the Agreement; or have no legal standing; depending on the language included in each individual letter. Side-letters are used in the Agreement in three main ways:

- To provide additional clarification on how a particular provision of the Agreement will apply to either the United States or Australia;
- Where either the United States or Australia wishes to make additional commitments that apply only to that country, as part of the overall deal;
- Where either the United States or Australia wishes to confirm to the other country how its current policies or systems operate.

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In general, the first two categories of side-letter would be agreed as “constituting an integral part of the Agreement”. This means they are a legally binding part of the Agreement.

The final category of side-letter does not normally become an “integral part of the Agreement” and is not legally binding. However, if there were a dispute between the Parties, these side-letters could be used to explain the context of the dispute.

4. Coverage of the Agreement

Unless specified otherwise, the Agreement covers both citizens and permanent residents of Australia and the United States (Article 1.2.15). The term “person” when used in the Agreement, refers both to a natural person or to an enterprise (Article 1.2.17).

The Agreement covers activity throughout the entire territory of Australia, except for the Australian Antarctic Territory. For the United States, it covers activity in the 50 states, the District of Columbia and Puerto Rico (Annex 1-A). It does not cover activity in the US possessions or leased territories in the Pacific, for example, the territory of Guam.

5. When does the Agreement commence operation?

The Agreement only commences operation (or ‘enters into force’) after it is signed and all domestic requirements are fulfilled. Before the Agreement enters into force, any necessary implementing legislation or regulations must be passed by the Australian Parliament and, if required, by State and Territory legislatures. The US Congress will also have to approve the Agreement and pass necessary legislation. Once the required domestic processes have been completed in both countries, the two governments can agree on a date for entry into force which would occur 60 days after an exchange of diplomatic notes (Article 23.4).

The earliest date under consideration for entry into force is 1 January 2005.

6. Can the Agreement be terminated?

Yes. Either country can terminate the Agreement simply by writing to the other country giving six months notice of the termination (Article 23.4.2).

7. Can the Agreement be reviewed and amended?

The Agreement can be amended at any time by agreement between Australia and the United States. Amendment of a treaty requires the repeat of domestic processes, such as tabling of the amendment

before the Australian Parliament's Joint Standing Committee on Treaties (Article 23.3.1).

The United States and Australia have specifically agreed to consider amending the Agreement if there is progress in the Doha Round of negotiations in the World Trade Organisation (Article 23.3.2).

The Agreement does not require that it should be completely reviewed at any specific time. Instead, a Joint Committee is established to continuously review the operation of the Agreement (Article 21.1). The Joint Committee will meet every year at Ministerial level to discuss the operation of the Agreement (Article 21.1.3) and both the United States and Australia will continue to consult closely with the public on how best to implement the Agreement (Article 21.1.6).

8. How does the Agreement protect the Government's ability to pursue key policy objectives on security, public morals, health and conservation?

The Agreement adopts the same general exceptions as have been adopted by the World Trade Organization in the General Agreement on Tariffs and Trade (GATT 1994) and General Agreement on Trade in Services (GATS), (Article 22.1).

This means that both the Australian and United States governments are free to enact laws, regulations or policies they consider are necessary to, for example:

- protect public morals or maintain public order;
- protect human, animal or plant life or health;
- protect national treasures of artistic, historic or archaeological value; and
- conserve exhaustible natural resources.

The Agreement also provides both the Australian and United States governments flexibility to protect their security interests (Article 22.2).

9. How does the Agreement apply to taxes?

The Agreement prohibits export taxes on goods and replicates WTO protection against discriminatory taxes on goods. Beyond this the Agreement does not apply to any existing taxes (Article 22.3.4(d)), but does place limits on the ability of both Australian and United States federal and state governments to implement discriminatory taxes in the future.

Article 22.3 sets out how the National Treatment, Most-favoured Nation Treatment and Expropriation and Compensation obligations apply to taxes. In particular, it clarifies that the Double Taxation

Legal and Institutional Framework

Convention between the United States and Australia should apply where there are inconsistencies between the Double Taxation Convention and the Agreement.

2. National Treatment and Market Access for Goods (including Pharmaceutical Benefits Scheme)

1. Purpose and structure

The Chapter applies to trade in all goods between the Parties, and commits both sides to non-discriminatory treatment in trade in goods. To this end, only those goods ‘substantially made or transformed’ in the US or Australia, which qualify under the Rules of Origin Chapter (see Chapter 5), are to benefit from the commitments in this Chapter on Goods.

The Chapter consists of 13 Articles; 3 Annexes; and an exchange of letters on (i) Pharmaceuticals, (ii) recognition of Bourbon and Tennessee whiskey, (iii) Import without Bond and (iv) Waiver of Customs duties.

2. National Treatment (Article 2.2)

The Parties have agreed to abide by their WTO commitments to each other to provide what is known as National Treatment. This means that Australia and the United States will provide the same treatment to imported goods from each other as they do to domestically produced goods.

3. Elimination of Duties (Article 2.3)

The Parties have agreed to eliminate customs duties (tariffs) on originating goods of the other Party according to their respective schedules. The schedules specify whether the particular category of good will be duty free when the Agreement comes into force, or be subject to removal over a specified period.

A large proportion of Australia’s exports of non-agricultural goods to the US will be duty free from day one of the Agreement. Apart from agricultural goods, tariffs on a range of textiles and clothing, some footwear, and a small number of other items, will be phased out with all trade in goods free of duty by 2015.

Australia’s tariffs will be phased out on much the same textile, clothing and footwear items, on finished passenger motor vehicles and on one agrochemical item.

Further, the Parties will not increase an existing customs duty or introduce a new duty unless expressly provided for by the Agreement.

4. Customs Value (Article 2.4)

The Parties will ensure that, when determining the value of goods, they base the valuation on the transaction value and not minimum import prices. This is in accordance with our WTO obligations on customs valuation.

5. Temporary Admission (Article 2.5)

The Parties have agreed to specific arrangements for goods which enter the country temporarily, and to allow such goods to enter free of duty. For example professional equipment which is necessary for a person to carry out certain business activities, and goods intended for use in displays or demonstrations at exhibitions, will enter duty free. The goods must, however, be exported on, or before, the departure of the person using the goods, or within a reasonable period of time related to the purpose of the admission.

6. Goods Re-entered After Repair or Alteration (Article 2.6)

The Parties have agreed to allow goods re-entered after repair or alteration to enter duty free provided the repairs or alterations do not destroy the essential characteristics of the goods or change them into different commercial items.

7. Commercial Samples of Negligible Value and Printed Advertising Material (Article 2.7)

The Parties have agreed to allow commercial samples of negligible value, or printed advertising material, to enter duty free. The samples are to be used only to solicit orders. The printed advertising material must be limited to one copy per packet and not be part of a larger consignment.

8. Waiver of Customs Duties (Article 2.8)

The Parties agreed not to adopt any new waiver of customs duties, or to expand any waiver program where the waiver is available only if the recipient fulfills a certain type of performance requirement. The prohibited performance requirements include export outcomes, import substitution, or domestic preferences (including local content thresholds).

9. Import and Export Restrictions (Article 2.9)

The Parties have agreed that, unless in accordance with our WTO rights and obligations, or specifically provided for in this Agreement, (refer Annex 2-A), there will be no restrictions on the importation or exportation of goods.

10. Administrative Fees and Formalities (Article 2.10)

The Parties have agreed to ensure that any administrative fees and formalities charged in connection with traded goods reflect the cost of the service provided, and do not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

11. Export Taxes (Article 2.11)

The Parties have agreed not to adopt, or maintain, any duty, tax or other charge on the export of any good to the territory of the other Party, unless the same is applied on any such goods destined for domestic consumption.

12. Merchandise Processing Fee (Article 2.12)

In order to reinforce the obligation that fees and charges must only reflect the cost of the service provided (refer Article 2.10), this article stipulates that customs import or export processing fees will not be calculated on an “ad-valorem” basis i.e. a fee based on the value of the goods to be imported or exported.

13. Committee on Trade in Goods (Article 2.13)

A Committee on Trade in Goods will be established to give both Parties the opportunity to raise issues of concern in relation to tariffs, non-tariff measures, rules of origin and customs administration.

14. Application of Chapter (Annex 2-A)

Both countries have retained the right to regulate the import and export of certain items. For Australia this includes forest products, second hand vehicles, and our ability to retain marketing arrangements for wheat, barley, rice, sugar and export arrangements for horticulture and livestock.

The United States has retained the right to maintain controls on the export of all logs of all species and to retain restrictions on the importation of foreign vessels and other measures under the so-called Jones Act.

15. Tariff Elimination (Annex 2-B)

Annex 2-B contains the notes explaining the different categories of goods and the time-frames for the removal of tariffs. They should be read in conjunction with the Schedules.

Pharmaceuticals (Annex 2-C)

Summary

The relevant text consists of an Annex (Annex 2-C – Pharmaceuticals) to Chapter 2 (National Treatment and Market Access for Goods) of the Agreement that reflects some joint obligations and common principles. There is also an exchange of letters (side letters) on pharmaceuticals that sets out some specific commitments that Australia has made in relation to the processes by which new products are added to the list of medicines subsidised under the PBS. These are described below.

1.1 Agreed Principles (2-C – (1))

Paragraph 1 sets out some agreed principles that Australia and the United States have agreed are important in facilitating high quality healthcare.

1.2 Transparency (2-C – (2))

This paragraph reflects certain general undertakings in relation to transparency and process that will apply to both countries in managing their respective pharmaceutical programs at federal level. The implications of this paragraph for Australia are that we shall:

- ensure that applications from companies seeking to have products added to the PBS are considered by the Pharmaceutical Benefits Advisory Committee (PBAC)² within a specified timeframe;
- publish the procedural rules and guiding principles that govern the PBAC's consideration of those applications;
- provide an applicant with an opportunity to provide comments to the PBAC during the process; and
- provide an applicant with a detailed explanation of the PBAC's consideration of their application.

The Government has also committed to making detailed information about the outcomes of the process available to the public.

The text also provides for the establishment of a review mechanism where PBAC recommends that a drug not be added to the PBS (see Para 2.2)..

A footnote to this paragraph states that where federal healthcare programs purchase, rather than reimburse the cost of medicines,

² The PBAC is the independent expert committee that is responsible for considering and recommending to the Minister for Health and Ageing those medicines that it considers should be subsidised on the PBS.

those programs will be subject to another Chapter in the Agreement that covers Government Procurement arrangements. This footnote does not affect the PBS.

1.3 Medicines Working Group (2-C - (3))

Australia and the United States have agreed to establish a Medicines Working Group to enable further discussion of the issues covered by the Annex. It will be similar to other Working Groups that will be set up to discuss other aspects of the Agreement. The Working Group will comprise appropriate government officials.

The details of how the Working Group will operate and the frequency of meetings are yet to be decided.

1.4 Regulatory Cooperation (2-C - (4))

This paragraph contains a provision for promoting closer cooperation between the Therapeutic Goods Administration (TGA) and the US Food and Drug Administration (FDA). This will strengthen the existing relationship between these two organisations. It does not mean that the TGA will be required to accept products that the FDA approves, or vice versa.

1.5 Dissemination of Information (2-C - (5))

The paragraph contains a statement about the sort of information pharmaceutical companies are permitted to place on their internet websites about the medicines that they manufacture and sell. The text accommodates different legal frameworks in Australia and the US covering the advertising of medicines. The current arrangements in Australia and the US in relation to advertising of medicines will therefore continue.

Exchange of Letters

(i) Pharmaceuticals

2.1 Transparency and Process Improvements (Paragraph 1)

This paragraph reflects commitments that Australia has agreed to make to enhance transparency and accountability in the processes of selecting, listing, and pricing medicines on the PBS, by providing:

- an opportunity for companies preparing an application to have a drug added to the PBS to discuss their application with technical staff of the Department of Health and Ageing prior to lodging it;
- opportunities for an applicant to respond to any reports or evaluations prepared for the technical sub-committees of the PBAC concerning their application;
- information about the reasons for the outcome of that application within a timeframe that will enable an applicant to proceed with a submission to the Pharmaceutical Benefits Pricing Authority³, if they wish.

In addition, Australia has agreed to provide applicants with an opportunity for a hearing before the PBAC while it is considering applications. Currently the PBAC considers applications on the basis of an exchange of papers only.

2.2 Review Process (Paragraph 2)

In the interests of greater transparency and accountability, Australia has agreed to establish a review mechanism that will be made available to companies when an application to have a drug added to the PBS has been rejected by the PBAC.

The details of how the review process will operate will be worked out in the context of Australia's legal and administrative framework.

2.3 Expediting Access to New Medicines (Paragraph 3)

In this paragraph Australia has agreed to streamline some of the administrative steps that are required before a drug is added to

³ The Pharmaceutical Benefits Pricing Authority is an independent, non-statutory body which makes recommendations on prices for new items that have been recommended for listing on the PBS by the PBAC. It may also recommend revised prices where uses of drugs are extended or changed.

the PBS - this will make new drugs more quickly available to the public by:

- reducing the time between the PBAC's recommendation and the medicine being available on the PBS;
- revising and distributing the Schedule of Pharmaceutical Benefits (the "Yellow Book") more frequently.

Australia will also continue to provide a simplified process for applications to PBAC that do not require a full evaluation.

2.4 Price Review (Paragraph 4)

The text reflects Australia's commitment to continue to make available opportunities for companies to seek a review of the PBS price of a drug through applications to the Pharmaceutical Benefits Pricing Authority.

(ii) Recognition of Bourbon and Tennessee whiskey

In this letter, both Parties agree that the Australia New Zealand Standards Code allows for the recognition of Bourbon and Tennessee whiskey as products of the United States and therefore no change is required to our Code. Accordingly, Australia will not permit the sale of Bourbon and Tennessee whiskey in Australia unless it has been manufactured in the United States according to the laws governing the manufacture of such products and complies with all applicable US regulations for the consumption, sale or export as Bourbon and Tennessee whiskey.

(iii) Import Without Bond

In this letter, Australia commits to allow duty free temporary entry of goods without requiring a security or bond provided that an undertaking is given by the importer. That said, in cases where Australian authorities consider the risk of non-compliance is high the right to require a security is retained.

(iv) Waiver of Customs Duties

In this letter the United States affirms its understanding that Australia's Automotive Competitiveness Investment Scheme (ACIS) does not contain any performance requirement as defined in this Chapter (refer Article 2.8)



3. Agriculture

1. Purpose and structure

Market access for agriculture is covered by the following Chapters, Schedules and Annexes of the Agreement:

- Chapter 2 (National Treatment and Market Access for Goods) establishes tariff elimination for agricultural products
- the Tariff Schedule of the United States and the Tariff Schedule of Australia (both of which form part of Annex 2-B) – together with the provisions of Annex 2-B and the General Notes and Annex I of the tariff schedules – set out the procedure for the elimination of tariffs on agricultural goods and the creation of duty free tariff rate quotas on certain agricultural products
- Chapter 3 (Agriculture) establishes a Committee on Agriculture, covers institutional provisions, and – together with Annex 3-A – sets up agricultural safeguard measures

The Agreement provides for increased market access for most Australian agricultural products and the elimination of tariffs over time on almost all United States agricultural tariff lines. In addition, the Agreement provides for increased upfront duty free quotas on a range of products. Some safeguards will apply to beef and some agricultural products, as detailed below.

2. Tariff elimination

2.1 United States agricultural tariffs

Every United States agricultural tariff line at the 8-digit tariff code level is assigned a staging category. This staging category establishes the rate at which the relevant tariffs will be eliminated under the Agreement. The staging categories for each tariff line are identified in the Tariff Schedule of the United States.

Agriculture

Five main staging categories are established for the elimination of United States tariffs on Australian agricultural goods. The staging categories – most of which are defined in Annex 2-B of the Agreement – are as follows:

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

In addition to these five main staging categories, there are a number of additional staging categories applying to a small range of goods. These are identified in the General Notes section of the Tariff Schedule of the United States and apply to products such as beef and avocados. The tariff elimination schedules for wine are identified in Paragraph 28 of Annex I to the Tariff Schedule of the United States.

The Agreement provides for the elimination over time of all United States agricultural tariffs, with two exceptions. In relation to dairy products subject to tariff rate quota, the Agreement does not provide for any change to the over-quota tariffs for these goods. The Agreement does, however, provide for a significant increase in the volumes of duty free quota access for these products and for the elimination of existing in-quota tariffs – see the dairy section below – as well as for the elimination over time of all tariffs on non-quota dairy products). In addition to dairy products, the Agreement does not provide for any change to any tariffs on sugar or sugar-products.

2.2 Australian agricultural tariffs

All Australian agricultural tariffs will be eliminated immediately the Agreement enters into force. Most of these tariffs are already zero. The remainder are currently applied at four or five percent (except for a small number of dairy tariffs, which are \$1.22/kg). These tariffs are identified in the Tariff Schedule of Australia.

3. Tariff rate quotas

In addition to the elimination of United States agricultural tariffs detailed above, the Agreement also provides for increased duty free access for certain Australian agricultural goods in the form of a tariff rate quota. This allows Australian producers to export increasing

amounts of these products free of duty to the United States during the tariff elimination period. In the case of dairy products subject to tariff rate quotas, the new (and growing) quota volumes provide the only additional access for these products into the United States market, in the absence of tariff reductions for these products.

Tariff rate quotas apply to the following products:

- beef
- dairy
- tobacco
- cotton
- peanuts
- avocados

The additional tariff rate quota access provided for each of these products is set out in Annex I to the Tariff Schedule of the United States.

The new duty free tariff rate quotas for beef and dairy established under the Agreement will be administered from Australia. The Australian Government will issue export certificates to Australian producers for the total volume of the tariff rate quotas. These export certificates will be recognised by the United States Customs Service and enable those products to enter the United States duty free. The Australian Government will develop procedures for the allocation of export certificates in consultation with Australian industry.

3.1 Beef

Australia currently has access to a tariff rate quota under the WTO agreements for 378,214 tonnes of beef. The tariff paid on that quantity of beef is US4.4c/kg, compared to a 26.4% tariff on beef exports to the United States in excess of 378,214 tonnes. Paragraph 2 of Annex I to the Tariff Schedule of the United States provides that the US4.4c/kg in-quota beef tariff will be eliminated immediately once the Agreement enters into force.

Under Paragraph 3 of Annex I, Australia will receive additional duty free access for an increasing volume of beef in subsequent years of the Agreement. The additional quota volumes will grow from 20,000 tonnes in year 3 of the Agreement (at the latest) to 70,000 tonnes in year 18 of the Agreement. Meanwhile, from years 9-18 the 26.4% tariff on over-quota exports will be reduced to zero. Beginning in year

18, Australia will be free to export an unlimited amount of beef to the United States, subject to a beef safeguard (see below).

Table: Beef access arrangements under the United States FTA

Year	Additional duty free FTA quota volumes (tonnes)	Total duty free quota volumes - WTO + FTA (tonnes)	In-quota tariff	Over-quota tariff
1	Zero	378,214	Zero	26.40%
2	15,000*	393,214	Zero	26.40%
3	20,000	398,214	Zero	26.40%
4	20,000	398,214	Zero	26.40%
5	25,000	403,214	Zero	26.40%
6	25,000	403,214	Zero	26.40%
7	30,000	408,214	Zero	26.40%
8	30,000	408,214	Zero	26.40%
9	35,000	413,214	Zero	24.64%
10	35,000	413,214	Zero	22.88%
11	40,000	418,214	Zero	21.12%
12	40,000	418,214	Zero	19.36%
13	45,000	423,214	Zero	17.60%
14	45,000	423,214	Zero	14.08%
15	50,000	428,214	Zero	10.56%
16	55,000	433,214	Zero	7.04%
17	60,000	438,214	Zero	3.52%
18	70,000	448,214	Zero	Zero
19 and beyond	Unlimited	Unlimited	Zero	Zero

*the 15,000 tonnes in year 2 will only be granted if United States beef exports return to their pre-BSE (2003) levels. Additional quota volumes in years 3 and beyond are guaranteed, regardless of United States exports.

The current 378,214 tonne WTO tariff rate quota for beef may be used for all types of beef, including high quality beef and manufacturing beef. The additional quota volumes obtained under the FTA apply to a more limited range of beef (see Tariff Schedule of the United States, Annex I, sub-paragraph 3(c)). The additional 20,000 tonnes in year 3, for example, may be used to ship all types of Australian beef with two exceptions – carcasses and half-carcasses of beef, and processed beef made ready for particular uses by the retail consumer (eg fancy cuts).

The tariff reductions on the 26.4% tariff apply to all types of beef.

Beef safeguards

Two types of beef safeguard will apply at different times under the Agreement.

First, during the 18-year tariff elimination period, a safeguard applies to exports of beef which exceed 110% of the total preferential quota volume in that year. The details of this safeguard are set out in Section B of Annex 3-A.

For example, in year 15 the preferential quota amount is 50,000 tonnes – so the safeguard would only apply to over-quota exports in excess of 5,000 tonnes. In other words, in year 15 the safeguard would only apply to exports exceeding the total of the 378,214 tonne WTO quota, plus the 50,000 tonne FTA quota for that year, plus an additional 5,000 tonnes (that is, a total of 433,214 tonnes).

If the 10% trigger is exceeded, any additional over-quota exports would have to pay a tariff equal to the FTA preferential tariff (10.56% in year 15) plus 75% of the difference between the original tariff and the FTA preferential tariff (i.e. 75% of 26.4%-10.56% = 11.88%). The tariff applied to those exports in excess of 433,214 tonnes in year 15 would therefore be 22.44% (still lower than the current 26.4% tariff).

Second, a price-based beef safeguard applies to beef exports starting in year 19 of the Agreement (that is, once the quotas and tariffs on beef have been eliminated). This safeguard is set out in Section C of Annex 3-A.

The price-based safeguard only applies to beef exports in excess of 448,634 tonnes in year 19 (the existing 378,214 tonne quota plus the additional 70,000 tonne quota in year 18 plus 420 tonnes). That amount will grow by an additional 420 tonnes in year 20 and every year thereafter. In other words, this amount of beef will always receive duty free access into the United States and cannot be subject to the price-based beef safeguard.

For most of the year, the price-based beef safeguard will be triggered if the price of beef in the United States falls 6.5% below the average of the past two years in two months of a quarter. A one month trigger applies to the final quarter of the year. If the safeguard is triggered, beef exports to the United States in excess of the minimum quota amount (448,214 tonnes) will be subject to a tariff equal to 65% of the prevailing tariff on beef (based on the current tariff, the safeguard tariff would be 17.2% – still lower than the current 26.4% tariff). Once

the safeguard is triggered, it will remain in place for three months or until the end of the calendar year, whichever period is shortest.

3.2 Dairy

The Agreement provides for a significant increase in duty free access into the United States market for Australian dairy products imported with tariff rate quotas. In addition, the in-quota tariffs in existing dairy quotas will be reduced to zero immediately once the Agreement enters into force. However, over quota tariffs on dairy products subject to quota will not change under the Agreement (except for goya cheese).

The dairy products subject to tariff rate quotas are divided into a number of product categories. The exact products contained in each category are set out in Annex I to the Tariff Schedule of the United States. For each product category, an initial quota amount is allocated for year 1 of the Agreement. In subsequent years, that amount grows by an additional percentage every year. The access arrangements for dairy are set out in the table below.

Table: Dairy access arrangements under the United States FTA

Product	Existing WTO quota (tonnes)	Additional FTA quota (year 1) (tonnes)	Growth of additional FTA quota (after year 1)	In-quota tariff	Over-quota tariff
Milk/cream/ice cream (litres)	0	7.5 million	6%	Zero	No change
Condensed milk	92	3,000	6%	Zero	No change
Butter/butterfat	0	1,500	3%	Zero	No change
Skim milk powder	600	100	3%	Zero	No change
Other milk powder (including whole milk powder)	57	4,000	4%	Zero	No change
Other dairy	3,016	1,500	6%	Zero	No change
Cheddar cheese	2,450	750	3%	Zero	No change
American-type cheese	1,000	500	3%	Zero	No change
Swiss cheese	500	500	5%	Zero	No change
European-type cheese	0	2,000	5%	Zero	No change
NSPF (other) cheese	3,050	3,500	5%	Zero	No change
Goya	0	2,500	5%	Zero	Eliminated after 18 years

The increased trade in dairy products covered by tariff rate quotas is in addition to the trade Australia already has with the United States in non-quota dairy products. As noted earlier, the tariffs on all non-quota dairy products will be eliminated over time under the Agreement, most in equal annual instalments over 18 years.

In addition, under Article 3.6 of the Agreement, after year 20 of the Agreement either Party may request consultations with the other party to review the market access arrangements for dairy. This will give Australia the opportunity to seek a reduction in over-quota tariffs for dairy products subject to tariff rate quota (as noted earlier, these tariffs are not being reduced as part of the current Agreement).

3.3 Tobacco, cotton and peanuts

New duty free tariff rate quotas will be established for tobacco and cotton, beginning at 250 tonnes in year 1 and growing by an additional three percent in subsequent years (see Paragraphs 23 and 24 of Annex I to the Tariff Schedule of the United States). At the same time, the over-quota tariffs on these products will be eliminated over a period of 18 years.

A new duty free tariff rate quota for peanuts and peanut products will be established in a similar manner, the only difference being that the quota volume in year 1 is 500 tonnes (rather than 250 tonnes for tobacco and cotton).

3.4 Avocados

Two new seasonal duty free tariff rate quotas will be established for Australian avocados into the United States. Beginning in year 2 of the Agreement, from February 1 to September 15 an amount of 1,500 tonnes of Australian avocados may enter the United States market duty free. Between September 16 and January 31 an amount of 2,500 tonnes of Australian avocados may enter the United States market duty free. Together, this means Australia has new access for 4,000 tonnes of avocados per year. Both amounts will grow by an additional ten percent every year until year 18 of the Agreement. At the same time, the over-quota tariff on avocados will be eliminated over a period of 18 years.

4. Agricultural safeguard measures (Article 3.4 and Annex 3-A)

Three types of agricultural safeguard measures may apply to Australian exports to the United States – a horticulture price-based safeguard (Section A, Annex 3-A), a quantity-based beef safeguard (Section B, Annex 3-A) and a price-based beef safeguard (Section C, Annex 3-A). The beef safeguards are described above under the section on tariff rate quotas.

4.1 Horticulture price-based safeguard

The horticulture price-based safeguard applies to a limited range of horticultural products. The list of those products is contained in Section A of Annex 3-A. The list of safeguard products also sets out a trigger price for the safeguard. That trigger price has been calculated by taking the average of the lowest two years from the previous five years. The trigger price is based on the Customs Import Value of the good (defined in the World Trade Atlas from where the figures were taken), which is similar to a \$US Free On Board (FOB) price.

The horticulture price-based safeguard will apply if the FOB import price of the Australian good is lower than the trigger price. If the safeguard triggers, an additional duty will apply to those goods, depending on the amount by which the FOB import price of the horticultural good falls below the trigger price (this is set out in detail in Section A of Annex 3-A).

The horticulture price-based safeguard applies on a shipment-by-shipment basis. If goods in one shipment trigger the safeguard, the additional safeguard duty will apply. If a second shipment arrives the following day with an import price which does not trigger the safeguard, no additional duty will apply.

The horticulture price-based safeguard only applies during the 18-year tariff elimination period. After that time, the relevant horticultural products will be duty free and safeguard free.

5. Other provisions of the agriculture Chapter

5.1 Multilateral cooperation (Article 3.1)

Australia and the United States have committed to working together in the World Trade Organisation (WTO) agriculture negotiations on the full range of issues regarding the reform of member country policies and programs that negatively impact on market access and distort international markets for agricultural products. This will include cooperating with the United States on proposals to phase out all forms of agricultural export subsidies, substantially reduce distorting domestic support and increase market access for agricultural exporters. The two parties will also consult in other multilateral fora (for example, OECD, FAO, IPPC, OIE, Codex etc) on issues relevant to agriculture.

Under Article 3.1, Australia and the US have also agreed to work together in the WTO to develop disciplines that eliminate restrictions

on any individual's or corporation's right to export. The effect of the provision is that Australia has indicated it would be willing to consider additional disciplines on Australia's state trading enterprises in the context of an outcome in the Doha round that included substantial reductions in export and domestic subsidies and substantial increases in market access. This is consistent with Australia's overall position in the WTO negotiations.

5.2 Committee on Agriculture (Article 3.2)

A Committee on Agriculture will be established under the Agreement. This Committee will meet annually and provide a formal opportunity for Australia and the United States to discuss a wide range of agricultural issues relevant to the Agreement, including trade promotion activities; barriers to trade; and consultation on the range of export competition issues (including export credits, domestic support, inappropriate surplus food disposal and all export subsidies). The Committee on Agriculture will report to the Joint Committee that has oversight of the whole Agreement.

5.3 Export subsidies (Article 3.3)

The United States and Australia have agreed not to use export subsidies on agricultural goods traded into each other's market. Australia does not use export subsidies, while the United States is only permitted under the WTO to employ export subsidies on a limited range of agricultural goods. The United States currently uses export subsidies on a small range of dairy products into markets other than Australia.

Should either the United States or Australia consider that another country is exporting an agricultural good that benefits from export subsidies into either country's market, the two countries will consult on measures to remedy the effect of such subsidised exports. In the event that the agreed measures are not implemented, the agreement to not use export subsidies into each other's market for that particular good would no longer apply.

5.4 Side-letter on BSE (Bovine Spongiform Encephalopathy - mad cow disease)

In a side-letter on BSE, the United States and Australia agree to cooperate in international standard setting bodies. This is intended to cover any international standards or guidelines that might be developed by OIE (the World Animal Health Organisation) and Codex Alimentarius (a joint body of the WHO/FAO, which develops international standards in food). Both of these organisations are recognised by the WTO as international standard setting bodies.

Agriculture

Australia and the United States already cooperate in these forums on BSE matters.

4. Textiles and Apparel

1. Purpose and structure

This Chapter deals with issues affecting the trade in textiles and apparel. It should be read in conjunction with the Chapters on National Treatment and Market Access for Goods (Chapter 2) and Rules of Origin (Chapter 5). The Chapter comprises a text covering emergency safeguard actions, rules of origin and customs cooperation. An Annex to the Chapter deals with the product-specific rules of origin (ROOs) applying to textiles and apparel.

2. Safeguard Mechanisms (Article 4.1)

The Agreement provides a mechanism to deal with a sudden growth in imports flowing from a tariff reduction having a detrimental effect on the domestic industry.

Under the provisions, the importing country would be required to examine factors contributing to the market impact prior to taking any action, and would need to give the other Party written prior notice of its intention to take action. In critical circumstances, a country would be permitted to take preliminary action in advance of this investigation, but would need to complete its investigation within 200 days of taking that action.

Should the importing country find that serious damage was occurring, or was threatened, as a result of an increase in imports from the other Party, it would be permitted to raise tariffs back to the most favoured nation (MFN) rate applying at the time that the action is taken.

Emergency action can only be imposed initially for a maximum period of two years, with the provision for a one-off extension of a further two years if considered necessary. No emergency action will be permitted to be imposed or maintained beyond 10 years after a tariff has been eliminated under the Agreement. An emergency action over a particular product can only be used once.

Once the emergency action has concluded, the rate of duty will return to the level that would have applied had no action taken place.

The country imposing an emergency action will be required to provide a level of trade liberalising compensation to the other Party, preferably on other textiles products and roughly equivalent to the negative trade effects caused by the action. If no mutually acceptable form of compensation can be found, then the exporting Party will be permitted to impose tariff penalties on other products equivalent to those suffered under the action.

3. Rules of Origin (Article 4.2 and Annex 4-A)

The rules of origin (ROOs) applying to textiles and apparel are based on a change in tariff classification (CTC) approach and are set out in Annex 4A. A general description of this approach is included in Chapter 5.

The ROOs apply a stringent test referred to as “yarn forward” under which, generally speaking and put simply:

- fabrics produced for export be made up of yarns wholly formed in one or other of the Parties to the Agreement; and
- apparel for export be produced from fabrics entirely formed in one or other of the Parties using yarns wholly formed in one or other of the Parties. The apparel must also be cut or knit to shape or otherwise assembled in one or other of the Parties.

There are, however, exceptions to these ROOs. For example:

- cotton and man-made fibre spun yarns and knitted fabrics must be produced from fibres grown or formed in one or other of the Parties;

The textile and apparel ROOs are product-specific and vary greatly depending on the particular good. For example, the Chapter Rules in the Annex allow for certain specific non-originating fabrics to be used in articles of apparel providing the good is both cut and sewn or otherwise assembled in the FTA territories. Examples of these special fabrics are: Harris Tweed, velveteen and corduroy fabrics. The product-specific ROO and Chapter and Subheading Rules in Annex 4-A should be consulted in order to determine the test that should be applied to a particular good.

Article 4.2.3 provides a mechanism for officials to meet as required to reconsider the ROOs applying to individual products and to amend the ROOs as appropriate.

Article 4.2.6 is a *de minimis* provision, under which a product will not forfeit its originating status if any non-originating fibres or yarns used in the production of the component of the good that determines the tariff classification account for less than seven per cent by weight of the textile or apparel good. However, the *de minimis* provision does not apply to elastomeric yarns for which there is zero tolerance for non-originating yarn. In other words, elastomeric yarn must be of American or Australian origin.

Article 4.2.8 provides that where a product for export consists of a set of products, e.g. a skirt with a belt, any non-originating goods in the set will not damage the status of the entire set if they account for no more than 10 per cent of the final value of the set.

4. Customs Cooperation (Article 4.3)

The Agreement provides for Customs authorities in both countries to cooperate to ensure compliance with the rules. Provision is made for the Customs authorities of the importing country to request the exporting country to verify a claim. The importing country can suspend preferential treatment of the suspicious imports while such an investigation is taking place.



5. Rules of Origin

1. Purpose and Structure

This Chapter sets out the rules for determining which goods are originating and therefore eligible for preferential tariff treatment under the Agreement (see also Chapter 2). The text comprises 17 Articles and an Annex (5-A). It also refers to Annex 4-A which is part of the Textiles Chapter.

2. Originating Goods (Article 5.1)

Originating goods are those that:

- are wholly obtained or produced entirely in the country, such as minerals extracted there, vegetable goods harvested there, and live animals born and raised there;
- are produced in the country wholly from originating materials; or
- are produced in the country partly from non-originating materials. In this case, the non-originating materials must meet the requirements of the origin rules in the Annex 4-A (Textiles – see Chapter 4) and Annex 5-A (Goods other than Textiles). These Annexes contain the product-specific changes in tariff classification that non-originating materials must undergo for the finished goods to qualify as originating. The goods must also satisfy all other applicable requirements.

3. Change in Tariff Classification Approach to ROOs

The concept of change in tariff classification used in the Annexes means that inputs sourced outside the territories of the FTA may not come from the same tariff item as the good in question nor from a defined set of related tariff items. This approach ensures that sufficient transformation has occurred within the US or Australia to justify a claim that the good is a legitimate product of the US or of Australia. The exact nature of the change of tariff classification required for a specific good can be found by referring to the rule in the Annexes covering that good.

4. Accumulation (Article 5.3)

Materials imported from the US are treated as originating goods under the FTA for purposes of determining the origin of goods produced in Australia. The production processes of a chain of producers in Australia, or the US, (and the tariff classification changes effected by that whole chain) can be taken into account in determining origin.

5. Regional Value Content (Article 5.4)

For a proportion of products, the change of tariff classification rule is supported by a local content threshold component called the regional value content (RVC) requirement, i.e. domestically sourced materials and processes must represent an agreed proportion of the final value of the product. The RVC component can take the form of either an additional requirement to the specified change in tariff classification, or can provide an optional test, allowing the product to meet a lesser degree of tariff shift if the threshold is reached. The Agreement provides for three formulas to determine the RVCs:

- The Build-Down method, where the RVC threshold is determined by calculating the value of the final product after subtracting the cost of non-originating materials and comparing this to the value of the exported product. Article 5.4.1(a)
- The Build-Up method, under which the RVC threshold is based on the proportion of the value of the final product represented by locally sourced materials. Article 5.4.1(b)
- A Net Cost method that is applied only to certain automotive products. This method akin to Australia's traditional RVC calculation under the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). See Article 5.4.2.

The normal thresholds under the Agreement are 35 per cent using the Build-Up method, 45 per cent per cent using the Build-Down approach and 50 per cent for the Net Cost automotive method. In many cases, importers have the option of choosing which of these methods will apply to their products. For some products the thresholds are higher.

For some cases, only one of the cost formulas will apply. For automotive, the Net Cost method is obligatory where an RVC is required. For non-automotive products, the single formula is generally the Build-Up approach. The use of this single approach ensures that there is no more than a set maximum contribution from imported materials in production of a qualifying export product.

The formulas used to calculate regional value content refer to the “adjusted value” of the export product. This value equates to the free-on-board (FOB) value of the product – i.e., the price paid by the importer, less international shipping and related costs.

The value of imported materials (Article 5.5) is based on the WTO Customs Valuation Agreement, which is normally the price paid by the importer adjusted to exclude international shipping costs. Materials sourced locally are valued on the same basis as for imported materials, with some minor modifications. Self-produced materials are valued on the basis of all production costs and an amount for normal profit. Indirect materials are treated as originating regardless of where they are produced. The source and cost of packaging materials does not affect a product’s origin status.

Where non-originating material is processed in Australia or the US, the cost of that processing and any local materials used may be deducted from the cost of the non-originating material for the purposes of calculating the RVC.

6. De Minimis (Article 5.2)

The Agreement contains a proviso that if all inputs which fail the ROOs test for a particular product account in total for less than 10 per cent of the value of the product, the final product will still be considered to be an originating product. What this means is that very small amounts of non-originating inputs will not disqualify an export product from access to preferential treatment.

This “de minimis” principle does not apply to dairy products, citrus fruit, certain animal or vegetable fats or sugars used in some food preparations, and some alcohol products if used in the production of other specified alcohol products.

A separate de minimis principle applies to products covered by the Textiles Chapter (see Textiles Chapter).

7. Essential Tools and Spare Parts (Article 5.6)

A product that otherwise qualifies for preferential treatment will not be disqualified on the basis that any essential tools, accessories or reasonable quantities of spare parts shipped with the product, do not pass the test of origin for those products.

8. Fungible Goods and Materials (Article 5.7)

Fungible materials are materials that are interchangeable and whose properties are essentially identical, e.g., fasteners used in metal manufacture. In determining whether they are originating or not, they

may be tracked by means of physical segregation or by inventory management (averaging, last in first out, or first in first out).

9. Packing Materials and Containers for Retail Sale (Article 5.8)

Packing materials and containers for retail sale are disregarded in terms of their origin and thus do not affect the treatment of the goods concerned in terms of change of tariff classification rules. However, if the good is subject to an RVC, the value of the packing materials and containers is taken into account as originating or non-originating as the case may be.

10. Packing Materials and Containers for Shipment (Article 5.9)

Packing materials and containers for shipment are disregarded in determining their origin and in terms of RVC calculations.

11. Third Country Transportation (Article 5.11)

The Agreement provides that an exported good will lose its origin status if it undergoes any process of production en route from one Party to the other, other than necessary unloading or reloading. In other words, a partially completed product could not be completed in a third country following export from either Australia or the US and en route to the other country.

12. Claims for Preferential Treatment (Article 5.12)

Under the Agreement, the onus for making a claim for preferential treatment for a product rests with the importer. This is a change from the practice under the FTA with Singapore and the Closer Economic Relations Agreement with New Zealand, both of which place the onus on the exporter.

This Agreement does not require that the importer provide a certificate of origin in support of a claim preference. However, importers claiming a preference for a good must be prepared to submit, upon request by Customs authorities, a statement setting out the reasons that the good qualifies, including pertinent cost and manufacturing information. No particular format for such a statement is specified in the Agreement.

Customs officials can require importers to maintain documents relating to purchases and costs for up to five years after importation should investigation and verification of claims be required. Customs officials can also seek information from exporters in verifying claims.

6. Customs Administration

1. Purpose and structure

This Chapter deals with Customs administration and cooperation and comprises 11 articles including advance rulings, reviews of Customs decisions, cooperation between the Parties to achieve compliance, penalties for violations, the release of goods, and express shipments.

2. Publication of Customs laws and regulations (Article 6.1)

This article provides for the prompt publication of laws, regulations, guidelines procedures and administrative rulings governing customs matters.

3. Administration (Article 6.2)

Each Party is obliged to administer its customs laws in a uniform, impartial and reasonable manner, and in a way that does not create arbitrary or unwarranted obstacles to trade.

4. Advance Rulings (Article 6.3)

Advance rulings on tariff classifications and rules of origin are to be provided in writing and within 120 days after obtaining all necessary information.

5. Reviews of Customs determinations (Article 6.4)

Customs authorities are required to provide at least one level of administrative review of their determinations. The option of a judicial review, following the administrative review, must also be provided.

6. Cooperation (Article 6.5)

This article provides for the cooperation between Customs authorities on a wide range of customs matters. In particular, the Article sets out the obligations of a Party to provide information on particular trade transactions when the other Party has a reasonable suspicion of unlawful activity relating to its imports laws and regulations.

7. Confidentiality (Article 6.6)

Confidential information shared between the Party's Customs authorities is to be protected in accordance with the general confidentiality provisions in Chapter 22 (Article 22.4).

8. Penalties (Article 6.7)

This Article provides for Customs authorities to impose their respective penalties for violations of their customs' laws and regulations.

9. Release of Goods (Article 6.8)

This Article provides for the prompt release of goods consistent with ensuring compliance with customs laws, including the provision of a security as a condition for release of goods.

10. Risk Assessment (Article 6.9)

Customs authorities are to apply risk management systems to ensure they concentrate on high-risk areas of trade and facilitate low-risk areas of trade.

11. Express Shipments (Article 6.10)

This Article requires Customs authorities to maintain expedited procedures for the handling of express shipments.

7. Sanitary and Phytosanitary (SPS) Measures

1. Purpose and Structure

In the SPS Chapter, which comprises four articles and an annex, Australia and the United States reaffirm that decisions on matters affecting quarantine and food safety will continue to be made on the basis of scientific assessments of the risks involved in the commercial movement of animals and plants and their products. This affirmation is made to reflect the primacy of existing rights and obligations under the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).

The Chapter recognises that both Australia and the United States are major agricultural producers and exporters but with different environmental conditions and pest and disease status. Nothing in the Chapter undermines the right of either Party to determine the level of protection it considers appropriate.

The Parties have agreed to work together to improve each country's understanding of the other's SPS measures and associated regulatory processes. Two Committees will be established for this purpose, one focusing on general matters and the other one on a more specific set of plant and animal health (quarantine) matters.

2. General Provisions

In Article 7.3.1, each Party reaffirms existing commitments to the WTO SPS Agreement. Article 7.3.2 states that there is no recourse to dispute settlement under the FTA for SPS matters. This is because the Chapter creates no new SPS rights or obligations so there is no need for the Parties to have recourse to dispute settlement under the Agreement. Rights under the WTO dispute settlement mechanism would continue to apply for each Party.

3. Committee on Sanitary and Phytosanitary Matters

The new bilateral SPS Committee established in this Chapter will comprise representatives of each Party with responsibility for sanitary and phytosanitary matters. Its mandate, set out in Article 7.4.5 of the Chapter, emphasises a role for the Committee in increasing the mutual understanding of the SPS measures and regulatory processes of each Party as well as continuing the cooperative efforts of the Parties internationally.

There are a number of regulatory agencies in Australia and in the United States with responsibility for SPS matters, including food

Sanitary and Phytosanitary Measures

safety as well as quarantine, not all of which interact regularly. The SPS Committee provides a forum where the various agencies can participate as necessary to enhance mutual understanding of the SPS processes and policies adopted by each Party. Representatives from the trade departments of both Australia and the United States will be members of the Committee. Their key contribution will be to provide advice on international rights and obligations, particularly those relating to SPS measures in the WTO.

The Committee will meet at least once a year following entry into force unless the Parties agree otherwise, and shall meet within 45 days of entry into force of the Agreement. Detailed operating procedures such as where the Committee will meet, who is responsible for preparing the agenda and other procedural matters are yet to be agreed.

Because Australia and the United States enjoy a significant trading relationship in agricultural products, it is likely that there will, at any point in time, be an agenda of market access issues for which quarantine risk assessments are underway or pending, and which may benefit from scientific and technical discussion. This is recognised by the establishment in Article 7.4.9 of the Standing Technical Working Group on Animal and Plant Health (the Working Group). Annex 7-A provides more detail on the Working Group's mandate and objectives.

The SPS Committee can establish other technical working groups if there is agreement to do so.

4. Annex 7-A: Standing Working Group on Animal and Plant Health

Paragraph 1 of Annex 7-A explicitly recognises the importance of protecting human, animal and plant life and health, the rights of the Parties in that regard and their right to maintain their own regulatory systems, risk assessment and policy development processes.

The Working Group is designed to help with the resolution of specific animal and plant health matters. This initiative recognises that technical exchange and cooperation can assist in resolving matters relating to specific quarantine risks in ways that address the importing Party's quarantine concerns but do not unduly restrict trade.

Paragraph 4 of Annex 7-A specifies that the Working Group will provide a forum for this enhanced technical cooperation with an emphasis on early engagement to avoid unnecessary delays in the risk assessment and policy development processes. Each Party understands, however, that it may not always be possible to reach agreement on scientific issues (Subparagraph 4 (a)).

The Working Group builds on the cooperative relationship that already exists between the Australian and United States' agencies with major responsibility for technical market access issues relating to animal and plant health (Biosecurity Australia and the US Animal and Plant Health Inspection Service (APHIS)). That is why Paragraph 2 of Annex 7-A specifies that the Working Group will be chaired by those agencies.

Paragraph 5 of Annex 7-A recognises that each Party is not the other's only trading partner and will be working on a range of access requests relating to quarantine for other trading partners. Existing arrangements that allow for exchanges on plant and animal health bilateral matters will continue. The Working Group is intended to manage a more intensive engagement on a small range of bilateral issues identified by either Party as of particular importance. Article 6 requires each Party to identify those priority issues that are of particular importance, to assist one another in balancing resource constraints.

Paragraph 8 provides the flexibility to the Working Group to appoint sub-groups to consider particular technical issues. These are intended to focus on specific scientific matters of relevance to the Working Group's agenda.

In Paragraph 9, the Chapter allows for the Working Group to manage a more intensive engagement on specific bilateral issues identified by either Party as being of particular importance.

5. Annex 7-A: Section B: Development of Work Plans

If either Party refers a matter of particular interest or concern to the Working Group, the Working Group will develop a specific work plan outlining how the Parties will engage with each other, and on what, in order to try to resolve any matters of scientific difference. Within 60 days of a Party referring a matter to the Working Group under this provision, the Working Group is required to develop a specific work plan that is focused on technical and scientific matters associated with the referral.

Paragraph 11 of the Annex identifies the range of possible types of activities arising from such a referral, but the inclusion of any one of them in the specific work plan will depend on the issue and the stage it has reached in the importing Party's risk assessment or regulatory process. The possible activities were developed in the light of each Party's existing processes and are not intended to interfere with or prejudice the outcome of any stage of those processes. Rather, the objective is to identify steps or stages in those processes where enhanced technical exchange may help in resolving issues and moving the process along.



8. Standards and Technical Regulations

This Chapter applies to all standards, technical regulations and conformity assessment procedures of the central (federal) government that affect trade in all goods. As tariffs are lowered or, in the case of an FTA eliminated, addressing non-tariff measures that can be used to frustrate trade becomes even more important. The Chapter contains 11 Articles and 1 Annex.

1. Affirmation of the TBT Agreement (Article 8.2)

Both Australia and the United States affirm their existing rights and obligations to each other under the WTO Technical Barriers to Trade (TBT) Agreement where such issues as standards, technical regulations and conformity assessment procedures are addressed.

2. Regional Governments (Article 8.3)

Under this Article, both Parties agree to provide information to state level governments and relevant bodies and to encourage their adherence to the commitments in the Chapter.

3. International standards (Article 8.4)

There are many entities in the US which develop standards in both the government and private spheres as well as at the federal and sub-federal/state levels. Exporters can find it very difficult and costly to meet these different standards and technical regulations. Both Parties have therefore agreed to use, to the maximum extent possible, international standards.

4. Technical Regulations (Article 8.5)

In this Article both Parties have agreed to give positive consideration to accepting, as equivalent, each other's technical regulations, provided they are satisfied that they adequately fulfil the objectives of their own regulations. This is important because sometimes the technical regulations of the Parties may be different but achieve the same result.

For example, if a US technical regulation stipulates that a product must contain certain features and pass certain tests to ensure safety, and this technical regulation is different from Australia's regulation covering the same product, the US will give positive consideration to accepting Australia's technical regulation. The result is that the Australian product, subject to US agreement would enter the US market without changes to production methods or the characteristics of the end product.

5. Conformity Assessment Procedures (Article 8.6)

Products often need to be tested to determine whether relevant standards and technical regulations have been met before they can enter the market. In many cases the tests are carried out in the country from which they are being exported. If the importing country does not accept the results of the test it may require further testing which can significantly add to costs. Both Parties have therefore agreed to facilitate the acceptance of each other's conformity assessment procedures.

Where they are rejected, the Parties must explain the reason for the refusal in detail. In some cases it may be possible to establish working groups involving practitioners to resolve the problem.

6. Transparency (Article 8.7)

Under this Article each Party allows persons of the other Party to participate in the development of standards, technical regulations and conformity assessment procedures.

Further, both Parties agree to exchange and publish relevant information to ensure that their processes are transparent.

7. Chapter Coordinator (Article 8.9)

Both Parties agree to establish a mechanism to address issues raised by either Party relating to the development, adoption, application or enforcement of standards, technical regulations or conformity assessment procedures.

In this case an enquiry point, and possible technical working groups, will aim to ensure that relevant practitioners are involved in finding practical solutions to real market access problems.

8. Information Exchange (Article 8.10)

Both Parties agree to provide each other with information or explanations in a timely manner and electronically.

9. Chapter Coordinator (Annex 8-A)

Under this Annex the relevant agencies which will assume the role of Chapter Coordinator are nominated. In the case of Australia it will initially be the Department of Industry, Tourism and Resources. In the case of the United States it will be the Office of the U.S. Trade Representative.

9. Safeguards

1. Purpose and Structure

The Chapter provides a mechanism for protecting industries in both Australia and the United States from injury from increased imports during the transition to free trade under the Agreement (the transitional bilateral safeguard). It also commits each Party to consider the exclusion from the application of global WTO safeguards imports from the other Party where those imports are not a substantial cause of the injury to the domestic industry.

The Chapter on trade remedies consists of 6 Articles.

2. Imposition of a Safeguard Measure (Article 9.1)

This Article allows each Party, during the transition period (see Section 3 for the definition of the transition period) to halt further reductions in customs duties (tariffs) for products from the other country and return the tariff rate to either:

- the rate that applies to the same good from all other countries (the 'most-favoured nation' rate) at the time of the decision;
- the rate that applied before the Agreement came into force; or
- in the case of horticultural goods, or any other good which could face a seasonal tariff, the level of duty that applied during the last corresponding season.

Where the products from the other country are being imported:

- in greatly increased quantities;
- as a result of the reduction of the tariff under this Agreement; and
- are causing or threatening serious injury to the domestic industry.

3. Conditions and Limitations (Article 9.2)

Such a safeguard can only be applied:

- once an investigation identical to that required by the World Trade Organisation has been conducted to justify the application of a safeguard. That investigation must be completed within one year;

Safeguards

- for a period of up to two years, with the ability to extend the safeguard for a further two years following a further investigation;
- during the agreed transition period, i.e. within a ten year period after the agreement enters into force, or the phase-in period for a particular product if it is longer than ten years; and
- once on any given product

Where a safeguard measure is expected to last more than one year, the safeguard tariff rate should be progressively lowered, consistent with the liberalisation goals of the Agreement.

4. Provisional Safeguard Measures (Article 9.3)

Where the threat of damage to an industry is particularly urgent, and delay would make the damage difficult to repair, either government may impose a safeguard measure on a provisional basis. The provisional safeguard may only apply for 200 days, during which the government is required to carry out an investigation and, where appropriate, apply a normal transitional bilateral safeguard under Article 9.2.

If the investigation determines that the provisional safeguard measure was not justified, the government must refund any tariff increases it charged during the application of the provisional safeguard measure.

5. Compensation (Article 9.4)

Where a transitional safeguard measure is imposed, the imposing government must provide trade-liberalising compensation elsewhere in the Agreement. This is done by further lowering a tariff that is of interest to businesses from the other country.

If the two governments cannot agree on appropriate compensation arrangements, the government whose goods are being subjected to the safeguard mechanism can halt tariff reductions on goods of importance to the country applying the safeguard.

6. Global Safeguard Measures (Article 9.5)

This Article commits each Party to consider excluding products from the other Party from any global safeguard measure (i.e. a safeguard measure applied to all imported products of a particular type, regardless of their country of origin, under the World Trade Organisation Agreement). Australian products may, for example, be excluded where they are not a substantial cause of the serious injury being suffered by the US industry.

The domestic legislative changes that the United States will put in place to implement this obligation will establish a process for advising the US President whether or not to exclude Australian products.

7. Other Remedies

Elsewhere, the Agreement also provides for:

- Textiles safeguards, which operate on equivalent terms to the transitional safeguard in this Chapter except that compensation should come from within the textiles Chapter (Chapter Four), and
- Agricultural safeguards (Chapter Three)

Australia and the United States will retain their WTO rights to anti-dumping and countervailing action and no changes will be made to relevant legislation as a result of the Agreement.



10. Cross-Border Trade in Services

1. Purpose and structure

The Cross-Border Trade in Services (CBTS) Chapter provides service suppliers with an open and non-discriminatory environment for cross-border trade in services. It ensures that service suppliers from each Party receive national treatment or most-favoured-nation treatment (whichever is better) from the other Party. It prohibits a range of market access restrictions on service suppliers, as well as restrictions on transfers.

Any company or national in either Party interested in supplying a service to a consumer in (or from) the other Party can benefit from the Chapter.

2. What is cross-border trade in services?

The Chapter is concerned with measures adopted or maintained by a Party (at all levels of government) that affect cross-border trade in services by service suppliers of the other Party (e.g. measures affecting the production, distribution, marketing, sale or delivery of a service).

The Chapter defines “cross-border trade in services” as the supply of a service:

- from the territory of one Party to the territory of the other Party;
- in the territory of one Party by a person from that Party to a person from the other Party; or
- by a natural person of a Party in the territory of the other Party.

The Chapter defines a “service supplier” as a national or enterprise of one Party who seeks to supply or supplies a service. Under the FTA, a “national” includes permanent residents as well as citizens. In the CBTS Chapter, an “enterprise” of a Party includes branches located in its territory, as well as incorporated companies and other entities constituted or organized under its laws.

In general, the Chapter does not deal with the supply of a service through a commercial presence, i.e. through the service supplier establishing a branch or a subsidiary in the territory of the other country to supply the service. This form of “trade in services” is subject to the general protections provided to investment by the Investment Chapter (Chapter 11). However, Article 10.1.3 extends the obligations of the articles in the CBTS Chapter on Market Access, Domestic Regulation and Transparency in Development and Application of Regulations to measures by a Party that affect the

supply of a service in the territory of a Party by a covered investment of the other Party (i.e. the supply of a service by commercial presence).

The Chapter does not apply to financial services, as these are covered by the Chapter on Financial Services (Chapter 13). However, any financial services that are subject to the Investment Chapter rather than the Financial Services Chapter, do benefit from the Article 10.1.3 extension of certain CBTS articles to the supply of a service through a covered investment.

The Chapter does not apply to:

- government procurement;
- air services (except for aircraft repair and maintenance services during which an aircraft is withdrawn from air service, and certain specialty air services);
- subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance; and
- services supplied in the exercise of governmental authority, being services supplied neither on a commercial basis, nor in competition with one or more service suppliers.

The Chapter does not oblige either Party to do anything in relation to natural persons of the other Party who are:

- seeking access to its employment market; or
- employed on a permanent basis in its territory (Article 10.1.5).

The Chapter does not confer any rights on such natural persons in relation to such access or employment (Article 10.1.5).

3. Core obligations

Non-discrimination

The Chapter requires each Party to accord to services and service suppliers of the other Party national treatment (Article 10.2) and most-favoured-nation treatment (Article 10.3).

National treatment means treatment no less favourable than a Party accords, in like circumstances, to its own services and service suppliers.

Most-favoured-nation (MFN) treatment means treatment no less favourable than a Party accords, in like circumstances, to service suppliers of any non-Party.

Market Access

Article 10.4 prohibits each Party from placing limits, either on the basis of a regional subdivision or on the basis of its entire territory, on:

- the number of service suppliers;
- the value of service transactions or assets;
- the number of service operations or the quantity of services output; or
- the number of natural persons that may be employed in a particular service sector or that a service supplier may employ.

It also prohibits each Party from restricting the type of legal entity or joint venture that a service supplier can use to supply a service.

Local Presence

Article 10.5 prohibits each Party from requiring, as a condition for the cross-border supply of a service, that a service supplier of the other Party establish or maintain a representative office or any form enterprise in its territory, or that it be resident in its territory.

4. Non-conforming measures

Article 10.6 allows the Parties to maintain or adopt certain measures that are not consistent with the provisions of the obligations on National Treatment, MFN Treatment, Market Access, and Local Presence (i.e. “non-conforming measures”). These non-conforming measures must be identified in individual Schedules for each Party that are contained in two Annexes to the Agreement:

- Annex I can be used by a Party to reserve the right to maintain existing non-conforming measures that are specifically identified in its Schedule to that Annex. These measures cannot be made more restrictive (i.e. less consistent with the obligations of the Chapter). Furthermore, Annex I measures are subject to a “ratchet” mechanism, which means that if a Party liberalizes such a measure, i.e. makes it less inconsistent with an obligation, then it cannot subsequently make it more restrictive. In other words, the ratchet mechanism means that the liberalized measure becomes “bound” as part of the Agreement’s treaty commitments.
- Annex II can be used by a Party to reserve the right to maintain existing non-conforming measures, make these measures more restrictive, and adopt new non-conforming measures for sectors, sub-sectors or activities identified in its Schedule to that Annex.

Cross-Border Trade in Services

The Schedules to Annex I and II represented a carefully negotiated balance of commitments between the Parties. An example of entries the Parties have included in their Schedules is the approach Australia has taken to the audiovisual and broadcasting sector. This is described in the box below.

The outcome of the negotiations on audiovisual and broadcasting services preserves Australia's existing local content requirements and other measures and ensures Australia's right to intervene in response to new media developments, subject to a number of commitments on the degree or level of any new or additional local content requirements.

It does this through three reservations in Australia's schedules to Annex I and Annex II.

- An Annex I reservation allowing Australia to maintain the existing 55% local content transmission quota on programming, and the 80% local content transmission quota on advertising, on free-to-air commercial TV on analogue and digital (other than multichannelling) platforms. Subquotas may also be applied within the 55% programming quota.
- An Annex II reservation allowing Australia to both maintain existing measures and introduce new measures, subject to a number of conditions, in relation to:
 - transmission quotas for multichannelled free-to-air commercial TV;
 - expenditure requirements for subscription TV;
 - transmission quotas for free-to-air commercial radio broadcasting;
 - ensuring that Australian content on interactive audio and/or video services is not unreasonably denied to Australian consumers;
 - broadcasting licensing and spectrum management; and
 - taxation concessions for investment in Australian film and television production.
- An Annex II reservation allowing Australia to maintain existing co-production arrangements with other countries and to introduce new ones.

Note: nothing in the Agreement affects the ability of either Party to provide public services, and subsidies and grants are explicitly excluded from the scope of the Chapter. Therefore, reservations are not required in Australia's schedules in relation to publicly provided cultural activities, such as the public broadcasters (ABC and SBS), public libraries or archives, or in relation to Government funding available to Australian artists, writers and performers.

5. Other obligations

Domestic Regulation

Article 10.7.1 provides that, where a Party requires authorization for the supply of a service, its competent authorities must, within a reasonable period of time after the submission of a properly completed

application, inform the applicant of the decision on the application. If the applicant asks, the Party must give a prompt update as to how the application is progressing. However, these obligations do not apply to any authorisation requirements in the sectors, sub-sectors or activities listed in Annex II.

Article 10.7.2 requires that a Party do its best to make sure that authorisation requirements do not create unnecessary barriers to trade in services. It must try to make sure that these requirements are:

- based on objective and transparent criteria (e.g. the ability to supply the service);
- not more onerous than is needed to ensure that a quality service is provided; and
- in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Australia and the United States also have obligations on trade in services under the World Trade Organization's General Agreement on Trade in Services (GATS). This has its own obligations in respect of domestic regulation, and it requires the future development of new obligations in respect of authorisation requirements for the supply of services. Under Article 10.7.3, if any such new obligations enter into effect (either through the GATS or through other international negotiations that Australia and the United States participate in) then the Article will be amended, as appropriate, so that it reflects these results.

Transparency in Development and Application of Regulations

Article 10.8.1 requires that each Party be in a position to respond to inquiries from interested persons about the regulations it imposes in the areas covered by the Chapter.

The separate Chapter on Transparency requires that, wherever possible, each Party must give advance notice of any proposed new law, regulation, procedure or administrative ruling on a matter covered by the Agreement and that it must let interested persons (and the other Party) make comments on the proposal. If the proposal is in relation to a matter covered by the CBTS Chapter, and the Party does not give this advance notice or opportunity for comment, then, wherever possible, it must explain why it could not do so.

Article 10.8.3 requires that each time a Party adopts a final regulation in relation to a matter covered by the Chapter, it must, wherever possible, give a written response to any comments it receives on the proposed regulation.

Cross-Border Trade in Services

Article 10.8.4 requires that each Party must, wherever possible, provide notice of the requirements of final regulations before they come into effect.

Recognition

Countries may require, e.g. for professional services suppliers, the authorization, licensing or certification of services suppliers. As these requirements may differ between countries, each country, or its relevant professional bodies, may have certain rules about recognising the education or experience obtained, requirements met, or licences or certifications granted in foreign countries. Sometimes this recognition is pursuant to formal agreements with the foreign country concerned or a country might accord such recognition unilaterally. Article 10.9.1 makes it clear that the Chapter does not prevent a Party from according such recognition to persons from foreign countries – but under Article 10.9.4 it must not do so in a way that would amount to:

- a means of discrimination between countries in the application of its requirements; or
- a disguised restriction on trade in services.

If a Party accords such recognition to persons from a non-Party then the MFN Treatment obligation does not require that it accord such recognition to persons from the other Party (Article 10.9.2). However, it must give the other Party the chance to show that it should also be accorded such recognition (Article 10.9.3).

Article 10.9.5 and Annex 10-A to the Chapter provide a formal mechanism by which the two Parties can encourage such recognition in respect of their professional service suppliers. Annex 10-A also provides for the establishment of a Professional Services Working Group that must report to the Parties, within two years of the entry into force of the Agreement, including with any recommendations for initiatives to promote mutual recognition of standards and criteria. The Working Group has a broad mandate to look at issues relevant to the provision of professional services, but with a particular focus on exploring ways to foster the development of mutual recognition arrangements among the relevant professional bodies, and on the scope to develop model procedures for the licensing and certification of professional services suppliers.

Transfers and Payments

Articles 10.10.1 and 10.10.2 require that each Party allow all transfers and payments relating to the cross-border supply of services to be made freely and without delay into and out of its territory, and allow such transfers and payments to be made in a freely usable currency

(i.e. currently the United States dollar, the Japanese Yen, the Euro, and the British Pound) at the prevailing market rate of exchange.

A Party can still prevent or delay such transfers or payments through the equitable, non-discriminatory, and good faith application of laws such as on bankruptcy.

Express Delivery Services

Article 10.12.1 defines “express delivery services” to mean the collection, transport and delivery of documents, printed matter, parcels and other goods on an expedited basis while tracking and maintaining control of the items throughout the supply of the service. Footnote 10-2 to the Chapter makes it clear that “express delivery services” do not include services reserved exclusively for Australia Post.

If a Party thinks that the other Party is not maintaining the level of market openness for express delivery services that existed when the FTA was signed then the Parties must consult and the other Party, wherever possible, must provide information in response to inquiries about the level of access and related matters (Article 10.12.2).

Article 10.12.3 contains a confirmation that each Party intends to prevent revenues derived from its monopoly postal services from being directed to its own (or any other) supplier’s express delivery service business in a way that is inconsistent with that Party’s law and practices in relation to the monopoly supply of postal services.

6. Denial of Benefits

Article 10.11 provides that a Party may deny the benefits of the CBTS Chapter to a service supplier of the other Party if it is an enterprise owned or controlled by persons of a non-Party, and the denying Party:

- does not have diplomatic relations with the non-Party; or
- has in place sanctions with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise.

A Party may also deny the benefits of the CBTS Chapter to a service supplier of the other Party that is an enterprise that:

- has no substantial business activities in the territory of the other Party; and
- is owned or controlled by persons of a non-Party or of the denying Party.



11. Investment

1. Purpose and structure

The Investment Chapter provides investors with an open and secure environment for investment. It ensures that investors from each Party and their investments receive national treatment or most-favoured-nation treatment (whichever is better) in the other Party. It also provides protection for investors and their investments through prohibitions on a range of distorting performance requirements and on restrictions on transfers, and through requiring compensation equivalent to fair market value for any expropriated investment.

Any company or national in either Party investing or planning to invest in the other Party can benefit from the Chapter. Protection for investment is provided from the pre-investment phase through the life of the investment.

The Investment Chapter does not impose any obligation on a Party to privatise.

The Investment Chapter does not apply to measures that are covered by the Chapter on Financial Services (Chapter 13).

2. What is investment?

“Investment” is defined in Article 11.17 of the Chapter as every asset of an investor that has the characteristics of an investment (e.g. the commitment of capital or other resources, an expectation of gain or profit, or the assumption of risk), including:

- an enterprise;
- shares, stock, and other forms of equity participation in an enterprise;
- bonds, debentures, other debt instruments, and loans;
- futures, options, and other derivatives;
- turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- intellectual property rights;
- licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law; and
- other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.

The Chapter defines an “investor” of a Party as a national or an enterprise of that Party who seeks to make, is making, or has made an investment in the other Party. Under the FTA, a “national” includes permanent residents as well as citizens. In the Investment Chapter, an “enterprise” of a Party includes branches located in its territory, as well as incorporated companies and other entities constituted or organized under its laws.

The protections of the Investment Chapter apply to both an investor and to any “covered investment”, i.e. an investment that an investor of a Party has in the territory of the other Party at the date of entry into force of the Agreement, or subsequently establishes, acquires or expands.

3. Core obligations

3.1 Non-discrimination

The Chapter requires each Party to accord to investors of the other Party, and to covered investments, whichever is better of national treatment (Article 11.3) or most-favoured-nation treatment (Article 11.4).

National treatment means treatment no less favourable than that accorded, in like circumstances, to a Party’s own investors or their investments.

Most-favoured-nation (MFN) treatment means treatment no less favourable than a Party accords, in like circumstances, to investors, or investments, of any non-Party.

The national treatment and MFN obligations apply to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment.

3.2 Performance Requirements

Article 11.9 establishes disciplines on the use of a range of performance requirements that distort trade and investment flows. Performance requirements are measures that impose certain requirements on the operation of a business, e.g. that the goods it produces must incorporate a certain proportion of domestically-produced inputs, or that a certain proportion of its output must be exported.

Article 11.9 prohibits each Party from imposing or enforcing any of the following requirements in relation to an investment in its territory:

- a: to export a given level or percentage of goods or services;
- b: to achieve a given level or percentage of domestic content;

c: to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

d: to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with an investment;

e: to restrict sales of goods or services in its territory that an investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

f: to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or

g: to supply exclusively from its territory the goods that an investment produces or the services it supplies to a specific regional market or to the world market.

In addition, the Parties may not condition the receipt or continued receipt of an advantage on compliance with the requirements in Categories b. to e.

The disciplines in Article 11.9 apply to all investments, whether by US investors, domestic investors, or investors from a non-Party.

Article 11.9 also contains a number of exceptions, which allow some of the performance requirements in Categories a. to g. to be used in several specified circumstances, such as government procurement, actions related to intellectual property rights or competition laws, and measures necessary to protect human, animal or plant life or health.

3.3 Senior Management and Boards of Directors

Article 11.10 provides that a Party cannot require that an enterprise that is a covered investment appoint individuals of any particular nationality to senior management positions. However, a Party may require that a majority or less of the board of directors (or any committee thereof) of an enterprise that is a covered investment be of a particular nationality or be resident in its territory, provided that this requirement does not materially impair the ability of that investor to exercise control over its investment.

4. Non-conforming measures

Article 11.13 allows the Parties to maintain or adopt certain measures that are not consistent with the provisions of the obligations on National Treatment, MFN Treatment, Performance Requirements, and Senior Management and Boards of Directors (i.e. “non-conforming measures”). These non-conforming measures must be identified in individual Schedules for each Party that are contained in two Annexes to the Agreement:

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- Annex I can be used by a Party to reserve the right to maintain existing non-conforming measures that are specifically identified in its Schedule to that Annex. These measures cannot be made more restrictive (i.e. less consistent with the obligations of the Chapter). Furthermore, Annex I measures are subject to a “ratchet” mechanism, which means that if a Party liberalizes such a measure, i.e. makes it less inconsistent with an obligation, then it cannot subsequently make it more restrictive. In other words, the ratchet mechanism means that the liberalized measure becomes “bound” as part of the Agreement’s treaty commitments.
- Annex II can be used by a Party to reserve the right to maintain existing non-conforming measures, make these measures more restrictive, or adopt new non-conforming measures for sectors, sub-sectors or activities identified in its Schedule to that Annex.

The Schedules to Annex I and II represented a carefully negotiated balance of commitments between the Parties. An example of entries the Parties have included in their Schedules is the approach Australia has taken with regard to its foreign investment policy. This is described in the box below.

The outcome of the negotiations liberalises Australia’s foreign investment policy while retaining the right for the Government to examine all investment of major significance.

It does this through the following reservations in Australia’s schedules in Annex 1 and Annex II:

- An Annex II reservation allowing Australia to continue to examine all foreign investments in urban land (including residential properties), other than developed non-residential commercial real estate;
- An Annex I reservation that allows Australia to examine investment in other sectors including the right to screen, in defined circumstances: direct and portfolio investment of 5 per cent or more in media; investment in Australian businesses in telecommunications, transport and defence related industries valued at \$50 million or more; investments representing stakes in financial sector companies of 15 per cent or more; and investments in Australian businesses in other sectors valued at \$800 million or more.
- Separate reservations preserving Australian foreign investment limits relating to the media, Telstra, CSL, Qantas and other Australian international airlines, federal leased airports and shipping.

In addition to the measures identified in the Schedules, Article 11.13 provides that the articles on National Treatment, MFN Treatment, and Senior Management and Boards of Directors do not apply to government procurement or to subsidies or grants provided by a Party.

5. Other obligations

5.1 *Minimum Standard of Treatment*

Article 11.5 requires a Party to treat covered investments in accordance with the “customary international law minimum standard of treatment of aliens”.

Annex 11-A confirms the understanding of the Parties that “customary international law” is law that results from a general and consistent practice of countries that they follow from a sense of legal obligation. It also confirms that the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Two important aspects of this customary international law minimum standard of treatment of aliens are:

- “fair and equitable treatment” – this includes a requirement that a country not deny justice to foreign investors in accordance with the principle of due process embodied in the principal legal systems of the world; and
- “full protection and security” – this requires a country to provide a minimum level of safety to foreign investors and their investments

5.2 *Treatment in Case of Strife*

Article 11.6 provides protection for an investor of the other Party or their covered investment for loss due to armed conflict or civil strife in the territory of a Party. If the latter takes action relating to such losses (e.g. by setting up a compensation system), then it must accord the investor of the other Party or their covered investment treatment no less favourable than the treatment accorded, in like circumstances, to:

- its own investors and their investments; and
- investors of any non-Party and their investments.

5.3 *Expropriation and Compensation*

Article 11.7 provides that a Party may not directly expropriate or nationalise a covered investment (“direct expropriation”), or indirectly do so through measures equivalent to expropriation or nationalisation (“indirect expropriation”), except for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and on payment of prompt, adequate and effective compensation. The compensation must be:

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- paid without delay;
- equivalent to the fair market value of the covered investment immediately before the expropriation (ignoring any changes to that fair market value that might have happened because the intended expropriation had become public knowledge before it occurred); and
- fully realisable and fully transferable.

Annex 11-B provides guidance on the operation of the expropriation article. A country's action can only constitute an expropriation if it interferes with a tangible or intangible property right or property interest in an investment. The determination as to whether an indirect expropriation has occurred requires a case-by-case, fact-based inquiry, with some relevant factors identified in Annex 11-B. Except in rare circumstances, non-discriminatory regulatory actions of a Party that are designed and applied to protect legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations.

5.4 Transfers

Article 11.8 requires that each Party must allow all transfers relating to a covered investment (e.g. contributions to capital, transfers of profits and dividends, payments of interest and royalties, and payments under a contract) to be made freely and without delay into and out of its territory, and must allow such transfers to be made in a freely usable currency as determined by the International Monetary Fund (i.e. currently the United States dollar, the Japanese Yen, the Euro, and the British Pound) at the prevailing market rate of exchange.

A Party must allow returns in kind relating to a covered investment to be made in the way set out in any written agreement between that Party and a covered investment or an investor of the other Party where that written agreement takes effect on or after the date of entry into force of the FTA.

A Party can still prevent or delay such transfers through the equitable, non-discriminatory, and good faith application of laws such as on bankruptcy.

6. Other provisions

6.1 Investment and Environment

Article 11.11 states that nothing in the Investment Chapter prevents a Party from taking measures otherwise consistent with the Chapter that it considers appropriate to ensure that investment activity in its

territory is undertaken in a manner sensitive to environmental concerns.

6.2 Denial of Benefits

Article 11.12 provides that a Party may deny the benefits of the Investment Chapter to an investor of the other Party if it is an enterprise that is owned or controlled by investors of a non-Party, and the denying Party:

- does not have diplomatic relations with the non-Party; or
- has in place sanctions with respect to the non-Party or an investor of the non-Party that prohibit transactions with the enterprise.

A Party may also deny the benefits of the Investment Chapter to an investor of the other Party that is an enterprise that:

- has no substantial business activities in the territory of the other Party; and
- is owned or controlled by investors of a non-Party or the denying Party.

6.3 Implementation

Article 11.15 provides for the Parties to meet annually, or as otherwise agreed, to discuss the implementation of the Chapter.

6.4 Investor-State dispute settlement

In recognition of the Parties' open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems, the Investment Chapter does not establish an investor-state dispute settlement mechanism. Article 11.16 provides that the Parties may consider establishing such a procedure to hear a claim by an investor, if there is a change in these circumstances regarding the Parties' economic and legal environments.



12. Telecommunications

1. Purpose and structure

The obligations in this Chapter apply to government measures affecting trade in telecommunications services. However, measures relating to broadcast or cable distribution of radio or television programming are specifically excluded from the Chapter (other than to ensure that enterprises operating broadcast stations and cable systems have continued access to, and use of, public telecommunications services). There is nothing in the Agreement to compel any enterprise to establish, construct, acquire, lease, operate or provide telecommunications networks or services where such networks or services are not offered to the public generally.

The Chapter builds on WTO rules in relation to major suppliers of telecommunications that control essential facilities or have a dominant position in a market. The Parties must prevent anti-competitive conduct and ensure that major suppliers provide interconnection, resale of designated services, leased circuit services and co-location of equipment on reasonable, non-discriminatory terms and conditions.

There are strong provisions on transparency and review for regulatory decisions. Regulators must be independent and impartial and properly explain decisions, such as determining which services are subject to regulation and licensing decisions. Australia and the US have also embraced a hands-off regulatory approach where markets are functioning competitively.

The Chapter consists of four broad parts, a total of 25 Articles, and an exchange of letters. The exchange of letters establishes regular consultation on issues and developments in the communications and IT sectors. This will give government and industry greater understanding of these dynamic sectors and enable them to pursue bilateral issues of particular interest. There is also a non-binding letter associated with the Chapter which outlines the Government's policy in relation to government ownership of Telstra.

2. Section A: Access to and Use of Public Telecommunications Services

Both Parties reaffirm their obligations under the WTO General Agreement on Trade in Services (GATS) which ensure that all enterprises of the other Party have access to and use of any public telecommunications service, including leased circuits, offered in its

territory or across its borders, on terms and conditions that are reasonable and non-discriminatory (including with respect to timeliness).

In accordance with this obligation, both Parties will ensure that enterprises can freely use public telecommunications services to send information and access databases, and will only intervene to ensure the security or confidentiality of messages. 'Confidentiality' will not be used as a means of arbitrary or unjustifiable discrimination or as disguised restriction on trade in services. Furthermore, no conditions will be imposed on access to, and use of, public telecommunications networks or services other than as necessary to safeguard the public service responsibilities of suppliers (for example, in order to make their networks or services available to the public generally, or to protect the technical integrity of the network).

3. Section B: Obligations for Suppliers of Public Telecommunications Services (PTS)

The commitments in this section are consistent with, and build upon, our respective GATS obligations and do not require any legislative or regulatory changes.

In summary, both Parties agree to ensure that suppliers of public telecommunications services provide:

- Interconnection, directly or indirectly, with the suppliers of public telecommunications services of the other Party;
- Number portability (the ability of customers to keep their phone numbers when moving from service provider to another) – this applies to fixed (i.e. non-mobile) telephony and any other service designated by that Party to the extent technically feasible, and on terms and conditions that are reasonable and non-discriminatory;
- Dialling parity (the ability of a customer to use an equal number of digits to access a similar, competing service, with no unreasonable dialling delays) to suppliers of public telecommunications services of the other Party, and afford suppliers of public telecommunications services of the other Party non-discriminatory access to telephone numbers and related services;
- Reasonable and non-discriminatory treatment for access to submarine cable systems (including landing facilities) in its territory, where a supplier is authorised to operate such a submarine cable system as a public telecommunications service.

4. Section C: Obligations for Major Suppliers of Public Telecommunications Services (PTS)

The commitments in this Section cover obligations on the Parties in relation to regulating telecommunications companies that control essential facilities or have a dominant position in a particular market. A supplier will only be subject to these additional commitments where it is a major supplier for a particular service. That is, a company which is a major supplier for most telecommunications services but not, for example, for mobile services, will not be treated as a major supplier for mobile services.

Both sides also agree to maintain competitive safeguards to prevent suppliers who, alone or together are a major supplier in its territory from engaging in, or continuing, anti-competitive practices. They also agree to ensure that major suppliers of PTS in its territory:

- Accord suppliers of public telecommunications services of the other Party no less favourable terms and conditions than such major supplier accords in like circumstances to its subsidiaries and affiliates, or any non-affiliated service supplier. This applies to the availability, provisioning, rates or quality of like public telecommunications services and the availability of technical interfaces necessary for interconnection;
- Provide interconnection for the facilities and equipment of suppliers of PTS of the other Party at any technically feasible point in the major supplier's network, and on non-discriminatory terms and conditions (including in relation to quality and timelines);
- Offer reasonable rates for the resale of designated services to suppliers of PTS of the other Party and do not impose unreasonable or discriminatory conditions or limitations on the resale of such services;
- Offer unbundled network elements on terms, conditions and cost-oriented rates that are reasonable, non-discriminatory and transparent. Both sides will continue to ensure that they have a regulatory framework for unbundling;
- Provide suppliers of PTS of the other Party leased circuits services that are public telecommunications services on terms and conditions and at rates that are reasonable, non-discriminatory (including with respect to timeliness), and transparent. Regulators will continue to have the authority to require major suppliers to offer these services at capacity-based, cost-oriented prices;

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- Provide physical co-location of equipment necessary for interconnection or access to unbundled network elements on terms and conditions, and at cost-oriented rates, that are reasonable, non-discriminatory (including with respect to timeliness) and transparent. Where physical co-location is not practical for technical reasons or because of space limitation, each Party will ensure that major suppliers facilitate alternative solutions; and
- Provide access to designated poles, ducts, conduits, and rights of way on terms, conditions, and cost-oriented rates that are reasonable, non-discriminatory (including with respect to timeliness), and transparent;

The Chapter also sets out conditions for the public availability of interconnection offers (an interconnection agreement is the agreement between a facilities-based supplier to allow a service supplier to 'interconnect' - or use its facilities to deliver services - at a certain rate and on certain terms and conditions):

- Firstly, both sides will ensure each major supplier in its territory makes publicly available a reference interconnection offer [RIO], or other standard interconnection offer, containing the rates, terms, and conditions that the major supplier offers generally to suppliers of public telecommunications services.
- Secondly, both sides will ensure that the procedures for interconnection negotiations with major suppliers are publicly available and that the rates, terms, and conditions for interconnection with a major supplier are made publicly available.

The commitments in this Section are consistent with, and build upon, our GATS obligations and do not require any legislative or regulatory changes. The commitments on resale, leased circuits, colocation and access to poles, ducts, conduits and rights of way are additional to our GATS commitments, but similar to provisions contained in the Singapore-Australia FTA.

5. Section D: Other Measures

In this section we have made a number of commitments which add to our existing commitments under the GATS. These commitments are consistent with our existing laws and practices and do not require any legislative or regulatory changes.

Both Parties agreed to highlight their hands-off regulatory approach to value-added services, which means that they will not intervene unless necessary to remedy a practice that the Party has found in a particular case to be anti-competitive under its law or regulation, or to

otherwise promote competition or safeguard the interests of consumers.

Both Parties are committed to existing practices of independent regulation. And will continue to ensure that:

- Any telecommunications regulatory body established or maintained is independent and separate from, and not accountable to, any supplier of public telecommunications service; and
- The decisions and procedures of the regulatory body are impartial by ensuring the regulatory body does not hold a financial interest in any supplier of public telecommunications services; and that any financial interest that the Party holds in a supplier of a public telecommunications services does not influence the decisions and procedures of its regulatory body.

The Parties have also agreed to notify each other, as soon as feasible, of any intention to reduce or divest any government interest in a telecommunications supplier.

Parties have agreed to maintain their approach to transparent and independent regulatory procedures which incorporates basic principles of natural justice. Each Party will ensure that rulemakings, processes and conditions of licenses, reasons for denial or licences, and any tariffs filed with a regulator, are published or made available to interested persons.

Both sides agree to administer any universal service obligations in a transparent, non-discriminatory and competitively neutral manner.

The Parties also undertake to administer procedures for the allocation and use of scarce telecommunications resources, including frequencies, numbers and rights of way, in an objective, timely, transparent and non-discriminatory manner, and to make publicly available the current state of allocated frequency bands (but not the identification of frequencies assigned for specific government uses). Australia will maintain all existing practices and retain the right to allocate frequency bands taking into account existing and future needs. Australia will endeavour to rely generally on a market-based approach in assigning spectrum for terrestrial non-government telecommunications services.

Both Parties agreed to maintain their robust frameworks for enforcing their own laws, and have committed to maintaining some of the basic principles for resolving domestic telecommunications disputes. Enterprises are entitled to:

- seek timely review by a regulator or court to resolve disputes;

- seek review of disputes regarding appropriate terms, conditions, and rates for interconnection; and
- to obtain judicial review of a determination by a regulatory body

Furthermore, consistent with current regulatory approach, each Party may forebear from applying regulation to a service upon a strict process of determination by its telecommunications regulatory body that enforcement is not necessary to prevent unreasonable or discriminatory practices, to protect consumers and to enhance competition. However, a Party must give adequate public notice, and an opportunity to comment, prior to any decision regarding forbearance and the capacity to obtain judicial review of such decision by an independent and impartial judicial authority.

6. Exchange of Letters on Consultation

The side letter on consultation commits the Parties to meet once a year, or as otherwise agreed, and to include industry representatives as may be relevant, to discuss and resolve any issues and to maintain a forward-looking and cooperative relationship. Initial subjects for discussion include developments in market structure, convergence, technological innovation including in relation to advanced wireless services, Internet charging, voice over Internet protocol, broadband, number portability, and digital products

7. Letter on Telstra

The side letter on Telstra is a non-binding part of the Agreement. It makes no commitments but serves to explain the current Government's policy with regard to Telstra (for an explanation of the different types of side letters see Chapter 1 on institutional issues). The side letter explains that the current Government has long been committed to the full sale of Telstra subject to certain service conditions being met. The letter does not commit the Government to selling its remaining share of Telstra. Rather, it explains that the Government had recently tabled a bill in Parliament proposing the full sale of Telstra which was rejected, and any future sale would be conditional on such a bill passing through Parliament. The letter explains Telstra's operational independence, Australia's rigorous regulatory framework and principles of competitive neutrality which ensure that government enterprises such as Telstra do not derive any commercial advantage from having government ownership.

13. Financial Services

1. Purpose and Structure

Chapter 13 provides cross-border suppliers of financial services with an open and non-discriminatory environment for the supply of financial services. It also provides financial institutions, and investors in financial institutions, with an open and secure environment for investment. Thus it ensures that financial service suppliers from each Party, and investors from each Party in financial institutions, receive national treatment or most-favoured-nation treatment (whichever is better) from the other Party.

However, recognising particular issues that affect the supply of financial services, this Chapter contains additional disciplines as well as additional safeguards that are specific to this sector.

Chapter 13 on Financial Services complements Chapter 10 on Cross-Border Trade in Services (CBTS) and Chapter 11 on Investment. Cross-border trade in financial services is carved out of the scope of Chapter 10, and is addressed only in Chapter 13. Investment in the financial services sector is covered by Chapter 13 when it takes the form of investment in financial institutions, and by Chapter 11 in all other cases. Financial institutions are defined as any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located.

2. What is covered by the Chapter?

The Financial Services Chapter is concerned with measures adopted or maintained by a Party (at all levels of government) that affect:

- financial institutions located in the territory of that Party that are controlled by persons of the other Party;
- investors of the other Party who have invested in financial institutions located in that Party;
- the investments of investors of the other Party in financial institutions located in that Party; and

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- cross-border trade in financial services by service suppliers of the other Party.

The Chapter defines “financial services” as including all insurance and insurance-related services, and all banking and other financial services, as well as services incidental or auxiliary to a service of a financial nature.

The Chapter defines “cross-border trade in financial services” as the supply of a financial service:

- from the territory of one Party into the territory of the other Party;
- in the territory of one Party by a person from that Party to a person from the other Party; or
- by a natural person of a Party in the territory of the other Party.

The Chapter defines a “financial service supplier” as a national or enterprise of one Party who is engaged in the business of supplying a financial service in that Party’s territory. Under the FTA, a “national” includes permanent residents as well as citizens.

The Chapter defines “financial institution” as a financial intermediary or other enterprise that is authorised to do business and regulated or supervised as a financial institution under the law of the Party in which it is located.

The Chapter does not apply to actions by a Party relating to:

- activities or services forming part of a public retirement plan or statutory system of social security; or
- activities or services conducted for the account or with the guarantee or using the financial resources of that Party, or its public entities, except where such activities or services have been opened up to competition.

3. Core obligations

3.1 Non-discrimination

The Chapter requires each Party to accord to investors of the other Party, financial institutions of the other Party, and investments of investors of the other Party in financial institutions, national treatment (Article 13.2) and most-favoured-nation treatment (Article 13.3).

National treatment means treatment no less favourable than a Party accords, in like circumstances, to its own investors, financial institutions, and investments of its own investors in financial institutions.

Most-favoured-nation (MFN) treatment means treatment no less favourable than a Party accords, in like circumstances, to the investors, financial institutions, and investments of investors in financial institutions, of a non-Party. The national treatment and MFN obligations apply to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory.

The Chapter also requires that each Party accord MFN treatment (Article 13.3) to cross-border financial service suppliers of the other Party, and, for services specified in Annex 13-A, national treatment (Article 13.5). MFN treatment means treatment no less favourable than a Party accords, in like circumstances, to cross-border financial service suppliers of a non-Party. National treatment means treatment no less favourable than a Party accords, in like circumstances, to its own financial service suppliers.

3.2 Cross-Border Trade

Article 13.5.2 requires each Party to permit persons in its territory (and its nationals wherever they might be) to buy financial services from cross-border financial service suppliers of the other Party located in the territory of the other Party. However, this does not require a Party to allow such suppliers to do business or solicit in its territory.

3.3 Market Access for Financial Institutions

Article 13.4 prohibits each Party from placing limits, either on the basis of a regional subdivision or on the basis of its entire territory, on:

- the number of financial institutions;
- the value of financial service transactions or assets;
- the number of financial service operations or the quantity of financial services output; or
- the number of natural persons that may be employed in a particular financial service sector or that a financial service supplier may employ.

It also prohibits each Party from placing controls on the type of legal entity or joint venture through which a financial institution can supply a service.

3.4 Senior Management and Boards of Directors

A Party cannot require that a financial institution located in the territory of that Party that is controlled by persons of the other Party appoint individuals of any particular nationality as senior managers or other essential personnel (Article 13.8.1).

A Party cannot require that more than a minority of the board of directors of a financial institution located in the territory of that Party that is controlled by persons of the other Party be nationals of that Party, persons residing in the territory of that Party, or a combination of those (Article 13.8.2).

4. Non-conforming measures

Article 13.9 allows the Parties to maintain or adopt certain measures that are not consistent with the provisions of the obligations on National Treatment, MFN Treatment, Market Access for Financial Institutions, Cross-Border Trade and Senior Management and Boards of Directors (i.e. “non-conforming measures”). These non-conforming measures must be identified in individual Schedules for each Party that are contained in two Annexes to the Agreement:

- Annex III can be used by a Party to reserve the right to maintain existing non-conforming measures that are specifically identified in its Schedule to that Annex. These measures cannot be made more restrictive (i.e. less consistent with the obligations of the Chapter). Furthermore, Annex III measures are subject to a

“ratchet” mechanism, which means that if a Party liberalizes such a measure, i.e. makes it less inconsistent with an obligation, then it cannot subsequently make it more restrictive. In other words, the ratchet mechanism means that the liberalized measure becomes “bound” as part of the Agreement’s treaty commitments. However, the ratchet mechanism does not apply to any non-conforming measures related to Article 13.5 (Cross-Border Trade).

- Annex IV can be used by a Party to reserve the right to maintain existing non-conforming measures, make these measures more restrictive, and adopt new non-conforming measures for sectors, sub-sectors or activities identified in its Schedule to that Annex.

These non-conforming measures are set out in Annexes to Chapter 13. In addition, some non-conforming measures set out in the Annexes to Chapters 10 and 11 are treated as non-conforming measures for the purposes of Chapter 13, as the measures involved are covered by the latter Chapter as well as the former (Article 13.9.4)

The Schedules to Annex III and IV represented a carefully negotiated balance of commitments between the Parties.

5. Other obligations

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If a financial service is supplied in the territory of one Party but not the other, and the other Party would permit its own financial institutions to supply that service without additional legislative action, then it must allow financial institutions of the other Party to provide that service in its territory (Article 13.6). However, that Party can require a certain institutional and juridical form through which the new financial service may be supplied. It can also require that authorisation be obtained for the new financial service, but it must make a decision on an application for such authorisation within a reasonable period of time and the authorisation can only be refused for prudential reasons (Article 13.6).

5.1 Specific Commitments

Annex 13-B sets out certain specific commitments by the Parties. These provide that each Party will allow the other Party’s financial institutions to provide investment advice and portfolio management services to their collective investment schemes. They also provide assurances aimed at promoting expeditious approval of insurance

products. In Australia's case, where insurance is regulated by authorising and supervising insurers, and not by approving insurance products, the commitment would only be relevant if our system of insurance regulation was modified in the future to include product approval.

5.2 Regulatory Transparency

Article 13.11.2 requires that each Party fairly administer its regulations of general application that come within the Chapter.

Article 13.11.3 requires that each Party must, to the extent practicable, publish in advance any proposed regulations of general application that come within the Chapter, as well as an explanation of the purpose of that regulation. Each Party must also, to the extent practicable, let interested persons (and the other Party) make comments on the proposed regulations.

Each time a Party adopts a final regulation in relation to a matter covered by the Chapter, Article 13.11.4 requires that it should, to the extent practicable, give a written response to any comments it received on the proposed regulation.

Article 13.11.5 provides that each Party must, to the extent practicable, provide notice of the requirements of final regulations a reasonable time before they come into effect.

Each Party must make sure that rules of general application that are made by non-government bodies that have authority over financial service suppliers or financial institutions can be made available to those who wish to look at them (Article 13.11.6).

Article 13.11.7 requires that each Party be in a position to respond to inquiries from interested persons about the regulations it imposes in the areas covered by the Chapter.

If a Party has requirements that a person complete an application to provide a financial service, it must make sure that the requirements, including any documentation required, for completing such an application, are easily available (Article 13.11.8). If the person asks, the Party must give a prompt update as to how the application is progressing. If the Party requires further information from the applicant, it must let the applicant know without undue delay (Article 13.11.9)

If an investor in a financial institution, a financial institution, or a cross-border financial service supplier of the other Party properly completes an application process relating to the supply of a financial service, then the Party assessing the application must let that person know of the decision on the application within 120 days and must promptly notify the applicant of its decision. If the Party cannot meet the 120 day deadline, it must inform the applicant and then make its decision within a reasonable time. If the application was unsuccessful, the Party must, to the extent practicable, tell the applicant why (Article 13.11.10)

5.3 Recognition

The prudential measures taken by countries differ around the world. Some countries have certain rules about recognising the prudential measures of foreign countries. Sometimes this recognition is pursuant to formal agreements with the foreign country concerned or a Party might accord such recognition unilaterally. Article 13.15.1 makes it clear that the Chapter does not prevent a Party from according such recognition to persons from foreign countries – but if it accords such recognition to persons from a third country, then it must give the other Party the chance to show that it should also be accorded such recognition (Article 13.15.2 and 13.15.3). An exchange of side-letters to the Chapter records the shared understanding of the Parties that the scope of the measures covered by Article 13.15 is no less extensive than the scope of the measures covered by similar provisions on recognition in Article VII of the GATS, and paragraph 3 of the GATS Annex on Financial Services.

5.4 Financial Services Committee

The Chapter sets up a Financial Services Committee which, amongst other things, is charged with considering ways to further integrate the countries' financial services sectors (Article 13.16 and Annex 13-C). An exchange of side-letters to the Chapter records the agreement of the Parties that the Committee provides an appropriate forum to discuss certain cross-border issues pertaining to securities, and that the Committee should report on its work on these issues within two years of the entry into force of the Agreement. The side-letter also records Australia's proposal that these issues that the Committee should discuss include cross-border access for foreign securities markets and foreign collective investment schemes.

5.5 Payment and Clearing Systems

Article 13.13 requires each Party to accord to financial institutions located in its territory that are controlled by persons of the other Party treatment no less favourable than that it accords to its own financial

institutions, in like circumstances, in respect of access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This does not provide such a financial institution with access to that Party's lender of last resort facilities.

6. Other Provisions

Certain provisions of Chapters 10 (Cross-Border Trade in Services) and 11 (Investment) are incorporated into Chapter 13 (Article 13.1.2). These are Articles 11.7 (Expropriation and Compensation), 11.12 (Denial of Benefits), 11.8 (Transfers), 11.14 (Special Formalities and Information Requirements), 11.11 (Investment and the Environment), and Article 10.11 (Denial of Benefits). In addition, Article 10.10 (Transfers and Payments) is incorporated into Chapter 13 to the extent that cross-border trade in financial services to subject to obligations under Article 13.5.

Article 13.7 provides that nothing in the Chapter requires that a Party furnish or allow access to:

- information related to the financial affairs and accounts of individual customers of financial institutions or cross-border financial service suppliers; or
- confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice the legitimate commercial interests of particular businesses.

Article 13.10 provides that the Chapter does not prevent a Party from taking actions for prudential reasons (e.g. to protect people who deposit money in banks or who take out insurance policies). However, if such an action does not conform to the provisions of the FTA, it must not be used as a means of avoiding a Party's commitments or obligations under such provisions (Article 13.10.1).

The Chapter does not prevent a Party's public entities from taking non-discriminatory actions of general application in pursuit of monetary and related credit policies or exchange rate policies, provided that they are not inconsistent with its obligations under the obligations with respect to transfers and payments (Article 13.10.2).

The Chapter does not prevent a Party from taking actions needed to secure compliance with laws or regulations that are not inconsistent with the Chapter (e.g. those dealing with deceptive conduct or default

on financial services contracts) - but it must not do so in a way that would amount to:

- a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail; or
- a disguised restriction on investment in financial institutions or cross-border trade in financial services. (Article 13.10.4).



14. Competition – Related Matters

1. Purpose and structure

The Competition – Related Matters Chapter commits the Parties to take measures to:

- proscribe anti-competitive business conduct;
- cooperate in the area of competition policy and law enforcement;
- ensure that monopolies and government enterprises do not abuse their position in the marketplace; and
- enhance cooperation between government agencies in both countries in the area of consumer protection.

These objectives recognise that business conduct that is anticompetitive or that defrauds, deceives or misleads consumers has the potential to restrict bilateral trade and investment, in addition to impairing the welfare of the citizens of either country.

The Chapter consists of 12 articles and an associated side letter between the two governments on strengthening cooperation, competition policy and law enforcement.

2. Competition Law and Anticompetitive Business Conduct (Article 14.2)

Under Article 14.2 of the Chapter, each Party is obliged

- to maintain or adopt measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto; and
- maintain an authority or authorities responsible for the enforcement of its national competition laws

These obligations are framed in general terms, reflecting the fact that, while both the United States and Australia have highly developed and extensive competition and antitrust legislation, there are differences in the legal and institutional frameworks in which they operate.

Article 14.2 also addresses the treatment of companies or individuals of either country in relation to the enforcement of each other's competition laws. It states that the enforcement policy of each Party's national competition authorities includes treating non-nationals no less favourably than nationals in like circumstances, and that both Parties intend to maintain their policy in that regard.

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There is also an obligation to ensure that a company or individual subject to the imposition of a sanction or remedy (e.g. a financial penalty) for anticompetitive business conduct is afforded due process in terms of having an opportunity to be heard, and to present evidence, and to seek review in a court or independent tribunal.

This Article is not subject to dispute settlement, and does not require any legislative or regulatory change.

3. Cooperation on Competition/Antitrust (Article 14.2 and Side Letter)

Article 14.2 of the Agreement also commits the Parties to strengthening their existing cooperation on competition law enforcement and policy. Competition matters often have a cross-border dimension, when companies subject to investigation for anticompetitive conduct may have engaged in business activity in another country's jurisdiction. Australia and the United States have well-established channels of practical cooperation on such matters with a cross-border dimension, between the Australian Competition and Consumer Commission (ACCC) and its United States counterparts, the Department of Justice Antitrust Division and the Federal Trade Commission (FTC). The current framework for cooperation is set out in two bilateral treaties relating to Cooperation on Antitrust Matters (1982) and Mutual Antitrust Enforcement Assistance (1999) (antitrust is the preferred United States term).

Existing forms of cooperation include mutual assistance, notification, consultation, and exchange of information. Article 2 of the Chapter also obliges the respective competition authorities to consider, where feasible and appropriate, requests from their counterparts in the other country to initiate or expand activities to enforce competition. This will strengthen the basis of bilateral cooperation on competition law enforcement. Existing agreements do not include such provisions – sometimes known as “positive comity” – which would allow either government to encourage the other to address particular business conduct that might affect the interests of the first country. Implementation of this provision is likely to be taken up in discussions on strengthening bilateral cooperation that the United States Department of Justice and the United States Federal Trade Commission have offered, on behalf of the United States, in an associated side letter.

Article 14.2 also establishes a joint working group that will examine the scope for strengthening support for, and minimising legal impediments to, the effective enforcement of each country's competition laws and policies.

4. Monopolies and Government Enterprises (Articles 14.3, 14.4 and 14.5)

These articles contain obligations to ensure that the activities of monopolies (private or public), and state (i.e. government) enterprises do not create obstacles to trade and investment. The provisions on monopolies only apply to private monopolies created after the Agreement comes into force, and to government monopolies at the central government level. Both governments are obliged to ensure that any monopoly or government enterprise exercises any regulatory, administrative or other governmental authority delegated to it in a manner consistent with the Party's obligations under the Agreement.

Both monopolies and government enterprises must accord non-discriminatory treatment in the sale of their goods or services. Monopolies must also accord non-discriminatory treatment in the purchase of their goods or services

In addition, a monopoly must act solely in accordance with commercial considerations in purchasing or selling a monopoly good or service in the relevant market – except where this is to comply with any terms of its designation (i.e. the legislative or other authority that confers exclusive rights on a particular enterprise).

However, the latter exception overrides neither of the above-mentioned requirements to treat enterprises of the other country in a non-discriminatory fashion. Nor does it exempt monopolies from a further requirement not to use their monopoly position to engage in anticompetitive activities in markets where they are not a monopoly. As an example, Australia Post is a public monopoly as defined in the Agreement with respect to collection and delivery in Australia of standard letters (as defined in the *Australian Postal Corporation Act 1989*). It would be exempted from acting solely in accordance with commercial considerations in the price it charges for letter delivery around Australia, insofar as this is necessary to comply with the universal service obligations, which are the basis for the monopoly. However, that would not allow it to charge one price for stamps for delivering standard letters for Australian companies and a higher price to equivalent United States companies. Nor would it be entitled to use any advantages derived from its standard letter monopoly to undertake anticompetitive practices in areas of the postal services market that are open to competition.

The obligations above do not affect Australia's existing agricultural single desk export arrangements (such as the AWB International).

With respect to government enterprises, Australia commits itself, as it did in the Singapore-Australia FTA, to take reasonable measures to ensure that governments at all levels do not provide any competitive

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advantage to any government businesses simply because they are government owned. This reflects the policy of competitive neutrality to which all Australian governments are committed. For its part, the United States is obliged to ensure that anticompetitive activities by state and local government enterprises are not excluded from the reach of its national antitrust laws solely because they are state or local, as opposed to federal government, enterprises. This commitment is conditioned by the fact that state and local government enterprises are often immune from United States antitrust law. This particular obligation is not subject to dispute settlement.

Article 14.5 makes an important clarification – that charging of different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions, is not in itself inconsistent with the obligations on monopolies and state enterprises. For example, an Australian monopoly supplier may charge a US company operating in Australia a higher price than an Australian company in the Australian market where commercial conditions would warrant it, but it would be considered discriminatory if a United States-owned company were charged higher rates simply because it was US-owned.

5. Cross Border Consumer Protection (Article 14.6)

The Parties agree to strengthen their cooperation in areas covered by their consumer protection laws, in particular fraudulent and deceptive commercial practices against consumers. This builds upon existing cooperation between the ACCC and the United States FTC. Strengthening cooperation will include the development of appropriate procedures for detecting and notifying breaches of laws, and assisting in investigating cases and enforcing consumer protection laws; and in the development of coordinated strategies to combat fraudulent and deceptive commercial practices both bilaterally and internationally.

Australia and the United States also agree to identify obstacles to effective cross-border cooperation in the enforcement of consumer protection laws, and to consider changing their domestic frameworks to enhance their ability to cooperate, share information and assist in the enforcement of their respective consumer protection laws, including, if appropriate, adopting or amending national legislation.

6. Recognition and Enforcement of Monetary Judgments (Article 14.7)

Article 14.7 seeks to facilitate the efforts of government agencies to undertake civil (non-criminal) legal proceedings for the purpose of obtaining monetary restitution to consumers, investors or customers

who have suffered economic harm as a result of being deceived, defrauded or misled. The agencies concerned are the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investments Commission (ASIC), the U.S. Federal Trade Commission (FTC), U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission.

This provision applies in particular to civil proceedings where the offending company or individual has assets in the second country and the relevant agency, or interested parties, seek to have a judgment by a court in the first country to repay money defrauded from customers recognised and enforced by a court in the other country. The article states that when one of the agencies listed above obtains a civil monetary judgment from a judicial authority for the purpose of providing monetary restitution to consumers, investors or customers who have suffered economic harm as a result of being deceived, defrauded or misled, a judicial authority of the other Party generally should not disqualify such a monetary judgment from recognition or enforcement as penal or revenue in nature or based on other foreign public law.

While this provision is not binding on courts in either Australia or the United States, it seeks to provide courts with interpretative guidance on the purpose of such legal actions. Common law judicial interpretations in this area have tended to interpret broadly actions by governments as being either penal in nature or undertaken in pursuit of governmental interests and thus inappropriate for recognition. The purpose here is for consideration to be given to each case on its merits in a manner that favours restoring money to consumers, investors or customers who have been defrauded, deceived or misled.

More broadly, the Parties also agree to examine the scope for establishing greater bilateral recognition of foreign judgments of their respective judicial authorities obtained for the benefit of deceived or defrauded consumers, investors or customers. This could include consideration of current regulatory provisions for recognition of judgments of each other's courts and how they apply in this area. This is only in relation to monetary restitution, and not to penalty orders.

7. Transparency, Cooperation and Consultations (Articles 14.8, 14.9 and 14.10)

Both sides undertake to make available to each other, on request, public information concerning the enforcement of their measures proscribing anticompetitive business conduct, exemptions and immunities to their measures proscribing anticompetitive business conduct; and public information concerning monopolies and

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government enterprises.

The Parties agree to enter into consultations on request of the other Party to address specific matters that arise under this Chapter.

There is also a broad commitment to cooperate to promote policies related to matters covered by this Chapter that foster free trade and investment and competitive markets.

8. Dispute Settlement (Article 14.11)

Most of the articles in this Chapter will not be subject to dispute settlement. The only obligations that will be subject to dispute settlement are those relating to monopolies; the provisions on government enterprises relating to exercise of delegated authority and non-discriminatory treatment; transparency; and the obligation to consult at the request of the other Party to address specific matters.

15. Government Procurement

1. Purpose and Structure

The core purpose of the Chapter is non-discrimination in the conduct of government procurement. In this context non-discrimination requires each government to afford the suppliers, goods and services of the other country the same treatment that applies to domestic suppliers, goods and services.

The Chapter sets out specific rules, procedures and transparency standards to be applied in the conduct of government procurement, consistent with non-discrimination.

The Government Procurement Chapter consists of 15 Articles, eight Annexes and a side letter dealing with blood plasma. The annexes determine which government entities are covered by the Chapter and the specific types of procurements and procurement arrangements that each Party has specified for exemption from application of the Chapter.

Readers should also refer to the definition of government procurement contained in Chapter One and provisions relating to the management of confidential information and essential security interests contained in the Chapter 22.

2. Implications for Australia

Australia is currently not a “designated” country under the US Trade Agreements Act as it does not have an agreement with the US on government procurement. This prevents US Federal Government entities from being able to consider bids from Australian suppliers. Australian companies currently wishing to sell to the US Federal Government must establish operations in the US, or in a designated country, or establish partnering arrangements with US firms.

By contrast, access to the Australian market is open – based on non-discrimination, without any legal or policy barriers to foreign suppliers.

By virtue of the non-discrimination provisions in Article 15.2, Australia will become a designated country under the US Trade Agreements Act. The non-discrimination provisions will also require the US to provide Australia with a waiver from the Buy American Act (1933, 41 U.S.C 10) for contracts to which the Chapter applies (see Section 3 below). The Buy American Act imposes a 6% penalty on foreign goods (not services). The waiver will enable Australian suppliers, for the first time, to compete in the US procurement market on equal terms with suppliers from the US and from over 60 other designated

countries.

In return, Australia has agreed to tender procedures and transparency arrangements that will require some changes to the way procurement is conducted in Australia (see Section 5 below) and the adoption of regulations to ensure compliance by procuring entities.

3. Coverage

The Chapter applies only to procurements by entities listed in the annexes with a value equal to or above certain thresholds. Annex 15-A lists 79 US Federal Departments including the new Department of Homeland Security. Subsidiary agencies of the US listed entities are covered unless specifically excluded.

Australia's list in Annex 15-A includes all Federal Departments and all other agencies covered by the Financial Management and Accountability Act 1997. In addition, Australia has listed in Annex 15-B, 33 entities covered by the Commonwealth Authorities and Companies Act 1997.

The US and Australian Departments of Defence are listed in Annex 15-A. Both sides have exempted procurement of items that are critical to their national security such as military equipment, systems and essential supplies. Australia has also reserved the right to maintain the Australian Industry Involvement Program for defence procurement.

Thresholds vary for different groups of entities and for supplying goods and services or construction services and are set out at the beginning of Annexes 15-A, 15-B and 15-C. A higher threshold applies to construction than for other goods and services. The general goods and services thresholds for federal entities for Australia and the United States are A\$81,800 and US\$58,550 respectively.

In addition to the value thresholds, the Government Procurement Chapter is limited in application by:

- a) general exclusions set out in paragraph 3 of Article 15.1 being specific types of procurements that both countries agreed the Chapter should not apply to;
- b) the exceptions set out in Article 15.12 ;
- c) exclusions and reservations specific to a country, entity or group of entities as set out in the Government Procurement Chapter Annexes;
- d) exclusion of purchases of goods or services for resale or for the production of goods or services for resale; and
- e) the general "essential security" provisions of the Agreement.

In Annex 15-G, the US has reserved their preference policies in respect of small and minority businesses. Australia has similarly specifically reserved in Annex 15-G a right to continue with procurement policies that assist small and medium enterprises and those which provide economic and social assistance to indigenous persons.

At the time of writing, the issue of inclusion of State and Territory level governments in the Chapter had yet to be resolved. More time has been allowed for further states and territories to join. The current Australian and US offers are set out in Annex 15-C.

4. Price Preferences and Offsets

The principle of non-discrimination means that neither country may apply local preference arrangements, including price preferences, for procurements to which the Chapter applies.

Article 15.2.5 also specifically bans offsets, defined broadly to cover any requirement built into a procurement, for such things as local content, technology transfer or export performance. However, this ban is itself subject to the Chapter exclusions mentioned above and therefore does not apply to Australian policies supporting small and medium enterprises.

The ban on offsets will prevent government procurement being used to promote industry development such as through requiring suppliers to engage in activities that are considered offsets and are not covered by the exclusions to the Chapter. This will require modification to the Australian Government Endorsed Supplier Arrangement assessment procedure and to general Australian Government policies such as the Model Industry Development Criteria (which currently may apply to contracts of \$5 million or more).

5. Tender Procedures

A number of Articles in the Chapter are devoted to setting out specific procedures and rules to apply to the conduct of procurement related activities. They detail rules and procedures for three procurement methods that government entities may use (Article 15.2.3):

- Open Tendering in which all interested suppliers may submit a tender;
- Selective Tendering in which the procuring entity selects the suppliers eligible to tender; and
- Limited Tendering which is a more restricted form of selective tendering to which many of the Chapter's procedures do not apply.

Government Procurement

The GP Chapter creates a presumption of open tendering, with the other forms of tendering allowed only in specific conditions (as set out in Article 15.7 and 15.8). The general requirement for open tendering is expected to lead to more tenders being subject to open tendering procedures in Australia.

The Chapter imposes minimum standards for public notices of procurement activities. Of importance to industry are the requirements for notices regarding the advertisement of tender opportunities (referred to as “notices of intended procurement”) (Article 15.4) as well as in respect of contract awards (Article 15.9).

Coupled with the public notice requirements are minimum times to allow suppliers to respond to the requests for tenders. Time Limits (Article 15.5) provide for tenders to remain open for at least 30 days, or 25 days where tender notices are published on the Internet (as is commonly the case in Australia). Under specific or exceptional circumstances, detailed in Article 15.5.3, time limits may be reduced to no less than 10 days. One important circumstance is where an entity procures commercial goods or services (see the definition of commercial goods and services in Article 15.15(2)).

6. Domestic Review of Supplier Challenges

The Chapter sets minimum procedures for dealing with supplier challenges to the process or outcome of a procurement. These procedures, detailed in Article 15.11, confirm a supplier’s right to challenge in the event that a procuring entity has failed to comply with measures put in place by a government to implement the Chapter. Article 15.11 does not, however, give suppliers rights to challenge the adequacy or compliance of measures put in place by a government. The existing court systems in Australia satisfy the requirements set out in the Chapter. This understanding is confirmed in a side letter to the Agreement.

7. Exchange of Letters – Blood Plasma

This exchange of letters includes a side letter from Australia to the United States and concerns the treatment to be provided to blood plasma products and blood fractionation services. The side letter is an integral part of the Free Trade Agreement and is subject to the dispute settlement provisions of the Agreement. In Australia decisions on the blood supply are a joint responsibility of the Commonwealth, State and Territory Governments under the National Blood Agreement. Plasma fractionation services are purchased by the National Blood Authority on behalf of all Governments.

7.1. CSL Contract (Paragraph 1)

The Commonwealth of Australia currently has a contract with CSL Limited for the supply of plasma fractionation services that will expire at the end of 2004. The National Blood Authority is negotiating a new contract with CSL Ltd which will commence from 1 January 2005. Under the terms of paragraph 1, this new contract will conclude no later than 31 December 2009, or earlier if Australian governments decide that is appropriate.

7.2. Review of Plasma Fractionation Arrangements (Paragraph 2)

By no later than 1 January 2007, Commonwealth, State and Territory governments will undertake a review of the arrangements for the supply of plasma fractionation services. The Commonwealth Government will recommend to the States and Territories that, in future, suppliers of such services are selected through tender processes consistent with the Government Procurement Chapter of the Agreement.

7.3. Reservation to Government Procurement Chapter (Paragraph 3)

The Government Procurement Chapter of the Agreement applies to purchase of goods and services, except where specifically excluded, by listed government agencies. Procurement of Plasma Fractionation Services has been excluded from coverage of the Government Procurement Chapter (See Annex 15-E Services). If the review of plasma fractionation arrangements results in agreement to move to tender processes consistent with the Government Procurement Chapter, Australia has undertaken to remove this exception to the provisions of the Government Procurement Chapter.

7.4. Regulatory Requirements (Paragraph 4)

This paragraph acknowledges the importance of each party maintaining regulatory requirements for ensuring the safety, quality and efficacy of blood plasma products and supply of blood fractionation services. In the case of Australia, the Therapeutic Goods Administration (TGA) will continue to regulate blood products. The TGA will keep regulatory control of standards, wherever the fractionation process takes place, and who ever is the fractionator. However, consistent with our obligations under the World Trade Organisation Technical Barriers to Trade Agreement, regulatory requirements should not unnecessarily obstruct trade.

7.5. Policy on Self-Sufficiency (Paragraph 5)

This paragraph acknowledges the right of governments to have policies that blood plasma products are derived from blood plasma collected in their own territory. This allows Australia to preserve its policy on using plasma collected from Australian blood donors.

7.6. Appendix 19 (Paragraph 6)

Australia has undertaken not to require that blood plasma products produced in the United States demonstrate significant clinical advantage over Australian produced products. This obliges Australia to remove the requirement in Appendix 19 of the Australian Guidelines for the Registration of Drugs that foreign products demonstrate significant clinical advantage over local products for registration in Australia.

16. Electronic Commerce

1. Purpose and structure

The e-commerce Chapter sets out a number of provisions designed to ensure that trade conducted electronically between Australia and the United States remains free. The Chapter also establishes useful precedents for developing a liberal trading environment for electronic commerce in the region and globally.

The Chapter consists of nine articles dealing with the electronic supply of services, customs duties, non-discriminatory treatment of digital products, authentication and digital certificates, online consumer protection, paperless trading and definitions of terms.

2. Key Provisions

2.1 General

The underlying rationale for the E-commerce Chapter is reflected in the text of Article 16.1: The Parties recognise the economic growth and opportunity that electronic commerce provides, the importance of avoiding barriers to its use and development, and the applicability of WTO rules to electronic commerce.'

2.2 Electronic Supply of services

As part of this generalized commitment, both Parties have affirmed in Article 16.2 that services delivered electronically remain just that - services. The purpose is to emphasise that if a service - such as an architectural consultancy or a university degree by coursework - is delivered electronically (such as by email, or online), it should not be treated any differently than if it was delivered by post or in person.

2.3 Digital products

The core trade obligations for each of the Parties relate to customs duties (Article 16.3) and non-discriminatory treatment (Article 16.4) for *digital products*.

Digital products are defined (see Article 16.8) as "the digitised form, or encoding of, computer programs, text, video, images, sound recordings, and other products, regardless of whether they are fixed on a carrier medium or transmitted electronically".

A footnote to this definition clarifies that digital products can be a component of a good, be used in the supply of a service, or exist separately. For example, the software embedded in a PC, or the online

elements of an online educational course, are digital products, but the PC and the educational course are not. Similarly, a digital version of a sound recording, whether it is available on a CD or online is a digital product, but the CD itself is not.

2.4 Customs Duties (Article 16.3)

Article 16.3 commits both Parties not to impose customs duties on digital products, delivered either online or on *carrier medium* (such as a CD). In Australia's case, there are no duties levied on carrier medium, so the issue of separating customs treatment of carrier medium (such as CDs) from their content (the sound recording) does not arise.

2.5 Non-discriminatory treatment (Article 16.4)

The provisions on non-discriminatory treatment of digital products (Article 16.4) mean that both countries agree not to distinguish amongst or between "like" digital products, regardless of their origin. In other words, Australia agrees that digital products from outside Australia will be treated the same as like digital products from Australia. Likewise, the United States will treat digital products from outside the United States - including Australia - no differently from like US digital products.

The commitment means that Australia and the United States may *not* discriminate on the basis that a digital product is created, produced, published, stored, transmitted, contracted for, commissioned or first made available outside its territory. This same protection extends to the author, performer, producer, developer and distributors of digital products.

A practical example is that of a digital sound track by a recording artist. Neither Australia nor the United States may treat that sound track differently (such as a different tax, or the non-payment of a royalty) on the basis that the sound track, or its artist, is not Australian, or not American.

Importantly, Article 16.4 enables the Parties to implement public policies that would otherwise be in breach of the provisions. Article 16.4.3 specifically states that the provisions do *not* apply to "non-conforming measures" set out elsewhere in the Agreement.

Article 16.4.3 clarifies that where there are inconsistencies with the intellectual property Chapter, that Chapter shall overrule the e-commerce Chapter, and also states further exceptions, such as subsidies and grants, and "services supplied in the exercise of governmental authority".

Article 16.4.3 clarifies that the reservation Australia has taken on audio-visual and broadcasting services prevails over the obligation for non-discriminatory treatment of digital products. An example is the local content rules in Australia that guarantee a minimum level of Australian programming on our digital media. A further example would be Australian or US grants, subsidies or tax offsets for digitised film production.

2.6 Authentication and digital certificates (Article 16.5)

Paragraph 1 of Article 16.5 obligates both Parties to domestic legislation governing electronic transactions that encourages competition, regulates industry only to the extent required, and gives parties to electronic transactions full standing before the courts.

Australia and the United States have agreed in paragraph 2 to negotiate an agreement whereby central government agencies will recognise the digital certificates issued by the other Party. This will make it much easier, for example, for an Australian firm to deal electronically with US government agencies in bidding for, or fulfilling, procurement contracts.

2.7 Online Consumer Protection (Article 16.6)

In Article 16.6, Australia and the United States have recognised that consumers who participate in electronic commerce should be afforded transparent and effective consumer protection under their respective laws.

2.8 Paperless Trading (Article 16.7)

In Article 16.7, Australia and the United States have said they will endeavour to make publicly available, in electronic form, all trade administration documents. Furthermore, both sides will endeavour to accept the same documents transmitted electronically.

An Australian firm wishing to export to, or import from, the United States should soon be able to download and send the appropriate forms to Australian or US Customs authorities online, rather than rely on postage, facsimile and other services to complete their paperwork.

2.9 Definitions (Article 16.8)

Article 16.8 defines four key terms in the e-commerce Chapter, namely *carrier medium*, *digital products*, *electronic transmission or transmitted electronically*, and *trade administration documents*.



17. Intellectual Property Rights

1. Purpose and Structure

The Chapter on Intellectual Property (IP) consists of 29 Articles, and 3 Exchanges of Letters: one on ISP Liability; one on various aspects of intellectual property that apply to Australia; and another on national treatment in respect of phonograms.

The subject matter of the IP Chapter covers: copyright and related rights, including encrypted program-carrying satellite signals; trade marks, including geographical indications; domain names; industrial designs; patents; regulated products; and intellectual property enforcement.

While many aspects of the Chapter are drafted to take account of Australia's existing intellectual property regime, some legislative change will be required to implement Australia's obligations. The Government is in the process of assessing exactly what those changes will be. This outline seeks to identify what are likely to be the main areas where changes can be expected.

2. General Provisions (Article 17.1)

The General Provisions Article of the Chapter contains a number of provisions relating to the general operation of the obligations in the Chapter, including national treatment and transparency, as well as provisions relating to the subject matter to which the obligations in the Chapter apply. The Article also contains provisions indicating the intention or action of the Parties regarding other international agreements on intellectual property. Key provisions in this Article are set out below.

2.1 Key international Intellectual Property agreements (Article 17.1.2, 17.1.3 and 17.1.4)

Australia and the US have:

- reaffirmed their membership of a number of key international treaties, including the TRIPS Agreement. (Article 17.1.2)
- agreed to ratify or accede to the 'World Intellectual Property Organization Internet Treaties' (the WIPO Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty

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(1996) by the date of entry into force of the Agreement. (Article 17.1.3)

- agreed to make their best efforts to comply with the Hague Agreement Concerning the International Registration of Industrial Designs (1999) and the Patent Law Treaty (2000). (Article 17.1.4)

2.2 National Treatment (Article 17.1.6, 17.1.7 and 17.1.8)

The Article requires that the Parties provide national treatment, subject to certain exceptions. These exceptions are contained in Articles 17.1.6, 17.1.7, 17.1.8 and the third Exchange of Letters.

2.3 What subject matter do the obligations apply to? (Article 17.1.9 and 17.1.10)

The obligations in the Chapter apply to all subject matter that exists when the Agreement comes into force and which is protected on that date, or which later becomes entitled to protection under the Agreement. The obligations do not apply to subject matter that has fallen into the public domain at the time the Agreement comes into force. While these provisions are stated to be subject to a contrary intention including a specific reference to Article 17.4.5, there is no contrary intention expressed either in the agreement generally or in the provision referenced in Article 17.4.5.

2.4 Transparency (Article 17.1.12)

The Chapter also contains a provision that requires the Parties to ensure transparency of laws and procedures that deal with the protection and enforcement of intellectual property rights.

3. Trade marks, including Geographical Indications (Article 17.2)

This Article reaffirms both Parties' commitment to providing world class trademark services. Australia already largely complies with this Article, and it is therefore, in most instances, a reaffirmation of current legislative requirements, policy and/or practice. In Australia's case there may be a need for some minor legislative change in relation to cancellation procedures and grounds for refusing an application for a geographical indication to codify current practice.

3.1 Agreed Features of Trade Mark System (Article 17.2.1-17.2.12)

- Confirmation of the types of trade marks that are available for protection. (Article 17.2.1)
- Agreement that trade marks can extend beyond things that are visible to the eye; for example, in certain circumstances, scents and sounds can be registered. (Article 17.2.2)
- Statement of the exclusive rights of trade mark owners. (Article 17.2.4)
- Limited exceptions to the trade marks owners' exclusive rights, including fair use of descriptive terms. (Article 17.2.5)
- Agreement that each Party's trade mark system include key features such as relevant notifications and appropriate opportunities to appeal both administratively and using the courts, giving the opportunity to apply for trade marks on-line and provision of public access to the trade mark database. (Article 17.2.7 and Article 17.2.8)
- Minimum 10 year term of registration and renewal of a trade mark. (Article 17.2.9)
- No requirement to record licenses for trade marks. (Article 17.2.10)
- Where a Party has a system for the registration of geographical indications, that system should have certain characteristics, including: opposition procedures; minimal formalities; and transparency. The grounds for refusal to grant an application shall include that the geographical indication is likely to cause confusion with a trade mark that is the subject of a pending application or registration or the rights to which have been acquired in good faith in that Party. (Article 17.2.12)

3.2 Further Work to Reduce Differences (Article 17.2.11)

Recognising a flow on benefit to users, especially where costs are involved, both Parties have also agreed to work together to reduce differences in their respective systems and in international fora such as the World Intellectual Property Organization.

4. Domain Names (Article 17.3)

The Domain Names Article recognises the importance of procedures to settle “cybersquatting” disputes in order to deter trade mark “cybersquatting”. It also requires an online database of contact information for domain name registrants. These obligations only apply in the country-code top-level domain (ie “.au” domain names). Australia already fully complies with this Article.

4.1 Dispute Settlement for Cybersquatting (Article 17.3.1)

Under this Article, a Party is required to ensure a procedure to settle so-called “cybersquatting” disputes is provided as part of the management of its country-code top-level domain (ie “.au” domain names). Australia provides a procedure to resolve cybersquatting disputes through the .au Dispute Resolution Policy, the auDRP, which is operated by .au Domain Administration Ltd. The procedure based on the Uniform-Domain-Name Dispute Resolution Policy.

4.2 Provision of an On-line Database (Article 17.3.2)

Each Party is also required to provide online public access to a database of contact information for domain-name registrants in its country-code top-level domain (i.e. “.au” domain names). Australia already has such a database maintained by AusRegistry under auDA's policy guidance at: <http://www.ausregistry.com.au/>.

5. Copyright (Article 17.4)

Article 17.4 of the Agreement contains the obligations concerned with copyright works and other subject matter. This Article includes obligations in relation to: the rights of reproduction and distribution; technological protection measures; rights management information; and government use of software and the provision for exceptions. Article 17.4.4 requires a term of copyright protection in excess of Australia's current term. This Article, amongst others, will require some changes to Australian law.

5.1 Reproductions (Article 17.4.1)

Under this Article the Parties agree that they will provide authors, performers and producers of phonograms, with the right to authorise or prohibit the reproduction of their works, performances and

phonograms in any manner or form. Under the Agreement, the Parties may provide exceptions and limitations to the right of reproduction consistent with international standards (see further Article 5.7).

5.2 Term of Copyright Protection (Article 17.4.4)

Australia has agreed that it will extend its term of copyright protection. In summary, the term of copyright protection for works (e.g. books, artwork and sheet music), films and sound recordings (phonograms) will need to be extended by an extra 20 years: so that the term of protection for works will move from the life of the author + 50 years, to life +70. The term of protection for sound recordings and films will need to be extended from the current 50 years, to 70 years after publication.

The effect of the application of Article 18 of the Berne Convention, referenced in Article 17.4.5, is that there is no obligation on Australia to enact retrospective protection of copyright material that has already fallen into the public domain.

5.3 Transfer of Rights (Article 17.4.6)

In Article 17.4.6 the Parties confirm that there is to be no impediment upon the free transfer of economic rights. This is consistent with the provisions of the Copyright Act already. Section 196 of the Copyright Act provides that copyright is personal property and is transmissible by assignment, by will and by devolution by operation of law.

Article 17.4.6(b) makes it clear, however, and regardless of the operation of Article 17.4.6(a), both Australia and the US may establish measures to give effect to the measures provided for in Article 14ter of the Berne Convention.

5.4 Effective Technological Measures (Article 17.4.7)

This Article has obligations regarding the circumvention of effective technological measures; in other words it addresses certain types of technology associated with copyright material. There are restrictions in relation to the manufacture and provision of devices or services used to circumvent effective technological measures, and restrictions on the use of such devices or services. The Agreement also provides for a review mechanism. The review mechanism will allow the Government to make or introduce new exceptions in addition to those specifically provided for in the Article. An example of an agreed exception is to allow for certain types of reverse engineering for the interoperability of computer software.

Implementation of this Article will require legislative change. The nature and extent of those changes need to be carefully explored.

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Article 17.12 provides that Australia has a two year period from the date of entry into force of the Agreement to implement its obligations under this provision.

5.5 Rights Management Information (Article 17.4.8)

This Article obligates parties to provide adequate legal remedies to protect electronic rights management information (RMI). The requirements of this Article largely mirror those already found in the Australian Copyright Act.

5.6 Government use of Software (Article 17.4.9)

This Article recognises, and provides obligations, that Federal government agencies have provisions in place for use of legitimate software. Australian government agencies are already required to be exemplars of appropriate behaviour in this area, as in others.

5.7 Flexibility to make limitations and exceptions (Article 17.4.10)

This Article provides both parties with the ability to make exceptions and limitations in accordance with the flexibilities contained in the “three-step” test. This test is also contained in Article 13 of the TRIPS Agreement and, in similar terms, in other international copyright treaties. Article 17.4.10(c) provides a clarification, if it is needed, that the application of the Article unless otherwise specifically provided in the Chapter, neither reduces nor extends the scope of applicability of the limitations and exceptions permitted under the agreements referenced in Articles 17.1.2 and 17.1.3.

In relation to the retransmission of television signals over the Internet dealt with in Article 17.4.10(b), the requirements of which reflects current Australian law, a procedure is set out in paragraph 2 to the Exchange of Letters to the IP Chapter which is triggered when a Party wishes to make exceptions in this regard.

6. Protection of encrypted program carrying Satellite Signals (Article 17.7)

The Parties have agreed that certain activities undertaken in relation devices or systems that decode an encrypted satellite signal without permission are to be subject to criminal and civil penalties. These include: receiving and making use of, or further distributing, a satellite signal knowing that it has been decoded without authorisation. The provision also provides that any person with an interest that is injured by these activities can seek a civil remedy. Australia will need to make legislative change to implement this Article.

7. Designs (Article 17.8)

This Article obligates the Parties to maintain an industrial design system and, to further work to reduce differences in laws and practice and to participate in relevant international fora.

8. Patents (Article 17.9)

The Article on Patents generally reflects Australia's current laws and it is not anticipated that major changes to the *Patents Act 1990* will be needed to implement the FTA. Australia's ability to access certain exceptions to the scope of patentability in the TRIPS Agreement and current springboarding arrangements have been preserved. Key provisions are set out below.

8.1 Scope of Patentability (Article 17.9.1 and 17.9.2)

The Agreement provides that, in general, patents will be available for all inventions. This is consistent with current Australian law. The text also includes the flexibility to exclude from patentability inventions that fall within the terms of Articles 27.2 and 27.3(a) of the TRIPS Agreement that is:

- *methods of treatment* – diagnostic, therapeutic and surgical methods for the treatment of humans or animals
- *morality grounds* – where necessary to protect *ordre public* or morality, including human, animal or plant life or health or to avoid serious injury to the environment.

8.2 Flexibility to make Exceptions and Limitations (Article 17.9.3 and 17.9.6)

Under this Article Australia is free to adopt exceptions and limitation to patent rights in accordance with the flexibilities available under Article 30 of the TRIPS Agreement.

A specific instance of an exception falling within the Article above is provided in Article 17.9.6 and paragraph 1 of the second Exchange of Letters. Under this provision, where an extension of a pharmaceutical patent term has been granted, a generic manufacturer can use the patent and export the product for the purposes of obtaining marketing approval overseas while the patent is still in force.

8.3 A Cooperative Framework and Further Work (Article 17.9.4 and 17.9.5)

These Articles provide for cooperation and best endeavours to reduce certain differences in the patent laws and practices of Australia and the US and in international fora. In addition, they encourage work towards the mutual exploitation of search and examination work. This will benefit users of each system.

8.4 Other Provisions

Article 17.9 also contains a number of provisions relating to the procedure for obtaining a patent, the grant of patent extensions for delays in grant caused by the Patent Office, grounds for revocation and compulsory licensing which generally reflect current Australian law.

9. Measures Related to Certain Regulated Products (Article 17.10)

Article 17.10 contains provisions relating to the protection of test data submitted to a regulatory authority when an application for a pharmaceutical or agricultural chemical product is made. It also contains provisions relating to patents and marketing approval for pharmaceutical products. The Article does not require Australia to make changes to its regime for the protection of test data for pharmaceutical products or its existing pharmaceutical patent extension regime.

Legislative changes will be required to our regime for agricultural chemical test data protection, but these changes are in line with a scheme already under consideration. Changes to the Therapeutic Goods Administration (TGA) marketing approval process will also be necessary to implement some obligations.

9.1 Test Data Protection - Pharmaceutical Products (Article 17.10.1(a))

The obligation to provide five years of protection for test data for new pharmaceutical products contained in Article 17.10.1(a) reflects Australia's current regime. Article 17.10.2 contains an obligation to provide three years of protection to new clinical information, however this refers to the US system and the footnote to this paragraph recognises that Australia's existing data protection system meets our obligations under this provision.

9.2 Test Data Protection – New Agricultural Chemical Products (Article 17.10.1(b))

The Parties have agreed to provide a period of 10 years protection to undisclosed data that is submitted when a person makes an application for marketing approval of a new agricultural product, when that approval is given in combination with the marketing approval of certain additional uses of the same product. This is consistent with the reforms already being developed by the Department of Agriculture, Fisheries and Forestry in consultation with State and Territory partners involved in the National Registration Scheme for Agricultural and Veterinary Chemicals, and with industry and other stakeholders.

9.3 Patent Extension due to Marketing Approval (Article 17.10.2)

Consistent with Australia's Patents Act 1990, the Agreement requires that an extension to a pharmaceutical patent be available to compensate an owner for unreasonable delays in the marketing approval process

9.4 Marketing of a Generic version of a patented medicine to be prevented during the Patent Term (Article 17.10.5(a))

The Agreement requires that Australia provide measures in the marketing approval process to prevent a person from entering the market with a generic version of a patented medicine before a patent covering that product has expired. It will be necessary to make some legislative change to provide for this.

9.5 Notification of Intention to Market during the Patent Term (Article 17.10.5(b))

The Agreement requires that a patent owner be notified of an application for marketing approval in the limited cases in which the person seeking the approval considers the patent invalid and intends to market a generic version of a patented product before the patent expires. This will require legislative change.

10. Enforcement (Article 17.11)

The obligations in this Article cover a range of enforcement activities, including: civil and administrative procedures and remedies; provisional measures; border measures; criminal procedures and procedures in relation to Internet Service Provider liability. The text is largely drafted to take into account the existing legal systems in both the US and Australia. Australia will need to make some legislative change to implement aspects of this Article, including in relation to Internet Service Provider liability and providing that a broader range of activities will be subject to criminal sanctions.

10.1 Transparency (Article 17.11.2 and Article 17.11.3)

The enforcement Article of the Chapter contains further provisions relating to transparency requiring publication of judicial decisions and informing the public of efforts in enforcement of intellectual property rights. This obligation is consistent with present Australian practice.

10.2 Civil Remedies and Procedures and Provisional Measures (Article 17.11.4 - 18)

The Article relating to civil remedies is not expected to require legislative change. It includes agreement on presumptions in relation to copyright (Article 17.11.4) and the availability of judicial procedures (Article 17.11.5).

There is also agreement on the availability of certain forms of compensation, including a requirement to have either a system of pre-established damages or an additional damages system for copyright (Article 17.11.6 and Article 17.11.7). In relation to Article 17.11.6 it has been agreed that the obligation does not require a change to existing measures that provide for the availability of different remedies and this will be set out in the second Exchange of Letters to the IP Chapter. Australia provides a system of additional damages which satisfied the requirement of Article 17.11.7.

The other measures for civil and administrative enforcement, including the powers of courts, are also understood to be consistent with Australian practice.

10.3 Border Measures (Articles 17.11.19 - 17.11.25)

The Border Measures Article will not give rise to any legislative change for Australia. Key provisions are:

- a requirement for transparent procedures when dealing with Custom authorities in relation to the suspension and release of

suspected counterfeit or pirated copyright goods (Article 17.11.19)

- the ability for Customs to act without the need for a specific formal complaint (Article 17.11.22)
- provisions for the destruction of infringing goods when they have been forfeited as pirated or counterfeit (Article 17.11.23)
- agreement to provide advice on the enforcement of intellectual property rights at the border and to promote bilateral and regional cooperation (Article 17.11.25)

10.4 Criminal Penalties and Procedures (Articles 17.11.26 - 17.11.28)

The obligations in relation to criminal penalties and procedures will require some legislative change for Australia. Key provisions include:

- Presumptions in relation to copyright (Article 17.11.4),
- criminal procedures and penalties in relation to wilful importation or exportation of copyright and trademark infringements on a commercial scale, and
- provision of penalties (including fines and imprisonment), providing courts with the ability to seize suspected infringing goods and related materials and, in certain circumstances, to order the forfeiture of assets (Article 17.11.27).

11. ISP Liability (Article 17.11.29 and Side Letter 1)

The Internet Service Provider (ISP) liability obligations establish a system for dealing with allegedly infringing material on an ISP's systems or networks. Put simply, the ISP qualifies for "safe harbour" immunity when dealing with alleged copyright infringements on their system or networks provided they comply with certain conditions. The Parties have also committed to using an expeditious judicial or administrative procedure for supplying subscriber details.

The first Exchange of Letters contains obligations in relation to:

- a model for an effective notice, by a copyright owner or person authorised to act on behalf of the owner to an ISP, and
- a model for an effective counter-notice by a subscriber.

Glossary

Term	Definition
<i>copyright</i>	Copyright protects the original expression of ideas, not the ideas themselves. It does not require registration in Australia and automatically applies to original writing, works of art, plays, music, film, television and radio broadcasts, and computer programs. The owner of the copyright in a work generally has the right to publish, reproduce, communicate (e.g. broadcast, email, publish online) and adapt it, and to perform it in public. It also provides public interest exceptions to allow reasonable access to such material (e.g. for research and study).
<i>cybersquatting</i>	Generally refers to the practice of buying up domain names that use the names of existing or likely businesses with the intent to sell the names for a profit to those businesses.
<i>design</i>	see industrial design
<i>domain name</i>	A domain name is the unique name that corresponds with an Internet Protocol address. It is both easy and intuitive to remember. For example, IP Australia's domain name is www.ipaustralia.gov.au (.gov = government, .au = Australia).
<i>geographical indication</i>	Indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.
<i>industrial design</i>	Design refers to the features of shape, configuration, pattern or ornamentation which can be judged by the eye in finished products. In other words, registered designs protect the way products look.
<i>industrial property</i>	Industrial property is a subset of intellectual property, referring to those types of intellectual property that have an industrial application. It includes patents, trade marks and designs.
<i>infringement</i>	Infringement occurs when someone copies or uses

	your intellectual property without your permission and where the use is not permitted by law.
<i>intellectual property</i>	Intellectual property (IP) represents the property of your mind or intellect. Types of intellectual property include patents, trade marks, designs, confidential information/trade secrets, copyright, circuit layout rights, plant breeder's rights etc.
<i>IP</i>	see intellectual property
<i>patent</i>	A patent is a right granted for any device, substance, method or process, which is new, inventive and useful.
<i>trade mark</i>	A trade mark can be a letter, number, word, phrase, sound, smell, shape, logo, picture, aspect of packaging or any combination of these, which is used to distinguish goods and services of one trader from those of another.
<i>TRIPS Agreement</i>	World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights. See www.wto.org



18. Labour

Purpose and structure

The labour Chapter sets out a number of provisions designed to ensure that neither Party fails to enforce its own labour laws in a way that affects trade between the Parties. The Chapter also provides for labour cooperation, including through the establishment of a consultative mechanism.

The Chapter consists of eight articles dealing with a Statement of Shared Commitment, Application and Enforcement of Labour Laws, Procedural Guarantees and Public Awareness, Institutional Arrangements, Labour Cooperation, Labour Consultations, Internationally Recognised Labour Principles and Rights, and Scope.

1. Why a Labour Chapter?

The underlying rationale for the Chapter is reflected in the text in Article 18.2.2: ‘The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective labour laws...’

2. Core obligations (Article 18.2)

The core obligation for each of the Parties is contained in Article 18.2.1(a), which provides that ‘neither Party shall fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties...’ This is the only obligation subject to dispute settlement (see Section 6). Labour laws are defined (in Article 18.8) as those directly related to the internationally recognised labour principles and rights set forth in Article 18.7 (see Section 4).

Under the Agreement only the government of each Party can bring such an action.

3. Labour standards (Article 18.1)

It reaffirms each Party’s obligations as members of the International Labour Organisation and their intention to strive to ensure that the internationally recognised rights and principles defined at Article 18.7 (see Section 4) are recognised and protected by domestic law. Conformity with ILO obligations does not, however, have any implications for conformity with the obligations subject to dispute settlement under this Chapter.

The Chapter recognises the right of each Party to establish its own standards and adapt or modify its laws and regulations accordingly (Article 18.1.2). The shared commitment by each Party to strive to improve those standards ‘consistent with high quality and high productivity workplaces’ recognises that labour laws and regulations need to reflect broader economic goals such as enhancing economic competitiveness (Article 18.1.2).

The Parties ‘recognise that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labour matters determined to have higher priority’ (Article 18.2.1(b)).

4. Labour laws (Article 18.7)

The core obligation not to fail to enforce labour laws (see section 2) is limited to those labour laws ‘directly related to the internationally recognised labour principles and rights set forth in Article 18.7’ (Article 18.8) as defined in United States Trade Promotion Authority. Those internationally recognised labour principles and rights are set forth as:

- (a) the right of association;
- (b) the right to organise and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labour;
- (d) labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour⁴; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

The footnote to sub-paragraph (d) refers to the fact that Australia does not have legislation concerning a universal minimum age for employment, but secures this objective through Federal, State and Territory government regulation on the age levels for compulsory education.

5. States and Territories (Article 18.8)

For the United States, labour laws are defined (Article 18.8.1) as ‘acts of the U.S. Congress, regulations promulgated pursuant to an act of

¹⁸⁴ Australia provides labour protections for children and young people primarily through laws and regulations that regulate age levels for compulsory education.

the U.S. Congress, or provisions of such acts or regulations directly related to the internationally recognised labour principles and rights set forth in Article 18.7 that are enforceable by action of the federal government'. This provision reflects the fact that, in the United States, the federal government exercises primary authority with respect to labour laws, and can enforce these laws at the state as well as federal level. US States are not, therefore, specifically included in the definition of US laws.

The situation is different in Australia as the Commonwealth Government is not able to enforce State laws. A definition of Australia that included only Federal Government laws would not cover state laws in a manner comparable to the undertaking made by the United States. For Australia, therefore, labour laws are defined (Article 18.8.2) as 'acts of a parliament of Australia, or regulations promulgated pursuant to such acts, directly related to the internationally recognised principles and rights set forth in Article 18.7.' This definition covers relevant Federal and State labour laws.

The Federal Government would be responsible for a failure to enforce effectively either State or Federal laws. Should the United States raise a concern about failure of an Australian State to enforce effectively its own laws in accordance with Article 18.2.1(a), the Commonwealth government would consult with that State government.

6. Dispute Settlement (Consultations) (Article 18.6)

The dispute settlement (consultations) provisions of the Labour Chapter (Article 18.6) mirror the general dispute settlement provisions of the Agreement (see Chapter 21).

Under the provisions of Article 18.6 a Party may raise with the other Party any matter arising under the Chapter (Article 18.6.1); Parties are encouraged to resolve the matter (Article 18.6.2); but if they cannot do so at that stage, they can convene the Sub-Committee on Labour Affairs (as described in Article 18.5.1) to help (Article 18.3). Only if the matter relates to Article 18.2.1(a) (failure to effectively enforce the Party's laws) may a Party initiate the general dispute settlement provisions of the Agreement (Articles 18.4 and 18.5).

A feature of the dispute settlement procedures applying to the labour and environment Chapters is that panelists chosen to determine the dispute are required to have expertise or experience in the relevant matter under dispute.

7. Penalties

The penalties for a failure to comply with Article 18.2.1(a) (effective enforcement of laws) are to be found in the dispute settlement Chapter

(Article 21.12). Penalties take the form of a fine of up to US\$15 million p.a. (adjusted for inflation) to be paid by the Party complained against into a fund, to be spent at the direction of the Parties on appropriate labour initiatives in the territory of that Party (Article 21.12.4).

8. Procedural Guarantees and Public Awareness (Article 18.3)

In the interests of transparency and procedural fairness, each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to judicial, quasi-judicial, or administrative proceedings for the enforcement of the Party's environmental laws. Each Party will:

- Ensure that persons with a legally recognised interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labour tribunals for the enforcement of the Party's labour laws;
- Ensure that its administrative, quasi-judicial, judicial or labour tribunal proceedings for the enforcement of its labour laws are fair, equitable and transparent;
- Provide that the parties to such proceedings may seek remedies to ensure the enforcement of rights under its labour laws; and
- Promote public awareness of its labour laws.

9. Institutional Arrangements (Article 18.4)

The Joint Committee established to supervise the implementation of the Agreement (see Article 21.1.1) will discuss matters related to the operation of the Labour Chapter and the pursuit of the labour objectives of the Agreement. The Joint Committee may establish a subcommittee on Labour Affairs to discuss matters related to the operation of the Chapter. Meetings of that subcommittee would normally include a public session (Article 18.4.1).

Each Party will designate an office to serve as a contact point with the other Party, and with the public to:

- Provide for the submission, receipt, and consideration of public communications; make such communications available to the other Party and, as appropriate, to the public; and review such communications, as appropriate, in accordance with its domestic procedures; and
- Coordinate the development and implementation of cooperative activities (see Section 10) (Article 18.4.2).

Each Party may consult, by whatever means it considers appropriate, with representatives of its labour and business organisations, and, as appropriate, other persons, on the operation of the Chapter (Article 18.4.3).

All formal decisions of the Parties concerning the operation of this Chapter will be made public, unless the Joint Committee agrees otherwise (Article 18.4.4).

10. Labour Cooperation (Article 18.5)

The Parties recognise that cooperation provides opportunities to promote respect for workers' rights and the rights of children consistent with the core labour standards of the International Labour Organisation, and agree to establish a consultative mechanism for such cooperation (Article 18.5.1).

These cooperative activities may include work on labour law and practice in the context of the ILO's *Declaration on Fundamental Principles and Rights at Work*, and such other matters as the Parties agree. In identifying areas for cooperation, the Parties will consider the views of their respective worker and employer representatives and other persons, as appropriate (Article 18.5.2).

Cooperative activities may be implemented through exchanges of information, joint research activities, visits or conferences, and such other forms of technical exchange as the Parties agree (Article 18.5.3).



19. Environment

1. Purpose and structure

The environment Chapter sets out a number of provisions designed to ensure that neither Party fails to enforce its own environment laws in a way that affects trade between the Parties. The Chapter also provides for environmental cooperation, including through the signing of a Joint Statement on Environmental Cooperation, and by seeking means to enhance the mutual supportiveness of multilateral environmental agreements and international trade agreements to which Australia and the United States are both parties, in particular in the negotiations in the WTO regarding multilateral environmental agreements.

The Chapter consists of nine articles dealing with Levels of Protection, Application and Enforcement of Environmental Laws, Procedural Guarantees and Public Awareness, Measures to Enhance Environmental Performance, Institutional Arrangements, Environmental Cooperation, Environmental Consultations, Relationship to Environmental Agreements, and Definitions.

2. Why an Environment Chapter?

The underlying rationale for the Environment Chapter is reflected in the text of Article 19.2.2: ‘The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws...’

3. Core obligations (Article 19.2)

The core obligation for each of the Parties is contained in Article 19.2.1(a), which provides that ‘neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties...’ This is the only obligation subject to dispute settlement (see Section 6).

Under the Agreement only the government of each Party can bring such an action.

4. Environmental standards (Article 19.1)

The Chapter recognises the right of each Party to establish its own levels of domestic environmental protection and priorities, and to adapt or modify accordingly its environmental laws and policies (Article 19.1).

Each Party undertakes to ensure that its laws encourage high levels of environmental protection, and to strive to improve those protections. The Parties recognise that ‘each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority’ (Article 19.2.1(b)).

5. Environmental laws (Article 19.9)

Environmental laws are defined, under Article 19.9, as any statutes or regulations of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health (but not worker safety), through:

- (a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
- (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.

6. States and Territories (Article 19.9)

For the United States, laws are defined as statutes or regulations of the Congress enforceable by action of the federal government. This provision reflects the fact that, in the United States, the federal government exercises primary authority with respect to environmental laws, and can enforce these laws at the state as well as federal level. US States are not, therefore, specifically included in the definition of US laws.

The situation is different in Australia as the Commonwealth Government is not able to enforce State laws. A definition of Australia that included only Federal Government laws would not therefore cover state laws in a manner comparable to the undertaking made by the United States. While there is no definition of Australia in this Chapter, as the Party to the Agreement as a whole, Australia includes state and territory laws.

The Federal Government would be responsible for a failure to enforce effectively either State or Federal laws. Should the United States raise a concern about failure of an Australian State to enforce effectively its own laws in accordance with Article 19.2.1(a), the Commonwealth government would consult with that State government.

7. Dispute Settlement (Consultations) (Article 19.7)

The dispute settlement (consultations) provisions of the Environment Chapter (Article 19.7) mirror the general dispute settlement provisions of the Agreement (see Chapter 21).

Under the provisions of Article 19.7 a Party may raise with the other Party any matter arising under the Chapter (Article 19.7.1); Parties are encouraged to resolve the matter (Article 19.7.2); but if they cannot do so at that stage, they can establish a subcommittee (see section 12) to help (Article 19.3). Only if the matter relates to Article 19.2.1(a) (failure to effectively enforce the Party's laws) may a Party initiate the general dispute settlement provisions of the Agreement (Articles 19.7.4 and 19.7.5).

A feature of the dispute settlement procedures applying to the environment and labour Chapters is that panelists chosen to determine the dispute are required to have expertise or experience in the relevant matter under dispute.

8. Penalties

The penalties for a failure to comply with Article 19.2.1(a) (effective enforcement of laws) are to be found in the dispute settlement Chapter (Article 21.12). Penalties take the form of a fine of up to US\$15 million p.a. (adjusted for inflation) to be paid by the Party complained against into a fund, to be spent at the direction of the Parties on appropriate environmental initiatives in the territory of that Party (Article 21.12.4).

9. Multilateral Trade and Environment Agreements (Article 19.8)

The Parties recognise the important role that multilateral environmental agreements play in protecting the environment globally and domestically and will continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements and international trade agreements to which they are both parties, in particular in the negotiations in the WTO regarding multilateral environmental agreements (Article 19.9).

10. Environment Cooperation (Article 19.6)

Australia and the United States have agreed to negotiate a US-Australia Joint Statement on Environmental Cooperation, to explore ways to support ongoing bilateral, regional and multilateral environmental activities (Article 19.6.1). There is also agreement to share information with each other and the public, as appropriate, on the environmental effects of trade agreements (Article 19.6.2) and take

account, as appropriate, of public comments on co-operative activities being undertaken by the two Parties (Article 19.6.3).

11. Procedural Guarantees and Public Awareness (Article 19.3)

In the interests of transparency and procedural fairness, each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to judicial, quasi-judicial, or administrative proceedings for the enforcement of the Party's environmental laws. Each Party will:

- Ensure that its administrative, judicial, quasi-judicial, or environmental administrative proceedings for the enforcement of its environmental laws are fair, equitable and transparent (Article 19.3.1);
- Ensure that persons with a legally recognised interest under its law in a particular matter have appropriate access to judicial, quasi-judicial, or administrative proceedings (Article 19.3.2);
- Provide that the parties to such proceedings may seek remedies to ensure the effective enforcement of rights under its environmental laws (Article 19.3.3); and
- Promote public awareness of its environmental laws (Article 19.3.4).

12. Measures to enhance environmental performance (Article 19.4)

As appropriate, and in accordance with its law, each Party will encourage the development of mechanisms such as flexible, voluntary and market-based mechanisms that encourage the protection of natural resources and the environment (Article 19.4).

13. Institutional Arrangements (Article 19.5)

The Joint Committee established to supervise the implementation of the Agreement (see Article 21.1.1) will discuss matters related to the operation of the Environment Chapter and the pursuit of the environmental objectives of the Agreement. The Joint Committee may establish a subcommittee on environmental affairs to discuss matters related to the operation of the Chapter. Meetings of that subcommittee would normally include a public session (Article 19.5.1).

Each Party will provide an opportunity for its public to advise on the implementation of the Chapter (Article 19.5.1). All formal decisions of

the Parties concerning the operation of the Chapter will be made public, unless the Joint Committee decides otherwise (Article 19.5.1).

14. Environmental Review of the FTA

Under the Institutional Arrangements (Chapter 21) the Joint Committee will, at its first meeting, consider reviews by each Party of the environmental effects of the Agreement and afford the public an opportunity to provide views on those effects (Article 21.1.7).

The Australian Government will be preparing an environmental assessment of the Agreement in the context of an overall analysis of the Agreement. The US Government has already prepared a draft review (December 2003) available on the USTR website (www.ustr.gov/environment/environment.shtml).

20. Transparency

1. Purpose and Structure

The Chapter on transparency consists of six Articles. It is intended to promote greater transparency in the making and implementation of laws, regulations and bureaucratic decisions. It also protects the principles of natural justice and due process.

2. Publication (Article 20.2)

This Article requires that all laws and regulations should be made publicly available. Where possible, governments in Australia and the United States should publish draft laws and regulations in advance to allow interested people from either country to comment on them.

This obligation is consistent with the recently passed Legislative Instruments Act 2003.

3. Notification and Provision of Information (Article 20.3)

This Article provides a mechanism for the Governments of Australia and the United States to consult about the effect a particular draft law or regulation might have on their respective citizens' or companies' interests.

4. Administrative Agency Processes (Article 20.4)

This Article provides individuals or companies of either country certain rights to natural justice and due process when they are subject to administrative and bureaucratic decision-making processes.

Australia is already in compliance with this Article and no additional action is required by the Australian Government.

5. Review and Appeal (Article 20.5)

In addition to the commitments on natural justice and due process in initial decision-making processes provided in Article 20.4, this Article requires Australia and the United States to provide for appeals against administrative or bureaucratic decisions.

Australia is already in compliance with this Article and no additional action is required by the Australian Government.



21. Institutional Arrangements and Dispute Settlement

1. Purpose and structure

The Chapter on institutional arrangements and dispute settlement consists of 15 Articles and 1 Annex. It establishes a fair, transparent, timely and effective procedure for settling disputes arising under the Agreement. Importantly, it does not allow private investors to directly challenge government decisions under the Agreement, provides high standards of openness and transparency in the resolution of disputes between the Australian and United States Governments, and provides for flexible compensation arrangements for resolving disputes.

2. Can private investors directly challenge decisions of the Australian Government under the Agreement?

In recognition of the Parties' open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems, the Investment Chapter does not establish an investor-state dispute settlement mechanism (see Investment Chapter).

Of course, individual investors are able to raise concerns about their treatment by the United States with the Australian Government (or vice versa), which is able to pursue these issues through traditional state-to-state dispute settlement in Sections 4-9 below.

3. Joint Committee (Article 21.1)

The Joint Committee is central to the ongoing evolution of this Agreement and the early identification and settlement of disputes through consultation. At its annual meetings, it will review the current functioning of the Agreement, consider any improvements or amendments that either country may wish to propose and, where further clarity is required, issue interpretations of the Agreement.

This last function is particularly important as it clearly reserves the power to interpret the Agreement to the Australian and United States governments operating together.

4. Scope of Application and Dispute Settlement Proceedings (Article 21.2)

A dispute can be initiated by either Party to resolve a disagreement about the interpretation or application of the Agreement or where:

- the actions of either government violate the Agreement;
- either government has failed to carry out an obligation under the Agreement; or
- either government has acted in a manner which, while complying with the strict letter of the Agreement, goes against the spirit of the Agreement and the expectations of the other government (a so-called 'nullification and impairment' case).

Importantly, it is only possible to bring nullification and impairment cases with regard to the commitments made in six named chapters.

5. Consultations (Article 21.5)

The Agreement emphasises settlement of disputes through consultation and gives the predominant role to the Parties in interpreting the Agreement.

At the same time, the Article notes the continuing importance of soliciting and considering the views of members of the public on matters under dispute.

6. Establishment of Panel (Article 21.7)

Where consultations are not effective in resolving a dispute, the Agreement provides for an arbitral panel to consider the matter. The panel mechanism adopted by the Agreement builds on the model for dispute settlement in the World Trade Organisation, with a range of significant improvements.

Innovative elements of Panel selection include:

- the use of strict timelines and a contingent list of panellists to overcome delays in agreeing the composition of dispute panels; and
- the use of panellists with specific expertise in disputes regarding the Labour and Environment Chapters.

7. Rules of Procedure (Article 21.8)

This Article sets high standards of openness and transparency through open public hearings, public release of legal submissions by both governments and opportunities for interested third parties to submit written views to the panel.

8. Panel Report (Article 21.9)

Consistent with the Agreement's commitment to maintaining the prominence of the two governments in resolving disputes between them, this Article:

- restricts panels to making findings of fact and determinations regarding consistency of a government's action with the Agreement. Panels may only make recommendations for the resolution of disputes where specifically requested to do so by the two governments; and
- panels must base their report only on the relevant provisions of the Agreement and the submissions and arguments of the Parties

9. Compensation for a breach of the Agreement (Articles 21.10 – 21.14)

These Articles provide a range of solutions where Australia or the United States is found to have breached the Agreement.

For breaches of trade obligations, the agreement requires:

- the breach to be corrected (Article 21.10); or
- trade compensation to be provided to the other country elsewhere in the Agreement by accelerating reduction in other tariffs, or by the other country suspending tariff reductions under the Agreement (Article 21.11).

An innovation introduced through this Agreement is the capacity of a government to choose to pay a monetary assessment in lieu of providing trade compensation (Article 21.11.5). This may prove a preferable policy option where:

- a breach cannot be rectified – where, for example, a state government measure is at fault and the Commonwealth has no constitutional capacity to intervene, and
- the Government does not consider it appropriate that traders in the broader economy should bear the burden of such a breach.

Such a monetary assessment will be set at fifty percent of the value of suspended benefits determined by the panel unless agreed otherwise by the governments (Article 21.11.5). The Joint Committee can agree that this monetary assessment be paid into a joint fund and expended on initiatives to facilitate trade between the United States and Australia (Article 21.11.6).

Where a Party is found to be in breach of its core commitment (not to fail to enforce effectively the Party's own laws) under the Environment

Dispute Settlement

or Labour Chapters (see Chapters 18 and 19), a dispute panel can impose an annual monetary fine, not exceeding US\$15 million, to be paid into a fund established under the Agreement for expenditure on appropriate labour and environment initiatives in the territory of the country that violated the Agreement, in a manner consistent with its law.

The Agreement makes specific provision for a review of the effectiveness of these compensation arrangements within the first five years, or following compensation being provided with regard to five separate complaints, whichever comes first (Article 21.14).

On 3 March 2003, the Minister for Trade, Mark Vaile, announced Australia's objectives for the negotiations.

Statement of Australian Objectives

Free trade leads to higher economic growth, better living standards and more and better job opportunities. The Government is committed to negotiating a Free Trade Agreement (FTA) with the United States that will reduce restrictions on the ability of the two countries to do business with each other. Australia will aim to ensure that the outcomes of the FTA negotiations complement and reinforce our objectives in the Doha Round of World Trade Organisation (WTO) negotiations and in Asia Pacific Economic Cooperation (APEC) forums, and set a high standard for other FTAs in the region. Australia's shared approach with the United States on many issues in both the WTO and APEC provides a strong foundation for achieving that goal.

The higher incomes that free trade brings will enhance the ability of both the US and Australia to achieve fundamental economic and social policy objectives. Nevertheless, the Government will ensure that outcomes from the FTA negotiations do not impair Australia's ability to meet fundamental policy objectives in health care, education, consumer protection, cultural policy, quarantine and environmental policy. The Government will continue to place a high priority on consultations with the States and Territories, industry and professional bodies and community organisations as the negotiations proceed.

The Government's specific objectives for negotiations with the United States are as follows:

Trade in Industrial Goods and Agriculture

- Seek to eliminate tariffs and other barriers to trade between Australia and the United States on the broadest possible basis.
- Seek the removal of tariff rate quota restrictions on Australian exports to the United States, including those affecting exports of beef, dairy products, sugar, peanuts and cotton.
- Seek the elimination or reduction of United States agricultural subsidies that affect Australian exports to the United States or to third country markets, as well as agreement for the United States not to subsidise exports of agricultural products to Australia.
- Reaffirm our commitment to work together in the WTO negotiations towards substantial improvements in market

Australian Objectives

access globally, eliminating all export subsidies on agricultural products, and substantial reduction in domestic support for agriculture.

- Seek the removal of legislative barriers to the export of Australian-built fast ferries and other vessels to the United States.
- Secure improved market access for Australian manufactured goods by addressing non-tariff barriers in such areas as standards certification and technical regulation.
- Pursue opportunities for harmonisation or mutual recognition of mandatory and/or voluntary technical standards.

Rules of Origin

- Agree on a set of rules of origin that ensure that the benefits of preferential tariff treatment under the FTA apply only to Australian and US goods eligible for such treatment while avoiding unnecessary obstacles to trade.
- Agree on conditions to maintain the integrity of the rules and seek to ensure they are not unnecessarily burdensome to administer from the points of view of business and government.

Quarantine / Sanitary and Phytosanitary (SPS) Measures

- Seek to have the United States reaffirm its WTO commitments on SPS measures and eliminate any unjustified SPS restrictions.
- Seek to strengthen cooperation between Australian and US quarantine authorities.
- Seek to reinforce mutual commitment to the development and application of science-based quarantine measures, consistent with the WTO SPS Agreement.
- Seek to strengthen collaboration with the US in implementing the SPS Agreement and to enhance cooperation with the US in relevant international bodies on developing international SPS standards, guidelines, and recommendations.

Trade Remedies

- Pursue exemption of Australian products from US general safeguards legislation.
- Seek provisions that minimise the impact of other US trade remedy laws on Australian exports to the US.

Customs Cooperation

- Ensure that the customs procedures of both parties are transparent, efficient, and consistent and that they facilitate trade.
- Strengthen cooperation in the investigation and prevention of infringements of customs law and in combating illegal trans-shipment of goods.
- Pursue harmonisation of customs policies, data and procedures, and develop cooperation in such areas as customs techniques and research and development.

Trade in Services

- Seek reduced impediments in accessing the United States market for Australian services suppliers such as providers of professional services, other business services, education services, environmental services, financial services and transport services.
- Explore the scope for improvements in the recognition of the qualifications and experience of Australian professionals in the United States.
- Look for opportunities to reduce any unnecessary access impediments imposed on Australian service suppliers by licensing requirements, standards or other regulations in the United States, including Australians seeking access to US capital markets.
- Pursue opportunities to enhance the temporary entry of business persons and other Australians to the United States.
- Ensure that the negotiations take account of Australia's cultural and social policy objectives, and the need for appropriate regulation and support measures to achieve these objectives in areas such as audiovisual media.
- Ensure that the outcome of the negotiations does not limit the ability of government to provide public services, such as health, education, law enforcement and social services.

Investment

- Seek an enhanced framework to govern investment flows between Australia and the United States that will complement the outcome of the negotiations in relation to trade in goods and services.
- Look for opportunities to reduce any unnecessary impediments that licensing requirements, standards or other regulations in the United States impose on Australian investors

Australian Objectives

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

Intellectual Property Rights

- Reaffirm the standards established in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and other international intellectual property agreements to which the USA and Australia are signatories.
- Seek to ensure that the rights of Australian holders of intellectual property are protected according to international standards in the US, including the right to be remunerated fairly for use of their works.
- Ensure that Australia remains free to determine the appropriate legal regime for implementing internationally agreed intellectual property standards, maintaining a balance between the holders of intellectual property rights and the interests of users, consumers, communications carriers and distributors, and the education and research sectors.
- Deepen cooperation on intellectual property issues of mutual interest, advancing our common objectives in multilateral intellectual property negotiations; and strengthening cooperation between our respective intellectual property agencies.
- Explore opportunities to work with the United States to promote the implementation of effective and appropriate intellectual property systems in the Asia-Pacific region, without limiting the scope of existing activities of this nature.

Telecommunications and Electronic Commerce

- Develop agreed principles in the regulation of telecommunications on the basis of non-discrimination, transparency, predictability, consultation with stakeholders and independence and autonomy of regulators.
- Address licensing and other procedural constraints on participation of Australian companies in the US telecommunications market.
- Seek to promote international Internet charging arrangements that are applied on fair, non-discriminatory and pro-competitive terms.
- Seek to enhance the growth of electronic commerce in goods and services with the United States in terms that promote the use of electronic commerce globally.

- Reaffirm the current practice of not imposing customs duties on electronic transmissions between Australia and the United States.

Government Procurement

- Agree on rules for government procurement that are flexible, transparent and fair.
- Seek to expand access for Australian goods and services to US government procurement markets.

Competition Policy

- Build upon existing bilateral treaty arrangements to foster cooperation on competition law and policy, and provide for consultations on specific problems that may arise.

State-to-State Dispute Settlement

- Encourage the early identification and settlement of disputes through consultation.
- Establish fair, transparent, timely, and effective procedures to settle disputes arising under the agreement.

Environmental issues

- Seek to ensure that trade and environment policies are mutually supportive by maintaining Australia's ability to protect and conserve its environment and to meet its international environmental obligations.