



Implications of the Australian-United States Free Trade Agreement: an ACOSS perspective

ACOSS Info 377 - July 2005

ACOSS is concerned that the Australian Government has pursued a preferential bilateral trade agreement with the United States, the Australia United States Free Trade Agreement (the Agreement) without adequate and sufficiently independent information being provided to the community about its potential effects or a proper process for consulting the community.

The potential implications of the Agreement appear to be poorly understood, even by the Government. The Government's assertions that the Agreement will be unambiguously positive for Australia do not sit easily with the concerns expressed across many fields, nor with the Productivity Commission's reservations about preferential trade agreements in general.¹

ACOSS has three principal concerns about the Agreement:

- the implication that Australia is departing from a policy of encouraging trade liberalisation as a means of tackling poverty in developing countries
- the potential negative impact on the Pharmaceutical Benefits Scheme and its users
- the impact on the capacity of the non-government community services sector in Australia and the potential reduction in Australia's capacity to make domestic policies which benefit all Australians, particularly for people who are living on low incomes or who are otherwise disadvantaged.

ACOSS INFO 377 — ISBN 085871 648 8 – ISSN 1442 486 X
Australian Council of Social Service
Locked Bag 4777 Strawberry Hills NSW 2012
Ph [02] 9310 4844 Fax [02] 9310 4822
www.acoss.org.au

Trade liberalisation and poverty in developing countries

¹ Adams, R., Dee, P., Gali, J. and McGuire, G. 2003, *The Trade and Investment Effects of Preferential Trading Arrangements — Old and New Evidence*, Productivity Commission Staff Working Paper, Canberra, May.

ACOSS is concerned that Australia's preparedness to make a trade agreement with the US which wins few concessions on reducing US agricultural subsidies and protections, signals a weakening of Australia's resolve to support trade liberalisation as a means of tackling poverty in developing countries.

In the light of the AUSFTA, it is difficult for the Australian Government to continue to argue that it supports the liberalisation of agricultural trade as its principal approach to reducing poverty in developing countries, as the Trade Minister did recently:

"There is no question that trade liberalisation, particularly in agriculture, has the potential to lift millions out of poverty world-wide. The World Bank estimates developing countries would gain about US\$100 billion a year if developed and developing countries removed all their trade barriers against developing country exports. This would far exceed the US\$57 billion developing countries receive each year in aid. With our partners in the Cairns Group, we are keeping pressure on the major agricultural subsidisers - EU, US, Japan - to live up to the Doha mandate."²

The Pharmaceutical Benefits Scheme (PBS)

The Pharmaceutical Benefits Scheme is a central part of Australia's public health system and is commonly regarded as one of the best systems in the world for the purchasing and subsidising of pharmaceuticals.

The Scheme is of particular importance to people living on low incomes who could not otherwise afford pharmaceuticals and to older people and people with chronic illnesses who are the heaviest users of medicines.

ACOSS supported the submissions of respected independent experts, with no vested commercial interest in the outcomes of the AUSFTA process, who were united in their opposition to the AUSFTA provisions relating to pharmaceuticals.

ACOSS agreed with the arguments in many of these submissions about the damage to the PBS and potential cost increases which would result from:

- the AUSFTA review process of PBAC decisions;
- relaxation of direct to consumer advertising regulation; and
- changes to patent laws³ which could limit competition from generic pharmaceutical manufacturers.⁴

ACOSS wishes to stress the particular negative impacts for people living on low incomes of higher drug prices. As the Government's 2002-03 Budget demonstrated, the Australian Government is already concerned about the current and future cost of the PBS to the Commonwealth Budget and used the Intergenerational Report which accompanied that Budget to justify an increase in consumer co-payments for medicines.

² Mark Vaile, *Speech at Bangladesh Festival*, 6 April 2004, http://www.trademinister.gov.au/speeches/2004/040406_bangladesh_festival.html

³ See in particular the submissions by The Australia Institute (Subs 171, 171a, 171b, 171c); Drahos, Faunce, Goddard and Henry (Sub 424) and Dr Ken Harvey (Sub 80, referring to a paper at www.econ.syd.edu.au/drawingboard/digest/0403/harvey).

⁴ Note that the legislative amendments introduced in the Senate provide fines for companies which try to stop cheap generic drugs being used in Australia.

Any substantial increase in the cost of the PBS is likely to attract political attention and whenever it does, the Commonwealth may attempt to contain budget costs by shifting costs to consumers. This almost always affects vulnerable consumers more severely.

Even if a Commonwealth Government decides to meet increased costs through public funding, this inevitably means cutting other areas of expenditure or increasing taxation. Both approaches are justified and possible when it can be shown that expenditure on the PBS is cost effective, but much harder to justify when the increasing cost of the PBS cannot be linked to improvements in health and well being.

In terms of funding increased PBS costs through cuts to other areas of budget spending, there is a real risk that this too will impact disproportionately on low income groups. Over 60% of the Commonwealth budget (health, housing and social security and welfare programs) is devoted to social spending which particularly benefits low income groups, and cuts to this expenditure have a heavy impact on these groups.

Regulation and funding of public, social and essential services

ACOSS is concerned that the Agreement leaves a significant degree of uncertainty about the freedom of Commonwealth and State Governments to 'adopt or retain' any measure relating to public, social and essential services.

While there appear to be general protections for domestic 'public services' and 'grants' to non-government organisations, it remains unclear whether community services delivered by non-government organisations in Australia via contracts on behalf of government (for example: home care, employment, aged care, and disability services) would be excluded from a definition of 'government procurement'.

The list of social services in Annex 2 to the Agreement is not exhaustive. The definition of a 'public service' in the Agreement does not satisfactorily reflect the situation in Australia where many public services are provided on a commercial or competitive basis, and the position on utilities regulation is unclear.

ACOSS strongly believes that regulation and funding of public, social and essential services (broadly and flexibly defined) should not be open to challenge under the Agreement because of the critical importance of these services to the well being of the Australian community and to the individual consumers of those services.

The regulation of these services is particularly important to protect the rights of low income and disadvantaged groups to good quality social and essential services on an equitable basis – and especially so in an environment where quasi-market mechanisms are increasingly used to distribute and deliver social services where less powerful consumers are particularly vulnerable.

The importance of non-profit community service organisations

Non-profit community service organisations have been at the forefront in developing and delivering community services in Australia. Over time, Australian governments have funded and greatly expanded many of these services in recognition of their importance to the Australian community. The development and expansion of child care is a good case in point.

Non-profit community service organisations are strong advocates on behalf of consumers and have striven to develop high quality services that are responsive to community needs. The community welfare sector also plays a central role in building the capacity of communities to resolve social problems and in fostering the bonds and connections within and between communities.

We believe that nurturing non-profit community service organisations is critically important to the continued development of innovative and high quality community services in Australia. These organisations are motivated by a different set of values than for-profit organisations and we believe it is in Australia's best interests to ensure that non-profit service providers continue to play a major part in the design, implementation and delivery of community services in Australia.

These unique roles would be seriously eroded if all or most community services were ultimately provided by commercial providers pursuing profits.

From our reading of the Agreement it appears that non-profit community services are not sufficiently protected under the terms of the Agreement.

The Agreement permits the Australian Government to maintain existing or devise new regulations in respect of certain social services in relation to the market access provisions of the Agreement, but the definition of social services is partial and poorly defined and so leaves open the possibility that the regulation of some existing services, such as employment programs, as well as new services, could be open to challenge under the Agreement. In relation to government procurement, governments will be permitted to adopt or maintain measures relating to the services of non-profit organisations, but it is not clear whether this protection covers services provided by non-profit organisations on behalf of government.

Cross border trade in services

Article 10 of the Agreement, which deals with cross border trade in services, states that the Article does not apply to:

- government procurement
- subsidies or grants provided by government
- services supplied in the exercise of government authority.

Putting aside the issue of government procurement for the moment, these provisions clearly protect services supplied by non-profit community service organisations where these services are funded by way of government grants or subsidies.

However, Article 1.2.22 defines services supplied in the exercise of government authority as a service which is supplied 'neither on a commercial basis or in competition with one or more service suppliers.' While this protects some services, it obviously does not protect services which are supplied on a competitive or commercial basis.

There are of course many examples of basic community services that are supplied on what may be called a 'competitive' or 'commercial' basis. At the Commonwealth level

the most obvious of these are employment, child care (long day care) and aged care services. Further, there are indications that current national and state government policy continues to promote contracting out and competitive tendering for community services.

Another problem is that the terms 'competitive' or 'commercial' are not defined in the Agreement, which creates uncertainty for service providers and regulators/funders alike. The NSW Government faced just this kind of problem when it argued it had called for 'expressions of interest' against the claims of community groups that it had introduced 'competitive tendering' for disability advocacy services.

When Chapter 10 is read with Annex 2 to Chapter 23 (Non Conforming Measures) it is clear that the Australian Government may maintain existing, or adopt new or more restrictive measures that do not conform with obligations imposed by Article 10.4 in relation to 'social services which are maintained for a public purpose – income security or insurance, social welfare, public education, public training, health and child care.'

To our knowledge, 'social welfare' services are not defined in the Agreement and nor are 'social services which are maintained for a public purpose' which creates confusion. We are concerned that unless 'social welfare' services encompasses services such as employment assistance programs, disability support and advocacy services, aged and community care services, community legal services and Indigenous legal services (as well as any future social services that may emerge), then it appears that these services, if delivered through contractual or competitive arrangements, will not be excluded from the application of Article 10.4.

This Article states that:

'Neither Party may adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that:

(a) impose limitations on:

- (i) the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers, or the requirement of an economic needs test
- (ii) the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test
- (iii) the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test, or
- (iv) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test, or

(b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.'

In other words, the Australian Government may be open to challenge under the Agreement where it exercises, for example, planning controls on the provision of community services or stipulates staff to client ratios for services.

Successful challenges to Australia's regulatory framework from the US Government on behalf of US commercial interests would, in our view, heavily favour the greater penetration of for-profit service provision in community services and see a gradual decline in service provision by Australian non-profit organisations.

Non-profit service providers could be forced to compete with for-profit providers in a regulatory framework which promotes opportunities for profit taking at the expense of quality standards and consumer/community interests.

As private, for-profit interests gain dominance in the 'market' for community services, we would expect to see significant and continuing pressure brought to bear on service regulations wherever these interfere with the profit maximising orientation of for-profit entities.

ACOSS believes the net effect of this drift would be greater inefficiency in the targeting of government expenditure to areas of need and to quality improvement.

Government procurement

Article 15 of the Agreement deals with government procurement and it appears possible that some community services could also be subject to these provisions.

The essence of Article 15 is that 'each Party and its procuring entities shall accord unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering the goods or services of that Party, treatment no less favourable than the most favourable treatment the Party or the procuring entity accords to domestic goods, services and suppliers.'

The provisions in this Chapter do not apply to 'non-contractual agreements or any other form of assistance that a party or government enterprise provides such as non-contractual agreements or any form of assistance that a Party or a government enterprise provides, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements, and sponsorship arrangements.'

As noted above, the majority of community services are supplied by community organisations under contract to governments and it may be possible that the Australian Government could be challenged where it provides favourable treatment to local non-profit providers of community services.

While there appears to be further protection for non-profit and philanthropic institutions under Article 15.12.1, which states that 'nothing in this Chapter shall be construed to prevent a party from adopting or maintaining measures relating to ... the goods or services of handicapped persons, of philanthropic or not for profit institutions, or of prison labour,' it is not clear what amounts to a good or service of a philanthropic or not for profit institution. For example, is a service provided by a non-profit community organisation under contract to government to be defined as a service of the non-profit community organisation or a service of government?

Conclusion

ACOSS is concerned that the Agreement is neither comprehensive nor clear enough in the protection it offers non-profit community services organisations and the services they deliver.

ACOSS recommended that the term 'social welfare,' as it appears in Annex 2 to Chapter 23, be defined to ensure that it covers all existing community services that are not explicitly covered under the current social services reservations, including but not limited to:

- employment assistance programs for unemployed people and disadvantaged job seekers
- residential, community and home care and support for people unable to function independently
- community legal services
- financial and material assistance for people experiencing hardship
- supported accommodation for homeless people
- counselling and family support
- community development, social capacity building and advocacy.⁵

In addition ACOSS recommended that the definition must also be broad and flexible enough to encompass any future services that are developed to promote social welfare.

ACOSS also recommended that Article 15.12.1 be amended to make it clear that services provided by non-profit institutions include the services they provide on behalf of government.

⁵ These categories have been derived from the Australian Institute of Health and Welfare National Classification of Community Services