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FREE TRADE AGREEMENT IMPLEMENTATION

Inside:

We review Australian legislative effects of the US-Australia Free Trade Agreement

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Legislative implementation of the US-Australia FTA

AAR's experts summarise the effect of the provisions of the US Free Trade Implementation Bill 2004 and the cognate bill, the US Free Trade Agreement Implementation (Customs Tariff) Bill. Both Bills passed the Senate and House of Representatives on 13 August 2004 and now await Royal Assent.

Introduction

The US Free Trade Implementation Bill 2004 (the **Implementation Bill**) consists of 10 schedules that amend relevant Australian legislation to fulfil Australia's obligations under the Free Trade Agreement between Australia and the United States (**AUSFTA**). The US Free Trade Agreement Implementation (Customs Tariff) Bill (the **Customs Tariff Bill**) amends the *Customs Tariff Act 1995* (the **Customs Tariff Act**), as discussed below.

Both Bills were passed in the Senate on 13 August, following amendments proposed by the Opposition and accepted by the Government relating to the Australian content standard for commercial television and relating to the commencement of patent claims by patent holders against generic pharmaceutical manufacturers.

Purpose and scope of the Bills

The Bills implement the necessary changes to domestic law to give effect to the AUSFTA. The Bills do not present the full picture of AUSFTA. For example, the increases in market access to the US for Australian goods and services by US tariff reductions or tariff quota increases are dealt with by US domestic processes and many of the operative provisions of the Bills require substantial reliance on regulations to implement the details of the legislation.

This article should not therefore be read as a complete overview of the AUSFTA, which is an unusually prescriptive and detailed agreement. An excellent overview is set out in the June 2004 report of the Joint Standing Committee on Treaties report into the AUSFTA (*JSCT Report*).¹ See also the Final Report of the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, dated August 2004, particularly the introduction and summary.²

Timing

Usually Commonwealth legislation commences on Royal Assent. However, the US and Australian governments intend that the AUSFTA should enter into force on 1 January 2005, but this depends upon the date of exchange of notes between the parties as to the completion of their respective domestic procedures. The AUSFTA comes into force 60 days after exchange of those notes, and a 1 January 2005 commencement date will require an exchange of notes by 2 November 2004.

From Australia's perspective, the passage of the Bills on 13 August makes this timetable achievable.

Therefore, in general, the amendments to legislation implemented by the Bills have a commencement date of the later of 1 January 2005 or the date the AUSFTA comes into force.

The AUSFTA's legal effect

Treaties, including trade treaties such as AUSFTA, are made by exercise of executive power, while domestic legislation required to give effect to obligations assumed under a treaty are made by the Parliament under the external affairs power in the Constitution.

That is, the AUSFTA becomes part of Australian domestic law only to the extent that the Bills implement it. Once the AUSFTA comes into force, those parts of it that are not implemented by the Bills:

- are nevertheless legally binding between the Australian and US Governments; and
- take legal effect by giving rise to rights as between those governments only, particularly in relation to dispute settlement mechanisms and binding enforcement processes.

1. See <http://www.oic.org/z/FZIG/A/ds/>

2. See http://www.aph.gov.au/Senate/committee/freetrade_ctte/report/final/index.htm

No private rights are conferred by the treaty alone and the AUSFTA does not, at this stage, contain any investor-state dispute settlement mechanisms.

Finally, either Government may terminate the AUSFTA by giving the other six months' notice in writing. However, until terminated, the AUSFTA, like any other treaty, effectively binds a future Australian Government.

The Customs Tariff Bill

The Customs Tariff Bill provides duty-free access to certain goods and preferential rates of customs duty for other goods that are US-originating goods in accordance with a new division inserted in the *Customs Act 1901* by the Implementation Bill (see 'Customs' paragraph below).

Provided that the rules of origination in the *Customs Act* are satisfied then, for the specified goods, the *Customs Tariff Act* is amended to the rates specified in the Customs Tariff Bill.

While a range of goods immediately are 'free' under the *Customs Tariff Act* from the commencement of the Bills, other goods are phased to 'free' from the preferential rates set at commencement by 2015. Certain alcohol, tobacco and petroleum products will continue to be subject to rates of customs duty that are equivalent to the rates of excise duty that would be applied to those goods if they were manufactured locally. Special provision is made for US footwear.

The Implementation Bill

Schedule 1: Customs

The Implementation Bill amends the *Customs Act 1901* to insert a new division defining US-originating goods. These are the US goods eligible for preferential rates of customs duty under the *Customs Tariff Act* (see above).

The rules on origination in the Implementation Bill are fact-based and relatively complex. They depend on the nature of the goods in question (that is, their tariff classification) and where the goods are obtained or produced.

In the case of non-US or Australian origination of materials comprising goods (other than clothing or textiles) produced in the US or in the US and in Australia, US origination will be conferred if three essential requirements are fulfilled:

- that sufficient transformation of the goods has occurred in the US or in the US and Australia (or the non-originating material does not exceed 10 per cent of the customs value of the goods);
- that the good satisfies the regional value requirement; and
- that the good satisfies any other requirement set out in the Free Trade Agreement Regulations.

The sufficient transformation requirement is aided by the drafting device that requires non-US or Australian originating materials to be classified under one tariff classification before the production process and a different tariff classification after the production process. The Explanatory Memorandum to the Implementation Bill states that Australian business and the Australian Customs Services have endorsed this 'Change in Tariff Classification' criteria for the rules of origin as less costly to administer.

The AUSFTA becomes part of Australian domestic law only to the extent that the Bills implement it.

This follows significant industry disquiet over the potential complexity in rules of origin. We do not perceive any decreased complexity in these provisions.

Additionally, the Implementation Bill amends the *Customs Act* to give the Australian Customs Service the power to conduct verifications of Australian exporters in order to ensure that textile or apparel goods that they export to the US have been produced in Australia.

Schedule 2: Agricultural and veterinary chemicals

The Implementation Bill amends the *Agricultural and Veterinary Chemicals Code Act 1994* by restricting the use of information provided by an applicant to the Australian Pesticides and Veterinary Medicines Authority unless the first applicant consents. Data protection prevents the practice of 'springboarding' generic products. There is a public interest exception that requires 28 days prior notice to the applicant unless there is an imminent risk to public health or occupational health and safety.

Information provided in connection with a product that has been registered cannot be used to register

a second equivalent product for a period of 10 years after the registration if there is no consent or if the registration of the second product would be commercially unfair.

Schedule 3: Australian Geographic Indications for Wine

The Implementation Bill amends the *Australian Wine and Brandy Corporation Act 1980* to insert provisions relating to the determination of Geographical Indications (**GIs**) that deal, in particular, with the conflict between GIs and trade mark rights.

The amendments provide procedures for a trade mark owner to object to the determination of a GI whether or not the trade mark is registered. The onus will be on the trade mark owner to give Notice of Objection and trade mark owners should therefore monitor the advertisement of proposed GIs. A proposed GI can be objected to on the ground that a prior trade mark is identical to the proposed GI or that the proposed GI is likely to cause confusion with a word or expression that the trade mark consists of or contains.

In addition, the Implementation Bill provides a discretion for the Registrar to allow a proposed GI in certain circumstances, even where an objection is made. An appeal from the Registrar's decision lies to the Federal Court. New provisions are introduced to allow for GIs to be omitted from the Register in circumstances where they are not in use or no longer required.

Schedule 4: Life insurance

A foreign life insurance company may not knowingly issue a life insurance policy (ie a life policy with a risk component) to a person in Australia, unless it establishes a subsidiary in Australia registered by the Australian Prudential Regulatory Authority (**APRA**) and carries on business within Australia through that subsidiary.

The AUSFTA provides that certain eligible foreign life insurance companies may carry on a life insurance business through a branch without breaching the *Life Insurance Act 1995*.

In order to be an eligible foreign life insurance company, the company must:

- be a corporation incorporated in a foreign country – for this purpose the Regulations may list the countries to which the Act applies (that is, more than the US);

- be authorised to carry on life insurance business in that foreign country;
- meet conditions set out in Regulations and under Prudential Standards established by APRA;
- establish a branch in Australia in the sense that they have an Australian permanent establishment as defined in sub-section 6(1) of the *Income Tax Assessment Act 1936* (Cth) and so become liable to Australian taxation;
- give APRA an address for service; and
- where it carries on insurance business in Australia, establish a Compliance Committee. The Compliance Committee must consist of persons with powers of management for the Australian operations and those management powers must be sufficient to enable those persons to ensure that the company complies with the Prudential Standards relating to the Australian business.

The AUSFTA, like any other treaty, effectively binds a future Australian Government.

The provisions will not apply to an existing life company registered under the *Life Insurance Act*.

Schedule 5: Foreign acquisitions and takeovers

The amendments to the *Foreign Acquisitions and Takeovers Act 1975 (FATA)* depend for their efficacy on the passing of supporting regulations to define the corporations and government investors that can take advantage of the following liberalised foreign investment arrangements:

- exemption from the FATA for acquisitions of interests in financial sector companies, as defined by the *Financial Sector Shareholdings Act 1998*;
- introduction of an examination or screening threshold of A\$800 million, indexed annually, for acquisitions of interests in Australian businesses in non-sensitive sectors; and
- introduction of an examination or screening threshold of A\$50 million indexed for acquisitions in defined sensitive sectors, including media, telecommunications, transport and port facilities, security technologies and extraction of uranium.

Clearly enough, the initial regulations will define US corporations and the US Government as the entities that will have the benefit of the significant liberalisation

in inbound investment. However, as drafted, the liberalising benefits may be extended to other countries.

Schedule 6: Commonwealth authorities and companies

The Implementation Bill amends the *Commonwealth Authorities and Companies Act 1997* to empower the Minister for Finance to issue directions to prescribed government authorities relating to procurement. The amendments require that such directions must not be inconsistent with Australia's obligations under any international agreement that deals with government procurement – such as the AUSFTA.

It has been clarified that those directions may apply, adopt or incorporate some or all of the *Commonwealth Procurement Guidelines* issued under relevant regulations. Accordingly, those guidelines are extended beyond the public service to prescribed government authorities and it is understood that other changes to ensure compliance with AUSFTA requirements not to discriminate against US providers in awarding government contracts will be effected through amendment to those guidelines.

Schedule 7: Therapeutic goods

The Implementation Bill addresses the relationship between innovator drug manufacturers and generic drug manufacturers by introducing steps into the Therapeutic Goods Administration (**TGA**) marketing approval process. This was the major political issue that resulted in the amendments to the legislation passed on 13 August.

An applicant seeking marketing approval from the TGA must provide one of the following two certificates:

- a certificate to the effect that the applicant is not marketing, and does not propose to market, that therapeutic good in a way that would (*in its reasonable belief*) infringe a *valid claim* of a patent; or
- a certificate to the effect that the applicant proposes to market the therapeutic good before the expiry of the patent for the good and that the applicant has notified the patentee about its application to include that good in the register.

The italicised words are the result of amendments proposed by the Federal Opposition as a condition of passing the Implementation Bill and will render the provision largely ineffective, since generic companies



will always assert that they believe they are not infringing a valid claim. It is therefore unlikely that many notices will be issued in accordance with the second procedure.

There will nevertheless be an obligation on the generic company to make searches and obtain advice to support the applicant's belief. If the applicant provides a certificate that is 'false or misleading in a material particular', that applicant will be guilty of a criminal offence (penalty A\$110,000).

As a result of the Opposition's amendments, the legislation now also requires manufacturers to certify that patent infringement proceedings have been commenced in good faith, have reasonable prospects of success, and will be conducted without unreasonable delay. These obligations are similar to current duties to the court, although they go further in some respects. This change is unlikely to impact substantially upon the number of patent infringement actions commenced.

However, patentees will need to make searches and obtain legal advice to support the 'reasonable prospects' certificate. If the certificate is 'false or misleading in a material particular', the innovator drug company is liable to a maximum penalty of A\$10 million.

The final Opposition amendment relates to the grant of interlocutory injunctions to temporarily stop the infringement of a patent pending a full determination of validity and infringement. The proposal provides for generic manufacturers, the Commonwealth, and States and Territories to recover compensation where an interlocutory injunction has been issued and the patentee fails to win the full determination. In assessing compensation, the proposal provides that a court may order compensation to the generic on the basis of an account of the gross profits of the patentee, without requiring the generic to establish or quantify any loss.

Interlocutory injunctions have been rarely granted in pharmaceutical patent cases in the past 20 years, so the immediate practical impact of this provision is likely to be small. However, it imposes potentially onerous penalties on patentees who do obtain interlocutory injunctions, and is likely to further deter patentees from seeking them even in cases where they would have been warranted. Ironically, the legislation may actually improve the chances for those patentees who do seek interlocutory injunctions. The extent of the penalties and protections given to the generic manufacturer and

the government may shift the discretionary balance in favour of a court granting an interlocutory injunction.

It appears that the legislation, as amended, may not comply with the AUSFTA, and that issue may be raised by the US in due course.

Schedule 8: Patents

The Implementation Bill amends the *Patents Act 1990* (Cth) in a relatively minor way to extend the grounds available to oppose a patent, with the result that the available grounds of opposition reflect the grounds of revocation. The amendments provide that a patent may be opposed, and subsequently refused, on the ground that the invention is not useful, or that there was a secret prior use of the invention. Also, the amendments remove the provision that a patent may be revoked on the ground of non-compliance with a condition.

Schedule 9: Copyright

Schedule 9 of the Implementation Bill deals with amendments to the *Copyright Act 1968* and they are the most complex changes implemented by the Implementation Bill.

- **New performers' rights** – Performers will be given co-ownership rights and moral rights in sound recordings of their performances. Currently, the person who makes a sound recording is the sole owner of copyright. Performers' rights will be retrospective and affect all sound recordings not in the public domain. The moral rights regime, which currently only applies to the authors of literary, musical, dramatic and artistic works and directors of films, will be extended to performers in respect of sound recordings but not audio-visual performers.
- **Extension of term of protection of copyright by 20 years** – The term of protection will be extended by 20 years for most copyright material, from 50 years from death of author or first publication (whichever is applicable depending on the particular subject matter) to 70 years from death of author/ first publication. The extension will apply to literary, dramatic, artistic and musical works and sound recordings and films; but not to broadcasts. The extension will not revive copyright protection for material already in the public domain.
- **Expansion of protection of encoded broadcasts** – The range of criminal and civil penalties will be expanded for the unauthorised manufacture, distribution and use of broadcast decoding devices relating to subscription television signal piracy (whether cable or wireless). These actions will



now be available to content owners and channel providers in addition to broadcasters. However, the Implementation Bill does not implement Australia's obligation under the AUSFTA to criminalise the non-commercial end-use of unauthorised broadcast decoding devices (home piracy).

- **Carriage service provider liability** – The liability of carriage service providers (eg ISPs) for the infringing acts of their subscribers will be limited if they satisfy certain conditions. Unlike the US 'safe harbour' regime, which has a lower threshold, a court must determine that infringement has occurred before an ISP is required to 'take down' material. Detailed 'take down' procedures will be prescribed in regulations.
- **Definition of 'material form'** – This concept has been expanded to apply to all forms of storage of a work or other subject matter, whether or not they allow further reproductions, eg temporary reproductions. This will provide rights holders with greater protection in a digital environment.
- **Electronic rights management information (ERMI)** – There has been an expansion in both the definition of ERMI and the scope of actions against the removal of ERMI or dealing with material that have had ERMI removed.
- **Technological protection measures** – Australian copyright law already contains provisions recognising technological protection measures and conferring rights of action against persons circumventing those measures. The AUSFTA requires an expansion of the scope of these provisions. However, Australia has two years in which to enact these requirements and, as a result, the Implementation Bill does not address them.

Schedule 10: Broadcasting

Following amendments proposed by the Opposition and accepted by the Government, the Implementation Bill amends the *Broadcasting Services Act 1992*:

- The *Broadcasting Services (Australian Content) Standard 1999* as in effect on 4 August 2004, or another standard 'having the same effect', must be in force at all times. That Standard, as at 4 August 2004, required that commercial television broadcasting licensees meet certain transmission targets for the broadcast of Australian content, including drama and children's drama – commonly known as the 55 per cent local content rule.
- Section 5 of the *Television Program Standard 23 – Australian Content in Advertising* as in effect on 4 August 2004, or another standard 'having the same effect', must be in force at all times. That section, as at 4 August 2004, required that at least 80 per cent of non-exempt advertising time broadcast in a year by a commercial television broadcasting licensee is occupied by Australian-produced advertisements.

This Schedule, introduced into the Senate on 4 August 2005, is broadly consistent with Recommendation 12 of the JSCT Report.

Conclusion

AUSFTA is a complex and detailed treaty. It is, however, a living agreement between the US and Australian Governments and it should not be assumed that there will not be further changes to the treaty or to Australian legislation to ensure compliance with it. We will continue to monitor developments.

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