Cosmetic concessions?

Dangers in the Australia-US trade agreement and how it is being sold to Australian voters

Colette Ormonde, ALIA copyright advisory service

The selling of the trade deal between Australia and the United States, to groups of somewhat suspicious citizens in both countries, has begun.

The Australian government has given the tender for an analysis of AUSFTA's economic impact to the Canberra-based Centre for International Economics (CIE), the organisation which the government used for the initial econometric modelling, in order to justify the opening of negotiations two years ago. That modelling predicted that an FTA with the United States, phased in over the next five years, would boost Australia's gross domestic product by over $3 billion a year by 2010. These findings were contested by ACIL Consulting who reported that, by 2010, such a deal would cut gross domestic product by $130 million a year or worse if Australian sugar failed to gain access to US markets. Sugar, as we now know, is the most obvious failure of the negotiation for Australia.

Choosing a firm committed to a particular result is one problem, especially for those, including many of Australia's parliamentarians and constituents, who would like to see the FTA get some genuinely impartial analysis and (given the vagueness of some of its language) some detailed explanations of definitions and processes.

Having CIE report by 8 April is another problem. The negotiation of this complex agreement has taken only a year. The parties announced their satisfaction as they placed different interpretations of 'who won what' on their respective departmental websites. The text of the agreement continues to undergo a fascinating process of 'legal massaging' while different interest groups discover a lack of clarity in a number of clauses. For example:

- the different and imprecise references to 'audio-visual services' and 'digital products' in discussing trade and local content regulation.
- the reservation relating to indigenous intellectual property, which should, but may not give, sufficient protection to recognition of indigenous ownership of oral knowledge and secret processes.
- the failure to identify rising costs of pharmaceuticals from our exposure to litigious American companies.
- the exposure of Australian government procurement to US companies, with an acknowledgement that they will do better than Australian companies bidding for US government contracts (Marcus Priest, 'FTA will pose stiffer competition', *Australian Financial Review*, 8 March 2004:7).
- the legal costs of challenging decisions under this Agreement.
- the cost to Australia, a nation of creators and information users, of privatising the public domain.

Those who support the trade deal argue that Australia's concessions are largely insubstantial, compared with the benefits. Trade Minister Mark Vaile told an interviewer on ABC radio's *The world today* on 11 March that people should trust the government's promises regarding these benefits.

Political correspondent for the *Australian Financial Review*, Mark Davis informed readers, in 'Benefits of the trade deal' 6–7 March: 22, that Australia had agreed to 'stiffen up' local copyright and intellectual property laws and '... give pharmaceutical manufacturers more scope for pushing their claims to have their medicines listed on the Pharmaceutical Benefits Scheme...'. Are these those same manufacturers who are prolonging patent protection to choke off competition from generic drug companies making cheaper drugs? Is this the same Pharmaceutical Benefits Scheme which Treasurer Peter Costello, in last year's polemic on Australia's ageing population, forecast as endangered within the next twenty years by cost blowouts?

'Public debate over the deal is being dominated by the limited and *largely cosmetic concessions* [author's emphasis] Australia has made to the US in areas like pharmaceuticals and local content rules for entertainment and by what Canberra didn't get from the deal — complete free trade in farm goods,' David commented.

But isn't that what free trade deals are supposed to be about, freeing up trade in commodities? And isn't that why intellectual property, with its careful balancing of public and private interest, sits as an anomaly in trade deals because it has been put there to privatise public property and access?

Copyright balance and the public domain

The extension of the copyright term from death of the creator plus fifty years to death plus seventy years, and the further proposed extension to all works, including performance, is touted as one of the 'cosmetic' concessions.

In previous *inCite* articles, I have referred to a briefing paper prepared by the modern father of market-forces economics, Milton Friedman and seventeen other economists which calculated the gains of an extra twenty years of protection for an individual work as less than one US cent per year. So the heirs of Australian author Thomas Keneally (who opposes the term extension because he understands the importance of the public domain to creators) might get $20 if they are lucky. Of course if you are a mega-product owner like Disney, the sponsor of infinity minus a day terms, or Sony or Time Warner, $20 times a million or so is worth fighting for.

The other side of this coin is the cost of tracking copyright owners of older material. As all librarians know, substantial numbers of older works still in copyright are not exploited commercially after first publication. Often owners cannot be found. The 2002 edition of *Books in print* showed that while the number of books in print (in English) from 1999 to 2002 was more than 600 000, the number of books in copyright and still in print, published between 1920 and 1950, was less than 6000.

The cost of seeking permission to reproduce a work or part of a work increases dramatically over time. An American study showed an average of $120 per item. And that is with no guarantee of finding the copyright owner or of finally getting the permission. You may be spending that money for no result, because, whatever the efforts you make to find the copyright owner, you can not use a 'good faith' argument to copy on promise of payment if the owner ever turns up.

And all of this applies to other works, music, art, photographs, collections of ephemera which local history libraries may wish to digitise and which have no likelihood of commercial exploitation.

Of course, Australian State and Federal Parliamentarians may not understand the impact of increased copyright restriction on the rest of us, since they are exempt from most restrictions under s.48A of the *Copyright Act*. Or perhaps, since there is no explicit reservation for them in the FTA, they will make the sacrifice with the rest of us.

When, in 2 March Senate Estimates, the Opposition spokesperson on trade, Senator Stephen Conroy, questioned chief Australian negotiator, Stephen Deady, on the economic effects of the copyright term extension, Mr Deady said he knew nothing of the Friedman report, but that the extension would bring great

benefits to Australian content creators.

Other expression of the monopoly mindset of US negotiators, advised by corporate interests, was their opposition to parallel importation, an example of removing monopoly from trade and reducing consumer costs which the Australian Government has legislated for. Apparently US negotiators on intellectual property matters believe that competition may encourage piracy. As for moral rights, no harmonisation here while the Motion Picture Industry of America still has a lobbying dollar to spare. The MPAA and American publishers like AOL Warner and Time, busily extinguish the rights of creators by pressuring them to sign work-for-hire contracts, without, of course, the labour law protections of employees.

So this is the regime which is going to encourage Australian creativity and innovation?

Libraries already pay considerable financial costs for copyright management. If they are not compensated for further costs incurred by extension of the copyright term and the other privatising proposals in the Digital Agenda Amendment review, they will reduce their purchases which will in turn reduce the income of living creators.

By capitulating to US negotiators on digital copyright, the Government has pre-empted the review of the Digital Agenda Amendments to the Australian *Copyright Act* and distorted the traditional balance of interests between copyright owners and users fundamental to the concept of intellectual property. The recommendations of the Copyright Law Review Committee on Copyright and Contract, particularly the principal one that contractual terms should not extinguish access to information permitted under the *Copyright Act*, are sidelined by this Agreement.

ANU academic and member of ALIA's Copyright and Intellectual Property advisory group, Dr Matthew Rimmer has commented that the FTA imposes on us the strict protection measures of US law without their constitutional guarantee of protection limits or the broad doctrine of fair use.

Cultural exemption and the Australian Coalition for Cultural Diversity

Australians should continue to lobby for cultural exemption. In this agreement our government has sacrificed its unfettered right to legislate for the cultural expression of our unique history, experience and diversity and we receive no compensating cultural benefit from the United States in return. A mishmash of clauses and terms, which appear across the document, require further clarification.

New media

The Australian Coalition for Cultural Diversity, which represents the interests of writers, screen producers and directors, musicians, performers, artists and journalists is concerned about the terms 'audio-visual services', 'interactive audio-visual services' and 'digital products' used in different parts of the agreement, including e-commerce. The committee wants more detail in definitions, content protection and clarification of dispute processes.

Free-to-air television

Existing provision for 55 percent local content on free-to-air television cannot, under the FTA be raised. If a future government lowers it (or in FTA-speak 'ratchets it downwards') it can not for practical purposes be ratcheted up, since the 'transparent process that includes consultations with any affected parties including the US' is obviously never going to lead to increases.

Pay television

Australian pay television providers may have to double their investment in Australian content from ten percent to twenty percent, if the government finds that the expenditure quota is not sufficient to produce the required local content. This is because of the higher cost of original Australian productions, compared to imported package deals, produces a ratio of ten percent investment to three percent content.

Music on commercial and community radio

These media are very important for the airing of Australian music and the promotion of Australian performers. Under Annexe II of the agreement, the government cannot impose a quota for Australian music higher than twenty-five percent of commercial programming. Community radio, a vehicle for much cultural and genre musical diversity not broadcast elsewhere, is ignored. This may be interpreted negatively in terms of Australia's interests.

Sinister dispute mechanisms

The clauses in the FTA relating to disputes over cultural matters are sinister in their implication, especially set against the prediction of chief negotiator Robert Zoellick, on the US Trade Department website, that 'The FTA contains important and unprecedented provisions to improve market access for US films and television.'

In Annexe II (f) interactive audio and/or video services, for example:

'Any measures [to address greater access for Australian content] addressing such a situation will be implemented through a transparent process permitting:

- *'participation by any affected parties'* [author's emphasis],
- 'be based on *objective criteria'* [author's comment: not stated, set by whom?],
- 'be the *minimum necessary'* [in whose opinion and how could this possibly be measured in relation to cultural expression?],
- 'be no more trade restrictive than necessary, not be unreasonable burdensome', [ditto, ditto] and
- 'be applied only to a service provided by a company that carried on a business in Australia in relation to the supply of that service' [what purpose does this definition serve and whose interest or interests does it satisfy?] ■