The Australia-US Free Trade Agreement

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This article will examine some of the Australia-US Free Trade Agreement (**FTA**) provisions with a particular focus on Chapter 17, *Intellectual Property Rights*, and how Australia will be affected by the FTA.

The Australia-US FTA has recently been passed by the Senate with amendments aimed at protecting Australia's pharmaceuticals benefits scheme (**PBS**) as well as local content requirements for Australian television.

Trade in manufactured goods

The most immediate impact of the deal is that more than 99 per cent of US manufactured goods will become duty-free and could lead to an increase of at least US$2 billion of imports of US goods. The US trade department describes this as " . . . the most significant immediate reduction of industrial tariffs ever achieved in a US FTA".[1]

The PBS

The amendments introduced by Labor aim to prevent big US drug companies from engaging in a practice known as "evergreening" whereby new patents are taken out on products whose patents are about to expire. However, Professor Peter Drahos from ANU does not believe that these measures are adequate to prevent this from happening. The penalties are not deterrent when compared to the size of the global market in the drugs of interest to large pharmaceutical companies, and generic companies face considerable evidentiary burdens in using the provisions. Professor Drahos believes that the impact of the FTA will not be realised for another five years because it will only affect new medications, at which time, consumers will have to pay at least a third more for PBS medications.[2]

Chapter 17: Intellectual property rights

Chapter 17 of the FTA is entitled "Intellectual Property Rights". The provisions of this chapter aim to: strengthen the rights of performers;[3] extend copyright protection to the life of the author plus a minimum of 70 years;[4] increase protections and penalties in relation to circumvention of technological protection measures;[5] impose criminal sanctions for unauthorised decrypting of encrypted satellite material;[6] harmonise design and patent protection laws;[7] and criminalise copyright infringements.

The FTA also provides exemptions from patent law provisions in relation to inventions necessary to protect public order or "morality including to protect human, animal or plant life or health or to avoid serious prejudice to the environment".[8]

The FTA also provides increased protection to Internet service providers and also extends copyright to electronic management information to life of the author plus 70 years minimum.

Nothing in the FTA changes our laws in relation to "fair use" provisions and we do not have to adopt US-style fair use provisions.

Kimberlee Weatherall, lecturer in trade marks at the University of Melbourne, says "the FTA is far too detailed; it unduly constrains Australia's IP [intellectual property] policy-making freedom in the future. IP policy has to change in response to technological developments and, contrary to the Australian government's assertions, we have simply not kept sufficient flexibility to implement our own laws and our own balance".

Open-source software and the FTA

Another source of concern is the potential for the FTA to limit or prevent the development of open-source software.[9] According to Kimberlee Weatherall "the anti-circumvention provisions and exceptions are far too constrained. I am concerned that innovative young industries like the open-source industry will be adversely affected – as they have been in the United States by the DMCA [*Digital Millennium Copyright Act*]". ■

1. http://www.ustr.gov/Document_Library/Fact_Sheets/2004/U.S.-Australia_Free_Trade_Agreement_Brief_Summary_of_the_Agreement.html
2. Evatt Foundation Publication: The FTA and the PBS http://evattt.org.au/publications/papers/126.html.
3. FTA Article 17.4[1(b)].
4. FTA Article [17.4(4(a))].
5. FTA Article [17.4(7)].
6. FTA Article [17.7].
7. FTA Article [17.8] and [17.9].
8. FTA 17.9(2(a)).
9. http://www.linux.org.au/fta.

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enter into negotiations on the recognition of qualification requirements, qualification procedures, licensing or registration procedures: Article 806(2). However, it appears on its face to be less likely that Article 806(2) will produce substantive results for the mutual recognition of the standards used by either country for the authorisation, licensing or certification of services suppliers. Its language is non-mandatory and given the domestic sensitivities surrounding this issue in both countries, Article 806(2) may be a dead-letter provision.

The services chapter also locks into place a future program of liberalisation. The parties have agreed to enter into further negotiations on services within three years of entry into force of the TAFTA: Article 812(1). Unlike the GATS, the services chapter of TAFTA does not have a Most Favoured Nation clause. However, under Articles 812(3) and 812(4), if a country were to undertake unilateral services liberalisation or enter into an agreement with a third party providing for better access, the other country may ask for the resulting more liberal regulatory treatment to be extended to it. The liberalising country is, however, under no compulsion to accede to such a request. While not couched in mandatory terms, these provisions do hold out the prospect for better market access for Australian service suppliers as Thailand's market reforms and push to conclude other bilateral free trade agreements gathers pace.

TAFTA in the key area of services is clearly modest in its achievements. The range of up-front commitments by Thailand will see the relaxation of equity thresholds in a limited number of sectors and the implementation of various business facilitation measures. However, with some exceptions, Thailand undertook no liberalising commitments in respect of key service sectors such as professional services, financial services and telecommunications. In the case of Australia, its services commitments under TAFTA will not actually reduce any barriers faced by Thai service exporters. Australia has merely committed itself to a standstill. Moreover, both countries appear to have also sidestepped the opportunity to tackle some key barriers to services trade such as qualification requirements and procedures, technical standards and licensing requirements. In short, the TAFTA will not produce any big-bang significant reductions in the barriers that characterises the bilateral trade in services between the two countries.

What TAFTA does, however, is to provide a foundation for the progressive liberalisation of that trade. The explicit commitments by both countries to engage in future negotiations, to cooperate in the services area, and to consider requests from each other for the enhanced access that may arise in other contexts, are clear positives of TAFTA. Through these commitments the processes required for achieving greater and more effective market access may ostensibly be in place and could be called on in due course by Australian trade negotiators. Whether these commitments will deliver is a story that remains to unfold. ■

New CGT concession for shares in active foreign companies

By Khai-Yin Lim, Solicitor, Rigby Cooke Lawyers

The third instalment of the government's international tax reforms, the *New International Tax Arrangements (Participation Exemption and Other Measures) Act* 2004 (Cth), received royal assent on 29 June 2004.

Among other things, the changes will generally allow Australian multinational companies to repatriate profits of their foreign active businesses to Australia without incurring Australian tax.

The new regime aims to ensure Australian multinational companies and their foreign subsidiaries can compete more effectively in capital markets. It enables companies to restructure their foreign shareholdings without being overburdened by Australian tax considerations.

Before the amendments, Australian companies were liable to tax on capital gains arising from the disposal of shares in foreign subsidiaries, including those with underlying active businesses.

Broadly, the amendments will reduce the capital gain or capital loss a company makes from specified capital gains tax (**CGT**) events happening on or after 1 April 2004 to shares in a foreign company where the foreign company has an underlying active business.

The specific CGT events that are affected are CGT events A1, B1, C2, E1, E2, G3, J1, K4, K6, K10 and K11. However, it is likely that CGT event A1 will be the most common event as it relates to the disposal of a CGT asset.

This CGT concession does not however apply to eligible finance shares or widely distributed finance shares.

Eligibility for the concession

To be eligible, the resident company must have held a direct voting percentage in the foreign subsidiary of at least 10 per cent, for a continuous 12-month period in the two years immediately before the CGT event.

This means that if there is a trust or a partnership interposed between the shareholding entity and the foreign company, then the company will not be taken to hold a direct voting percentage in the foreign company.

It also means that the concession only applies to shares in a foreign company that conducts an active business, not to shares that are a mere temporary investment.

Further, it allows the concession to be available for up to a year after the company ceased to hold at least a 10 per cent direct voting percentage that is held for at least 12 months. It also allows companies to retain eligibility for the concession in cases where they sell their shares in foreign companies in instalments.

Reduction of capital gains and capital losses

The resident company may reduce its capital gain or capital loss by the active foreign business asset percentage, which is the proportion of the value of active foreign business assets as compared to the value of total assets owned by the foreign company.

Where the result of the calculation is 90 per cent or more, the active foreign business asset percentage is taken to be 100 per cent. In this situation, the capital gains arising from the CGT event in relation to the shares in the foreign company will be reduced to nil, and thus exempt from capital gains tax.

However, all capital losses arising from the CGT events will also be disregarded. Thus, where capital losses arise, the new rules do not provide a concession. The capital losses are not available to be deducted against any capital gains arising during the income year nor will they be available to be carried forward to be deducted against future capital gains.

On the other hand, if the result of the calculation is less than 10 per cent, the active foreign business asset percentage is taken to be nil and all capital gains arising from the relevant CGT event will be subject to tax. All capital losses that arise from the CGT event will be available to be deducted from any other capital gains or carried forward to be used against future capital gains.

The active assets and total assets owned by the company can be valued either using market values or book values.

Active foreign business asset

An active foreign business asset is either of the following:

- an asset (e.g. trading stock, plant and equipment, land and buildings) that is used, or held ready for use, by the company in the course of carrying on a business;
- goodwill; or
- shares in a company (but not a resident company).

Active assets also include trade debts used solely in carrying on a business.

Excluded assets

The assets that are specifically excluded from the definition of an active foreign business asset include:

- financial instruments such as loans (including deposits with a bank or financial institution), debenture stock, bonds, debentures, certificates of entitlement, bills of exchange, promissory notes or other securities;
- eligible finance shares or widely distributed finance shares;
- interests in a trust or partnership;
- life insurance policies;
- rights or options to acquire a financial instrument, an interest in a company, trust or partnership or a life insurance policy;
- cash or cash equivalents; and
- assets deriving passive income, namely interest, an annuity, rent, royalties or foreign exchange gains (except where the asset is an intangible asset and its market value has been substantially enhanced through development, alteration or improvement to the asset, or the main use for deriving rent was only temporary). ■

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1. *Marriage Amendment Act* 2004 (Cth), Item 1 Schedule 1.
2. (1866) LR 1 P&D 130.
3. Note 2 above.
4. (1991) 174 CLR 379.
5. Note 4 above, p392.
6. Norberry, J, (2004) "*Marriage Legislation Amendment Bill* 2004", *Bills Digest*, Department of Parliamentary Services, p13.
7. Attorney-General, second reading speech, "*Marriage Legislation Amendment Bill* 2004", House of Representatives, *Hansard*, 27 May 2004, p29161 cited in Ibid, 14.
8. Young, K, and Nathanson, P, "Answering advocates of gay marriage", *The Australian Family*, July 2003 edition, 6.
9. Note 6 above, p11.
10. Note 6 above, p11.
11. Tanya Plibersek, "*Marriage Legislation Amendment Bill* 2004", speech to House of Representatives, 17 June 2004.
12. *Goodridge v Mass. Department of Public Health*, 440 Mass. 309, 798 NE2d 941 (2003).
13. SBS Archives, "Californian gay marriages axed", 14 August 2004.
14. Mikkelsen, Randall, "Bush hunts for way to doom gay marriages", *The Sydney Morning Herald*, 2 August 2003.
15. Hawaiin State Legislature of House Bill 2312.
16. 5/96 HR 3396.
17. Note 14 above.
18. Graff, James, "Summer Of Love Move over, San Francisco. France is about to celebrate its first gay wedding. Is Europe ready for equal rites?", 7 June, 2004 i *TIME Europe* magazine.
19. Jennifer Joan Lee, "Gay 'marriages' tangle European laws", *The Washington Times*, washingtontimes.com, downloaded 20 August 2004.
20. Denmark 1988, Norway 1993, Netherlands 1998.
21. Act of 21 December 2000 amending Book 1 of the Civil Code.
22. *Barbeau v British Columbia (Attorney-General)* 2003 BCCA 406.
23. *Catholic Civil Rights League v Hendricks*, QCCA 500-09-012719-027;500-05-059656 007 (2004-03-19).
24. *Halpern v Attorney-General of Canada Docket*, No C39172 and C39174 (Court of Appeal for Ontario, 10 June 2003).
25. "Canada will Legalise gay marriage", 18 June 2003, CBS News.