

## **WHAT HAVE WE SIGNED?**

### **THE TRUTH BEHIND OUR FREE TRADE AGREEMENT**

By David Mason-Jones

Published in Chief Officer Magazine, Australia, 2006

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**Who is right about the Free Trade Agreement with the United States? Is it those who embrace free trade at any cost or is it those who caution that the current agreement just has too many adverse effects to be good for the Australian economy? In this, the first of two articles, *David Mason-Jones* interviews Dr. John Mathews, Professor of Strategic Management at Macquarie Graduate School of Management. Together with Linda Weiss and Elizabeth Thurbon, Mathews is co-author of *'How to Kill a Country – Australia's devastating trade deal with the United States'*. Dr Weiss is Professor of Government and International Relations at the University of Sydney and Dr Thurbon is a Senior Lecturer in the School of Politics and International relations at the University of NSW.**

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**How is it that Australians can get themselves all tied up in a knot over the role of the monarchy in the constitution, and yet miss the point when the government has signed away huge blocks of our sovereignty in the free trade agreement (FTA) with the United States? In the view of John Mathews there's definitely a contradiction here.**

**Sure the republican debate may hold some symbolic importance – probably not much in reality – but the issue pales into insignificance when compared with the abrogation of sovereignty involved with the FTA.**

*DMJ*: Surely Australia's best interests are served by an increase in the openness of international trade. Why fight rearward actions – such as writing this book – against what the government has already done and against what even the opposition has agreed?

**Mathews:** I really need to stress at the outset that neither myself nor my coauthors are against free trade. The term 'free' has no place in this agreement because it is a travesty of free trade. Nor are we anti American. We are simply pro the Australian interest.

What we are against is a lopsided agreement that sacrifices the Australian interest. Many of its terms are so unbalanced that it excludes entire sectors in which Australia holds a competitive advantage, as well as doing damage to the institutions that preserve our competitiveness in other sectors like agriculture. In any other business the shareholders would be alarmed if the CEO and board negotiated a long term contract which may have appeared sensible in concept but turned out to be bad in the detail of the contract clauses. The shareholders would demand an explanation.

**DMJ:** You mention the exclusion of sectors where we have a competitive advantage. Can you expand on that?

**Mathews:** Two obvious and easy ones are sugar and fast ferries, where Australia holds a clear technology and price advantage. Both these sectors have been excluded completely. There is no extended phase-in period as there is with beef – over an inordinate 18 year period – the sectors are simply excluded and there is no further undertaking for future discussion. The Americans were quite open about the reason for the exclusion of sugar – their sugar lobby groups are so powerful that they could wreck US Congressional ratification of the agreement. So a major Australian rural commodity, one that receives no government support, is locked out of the FTA. What sort of agreement is that?

But it's not just in rural commodities that the Americans pick and choose. It's in manufactured products as well. In ship building – fast ocean going wave piercing aluminium ferries suitable for domestic use and short hop international sea passages – Australia is a world leader. But ship sales into the United States for domestic shipping purposes are excluded by the US Jones Act – an Act of the Congress which pre-dates the twentieth century. The US Jones Act is blatantly in contravention of WTO rules but no one has, so far, taken a case against them. In fact Australia would have been one of the best positioned countries to take a case to the WTO over the Jones Act but we have just rolled over on the issue. By signing the FTA Australia has implicitly conferred legitimacy on the Jones Act and have simply agreed to the exclusion of Australian built ships from the American domestic market. Again, what sort of agreement is that?

So there's no consistent rule about what gets excluded. The United States extends unashamed legislative protection of its national interest. And this is okay as an exercise in sovereignty but it's not okay when it gets dressed up as part of a free trade agreement.

**DMJ:** But where is there a surrender of sovereignty?

**Mathews:** There are a number of cases. What is effectively agreed in the FTA is that one country's institutions – Australia's – will be changed to suit the interests of the other party to the agreement – the US. There is no effective concession from the United States

in this matter. Two important institutions affected by this are the Australian Quarantine regulations and the Pharmaceutical Benefits Scheme.

A third, and truly indicative of the lop sided nature of this deal, is in the area of government procurement. Under the agreement, Australian Government procurement processes are now fully open to the participation of United States firms. This might be a reasonable clause in a true free trade agreement – one you would expect to see – but it is not a reasonable clause where there is no concession in return. For US government procurement there is still very definitely a Buy American policy backed by Buy American legislation and this will do nothing to provide genuine access to the US market for Australian companies.

The loss of sovereignty here is that it is now effectively Australian law that US companies have access to government procurement contracts and this law cannot be selectively reversed by the Australian Parliament. It can only be reversed if the Australian Parliament renounces the entire agreement.

An even clearer case of loss of sovereignty can be seen when it comes to the protection of Intellectual Property rights. In the negotiations preceding the agreement this is an area where the United States negotiators placed great emphasis. And the IP portions of the agreement are the lengthiest and most detailed sections of the agreement.

Whole sections of the US Digital Millennium Copyright Act have been incorporated into the agreement and given the force of law in Australia. One alarming provision of the US Act is to move from civil sanctions to criminal sanctions and this has passed straight into our law without debate. One of the surprising issues is that the Act – and its provision to lift sanctions to the criminal level – is a highly contentious Act in the USA and has twice been taken to the Supreme Court. But it is incorporated into Australian law nevertheless.

And yet there have been no alarm bells ringing about this in Australia and any future legislation in Australia is now restricted by the existence of this US Act. It's a clear case of loss of sovereignty.

Singapore has a government whose example we should be following. There is possibly no country on earth that is so internationalised as Singapore. And yet the Singapore Government has a powerful sense of Singapore's own identity and its own standing in the world. There is no way the Singapore Government – despite its clear commitment to free trade – would have entered an agreement where they surrendered sovereignty over their own law making processes.

**DMJ:** Do you think we make any gains in the foreign investment field – easier access to American investment markets?

**Mathews:** Hardly. Again the situation is unbalanced. We have substantially given away our procedures for monitoring foreign investment; up to \$800 million in a single foreign investment can now pass into Australia with no restrictions or review whatsoever. Again,

I stress that we are not against the international flow of investment, but there are cases where this is not to the advantage of Australia and we need to retain the power to review such cases.

The case of Portman Limited in WA has been a particular case in point. Portman is virtually a small 'cash box' mining company centred in Western Australia. It has iron ore assets and mining contracts to sell its iron ore to China. In fact Mark Vaile, as Minister for Trade, went to China around four years ago to help in the contract process and, when he returned, he touted Portman as a proud example of what Australian companies can do and how the Australian government was supporting them.

Well, now the company has been lost to American interests due to the relaxation of foreign investment review. The sale price for Portman was just under \$800 million and it is richly ironic that the company was the first to fall under the new free investment regime.

But again, we have to compare this with the American approach to foreign investment in their own economy. They retain substantial controls and, in the past twelve months, we have seen the Congress block foreign investment in the cases of the China National Overseas Oil Company bid to buy Unocal and in the Dubai Ports bid to acquire further interests in US ports. While these were not Australian attempts to invest in USA, they are cases which show the American resolution to restrict investment in certain vital industries.

**DMJ:** So, Professor Mathews, isn't this a done deal? What can be really done now that the document has been agreed.

**Mathews:** Yes, it is a done deal and has been ratified by both sides. But the issues we have raised in our book are not dead issues and we believe that they will gradually become more widely recognised by the Australian community and by Australian business. At this stage we are locked in and we see the deal as containing so many bad provisions that the only option is to withdraw from the agreement and start again. The deal in principle allows for this if either party gives six months notice. Why have such a clause if it cannot be invoked? Australia has rejected previous United States free trade overtures in the past and we think this one should have also been rejected.

Article 23.4 of Chapter 23 of the agreement (Final Provisions) provides that either party may terminate the agreement by giving the other Party six months' notice in writing. We, the writers of *'How to Kill a Country'* are looking for a future government to come to power in Australia on a policy of pull out from this agreement.

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**Dr John A. Mathews**

Professor Mathews holds the Chair of Strategic Management at Macquarie Graduate School of Management, Sydney.

He has been a member of the Faculty at Macquarie since June 1998, where he teaches courses in Strategic Management, Competition and Strategy in Asia-Pacific, and Global Strategic Management, in Sydney, Singapore and Hong Kong. He was appointed Director of Research at MGSM in March 2000, assuming responsibility for doctoral students in the PhD and DBA programs. During September to December 2002, he was Visiting Professor at the Aarhus School of Business, Denmark.

Professor Mathews holds a PhD from Imperial College, London, in cybernetics theory; and earned a BSc (Econ) from the London School of Economics and MSc from Imperial College. Prior to taking up an academic appointment at the University of New South Wales in 1990, he worked in industry and government for the State of Victoria, on industry development strategies. He has taught visiting programs at the National Graduate School of Management, ANU, Canberra; at the Stockholm School of Economics; at the Faculty of Business Administration at National University of Singapore, at the Smeal College of Business at Penn State University; and in the EMBA program, Seoul.

Professor Mathews' research interests focus on the competitive dynamics of international business, the evolution of technologies and their strategic management, and the rise of new high technology industries.

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