

# Patently yours

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Elizabeth Thurbon, John Mathews and Linda Weiss..."Australia's distinctive institutional arrangements that are being sacrificed with this agreement."

The US-Australia free trade agreement which comes into effect in 2005 will hit Australia hardest in the area of intellectual property rights, according to three academics who have authored a book detailing the specifics of the agreement.

The book, by John A. Mathews, who holds the chair of strategic management at the Macquarie Graduate School of Management in Sydney, Linda Weiss, professor of government and international relations at the University of Sydney, and Elizabeth Thurbon, a lecturer in the school of politics and international relations at the University of NSW, has not received much publicity.

This lack of publicity appears all the more pronounced as it is the only book which makes plain the details of a deal that has been pushed as *nirvana* by the government and as a virtual surrender of autonomy by its detractors. It is titled, rather controversially, *How to Kill a Country*.

The book deals with the subject at hand simply - the average person can read it and understand the implications of the trade deal from the Australian perspective.

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Mathews, Weiss and Thurbon say the common man would feel the effects of the FTA in many ways - for instance, CDs and DVDs are likely to become dearer, as also mobile phones or digital cameras.

They said IPRs were the one area which was most difficult to understand and it appeared that a large portion of the specifics dealing with the enforcement of IPRs was taken directly from the Digital Millennium Copyright Act.

In an email interview, they expanded on some of the themes covered in the book:

**Some people would consider the title of your book a bit alarmist. You justify it by pointing to the Canadian example. What are the specifics of what has happened there?**

We quite understand that (the title) *How to Kill a Country* may sound alarmist. But we settled on this title for two important reasons. First, it draws attention to the principal issue with the FTA, namely that it is Australia's distinctive institutional arrangements that are being sacrificed with this agreement, rather than our just getting a lousy trade deal; in other words, the deal is extremely destructive not because of poor market access (bad enough) but because it dismantles the arrangements that are vital to our economic security and contribute to our competitiveness. Secondly, the title is designed to draw the reader's attention to the fact that it is the Howard government that is responsible for the destructive nature of the agreement, not the American negotiators, who were after all only pursuing a good deal when they saw one. It is our own government that is posing such a threat to Australia's institutions. Thirdly, the title is posed as a conditional: If you wanted to kill a country, then here is how you might go about it, in six steps - and it just so happens that these are in fact the steps that the Australian government has taken.

Indeed there is ample evidence that the Americans in government and business view their own future in terms of royalty income from patents, copyright and trademarks.

We use the parallel experience of Canada to buttress some of these points. Canada is now being described by leading author, Mel Hurtig, as a "Vanishing country" - an arresting idea, and one that is every bit as dramatic as our own title, "killing a country". In Mel Hurtig's illuminating book *The Vanishing Country*, he shows how Canada abolished its Foreign Investment Review Agency (the equivalent of our Foreign Investment Review Board) following its FTA with the USA in 1989, and replaced it with 'Investment Canada', charged with the task of soliciting foreign investment. This led to a massive influx of US investment, \$487 billion between June 1985 and June 2002. Incredibly, however, a staggering 96.6 percent of this total was for US takeovers of existing Canadian assets and companies, while a miniscule 3.4 percent was for investment in new businesses (businesses bringing job and wealth creation)! The implications for the Canadian economy have been profound:

By the mid 1980s, about half of the major US corporations in Canada were 100-percent American-owned. Ten years later, some 85 per cent had no Canadian shareholders. And in the latest Financial Post list of the fifty largest foreign-controlled corporations in Canada, forty six were 100-per-cent foreign-owned. As Canadian shareholders were eliminated, corporate boards were substantially reduced in size and more American directors were added, as were more U.S. CEOs and board chairmen. As external directors were eliminated, there was no longer a force to influence policy decisions which would be beneficial to Canada. Gone too was the ability to scrutinise the payment of dividends, management fees, and content costs paid to the parent company. Increasingly, local advertising, insurance, travel agencies, and many other companies are bypassed as head offices in the US make purchasing decisions. These new arrangements increase the likelihood that corporate decisions will be made without particular regard for Canadian

law, conventions of business behaviour or the sensibilities of local communities or governments (Hurtig pp. 26-27). We think that this an all-too prescient account of what will happen in Australia's case unless the FTA is stopped.

**Much of the commentary about the FTA has focused on the PBS. Yet according to your book this appears to be one act in a play where the main game is intellectual property rights. Can you elaborate?**

We focus in our book on four areas of institutional dismantling - quarantine, the PBS, government procurement and intellectual property rights. All are important for Australia's future and all are threatened by the FTA. The most subtle of the changes introduced by the FTA are certainly those to do with intellectual property rights (IPRs) - because these are more difficult to understand. But the IP changes will also have an impact on the PBS, because of the calculated hurdles placed by Chapter 17 of the FTA (on IPRs) on competition by generic drugs makers in Australia.

We see the IPRs chapter as significant because all the recent FTAs signed by the US (with Chile, Singapore et al) have a core section on IPRs, and there is anecdotal evidence that the American negotiators drive hardest on the section on IPRs, allowing no changes in the carefully crafted wording they offer the other side.

Indeed there is ample evidence that the Americans in government and business view their own future in terms of royalty income from patents, copyright and trademarks. In the period we were writing the book, we were watching the international business press - and hardly a day went by without the US business press running some story or other on the importance of IPRs to their own economy - in such fields as pharmaceuticals, software, movies and music, games and so on. The success of all these industries (and their combined output is huge, accounting for over 5 percent of US GDP) is dependent on defining and enforcing clear IPRs.

We see Australia's capitulation on IPRs (the wording of Chapter 17 appears to have been accepted wholly from the American side) as being based on a misunderstanding of our position in the world. There are industrial interests in Australia who see themselves as benefiting from more stringent definition and enforcement of IPRs, such as some software and media companies.

But the Australian negotiators overlooked the point that Australia is a net importer of IPRs (i.e. we pay out more than \$1 billion in royalties over and above what we collect) and that this imbalance will only get worse as a result of the FTA. We argue in the book that a better alternative would have been for Australia to reassert its international obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), and perhaps to go as far as undertaking to adopt the two World Intellectual Property Organization (WIPO) treaties on Copyright (1996) and Performances and Phonograms (1996) - and that that should have been sufficient.

**What would be the dangers for Australian software developers under the FTA?**

The case of Australian software development precisely illustrates the dangers of the FTA and its strengthening of IPRs along the US model. As a whole, Australian industry has everything to gain by moving away from the Microsoft stranglehold and towards an Open Source mode - rather like governments in Germany and Taiwan are currently doing in earnest.

The FTA further cements the Microsoft hold, and adds criminal penalties, seemingly taken straight out of the controversial US Digital Millennium Copyright Act. The government procurement chapter of the FTA now gives US software firms like Microsoft virtually unconditional and preferred access to our lucrative government contracts, over the claims of local firms.

So local firms would do well to shift towards the Open Source model, and utilise open source programs such as Linux both as a means of avoiding IPR-related disputes as they develop their own software products, and because these Open Source programs are more efficient than their privately owned and monopolistic alternatives. For a view of the impact of the FTA on Australia's Open Source community, see [this webpage](#).

### **As far as patents go, would the Australian system of patents be totally cast aside?**

The FTA does not totally cast aside the present Australian system, but it does certainly go a long way to removing any remaining differences between the US and Australian systems - in the name of "harmonisation" (a euphemism for Americanising Australian laws and institutions). Big changes introduced by the FTA include extending the copyright term from 50 years to 70 years, and making life much more difficult for generic producers of goods - from CDs and DVDs to pharmaceuticals.

The major change introduced by Chapter 17 of the FTA concerns enforcement provisions. It seems that whole sections of the Digital Millennium Copyright Act have been cut and pasted from the US legislation to the FTA, from where they become Australian law - without any discussion in the Australian parliament. These are provisions concerning the criminalization of acts to circumvent technological gizmos used to control the use of such copyright-protected goods and services as DVDs, satellite broadcasts and Internet sources of music and film.

Specifically on patents there is not much to change in the Australian system, since it is already a world class system operating in full compliance with its TRIPS obligations. The main changes are in the way that patented products' monopolies are strengthened, at the expense of generics - whether these be CDs or drugs - such as through making 'parallel imports' harder to sustain, and through making it much more difficult to introduce compulsory licensing, even when there is an overwhelming public case for it.

To see how this affects our future health and security, consider the case of the bird flu virus, or avian flu, which threatens to reach pandemic proportions next year. The world health authorities are alarmed by the threat posed by this new flu strain, which has killed thousands of birds (chickens, ducks) in Asian countries such as Thailand and China.

Cases have been reported in pigs, tigers, and in some people. Now there are two lines of defence against bird flu virus - and both are severely constrained for Australia by the FTA.

- a. The first line of defence is a vaccine. But the patent thicket that surrounds biotechnology has made it all but impossible for any single company to develop an effective vaccine using genetic engineering techniques. Only two companies in the world are attempting to develop such a vaccine - Aventis Pasteur, and Chiron. Both are attempting to do so in the US, and the patents problems are so intense that both companies are doing so under the protection of the US government - under National Institutes of Health contracts. To our knowledge, no other companies anywhere in the world are attempting to produce an avian flu vaccine - despite the obvious commercial rewards for succeeding - precisely because the biotechnology patents impede such activity, and no government other than the US has so far been prepared to offer protection for the companies concerned. This is an opportunity for innovation from which Australian companies are shut out because of the patent thicket surrounding this vaccine.
- b. The second line of defence is an antiviral drug - but there is only one that is known to be active against avian flu namely Tamiflu. This is made exclusively by the Swiss company Roche, which has so far been most reluctant to increase production capacity, and to license the manufacturing capability to other firms. Here is a case where a government could and should be able to use compulsory licensing. Yet this is the very right that we are curtailing drastically through the FTA!

**In his legendary book on management, the late C. Northcote Parkinson wrote that a management committee would discuss a system for serving coffee (which cost \$10) for much longer than it would a nuclear waste disposal system costing a million dollars - simply because the former was more comprehensible to all the members. Do you think the lack of debate on the FTA and lack of elucidation of what it means to the ordinary Australian is because of this?**

**Or has there been a deliberate move to block meaningful information being spread throughout the community?**

Certainly, the lack of debate within Australia as to the long-term consequences of the FTA has been scandalous. We pinpoint some of the reasons in the final chapter of our book - such as the manipulation of the media by Howard government ministers; the relentless depiction of a shocking agreement as a 'victory' and a once in a lifetime opportunity; and the promotion of paid consultants to sing the praises of the deal; and the intimidation and abuse of opponents of the deal in public fora. Fortunately not all the media in Australia have been silenced, as your invitation to us to engage in this dialogue demonstrates.

**You've mentioned that you see the price of CDs and DVDs going up after the FTA comes into play. Is it possible that this will also lead to a rise in piracy?**

You ask whether "piracy" of CDs and DVDs is likely to rise in Australia following on from the signing of the FTA - because of the more stringent clampdown on parallel imports. We are in no position to say what the effects of this will be. But bear in mind that "piracy" is a term used by the holders of IPRs, to cast in criminal guise the actions of those who do not hold such IPRs.

But frequently the actions are entirely justified, and entirely in the spirit of competition - as when an importer of copyright-protected CDs seeks them out in a third market and imports them, entirely legally, at a lower cost than is stipulated by the IPR-holder. The FTA makes this action much more difficult - in the name of placing severe restrictions on parallel imports. Another name for this is placing restrictions on free trade in IPR-protected goods - all within a "free trade" agreement!

**You've mentioned that either of the two countries can drop this deal after giving the other six months written notice. Do you really think that is a possibility given the political implications?**

Yes. There is an exit strategy, either side can withdraw from the agreement by serving six months notice of intention. We have three years to work on the opposition. Domestic politics is the key, not international politics. The Americans can understand the language of domestic politics because they are they first to invoke it whenever they cannot or do not wish to meet international obligations.