
The Parliament of the Commonwealth of Australia
Joint Standing Committee on Treaties

Report 142

Treaty tabled on 13 May 2014

Free Trade Agreement between the Government of Australia and the
Government of the Republic of Korea (Seoul, 8 April 2014)

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Canberra

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Foreword

Following a lengthy negotiation period, the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea* (KAFTA) was tabled in Parliament on Tuesday 13 May 2014. Free trade agreements are becoming increasingly popular as a means of encouraging trade liberalisation, opening up market access and strengthening bilateral relationships. This is the eighth free trade agreement that Australia has signed.

Korea is one of Australia's most important trading partners: our third-largest export market, our fourth-largest trading partner and a growing investment partner. Currently Australia faces various tariff and non-tariff barriers and restrictions in Korea. Korea's average tariff on imports is 16.8 per cent, with an average tariff on agricultural goods of 53.6 per cent, with tariff peaks of over 500 per cent.

The Agreement will eliminate these very high tariffs on a wide range of Australian goods exports, including beef, wheat, sugar, dairy, wine, horticulture and seafood. It will also create new market openings in key areas of commercial interest to Australian services providers, including legal, accounting, financial, education and other professional services.

KAFTA is expected to be worth \$5 billion in additional income to Australia between 2015 and 2030 and to provide an annual boost to the Australian economy of approximately \$650 million after 15 years of operation. In its first year of operation, it is expected to create 1 700 jobs. Eighty-four per cent of Australia's current exports (by value) will enter Korea duty free. Agricultural exports are expected to increase by 73 per cent and manufacturing by 53 per cent by 2030 as a result of the Agreement.

The Committee found that a range of benefits are likely to flow from the implementation of KAFTA for Australian businesses, industry and exporters. Apart from the direct value of tariff reductions, increased competitive advantage and potential future opportunities were identified as tangible positive results. Witnesses emphasised the importance of the Agreement in protecting our competitive edge in the Korean market as Korea signs free trade agreements with

our major competitors, including the United States, European Union, Chile and ASEAN countries.

The Committee identified and examined a number of issues that are causing concern amongst the wider community. In particular, the perceived dangers associated with the inclusion of an investor-state dispute settlement mechanism in the agreement and mooted changes to intellectual property rights. More generally, the Committee acknowledges ongoing dissatisfaction with the treaty making process but recognises the constitutional constraints on the process in Australia and highlights the progress that has been made in improving that process over the last two decades.

Overall, the Committee is satisfied that KAFTA will provide substantial economic benefit, not only to Australian business and industry, but also to the broader community.

Mr Wyatt Roy MP
Chair

Membership of the Committee

Chair Mr Wyatt Roy MP

Deputy Chair The Hon Kelvin Thomson MP

Members	Mr Andrew Broad MP	Senator Chris Back
	Dr Dennis Jensen MP	Senator David Fawcett
	Mr Ken O'Dowd MP	Senator Sue Lines
	The Hon Melissa Parke MP	Senator Scott Ludlam (<i>until 7/7/14</i>)
	The Hon Dr Sharman Stone MP	Senator the Hon Joe Ludwig
	Mr Tim Watts MP	Senator James McGrath (<i>from 1/7/14</i>)
	Mr Brett Whiteley MP	Senator Dean Smith (<i>until 30/6/14</i>)
		Senator Glenn Sterle (<i>from 1/7/14</i>)
		Senator the Hon Lin Thorp (<i>until 30/6/14</i>)
		Senator Peter Whish-Wilson (<i>from 8/7/14</i>)

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	Zoe Smith
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	Jhie Gough



Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

List of abbreviations

ACCI	Australian Chamber of Commerce and Industry
AFTINET	Australian Fair Trade and Investment Network
AGD	Attorney-General's Department
AIG	Australian Industry Group
AMWU	Australian Manufacturing Workers' Union
ASEAN	Association of South-East Asian Nations
AUSFTA	Australia-United States Free Trade Agreement
BRTAs	Bilateral and Regional Trade Agreements
CFMEU	Construction, Forestry, Mining and Energy Union
CIE	Centre for International Economics
DFAT	Department of Foreign Affairs and Trade
FIRB	Foreign Investment Review Board
FTAs	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ILO	International Labour Organization
IP	Intellectual Property

ISDS	Investor-State Dispute Settlement
ITO	International Trading Organisation
JSCOT	Joint Standing Committee on Treaties
KAFTA	<i>Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea</i>
KOREU	Korea-European Union Free Trade Agreement,
KORUS	Korea-United States Free Trade Agreement
LMT	Labour market testing
MFN	Most-favoured-nation
NAFTA	North American Free Trade Agreement
NFF	National Farmers' Federation
NGO	Non-Government Organisation
NIA	National Interest Analysis
OHMA	Office of Horticultural Market Access
RCEP	Regional Comprehensive Economic Partnership
RIS	Regulation Impact Statement
ROK	Republic of Korea
ROO	Rules of Origin
SPS	Sanitary and phytosanitary
TPP	Trans-Pacific Partnership Agreement
TRIPS	Trade Related Aspects of Intellectual Property Rights
TRQ	Tariff Rate Quota
UNCTAD	United Nations Committee on Trade and Development
USTR	United States Trade Representative

WTO World Trade Organisation

List of recommendations

5 Conclusion

Recommendation 1

The Committee supports the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea* and recommends that binding treaty action be taken.

Introduction

Purpose of the report

- 1.1 This report contains the Joint Standing Committee on Treaties' review of the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea* (Seoul, 8 April 2014), which was tabled in Parliament on 13 May 2014.
- 1.2 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become signatory, on the treaty being tabled in Parliament.
- 1.3 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not arise.
- 1.4 Prior to tabling, major treaty actions are subject to a *National Interest Analysis* (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.
- 1.5 A *Regulation Impact Statement* (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. The Treaty examined in this report required an RIS.

- 1.6 The Committee takes account of these documents in its examination of the Treaty text, in addition to other evidence taken during the inquiry program.
- 1.7 Copies of each treaty and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:
 - http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Terms_of_Reference.

Conduct of the Committee's review

- 1.8 The Treaty action reviewed in this report was advertised on the Committee's website from the date of tabling. Submissions for the Treaty were requested by 13 June 2014.
- 1.9 Invitations were made to all State Premiers, Territory Chief Ministers and to the Presiding Officers of each Parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the Treaty under review.
- 1.10 The Committee held public hearings into the Treaty in Canberra on Monday 14 July and Tuesday 5 August 2014, Sydney on Tuesday 29 July 2014 and in Brisbane on Wednesday 30 July 2014.
- 1.11 The transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website under the Treaty's tabling date, 13 May 2014.
- 1.12 A list of submissions received and their authors is at Appendix A.
- 1.13 A list of exhibits received is at Appendix B.
- 1.14 A list of witnesses who appeared at the public hearings is at Appendix C.

2

Overview and analysis

Trade agreements

- 2.1 The General Agreement on Tariffs and Trade (GATT) was developed and implemented to aid economic recovery after the Second World War. The objective was to break down trade barriers and liberalise world trade. GATT was formed in 1947 and came into effect on 1 January 1948, establishing a set of rules and principles for participating countries to follow. However, the accompanying proposed institutional arrangements for the establishment of an International Trading Organisation (ITO) did not eventuate. GATT remained a negotiating forum for tariff reductions and dispute resolution.
- 2.2 GATT transitioned to the World Trade Organisation (WTO) in 1995 after members adopted the Marrakesh Declaration in April 1994.¹ GATT had provided a multilateral trading agreement for merchandise trade. Under the WTO the General Agreement on Trade in Services (GATS) and the Trade Related Aspects of Intellectual Property Rights (TRIPS) extended the multilateral trading agreements to services and intellectual property rights respectively.²
- 2.3 As negotiations on the WTO multilateral trade agreements slowed during the 1990s, bilateral, plurilateral and regional trade agreements increased.³ These agreements are often referred to as ‘free trade agreements’ but are

1 World Trade Organization (WTO), ‘Marrakesh Declaration of 15 April 1994’, http://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm, accessed 24 July 2014.

2 For more detail on the history of GATT and the WTO see: <http://www.wto.org/index.htm>.

3 As at June 2014 the WTO had been notified of 585 regional trade agreements. WTO, ‘Regional trade agreements’, http://www.wto.org/english/tratop_e/region_e/region_e.htm, accessed 25 July 2014.

more correctly termed ‘preferential trade agreements’. Such agreements are signed between two or more countries providing them with favourable market access conditions by reducing tariff and non-tariff barriers.

- 2.4 As at July 2014, Australia has seven free trade agreements in place, eight under negotiation and two signed but not yet in force.⁴

Benefits of free trade agreements

- 2.5 Advocates for free trade agreements (FTAs) suggest that FTAs have provided a way forward since the WTO process stalled during the 1990s, encouraging trade liberalisation, opening up market access and strengthening bilateral relationships. The WTO gives conditional support for free trade agreements, allowing for them under GATT’s Article 24, providing they meet WTO rules. The WTO indicates that such agreements can go beyond what may be available in a multilateral agreement at a given time.⁵ It is often quicker and easier to achieve an outcome for an FTA where negotiations are taking place between a limited number of parties.⁶
- 2.6 As well as tariff reduction or elimination, free trade agreements often cover a range of non-tariff barriers and increasingly cover such matters as investment protection, intellectual property rights, trade facilitation, government procurement, and labour and environment standards. Many of these impediments to free trade are ‘not within the scope in the WTO setting’ and FTAs open up an avenue to pursue such matters.⁷ The outcome in these non-tariff areas frequently lays the foundation for rules and issues that are subsequently incorporated into multilateral agreements.⁸

4 Department of Foreign Affairs and Trade (DFAT), ‘Australia’s Free Trade Agreements’, <<http://www.dfat.gov.au/fta/>>, accessed 25 July 2014.

5 World Trade Organization, ‘Understanding the WTO’, p. 64, <http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf>, accessed 25 August 2014.

6 The Australian APEC Study Centre, Monash University, *An Australian–USA Free Trade Agreement: Issues and Implications*, Department of Foreign Affairs, August 2001, p. 19, <http://www.dfat.gov.au/publications/aus_us_fta_mon/aus_us_fta_mon.pdf>, accessed 25 August 2014.

7 Productivity Commission, *Bilateral and Regional Trade Agreements*, November 2010, p. xxi.

8 World Trade Organization, ‘Understanding the WTO’ p. 64, <http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf>, accessed 25 August 2014.

Criticism of free trade agreements

- 2.7 The contribution of free trade agreements to world trade liberalisation and economic growth has been questioned. The WTO cautions that, although such agreements can complement the multilateral trading system, there are a number of concerns:
- net economic impact will depend on the architecture of the individual agreement and its internal parameters;
 - they are discriminatory and advantage the signatory countries;
 - distortions in resource allocation, and trade and investment diversion may minimise benefits; and
 - the proliferation of agreements and consequent overlapping trade rules can hamper trade by imposing extra costs on potential participants.⁹
- 2.8 The Productivity Commission found that commercial benefits for Australian businesses from BRAs were limited as the agreements did not address the non-tariff barriers that prevented market access.¹⁰
- 2.9 The Productivity Commission called for a more realistic, transparent process, including a post-negotiation analysis to identify possible adverse impacts.¹¹

Korea-Australia Free Trade Agreement

- 2.10 The following summary of the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea* (KAFTA) and its claimed benefits is taken from the National Interest Analysis (NIA) and the Regulation Impact Statement (RIS).

Background

- 2.11 Over the past decade, Republic of Korea's (ROK) economic importance to Australia has expanded significantly. Korea is now Australia's third-largest export market, fourth-largest trading partner, and a growing investment partner. It is Australia's fifth-largest market for agricultural exports, Australia's largest export market for raw sugar (estimated at \$461 million in 2012–13); third-largest for beef (\$703 million in 2012–13); and an important market for wheat, malt and malting barley, dairy products,

9 WTO, 'Regional Trade Agreements: Scope of RTAs', http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm, accessed 25 July 2014.

10 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. xxiv.

11 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. xxxiii.

animal fodder, wine, seafood and horticulture. Korea is also an important export market for Australian ores and concentrates, crude petroleum, coal, inorganic chemical elements, pharmaceuticals and automotive parts. In services, Korea is Australia's ninth largest export market, accounting for 3.2 per cent of Australia's total service exports.¹²

- 2.12 Currently Australia faces various tariff and non-tariff barriers and restrictions in Korea. Korea's average tariff on imports is 16.8 per cent, with an average tariff on agricultural goods of 53.6 per cent, with tariff peaks of over 500 per cent. (See Table 2 in the RIS for a summary of selected tariff restrictions faced by Australian exporters).¹³
- 2.13 According to the RIS, Australian exporters to Korea are coming under increasing competitive pressure which threatens Australia's existing market share as competitor countries enter bilateral and regional Free Trade Agreements (FTAs) with Korea. The European Union (EU) (through the Korea-European Union Free Trade Agreement, or KOREU), the United States (US) (through the Korea-United States Free Trade Agreement, or KORUS), Association of South-East Asian Nations (ASEAN) countries and Chile, key competitors of Australia in agriculture and services, already enjoy preferential access through their FTAs with Korea. Canada and New Zealand, also key competitors with Australia, are close to concluding their own FTAs with Korea.¹⁴
- 2.14 The RIS suggests that Australia will be at a tariff disadvantage as Korea's FTA partners receive either immediate tariff elimination or phased reductions over several years for key products.¹⁵ Compounding the issue for Australian exporters is the danger that the tariff gap between Australia and its competitors will remain at current levels or increase allowing Korea's FTA partners to gain further advantage in the long term.¹⁶
- 2.15 The RIS concludes that Australian exports to Korea can be expected to decline as they lose competitiveness. Independent modelling by the Centre for International Economics (CIE) predicts that in the absence of a bilateral FTA with Korea, Australia's total exports to this important market would decline by 5 per cent by 2030. The RIS indicates that Australian agriculture exporters would be most disadvantaged as Korean imports of Australian agricultural goods would decline by 29 per cent.
-

12 Regulation Impact Statement, Korea-Australia Free Trade Agreement, 4 February 2013 (hereafter referred to as 'RIS'), para 3.

13 RIS, para 4.

14 RIS, para 5.

15 RIS, para 6.

16 Mr Malcolm John Foster, Chairman, KAFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 17.

Mining and manufacturing exports would also decline, by 1 and 7 per cent respectively.¹⁷

- 2.16 On the other hand, the RIS states that modelling predicts that implementing a bilateral FTA with Korea could result in exports to Korea being 25 per cent higher than they otherwise would have been by 2030. Agriculture exports could be 73 per cent higher, mining exports could be 17 per cent higher and manufacturing exports could be 53 per cent higher. The RIS therefore concludes that entering into an FTA with Korea could not only avert the threat faced by erosion of Australia's competitiveness in the market but could also create new and further opportunities for Australian exporters in Korea.¹⁸
- 2.17 The NIA argues that the Agreement could deliver market gains and deeper cuts to tariffs more rapidly than current multilateral and plurilateral initiatives underway such as the WTO Doha Round, the Regional Comprehensive Economic Partnership (RCEP) and the Trans-Pacific Partnership Agreement (TPP) (which currently does not include Korea).¹⁹

Overview and national interest summary

- 2.18 The RIS maintains that the Agreement will deliver significant market access improvement and significant tariff liberalisation for Australia's merchandise exports to Korea through the elimination of tariffs on a wide range of Australian goods exports, including beef, wheat, sugar, dairy, wine, horticulture and seafood. Further the Agreement could create new market openings in key areas of commercial interest to Australian services providers, including legal, accounting, financial, education and other professional services.²⁰
- 2.19 The NIA also asserts that KAFTA protects Australia's competitive position in the Korean market, where major competitors such as the US, EU, Chile and ASEAN countries are already receiving preferential access through their respective free trade agreements. The same could apply to New Zealand and Canada, both of whom are close to concluding FTA negotiations with Korea.²¹
-

17 RIS, para 7.

18 RIS, para 8.

19 National Interest Analysis [2014] ATNIA 8 with attachments *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea, done at Seoul, 8 April 2014*, [2014] ATNIF 4 (hereafter referred to as 'NIA'), para 5.

20 NIA, para 3.

21 NIA, para 4.

Reasons for Australia to take the proposed treaty action

- 2.20 A comprehensive free trade agreement with Korea is expected to further strengthen the broader bilateral relationship between Australia and Korea by supporting an already significant, complementary and growing economic relationship. Australia and Korean two-way goods and services trade reached \$30.5 billion in 2012–13. Total Australian investment in Korea in 2012 was valued at \$10.4 billion, while Korean investment in Australia was valued at \$12 billion.²²
- 2.21 The NIA claims that the Agreement will benefit Australian exporters, importers and consumers by opening markets and freeing trade and investment between Australia and Korea. With one in five Australian jobs linked to trade, KAFTA could provide an important boost to the Australian economy.²³
- 2.22 The NIA suggests that the Agreement may create immediate market access opportunities for many sectors of the Australian economy. Korea's tariffs will be set at zero on 84 per cent of its imports (by value) from Australia immediately on entry into force with most other tariffs phased out quickly. After 10 years, a zero tariff would apply to 95.7 per cent of imports from Australia (by value) and on full implementation of KAFTA, 99.8 per cent of Australia's current goods trade would enter Korea duty free.²⁴
- 2.23 The summary below sets out the key outcomes. Further details can be found in Attachment IV to the Agreement, Table 1 and 2 of the RIS and in the DFAT Fact Sheets.

Agriculture

- 2.24 Currently Australian exporters face high barriers with Korea imposing an average tariff of 53.6 per cent on agricultural imports and prohibitive tariffs on some products of up to 550 per cent. Under the Agreement, Korea has agreed to eliminate:
- beef tariffs over 15 years;
 - tariffs immediately for raw sugar, wheat, wine and some horticulture; and
 - most dairy tariffs over 3-20 years with immediate duty-free increased quotas for cheese, butter and infant formula.²⁵
-

22 RIS, para 95.

23 NIA, para 6.

24 NIA, para 7.

25 For further details see the RIS, paragraphs 31–43.

- 2.25 One hundred and seventy-one sensitive products accounting for 0.2 per cent of Australian exports to Korea receive no tariff concessions under the Agreement. The excluded products include: rice, milk powder, honey, abalone, ginger, apples, pears and walnuts.²⁶

Energy, minerals and manufacturing

- 2.26 Energy and minerals products accounted for approximately 80 per cent of the value of Australia's merchandise exports to Korea in 2012–13. While many Australian mineral and energy exports to Korea enter duty free, it applies tariffs of up to 8 per cent on a range of priority resources products, and tariffs of up to 13 per cent on manufactured products. On entry into force of the Agreement, 88 per cent of Australia's manufactures, resources and energy exports will enter Korea duty free, with all remaining tariffs eliminated within 10 years.²⁷

Services

- 2.27 The Agreement is expected to provide new market openings for Australian service suppliers in education, telecommunications, financial, accounting, taxation and legal services. These services currently face a range of restrictions including with respect to commercial presence, cross-border supply and licensing requirements. Under the Agreement, Korea will permit new Australian access in these sectors, providing outcomes equivalent to those in its free trade agreements with the US and the EU.²⁸

Investment

- 2.28 The NIA states that the Agreement provides improved access and protection for Australian investors and investments in Korea as well as for Korean investors in Australia. Korea has agreed to further open several sectors to Australian investment, including the telecommunications sector and legal, accounting and taxation services, through the progressive reduction of market access barriers.²⁹ The monetary threshold at which investments from Korea in non-sensitive sectors are considered by the Foreign Investment Review Board (FIRB) will rise from \$248 million to \$1 078 million, consistent with the threshold provided to the US and New Zealand.³⁰ The Australian Government has reserved policy space to

26 RIS, para 22.

27 NIA, para 7. For further details see the RIS, paragraphs 44–45. For further details on the effect on manufacturing see the RIS, paragraphs 48–51.

28 NIA, para 7. For further details see the RIS, paragraphs 56–66.

29 NIA, para 7. For further details see the RIS, paragraphs 67–70.

30 RIS, para 72.

introduce its policy on screening proposals for foreign investment in agricultural land at \$15 million and in agribusinesses at \$53 million.³¹

- 2.29 The Agreement includes an investor-state dispute settlement mechanism with appropriate protections in areas such as public welfare, health, culture, environment and foreign investment screening.³²

Other

- 2.30 The Agreement also includes commitments on:
- intellectual property: KAFTA will ensure that Australian innovators and Australian creative industries receive high levels of protection in Korea broadly equivalent to protections provided in Australia;³³
 - government procurement: for Australia, this will provide, subject to agreed exceptions, national treatment for Australian goods, services and suppliers in the Korean market for government procurements above agreed value thresholds;³⁴ and
 - electronic commerce: KAFTA contains provisions that safeguard electronic commerce, prevent the imposition of customs duties on electronic transmissions and maintain best practice regulation in this field.³⁵

Obligations

- 2.31 KAFTA consists of 23 chapters, with associated annexes and schedules, and four side letters. A detailed chapter-by-chapter summary of key obligations is provided at Attachment III (KAFTA: An Introduction to the Text of the Agreement).
- 2.32 Upon entry into force, or over time, each Party will eliminate specified tariffs on imports of goods from the other Party (**Chapter 2**) that meet the agreed rules of origin³⁶ criteria (**Chapter 3**). The Parties schedules of tariff commitments are set out at **Annex 2-A**. Tariff rate quotas³⁷ (TRQs) for certain Australian agricultural exports to Korea are set out at **Appendix 2-**

31 RIS, para 73.

32 NIA, para 7. For further details see the RIS, paragraphs 67–73.

33 For further details see the RIS, paragraphs 80–82.

34 For further details see the RIS, paragraphs 78–79.

35 NIA, para 7. For further details see the RIS, para 85.

36 ‘Rules of origin’ (ROO) establish the criteria for determining whether goods will qualify for preferential tariff treatment under KAFTA (that is, whether a good ‘originates’ in Australia or Korea). (For further detail on the ROO requirements see the RIS paragraphs 52–54).

37 Under KAFTA, a ‘tariff rate quota’ (TRQ) represents the maximum quantity of a product permitted to enter duty-free in a particular year.

- A-1.** Most TRQs will be progressively phased out over 10–20 years, depending on the product.³⁸
- 2.33 Each Party will grant market access and non-discriminatory treatment (known as national treatment³⁹ and most-favoured-nation treatment⁴⁰) to services and investments from the other Party under the Cross-Border Trade in Services, Financial Services and Investment chapters (**Chapters 7, 8 and 11** respectively), except where specific measures or individual sectors are specifically reserved in the non-conforming measures annexures to KAFTA (**Annexes I-III**).⁴¹
- 2.34 KAFTA also contains commitments and disciplines on:
- customs procedures (**Chapter 4**);
 - sanitary and phytosanitary (SPS) measures (**Chapter 5**);⁴²
 - telecommunications (**Chapter 9**);
 - the temporary entry of skilled persons (**Chapter 10**);
 - government procurement (**Chapter 12**);
 - intellectual property rights (**Chapter 13**);
 - competition policy (**Chapter 14**);
 - electronic commerce (**Chapter 15**);
 - labour (**Chapter 17**); and
 - the environment (**Chapter 18**).⁴³
- 2.35 There is a binding State-to-State dispute settlement mechanism modelled on previous free trade agreements and the WTO system (**Chapter 20**). Most substantive obligations in the Agreement will be subject to this mechanism, except those found in the Technical Barriers to Trade, SPS Measures, Competition Policy, Labour, Environment and some aspects of the Movement of Natural Persons chapters.⁴⁴
-

38 NIA, para 11.

39 ‘National treatment’ means Australia must treat Korean investors and service providers no less favourably than it treats Australian investors and service providers of third countries in like circumstances, and vice versa.

40 ‘Most-favoured-nation’ (MFN) treatment means Australia must treat Korean investors and service providers no less favourably than it treats investors and service providers of third countries in like circumstances, and vice versa.

41 NIA, para 12.

42 ‘Sanitary and phytosanitary’ (SPS) are measures, such as quarantine, to protect human, animal or plant life or health from pests and diseases.

43 NIA, para 13.

44 NIA, para 13.

- 2.36 An Investor-State Dispute Settlement (ISDS) mechanism is included in the Investment Chapter (**Chapter 11**).⁴⁵ The RIS states that the ISDS provisions do not constrain the Government's ability to regulate or implement policy.⁴⁶
- 2.37 **Chapter 22** sets out exceptions which apply to a number of chapters of the Agreement. Such exceptions ensure FTA obligations do not unreasonably restrict government action in key policy areas, including action to protect essential security interests, the environment and health. **Chapter 22** also carves out application of the Agreement to a Party's taxation measures except in certain circumstances, and provides for the protection of confidential information.⁴⁷ Procedural safeguards to deter frivolous claims and contain costs are also included.⁴⁸
- 2.38 Four legally binding 'side letters' set out the Parties' agreed interpretation of particular KAFTA provisions in relation to services and investment, telecommunications, gambling and betting services and transparency in investor-state arbitration proceedings. The side letters form an integral part of the Agreement.⁴⁹

Implementation

- 2.39 To implement the Agreement, amendments need to be made to the *Customs Act 1901*, the *Customs Tariff Act 1995* and relevant customs regulations such as the *Customs Regulations 1926*. New customs regulations need to be enacted for the product specific rules of origin set out in **Annex 3-A** of the Agreement. *The Foreign Acquisition and Takeovers Regulations 1989* will also require amendment to incorporate the new threshold for screening investment proposals by Korean investors at \$1 078 million (subject to lower thresholds for sensitive sectors). *The Life Insurance Regulations 1995* will require amendment in order to implement the agreement reached in respect of life insurance, whereby Korean life insurers will be able to operate in Australia through branches rather than subsidiaries. Consistent with Australia's existing obligations in the Australia-US and Australia-Singapore FTAs, and to fully implement its obligations under KAFTA, the *Copyright Act 1968* will require amendment in due course to provide a legal incentive for online service providers to cooperate with copyright owners in preventing infringement due to the

⁴⁵ NIA, para 13.

⁴⁶ RIS, para 74.

⁴⁷ NIA, para 14.

⁴⁸ RIS, para 76.

⁴⁹ NIA, para 15.

- High Court's decision in *Roadshow Films Pty Ltd v iiNet Ltd*⁵⁰, which found that ISPs are not liable for authorising the infringements of subscribers.⁵¹
- 2.40 The remainder of Australia's obligations under the Agreement do not require any legislative or regulatory amendments. The impact of KAFTA on States and Territories is outlined at Attachment I (*Consultation*) to the NIA.⁵²

Costs

- 2.41 Treasury modelling has estimated that the loss of tariff revenue to the Australian Government resulting from the Agreement, based on current levels of trade, will be approximately \$100 million in 2014–15 and \$635.9 million over the forward estimates period. This estimate assumes that the Agreement will enter into force in the second half of 2014. The costing does not include any second-round impacts arising from increased bilateral trade. Accordingly, the estimates do not take into account additional lost tariff revenue if imports from Korea displace imports from other countries. On the other hand, the estimates do not take into account the potential domestic economic growth that the Agreement could generate and any additional taxation revenue resulting from this growth. Overall, noting the economic modelling, the NIA concludes that the Agreement represents a net gain to the Australian economy.⁵³

50 [2012] HCA 16 (20 April 2012).

51 NIA, para 17.

52 NIA, para 18.

53 NIA, para 19.

3

Benefits and implementation timeframe

- 3.1 The majority of evidence received by the Committee indicated a range of benefits flowing from the implementation of the Korea-Australia Free Trade Agreement (KAFTA) for business and industry. Apart from the direct value of tariff reductions, increased competitive advantage and potential future opportunities were identified as tangible positive results.
- 3.2 However, there is a sense of urgency amongst the commercial community for implementation of KAFTA to be finalised before the end of calendar year 2014. Any delay in implementation may compound long-term disadvantage for a number of Australian industries. Missing out on the double tariff reduction which early implementation will allow, will entrench existing tariff gaps and seriously impede competitiveness.

Benefits

- 3.3 Witnesses from business and industry welcome the proposed free trade agreement with Korea. They told the Committee that the agreement provides benefits and opportunities on a number of levels. Apart from the obvious direct benefit of reduced tariffs and increased market access, they identified competitive advantage, protection of existing markets, and positioning to take advantage of future negotiating opportunities as positive outcomes.
- 3.4 Reduced tariffs and increased market access will provide an immediate boost to trade. For example the dairy industry told the Committee it expects an increase of US\$7.6 billion in the first year of operation of KAFTA and continued annual growth thereafter. The dairy farm,

- manufacturing and export industry is currently worth \$13 billion a year to the Australian economy and Korea is its tenth largest market.¹
- 3.5 If KAFTA is introduced before the end of calendar year 2014 and the beef industry can take advantage of the double tariff reduction, Meat and Livestock Australia estimate that the red meat industry will benefit by \$408 million over the next 15 years.² For the Australian Agricultural Company for whom the Korean market is currently worth \$35 million, the expected reduction in the tariff differential between Australia and their major competitor, the United States (US), from 8 per cent to 5.34 per cent represents a significant increase in trade value.³
- 3.6 Likewise, the sugar industry told the Committee that the removal of the 3 per cent tariff on raw sugar, which equates to \$15 per tonne, will provide a significant increase to existing exports. Presently Korea is Australia's largest export market for raw sugar, taking approximately 100 million tonnes worth \$500 million annually.⁴
- 3.7 For the horticultural industry KAFTA is particularly welcome as the industry has faced high tariff barriers in the Korean market.⁵ The Australian Table Grape Association expects to create \$40 million worth of exports over the next five years if KAFTA comes into effect.⁶ Australian potato growers already hold a 37 per cent market share of the Korean potato import market worth \$11 million to \$12 million annual with an existing 27 per cent tariff. That tariff can reach 304 per cent if the above-quota tariff clicks into force.⁷ With tariffs due to drop to zero with the implementation of KAFTA, the market is expected to double.⁸
- 3.8 Australian nuts are an expanding horticultural export sector. The 30 per cent tariff on Australian macadamia nuts, for example, will be reduced to zero over five years and exports are expected to go from 175 tonnes per

1 Mr Noel Campbell, Chairman, Australian Dairy Industry Council Inc., *Committee Hansard*, Canberra, 14 July 2014, p. 21.

2 Mr Malcolm John Foster, Chairman, KAFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 17.

3 Mr Jason Strong, Managing Director, Australian Agricultural Company, *Committee Hansard*, Brisbane, 30 July 2014, p. 16.

4 Mr Warren Peter Males, Head, Economics, Canegrowers, *Committee Hansard*, Brisbane, 30 July 2014, p. 1.

5 The Office of Horticultural Market Access (OHMA), *Submission 37*, p. [1].

6 Mr Jeffrey Scott, Chief Executive Officer, Australian Table Grape Association, *Committee Hansard*, Sydney, 29 July 2014, p 45.

7 Mr Scott, *Committee Hansard*, Sydney, 29 July 2014, p. 45.

8 Mr Hayden Moore, National Manager, Export Development, AUSVEG Ltd., *Committee Hansard*, Sydney, 29 July 2014, p 45.

- annum (worth \$3 million) to approximately 2000 tonnes (worth \$40 million).⁹
- 3.9 The wine industry too is enthusiastic about the opportunities presented by KAFTA. The 15 per cent tariff on Australian wine will reduce to zero on entry into force. In 2013 the industry held approximately four per cent by volume of the Korean market but expects that market share to increase to 15 per cent over the next two or three years against their global competitors.¹⁰
- 3.10 However, it is the competitive advantage that KAFTA presents that provides significant potential for many Australian industries. The Winemakers' Federation of Australia informed the Committee that exports to Korea had been 'steadily decreasing since 2007' largely because of the Korean free trade agreements with the US, the European Union (EU) and Chile.¹¹ The wine industry sees the Korean market as a 'major growth opportunity' and KAFTA will enable the industry to compete on a 'level playing field'.¹²
- 3.11 The Nut Council of Australia told the Committee that Australian growers have sold almost no almonds to Korea since the Korea-US free trade agreement (KORUS) came into effect in March 2000, reducing the US tariff to zero.¹³ The entry into force of KAFTA will reduce the tariff for Australian almonds from 8 per cent to zero, putting the Australian industry back on an equal footing with the US industry. The Korean market imports 20 000 tonnes of almonds annually worth \$160 million.¹⁴
- 3.12 The importance of this competitive advantage was stressed by nearly all of the industries and industry bodies that spoke to the Committee, not only to grow markets but to maintain existing market share. The sugar industry explained the consequences of losing the competitive edge in a strong existing market:

Korea is a longstanding customer of the Australian industry. The Thais will have a tariff advantage over Australia going forward unless this agreement is ratified. At the limit it would mean that Australia would be looking for alternative outlets for one million

⁹ Australian Nut Industry Council, *Submission 40*, p. [2].

¹⁰ Mr Anthony Nicholas Battaglene, General Manager, Strategy and International Affairs, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 5 August 2014, pp. 1 and 3.

¹¹ Winemakers' Federation of Australia, *Submission 4*, p. [4].

¹² Mr Battaglene, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 5 August, 2014, p. 1.

¹³ Australian Nut Industry Council, *Submission 40*, p. [2].

¹⁴ Australian Nut Industry Council, *Submission 40*, p. [2].

tonnes of its raw sugar exports. If so, that would have a significant impact on returns to the Australian industry, not just because of the impact of the tariff but seeking alternative markets would see those markets delivering a lower net to our industry than the Korean market, which is a very good market for us.¹⁵

- 3.13 The National Farmers' Federation (NFF) pointed out that 70 per cent of Australian agricultural products are exported, emphasising that 'it is about having a market and an opportunity; it is about having another customer for our exports'.¹⁶ The Cattle Council of Australia told the Committee that market access to multiple markets was the major issue for producers as it protects profitability from fluctuating demand in individual markets:

We used to sell pretty much 95 per cent of our export beef to three markets. We are now in 105 markets. Having competitive advantage or at least being on an equal playing field in those markets makes operations on a day-to-day basis a lot easier.¹⁷

- 3.14 The Australian Table Grape Association reiterated the need for access to diversified markets:

We need diversification in our export markets ... To have diversification means the growers have choice – different prices, different quality fruit. Different varieties of fruit can go to various markets. It cannot all just go to one country.¹⁸

- 3.15 Diversification and choice of markets also helps domestic competition. Witnesses referred to the supermarket duopoly in Australia and told the Committee that access to a variety of external markets forced supermarket chains to offer growers and producers more realistic prices.¹⁹

- 3.16 Industries also noted that secure access to existing markets coupled with the expected increase in trade will provide increased employment opportunities. Many of these industries are significant employers in rural and remote areas. For example the red meat industry employs some 150 000 people: 100 000 at the farm gate and 50 000 downstream:

About 50 000 of those are directly employed in meat processing and retailing. The remainder are throughout the supply chain. So

15 Mr Males, *Canegrowers, Committee Hansard*, Brisbane, 30 July 2014, p. 1.

16 Mr Brent Finlay, President, National Farmers' Federation (NFF), *Committee Hansard*, Sydney, 29 July 2014, p. 28.

17 Mr Jed Matz, Chief Executive Officer, Cattle Council of Australia, *Committee Hansard*, Sydney, 29 July 2014, pp. 21–22.

18 Mr Scott, Australian Table Grape Association, *Committee Hansard*, Sydney, 29 July 2014, p. 47.

19 Mr Finlay, NFF, *Committee Hansard*, Sydney, 29 July 2014, p. 29.

they are not just farmers but truck drivers and people who provide ancillary services from laboratories to air freight and all the rest of the things that come with an industry of this size.²⁰

- 3.17 The dairy industry has 6 400 dairy farmers but reminded the Committee that to support the growth in exports ‘significant capability’ will also be required in the processing sector.²¹ An example that emphasised the important role played by relevant industries in rural employment came from the Australian Nut Industry Council. An operation in a small rural township with a population of 34 employed six full-time staff, supplemented with seasonal work during harvest pruning.²²
- 3.18 Asked about the possible flow on effects on employment presented by the opportunities provided in KAFTA, the Director of the Board of the Australian Nut Industry Council told the Committee:
- ... the more economic activity you have, the more jobs you have ...
If you have markets, you can expand your production and if you expand your production, you create jobs. It is simple, really.²³
- 3.19 A further benefit identified by witnesses was the opportunities presented by ‘having a seat at the table’. The Australian Nut Industry Council indicated that KAFTA was the first step in the process of establishing a relationship with Korea that could open up future prospects.²⁴ Citrus Australia provided an example of the types of non-tariff benefits that flow from free trade agreements:

We often talk about tariffs and that it is the be all and end all of these free trade agreements, but what we often overlook—and you can see a good example of it with Thailand—is that, as part of the free trade agreement, the two nations actually commit to having ongoing dialogue about phytosanitary issues.²⁵

20 Mr Steve Martyn, National Director processing, Australian Meat Industry Council, *Committee Hansard*, Sydney, 29 July 2014, p. 18.

21 Mr Campbell, Australian Dairy Industry Council Inc., *Committee Hansard*, Canberra, 14 July 2014, p. 22.

22 Mr Christopher Kenneth Joyce, Board Director, Australian Nut Industry Council, *Committee Hansard*, Brisbane, 30 July 2014, p. 11; ANIC, *Supplementary 40.1*, p. [1].

23 Mr Joyce, Australian Nut Industry Council, *Committee Hansard*, Brisbane, 30 July 2014, p. 14.

24 Mr Joyce, Australian Nut Industry Council, *Committee Hansard*, Brisbane, 30 July 2014, p. 10.

25 Mr David Daniels, Market Access Manager, Citrus Australia Ltd, *Committee Hansard*, Sydney, 29 July 2014, p. 47.

Implementation timeframe

- 3.20 The primary risk identified by industry was the possibility that KAFTA would not be implemented before the end of the 2014 calendar year. For those industries that are relying on a phased tariff reduction period, the initial tariff reduction will come into effect on entry into force of KAFTA. If this takes place before the end of 2014, a second tariff reduction will take place on the 1 January 2015, providing a double reduction within a short timeframe.
- 3.21 The importance of this double reduction in tariffs was reiterated throughout the evidence to the Committee. Of particular concern to industry is the possibility of falling further behind competitors who have already implemented free trade agreements with Korea. The dairy industry was one of the many industries to draw the Committee's attention to the competitive disadvantage that could result if implementation of KAFTA is delayed:
- ... if implementation does not occur until 2015, Australia will fall another year behind the EU and the US in terms of commercial disadvantage. It is vital that this opportunity for early implementation is not lost.²⁶
- 3.22 The red meat industry quantified the disadvantage, explaining that the US had benefited from tariff cuts since entry into force of KORUS in 2012 and now has an 8 per cent preferential tariff over Australia.²⁷ As Korea is Australia's fourth-largest beef export customer, delayed implementation could have a detrimental effect on the whole industry:
- If we achieve entry into force this calendar year [2014] ... we will see the current 40 per cent tariff on Australian beef drop to 37.3 per cent and therefore the eight per cent differential between us and the US drop to 5.3 per cent. That 5.3 per cent will then remain for the life of the phase-out period until there is no tariff at all. If we do not achieve entry into force in 2014 that eight per cent competitive disadvantage will remain for the life of the phase-down period and will have a significant impact on our market share.²⁸

26 Mr Campbell, Australian Dairy Industry Council Inc., *Committee Hansard*, Canberra, 14 July 2014, p. 21.

27 Mr Foster, KAFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 16.

28 Mr Foster, KAFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 17.

4

Issues

- 4.1 Although business and industry are overwhelmingly supportive of the proposed Korea-Australia Free Trade Agreement (KAFTA) a number of issues are causing concern amongst the wider community. In particular, the perceived dangers associated with the inclusion of an investor-state dispute settlement (ISDS) mechanism in the agreement and mooted changes to intellectual property rights.
- 4.2 Other issues specifically related to KAFTA include:
 - the benefits of third party certification of the origin of products *versus* self-certification;
 - possible flaws in the economic modelling undertaken to support implementing the agreement;
 - the potential effect of implementation of the agreement on the Australian automotive industry;
 - perceived lack of labour market testing provisions in the movement of natural persons chapter; and
 - perceived weakness of the labour and environment chapters.
- 4.3 Several broader issues regarding Free Trade Agreements (FTAs) more generally were also raised including:
 - utilisation of FTAs and possible regulatory confusion due to the proliferation of such agreements;
 - levels of stakeholder consultation during treaty negotiations and the need for reform of the Australian treaty making process; and
 - monitoring of the impact of FTAs on the economy.

Investor-state dispute settlement mechanisms

- 4.4 KAFTA includes an ISDS mechanism. These mechanisms provide a means for foreign investors to settle disputes with host governments through a third party outside of either country's formal judicial system.¹ ISDS provisions are designed to protect foreign investors from direct or indirect expropriation of their investments. Originally set up to protect foreign investors in developing countries, ISDS clauses are now included in the majority of FTAs.²
- 4.5 DFAT told the Committee that Korea had refused to sign the Agreement without the inclusion of an ISDS mechanism. DFAT explained that, faced with Korea's position, the Australian Government took measures to ensure that the final ISDS mechanism addressed the growing concerns over these provisions:
- The inclusion of an ISDS mechanism was essential to Korea and we negotiated a modern balanced mechanism that includes a range of explicit ISDS safeguards at least as strong as any other Australian agreement and certainly stronger than the majority to protect the government's ability to regulate in the public interest, including for public health and the environment.³
- 4.6 According to the RIS, the ISDS in KAFTA will promote investor confidence by providing for international arbitration of FTA-based investment disputes.⁴ To succeed in an ISDS claim, an investor must establish that the host government has breached an investment obligation.
- 4.7 KAFTA contains a significant range of carve-outs and safeguards to protect regulation in areas of key public policy concerns including public welfare, health, culture and the environment. Foreign investment screening decisions are also carved-out from the scope of the ISDS mechanism. Procedural safeguards to deter frivolous claims and contain costs are also included.⁵
- 4.8 Some witnesses expressed blanket opposition to ISDS mechanisms in all FTAs. Dr Rimmer told the Committee that based on the way the current

1 Productivity Commission, *Bilateral and Regional Trade Agreements: Productivity Commission Research Report*, November 2010, p. 265.

2 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 265.

3 Ms Jan Adams, Deputy Secretary, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 5 August 2014, p. 6.

4 RIS, para 74.

5 RIS, para 76.

system is working an ISDS mechanism was unnecessary in any FTA.⁶ Dr Tienhaara expressed a similar opinion, stating that ‘trade agreements should be about trade and should not include investor-state dispute elements’.⁷

4.9 On the other hand, a number of witnesses told the Committee that they had no concerns over the inclusion of ISDS mechanisms in FTAs. When the beef industry became aware that the ISDS provisions were holding up the KAFTA negotiations, they actively lobbied the Government to come to a compromise on the issue.⁸ The wine industry saw the inclusion of such mechanisms as providing ‘protection against sovereign risk due to the introduction of social engineering policies and legislation’.⁹ The wine industry stressed that they were neutral regarding the inclusion of an ISDS mechanism in KAFTA but did not see it as a threat as Australia has a strong regulatory system in place.¹⁰

4.10 A number of witnesses drew the Committee’s attention to the findings of the Productivity Commission’s 2010 report, *Bilateral and Regional Trade Agreements*, which concluded that ‘experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions’.¹¹ Further, the report found that:

There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements.

Available evidence does not suggest that ISDS provisions have a significant impact on investment flows.¹²

4.11 The risks identified by the Productivity Commission and reiterated by witnesses include:

- ‘regulatory chill’: governments may be hesitant to introduce regulations, particularly in the areas of environmental legislation or taxation, because it could be challenged and leave the government open to compensation claims;¹³

6 Dr Matthew Rimmer, *Committee Hansard*, Canberra, 14 July 2014, p. 3.

7 Dr Kyla Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 9.

8 Mr Malcolm John Foster, Chairman, KAFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 19.

9 Winemakers’ Federation of Australia, *Submission 4*, p. [5].

10 Mr Anthony Nicholas Battaglene, General Manager, Strategy and International Affairs, Winemakers’ Federation of Australia, *Committee Hansard*, Canberra, 5 August 2014, pp. 2 & 4.

11 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 274.

12 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 271.

13 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 271.

- **rights of investors:** foreign investors gain greater legal rights than domestic businesses by granting them access to third-party arbitration;¹⁴
 - **compensation payments:** foreign investors have been awarded large compensation payments running into billions of dollars;¹⁵ and
 - **international tribunals:** the tribunals are made up of three corporate lawyers and usually hold closed hearings. The tribunal members are practicing advocates, not independent judges. There is no system of precedents and no appeal system.¹⁶
- 4.12 Several submissions to the Committee cited the 2014 report of the United Nations Committee on Trade and Development (UNCTAD) which found that the number of ISDS cases lodged annually had risen from five in 1993 to 57 in 2013. The report estimates the total number of ISDS cases lodged as 568 but warns that the figure may be higher as the proceedings do not take place publicly.¹⁷ Dr Tienhaara informed the Committee that, of these cases, 274 have been concluded and that approximately 43 per cent were decided in favour of the State and 31 per cent in favour of the investor with approximately 26 per cent settled out of court.¹⁸
- 4.13 The nature of the international tribunals set up to arbitrate ISDS cases is considered by some as problematic. The tribunals lack a system of precedent or an appeals process which can be perceived to promote inconsistency and unfairness. Dr Ranald pointed out that this meant that 'decisions about cases with similar facts can have quite different outcomes'¹⁹ and Dr Tienhaara told the Committee it creates 'uncertainty for regulators'.²⁰
- 4.14 The three arbitrators for a case are chosen from a pool of arbitration investment law experts: one by the complainant, one by the defendant and the third is mutually agreed by both parties. Stressing the absence of judicial independence, Dr Tienhaara articulated the concerns of many with the system:
- Arbitrators lack the independence of judges because they were chosen by the parties to the dispute and paid by the hour.
- Additionally, individuals may act as an arbitrator in one case and

¹⁴ Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 272.

¹⁵ Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 272.

¹⁶ Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 273.

¹⁷ Dr Kyla Tienhaara, *Submission 1*, p. 4; Australian Fair Trade and Investment Network (AFTINET), *Submission 42*, p. 6; Dr Matthew Rimmer, *submission 45*, p. 17.

¹⁸ Dr Tienhaara, *Submission 1.1*.

¹⁹ Dr Ranald, AFTINET, *Committee Hansard*, Sydney, 29 July 2014, p. 1.

²⁰ Dr Kyla Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 8.

as a legal representative for a claimant in another, which creates serious issues of conflict of interest.²¹

- 4.15 Asked why health and environment regulations were particularly at risk, Dr Tienhaara identified two reasons: frequent regulatory change to accommodate scientific and technological advances and the costs of adjusting to such change for affected industries:

Basically health and environment tend to be areas where regulation is often being ratcheted up. It is regulatory change that is the problem under ISDS. Existing regulations cannot be challenged; it is when you increase regulation that it gets challenged. So these are areas where we want to keep improving. We constantly have new scientific evidence and new technologies that we want to introduce so that we can improve health and environment ... these are very important issues that we can do something about. The other part of it is that health and environmental regulation can be quite costly for industries to adjust to, especially if we are talking about big mining companies and the big fossil fuel industry. If you start ratcheting up regulations in the environmental field, it can be quite costly for them so these are the types of regulations that are often going to get challenged.²²

- 4.16 The Committee noted that KAFTA includes a range of safeguards and carve-outs designed to mitigate the risks associated with ISDS mechanisms. The Department of Foreign Affairs and Trade (DFAT) is confident that the safeguards cover public policy areas including the environment, health and welfare.²³ DFAT said that the protections 'to safeguard the right to regulate' have been evolving since the early ISDS mechanisms were included in trade agreements and that the Korea agreement provides a 'very good balance between the rights of sovereign governments to regulate and investor protection rights'.²⁴

- 4.17 DFAT categorised the safeguards into five groups:

- the carve out of the Foreign Investment Review Board decisions from investor-state dispute settlement;
- the exceptions;

21 Dr Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 8.

22 Dr Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 12.

23 Ms Jan Adams, Deputy Secretary, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 5 August 2014, p. 7.

24 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 9.

- the schedules of reservations which allow Australia to reserve policy space to maintain or adopt new measures in specified sensitive areas;
 - safeguards built into the core investment obligations; and
 - the procedural protections.²⁵
- 4.18 Witnesses conceded that the exemptions and protections in KAFTA go further than previous agreements. Dr Rimmer admitted that KAFTA was 'certainly better' than the Hong Kong Bilateral Investment Treaty.²⁶ Dr Tienhaara acknowledged the Government's efforts to improve the ISDS mechanism and said that 'KAFTA is much better worded than previous treaties'.²⁷
- 4.19 Dr Tienhaara also stated that the fair and equitable treatment standard included in KAFTA as a safeguard is one of the 'most abused standards in international investment law' and that linking it to customary international law left it open to 'expansive interpretations'. She concluded that:
- Both of these purported safeguards are also susceptible to the most favoured nation treatment loophole. Through MFN investors can effectively import broader standards from earlier treaties to which Australia is party, into KAFTA.²⁸
- 4.20 The current case involving Philip Morris' challenge to Australia's plain packaging tobacco laws was repeatedly cited as an example of the dangers of ISDS mechanisms. The Committee asked a range of witnesses if the proposed additional safeguards in KAFTA would prevent such a case happening in the future. The general response was that until the safeguards are tested it is difficult to determine how successful they will be.²⁹
- 4.21 Dr Rimmer argued that such a challenge could not be ruled out as it could be brought to test the scope of the exemptions:
- ... I think what would happen is a tobacco company would bring an action in relation to an investor-state dispute settlement regime and Australia would have to defend that, and then they would have to try to invoke the exemptions. But the tobacco industry would argue that it is not a matter of health, it is a matter of intellectual property or it is a matter of trade or a range of other

²⁵ Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 6.

²⁶ Dr Rimmer, *Committee Hansard*, Canberra, 14 July 2014, p. 4.

²⁷ Dr Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, pp. 9–10.

²⁸ Dr Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 8.

²⁹ See Dr Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 9 and Dr Ranald, AFTINET, *Committee Hansard*, Sydney, 29 July 2014, p. 3.

current issues. There would be a debate about the scope of the exemptions.³⁰

- 4.22 DFAT considered that the safeguards included in the ISDS mechanism in KAFTA would mitigate the risk of frivolous claims being lodged, explaining how the procedural protections would operate:

The first of those is an expedited procedure to dismiss frivolous claims at an early stage of the proceedings and potentially to award costs against an investor in those circumstances. Another key procedural protection is the ability of the parties to issue a joint interpretation of any obligation in the agreement which is then binding on a tribunal. This is valuable because if the parties think that a tribunal is interpreting an obligation in an overly broad way, in a way that increases the exposure of the parties in ways they had not anticipated, they can issue a joint interpretation of what they consider that obligation to require and that will be binding on any tribunal.³¹

Intellectual property rights

- 4.23 The intellectual property rights chapter of KAFTA has drawn considerable attention from academics and stakeholders regarding the proposed need for changes to Australian intellectual property law and the inclusion of intellectual property in the definition of investment with regard to the investor-state dispute mechanism. Other concerns raised with the Committee include the prescriptive nature of the chapter, the lack of recognition of the broader public interests of intellectual property rights, and possible changes to fair use provisions.
- 4.24 The NIA implied that Australia is currently non-compliant with its obligations under the Australia-US Free Trade Agreement and the Australia-Singapore Free Trade Agreement and that changes to the *Copyright Act 1968* were required in due course to correct the situation. In order to effect the changes it was suggested that the High Courts' decision in *Roadshow Films Pty Ltd v iiNet Ltd* would need to be nullified.³²

30 Dr Matthew Rimmer, *Committee Hansard*, Canberra, 14 July 2014, p. 4.

31 Mr Richard Braddock, Directory, Office of Trade Negotiations, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 7.

32 NIA, para 17.

- 4.25 While there was limited support for this position³³, the majority of evidence received by the Committee took exception to the proposal. It was described variously as ‘incorrect’³⁴ and ‘inaccurate and misleading’.³⁵ Asked to explain the need for the proposed changes, the Attorney-General’s Department (AGD) told the Committee that the three free trade agreements mentioned ‘require Australia to provide a legal incentive for cooperation between ISPs and copyright owners’.³⁶ The High Court decision ‘cast some doubt on the effectiveness of those provisions in giving effect to that obligation’.³⁷
- 4.26 To clarify their position AGD said that, prior to the High Court’s decision Australia ‘complied with this obligation through technology neutral “authorisation liability” provisions contained in sections 36 and 101 of the *Copyright Act 1968*’.³⁸ However, the High Court’s decision:
- ... substantially limited the circumstances in which ISPs will be found liable for authorising the infringements of subscribers, giving rise to some risk that Australia could be perceived as not fully complying with this obligation.³⁹
- 4.27 In a comprehensive and detailed argument Professor Weatherall, an intellectual property specialist, refutes this suggestion, maintaining that Australia does not have such an obligation under these free trade agreements. Further she contends that existing Australian law provides the necessary legal incentives and that the High Court decision does not need to be reversed.⁴⁰
- 4.28 Other submitters support Professor Weatherall’s claims. Dr Rimmer informed the Committee that the High Court’s decision is ‘consistent with Australia’s international obligations’ and that there is ‘no pretext for overturning the ruling of the High Court of Australia under the guise of international law’.⁴¹
- 4.29 The proposed nullification of the High Court’s decision and mooted changes to the *Copyright Act 1968* also raised concerns over ‘policy

³³ See, for example, News Corp Australia, *Submission 74*; Music Rights Australia, *Submission 73*.

³⁴ Professor Kimberlee Weatherall, *Committee Hansard*, Sydney, 29 July 2014, p. 13.

³⁵ Dr Matthew Rimmer, *Submission 45*, p. 49.

³⁶ Mr Andrew Kenneth Walter, Assistant Secretary, Commercial and Administrative Law Branch, Civil Law Division, Attorney-General’s Department (AGD), *Committee Hansard*, Canberra, 5 August 2014, p. 18.

³⁷ Mr Walter, AGD, *Committee Hansard*, Canberra, 5 August 2014, p. 18.

³⁸ Attorney-General’s Department (AGD), *Submission 75*, p [1].

³⁹ AGD, *Submission 75*, p. [1].

⁴⁰ Professor Weatherall, *Submission 49*, pp. 8–11.

⁴¹ Dr Rimmer, *Submission 45*, p. 49. See also Australian Digital Alliance, *Submission 56*, p. 4.

laundering'. The Australian Digital Alliance pointed out that the NIA and RIS provide no details on what the proposed changes to the Act would be or any analysis of the possible impact of changes.⁴² AFTINET were quite blunt in their criticism of the proposal:

The introduction of legislation to nullify a High Court decision which would have the effect of greatly strengthening copyright law in favour of copyright holders is an issue of great public interest, not only to internet service providers as an industry sector, but also to consumers. Such a proposal should be fully debated and rigorously scrutinised by the democratic parliamentary process, not presented as a done deal in legislation to implement a trade agreement.⁴³

- 4.30 KAFTA includes intellectual property rights within the definition of investment in the ISDS mechanism. Dr Rimmer informed the Committee that this considerably extended the power of intellectual property owners as they could use the ISDS mechanism to challenge a 'wide range of public regulation'.⁴⁴ He warned that Canada had been attacked by pharmaceutical companies in this way under the North American Free Trade Agreement (NAFTA).⁴⁵ While acknowledging the carve-outs included to protect public interest in the ISDS mechanism, the Australian Digital Alliance voiced concerns that 'they are simply not wide enough to cover the various public policy areas that may require a change to copyright settings in the future'.⁴⁶
- 4.31 There is also concern that the intellectual property chapter 'locks in' existing Australian intellectual property law. Professor Weatherall described its detailed, prescriptive nature as 'harmful to Australia's long term interests'.⁴⁷ It will constrain Australia's flexibility in this area, stifling innovation and creativity.⁴⁸ She indicated the difficulty of amending international agreements once they are adopted and explained that this would complicate Australia's capacity to respond to economic, social and technical change:

IP law has been amended countless times in the last 15 years.

Technology has changed even more in that time. How can we

42 Australian Digital Alliance, *Submission 56*, p. 3.

43 AFTINET, *Submission 42*, p. 4.

44 Dr Rimmer, *Submission 42*, p. 38–39.

45 Dr Rimmer, *Committee Hansard*, Canberra, 14 July 2014, p. 1.

46 Australian Digital Alliance, *Submission 56*, p. 6.

47 Professor Weatherall, *Submission 49*, p. 3.

48 Professor Weatherall, *Submission 49*, p. 1.

presume to predict how technology will operate and what an appropriate IP law will look like in even 5 years, let alone 20?⁴⁹

- 4.32 The implications of the extension of the copyright term to 70 years were also drawn to the Committee's attention. The extension strengthens the rights of copyright owners and increases the difficulties faced by cultural institutions dealing with orphan works.⁵⁰ The Australian Digital Alliance provided an example of the extent of the problem for Australia citing the National Library collection:

... the National Library estimates that its collection holds over 2 million unpublished works, of which over half are orphans, and other libraries, museums, archives and galleries all face similar problems.⁵¹

- 4.33 Overall there was concern that the intellectual property rights chapter strengthened the rights of copyright holders but did not recognise the broader public interest in access to knowledge and information. Dr Rimmer stated that the chapter failed to consider the objectives and purposes of intellectual property law:

... such as providing for access to knowledge, promoting competition and innovation, protecting consumer rights, and allowing for the protection of public health, food security, and the environment.⁵²

- 4.34 The Australian Digital Alliance identified the risks inherent in not having balancing provisions within the chapter:

Lack of any language recognising that intellectual property rules need to balance protection for rightsholders with legitimate public interests in promoting innovation and accessing culture and knowledge, as well as legitimate consumer concerns around areas such as privacy, may weigh towards an enforcement heavy interpretation of any disputes.⁵³

- 4.35 Professor Weatherall identified a number of areas where lack of protection for non-rights holders could cause concern including access to reasonably priced medicines. She also emphasised the right to due process and the rights of third parties affected by enforcement procedures.⁵⁴
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49 Professor Weatherall, *Submission 49*, p. 4.

50 Australian Digital Alliance, *Submission 56*, p. 6.

51 Australian Digital Alliance, *Submission 56*, p. 6.

52 Dr Rimmer, *Submission 45*, p. 43.

53 Australian Digital Alliance, *Submission 56*, p. 6.

54 Professor Weatherall, *Submission 49*, p. 14.

- 4.36 The Committee asked Professor Weatherall how the lack of balance could be redressed in future agreements:

... preambular-type text that actually recognises the other interests that are involved in making IP law; affirmation of things like the TRIPS articles 7 and 8, which again recognise interests in the making of intellectual property law; provisions that deal with the interests of others in enforcement actions, particularly defendants, and protect the interest of defendants and third parties, requiring revenues to be proportional, requiring measures to be proportional, requiring fair and equitable procedures in IP; and, more broadly, provisions that positively recognise, for example, the right of a country to introduce fair use.⁵⁵

Certificates of origin

- 4.37 One aspect of KAFTA that concerned Australian Chamber of Commerce and Industry (ACCI) was the perceived ambiguities surrounding Certificates of Origin. Article 3.15 sets out the requirements for a Certificate of Origin stating that the document shall be completed by the exporter or producer. ACCI maintain that, according to international definitions, such a self-certification document would more properly be called a Declaration of Origin.⁵⁶ Article 3.16 provides for authorised bodies to issue Certificates of Origin which ACCI claims directly contradicts the provision in Article 3.15.⁵⁷ ACCI argued that third-party authorisation of a Certificate of Origin is required to maintain the integrity of the system:

Without a Certification process there is no basis for trust in the statement of the exporter, and entities engaged in international trade along with Customs authorities will be rightly sceptical of the claims of the transaction.⁵⁸

- 4.38 When the Committee asked business and industry about these concerns, there appeared to be no confusion and there was support for self-certification.⁵⁹ The horticultural industry explained that, while its
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⁵⁵ Professor Weatherall, *Committee Hansard*, Sydney, 29 July 2014, p. 14.

⁵⁶ Australian Chamber of Commerce and Industry (ACCI), *Submission 63*, p. 16.

⁵⁷ ACCI, *Submission 63*, p. 23.

⁵⁸ ACCI, *Submission 63*, p. 16.

⁵⁹ Mr Brent Finlay, President, National Farmers' Federation (NFF), *Committee Hansard*, Sydney, 29 July 2014, p. 28; Mr Gregory Beashel, Managing Director and Chief Executive Officer, Queensland Sugar Ltd, *Committee Hansard*, Brisbane, 30 July 2014, p. 5.

members would use third-party certification if it was deemed valuable, the option of self-certification was important for them:

For a lot of horticultural producers, which are not in the main centres, being able to do it yourself is a great advantage, without having to organise a third party to come to do that certification. It adds to the cost as well and sometimes to the time delay. When you are exporting fresh produce, a lot of product is obviously time sensitive. A lot of horticultural exporters wanted to have at least the option of doing self-certification.⁶⁰

- 4.39 A number of witnesses indicated that ACCI is a beneficiary of the current system, acting as the third-party certifier for Certificates of Origin and accepting fees for the process.⁶¹

Economic modelling

- 4.40 The RIS stated that economic modelling carried out for DFAT by the Centre for International Economics (CIE) predicts that KAFTA could provide an annual boost to the Australian economy of \$650 million after 15 years.⁶² According to the CIE KAFTA will be worth \$5 billion in additional income to Australia over that period and by 2030 Australia's exports could be 25% higher (or \$3.5 billion). Further, KAFTA could create 1 700 jobs in its first year of operation.⁶³ AFTINET questioned the significance of these figures considering that it represents only 0.04 per cent of GDP.⁶⁴ They drew the Committee's attention to the Productivity Commission's findings that the general equilibrium model used to establish the figures is generally overoptimistic – overestimating the gains and underestimating the losses.⁶⁵
- 4.41 Further the model relies on a range of favourable assumptions.⁶⁶ The Australian Manufacturing Workers' Union (AMWU) and AFTINET indicated that the expected losses to employment in the automotive manufacturing industry have not been factored into the economic

60 Mr Chris Langley, Market Access Manager, The Office of Horticultural Market Access (OHMA), *Committee Hansard*, Sydney, 29 July 2014, p. 46.

61 Mr Langley, OHMA, *Committee Hansard*, Sydney, 29 July 2014, p. 46; Mr Joyce, ANIC, *Committee Hansard*, 30 July 2014, pp. 13–14.

62 RIS, para 27.

63 NIA, para 8.

64 AFTINET, *Submission 42*, p. 17.

65 AFTINET, *Submission 42*, p. 17.

66 AFTINET, *Submission 42*, p. 17.

modelling for KAFTA.⁶⁷ They claim that the economic modelling assumes that the operations would already have ceased at the time of the implementation of KAFTA.⁶⁸

- 4.42 Evidence to the Committee suggests that the gains to individual sectors of the economy may be significant, as shown in Chapter 3 of this report. However, AMWU cautioned that the assessment of KAFTA had to be made with regard to its impact on the whole of the economy:

It is a question of whether the agreement should be signed or not, from our point of view, and I think from the government's point of view it is one of the national interests; it is not of sectoral interests.⁶⁹

Manufacturing industry

- 4.43 The RIS states that, while KAFTA will increase competitive pressure for some Australian manufacturers, the elimination of Korea's tariffs of up to 13 per cent on Australian industrial exports will create opportunities for Australian manufacturers.⁷⁰ The CIE predicts that manufacturing exports could be 53 per cent higher after 15 years of KAFTA's entry into force.⁷¹
- 4.44 However, there is controversy regarding the effect of KAFTA on the Australian automotive industry. Questions remain as to whether the negotiation for KAFTA influenced the original decision of the major auto manufacturers to close their Australian operations and also questions whether the implementation of KAFTA will hasten the announced closures.
- 4.45 DFAT told the Committee that they consulted regularly with the relevant auto manufacturers throughout the six or seven years of the negotiating process for KAFTA.⁷² DFAT discussed the impact of different phasing arrangements would have on the companies' operations and ensured
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⁶⁷ Dr Tom Skladzien, National Economic and Industry Adviser, Australian Manufacturing Workers' Union (AMWU), *Committee Hansard*, Sydney, 29 July 2014, p. 33; Dr Ranald, AFTINET, *Committee Hansard*, Sydney, 29 July 2014, p. 4.

⁶⁸ AFTINET, *Submission 42*, p. 17; Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 33.

⁶⁹ Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2104, p. 38.

⁷⁰ RIS, para 51.

⁷¹ RIS, para 51.

⁷² Consultations began in January 2009 and continued until October 2013. DFAT held meetings with the Federation of Automotive Products Manufacturers and the Federal Chamber of Automotive Industries as well as Ford Australia, Toyota Australia and GM Holden. For details of meeting dates see DFAT, *Supplementary submission 76.1*.

that transition periods for the ‘tariff phase-outs of some of the elements of the Korean auto imports’ was included in the final Agreement.⁷³ At the beginning of that period closure of Australian operations was not expected but conditions within the industry changed over that time.⁷⁴ AMWU emphasised that Ford and Holden both referred to the pending free trade agreements with Korea and Japan when announcing their intention to close their Australian operations.⁷⁵

- 4.46 However, the AMWU’s major concern was the impact of the possible early closure of automotive operations due to a fall in demand. The Union informed the Committee that such an eventuality would curtail the transition programs that have been put in place for both the workers and supply chain firms.⁷⁶
- 4.47 The Committee noted that Korea is Australia’s largest market for gearboxes and second largest export market for car engines and that the eight per cent tariff on both these items will be eliminated immediately. Asked if that would benefit the industry and serve to mitigate some of the effects of the closures, the AMWU was of the view that Australia will not produce either car engines or gearboxes once the automotive industry ceases operation.⁷⁷
- 4.48 The Committee notes that the AMWU has a ‘longstanding policy of opposing bilateral trade agreements’.⁷⁸

Movement of Natural Persons

- 4.49 In the Movement of Natural Persons chapter in KAFTA, Australia has made a commitment not to apply labour market testing on Korean nationals entering Australia temporarily as service suppliers or investors.⁷⁹ Labour market testing (LMT) requires employers to test for suitably qualified and experienced Australian citizens to fill an available

⁷³ Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 10.

⁷⁴ Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 8 and Mr Paul Trotman, General Manager, Trade and International Branch, Department of Industry, *Committee Hansard*, Canberra, 5 August 2014, p. 16.

⁷⁵ Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, pp. 33 and 38.

⁷⁶ Australian Manufacturing Workers’ Union (AMWU), *Submission 69*, p. 6–7.

⁷⁷ Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 34–35.

⁷⁸ Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 32.

⁷⁹ RIS, para 77.

position before engaging a temporary foreign worker. Korea has retained the right to apply labour market testing to professionals entering Korea.⁸⁰

- 4.50 Currently contractual service suppliers usually enter Australia through the 457 visa program which has provision for labour market testing although exemptions apply. Submitters to the inquiry expressed concern over the lack of clarity around the proposal in KAFTA and the apparent binding obligation to grant LMT-exempt status in the 457 program to 'all categories of Korean national covered by the agreement'.⁸¹
- 4.51 AFTINET consider that Australia's concession to waive LMT as opposed to Korea's retention of the right indicates an imbalance in the agreement and pointed to the possible impact on unemployment in Australia.⁸²

Labour and environment chapters

- 4.52 The labour and environment chapters of KAFTA were criticised by some witnesses. Both are described as 'weak' with 'low standards' and are censured for lack of enforceability.⁸³
- 4.53 There is concern that the labour chapter does not seek to improve labour standards or rights in either country as it only requires the parties to 'endeavour to adopt or maintain' the principles and rights contained in the International Labour Organization's (ILO) *Declaration on Fundamental Principles and Rights at Work*.⁸⁴ Similarly, the environment chapter has been labelled 'aspirational' and doubt has been expressed over its ability to effectively protect the environment.⁸⁵

Utilisation of FTAs

- 4.54 While supporting the adoption and implementation of KAFTA, ACCI expressed concern over the proliferation of trade agreements and the consequent 'cumulative effects of divergent and novel procedures'

80 *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, Chapter 10, Annex 10B, Article 10.

81 Construction, Forestry, Mining and Energy Union (CFMEU), *Submission 71*, p. 2.

82 Dr Ranald, AFTINET, *Committee Hansard*, Sydney, 29 July 2014, p. 4; AFTINET, *Submission 42*, p. 17.

83 Dr Rimmer, *Submission 45*, pp. 57–58, 71–74; AFTINET, *Submission 42*, pp. 14–16.

84 Dr Rimmer, *Submission 45*, p. 72; AFTINET, *Submission 42*, pp. 14–15.

85 Dr Rimmer, *Submission 45*, p. 57; AFTINET, *Submission 42*, p. 16.

confronting business and industry.⁸⁶ ACCI is interested in the operability of these agreements and practical aspects of access for end users. They suggested that the difficulties imposed by the complexity of compliance requirements could discourage utilisation of the agreements.⁸⁷

- 4.55 The ACCI's assertion was supported by the AMWU who directed the Committee's attention to the Productivity Commission's findings that Australian industry have been underutilising these agreements.⁸⁸ The AMWU identified a number of issues:

... in order to utilise a bilateral trade agreement, there are a whole bunch of regulatory hurdles that you need to jump over as a business. Often, businesses just do not have the resources, the knowledge and the time to jump over all of those hurdles.⁸⁹

- 4.56 The industries and businesses that the Committee raised this issue with were strongly of the view that their members were definitely taking advantage of the opportunities provided by bilateral trade agreements.⁹⁰ A number of them stressed that they were predominantly export industries so such agreements were extremely important to their members.⁹¹ For example, the Australian Nut Industry Council told the Committee that free trade agreements are vital to the growth of their industry:

I think our exporters know how to find a market, particularly macadamia, almonds and walnuts. These industries are entirely focused on exports; they have expanded with the intention of exporting ... The trees were planted to export, so when people invested substantial sums of money in an orchard, they have targeted their market, which are export markets. And if the export markets are there, like we are opening up the Korean market, that is going to provide further impetus into nut farming in Australia.⁹²

⁸⁶ ACCI, *Submission 63*, p. 3.

⁸⁷ ACCI, *Submission 63*, pp. 2–3.

⁸⁸ Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 33.

⁸⁹ Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 34.

⁹⁰ Mr Malcolm John Foster, Chairman, KFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 24; Mr Langley, OHMA, *Committee Hansard*, Sydney, 29 July 2014, p. 47.

⁹¹ See for example Mr Anthony Nicholas Battaglene, General Manager, Strategy and International Affairs, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 5 August 2014, p. 1; Mr Finlay, NFF, *Committee Hansard*, Sydney, 29 July 2014, p. 28; Mr Jeffrey Scott, Chief Executive Officer, Australian Table Grape Association, *Committee Hansard*, Sydney, 29 July 2014, p. 45; Mr Christopher Kenneth Joyce, Board Director, Australian Nut Council, *Committee Hansard*, Brisbane, 30 July 2014, p. 8.

⁹² Mr Joyce, Australian Nut Council, *Committee Hansard*, Brisbane, 30 July 2014, p. 9.

Treaty making process

Consultation

- 4.57 The Committee received conflicting evidence on the amount of industry and stakeholder consultation that took place during the negotiation process for KAFTA. On the one hand the majority of business and industry representatives were satisfied with the level and quality of consultation they had received and praised the accessibility and professionalism of the department staff they had contact with. On the other there is criticism of a lack of transparency and accusations of secrecy.
- 4.58 The Committee notes that DFAT received 66 submissions for KAFTA and consulted 181 separate stakeholders.
- 4.59 The dairy industry said they were 'kept well informed' and made aware of changes as they occurred.⁹³ The beef industry had 'very good access to government' and received regular feedback on the negotiations as they took place.⁹⁴ The National Farmers' Federation spoke of their cooperative and effective relationship with DFAT.⁹⁵ The sugar industry told the Committee that they had a 'very strong, very open and very honest relationship with the DFAT negotiating team'.⁹⁶ Smaller industries felt they had as much access as larger interests with the wine industry finding the consultation process 'outstanding'.⁹⁷
- 4.60 Industry also highlighted the need to be proactive to ensure that their needs were known and appreciated by the negotiators. The sugar industry stressed that they prioritised trade negotiations and ensured that they were actively involved in the process.⁹⁸ The nut industry told the Committee that, after being left out of the AUSFTA, they had launched a concerted effort to bring themselves to the attention of DFAT. Over the last five years the potential of their industry has been recognised:
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⁹³ Mr Peter Brendan Myers, International Trade Development Manager, Trade and Strategy Division, Dairy Australian, *Committee Hansard*, Canberra, 14 July 2014, p. 23.

⁹⁴ Mr Foster, KAFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 18.

⁹⁵ Mr Tony Mahar, General Manager, Policy, National Farmers' Federation (NFF), *Committee Hansard*, Sydney, 29 July 2014, p. 30.

⁹⁶ Mr Warren Peter Males, Head, Economics, Canegrowers, *Committee Hansard*, Brisbane, 30 July 2014, p. 5.

⁹⁷ Mr Battaglene, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 5 August 2014, p. 2.

⁹⁸ Mr Dominic Nolan, Chief Executive Officer, Australian Sugar Milling Council and Joint Secretary, the Australian Sugar Industry Alliance, *Committee Hansard*, Brisbane, 30 July 2014, p. 5.

If you keep presenting your case, providing the data and providing the information to all levels of government and you have a solid case, which I think the nut industry has, you get listened to. You present your case in a logical, coherent fashion and you present the data and the information, you get listened to.⁹⁹

- 4.61 However, business and industry were pragmatic about both the need for confidentiality in the negotiation process and the need for compromise. The beef industry said that compromise is a given in trade negotiations:
- FTAs are, by their nature, a give-and-take-affair. Both sides of the agreement are looking for things. You never get all the things that you want to get. They tend to be a compromise.¹⁰⁰

- 4.62 With regard to confidentiality, the wine industry expressed it bluntly:
- We do not believe, like some others, that it should all be public, because, if you have interest groups—and we would be the same—they would be out there objecting to something and you would never get any decisions happening.¹⁰¹

- 4.63 The conflict over the success or otherwise of the consultation process appears to reside in access to the specific content and text of the treaty before it is finalised. The Australian Industry Group, while appreciative of the accessibility and professionalism of DFAT officials during the negotiations for KAFTA, argued that lack of information on the final content of the document was detrimental to their members:

For many SMEs the timing for abolishing tariffs on a particular tariff line—overnight, or over a longer period—is crucial. But this level of detail was not available. Negotiators were constrained by the policy to not reveal the terms of offers. We recognise the obligation to hold closely the negotiating position of the other side. However, we do believe that the offers of the Australian side should be explained clearly to those affected by them. It is Australian industry which will implement the advantages of freeing up trade. But it is also industry which will bear the brunt of rapid erosion of domestic markets. And it is industry which has the expertise to advise on the effect of proposed measures and to highlight some of the unintended outcomes.¹⁰²

99 Mr Joyce, Australian Nut Council, *Committee Hansard*, Brisbane, 30 July 2014, p. 13.

100 Mr Foster, KAFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 18.

101 Mr Battaglene, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 5 August 2014, p. 2.

102 Australian Industry Group (AIG), *Submission 64*, p. [2].

- 4.64 DFAT explained that their consultation process is extensive and comprehensive. They advertise for, and receive, submissions from a broad range of interested parties and make themselves available to talk to all stakeholders. They also hold ongoing briefings throughout negotiations with interested groups including community groups, NGOs, unions and businesses to keep them updated on the 'entire trade negotiating agenda, including the specific FTA'.¹⁰³
- 4.65 With regard to the level of detail provided to stakeholders, DFAT told the Committee that they provide very detailed information, particularly when they need to ensure that technical or administrative proposals are going to work effectively:
- We would be very explicit to relevant groups and companies and interested parties as to what the positions were and what the outcomes were when we got to outcomes in particular areas ... When it is very technical and you need to know whether a quota-administration system is going to suit our industry, for example, then we would work with text with our stakeholders.¹⁰⁴
- 4.66 Asked about the apparent conflicting evidence the Committee had received regarding the level of industry and community consultation being undertaken, DFAT suggested that different groups are more actively engaged in the consultation process:
- ... I think there are differing amounts of priority that different groups attach to engaging with the negotiators throughout the course of proceedings ... we are very open to meeting and discussing issues with groups coming from all different angles – ... across intellectual property and public welfare as well as the commercial interests. ... there are different degrees of interest in terms of active engagement from the relative groups.¹⁰⁵

Reforms to process

- 4.67 The criticism of the treaty making process received during the Committee's inquiry into KAFTA reflects ongoing dissatisfaction with the treaty making process in Australia more generally. Constitutional responsibility for treaty making in Australia lies with the Executive Government. After the Senate Legal and Constitutional Committee's report, *Trick or Treaty?* was published in November 1996 the Government agreed to:

¹⁰³ Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 7.

¹⁰⁴ Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 8.

¹⁰⁵ Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 11.

- table treaties in both Houses of Parliament before ratification;
 - establish a treaties council for consultation with the states; and
 - support the establishment of the Joint Standing Committee on Treaties (JSCOT).
- 4.68 Despite these reforms the process continues in some cases to be perceived as undemocratic and secretive and these concerns largely focus on the lack of access to the full text of an agreement before it is signed. The AMWU suggests that the Parliament should have greater power to scrutinise and make amendments to the text of draft trade treaties.¹⁰⁶ Asked how this might work in practical terms the AMWU said they would like to see the draft treaty subject to the usual parliamentary legislative process:
- ... we would like to see parliament have a debate and a process much like this process, if not this process, consider the entire text of the agreement, for parliamentarians to be able to provide amendments to the text of the agreement, not necessarily the implementing legislation, and for the text of the agreement to follow through the usual parliamentary process that legislation itself does.¹⁰⁷
- 4.69 Several witnesses and submitters directed the attention of the Committee to the treaty making process in the US. While constitutional responsibility for the treaty making process in the US is different to that in Australia, the industry consultation framework is more structured. There is an advisory committee system in the Office of the United States Trade Representative (USTR), consisting of 28 advisory committees with a total membership of approximately 700 citizen advisors.¹⁰⁸ Cleared advisors are provided with access to the text of draft treaties, but there appears to be some debate about the extent of the access. Asked about the level of access to draft treaty text for the US advisory committee members, DFAT suggested that it was limited:
- I do not think the US groups get copies of the entire text. ... They get US proposals and sometimes they might get small pieces of text.¹⁰⁹
- 4.70 ACCI see merit in the US system, suggesting that it is a way of retaining the degree of confidentiality needed to progress negotiations while

¹⁰⁶ AMWU, *Submission 69I*, p. 11. See also Dr Rimmer, *Submission 45*, pp. 9–10.

¹⁰⁷ Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 32.

¹⁰⁸ Office of the United States Trade Representative (USTR), <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees>, accessed 13 August 2014.

¹⁰⁹ Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 8.

assuring that accredited advisers have access to the detail of the draft text.¹¹⁰ Asked why this would be an improvement on the current consultation process that industry in general appear to support, ACCI told the Committee it would provide more detail of the actual negotiation position as well as the proposed text. Further it would allow for an exchange of views amongst the accredited advisers that could promote a consistent approach.¹¹¹

- 4.71 Enlarging on this proposal, ACCI recommends the establishment of a Centre of Excellence for International Trade Policy that would include industry groups, academia and the Productivity Commission who would be directly involved in the negotiations process.¹¹²

- 4.72 ACCI also suggests that one way of increasing transparency for preferential trade agreements is to develop a model agreement incorporating international standards to be used as the basis for future negotiations.¹¹³ ACCI told the Committee such a model would promote consistency and improve confidence in what each agreement contains:

We think it would add transparency to the process if Australia had a model agreement which was available to all to see, including potential other partners ... I think that would be a great benefit and comfort to industry, frankly, about where the negotiators' guidelines are going to be.¹¹⁴

- 4.73 Questioned as to the practicality of this approach, ACCI maintained that precedents in best practice already exist through the WTO process and that these could be drawn on to develop a workable model that could gain consensus support.¹¹⁵

Monitoring of FTAs

- 4.74 A recurring issue throughout the inquiry was the apparent absence of any ongoing monitoring and evaluation of FTAs and the lack of data regarding their impact on the economy.

¹¹⁰ Mr Bryan Clark, Director of Trade and International Affairs, Australian Chamber of Commerce and Industry (ACCI), *Committee Hansard*, Canberra, 14 July 2014, p. 18. See also ACCI, *Submission 63*, p. 38.

¹¹¹ Mr Clark, ACCI, *Committee Hansard*, Canberra, 14 July 2014, p. 18.

¹¹² ACCI, *Submission 63*, p. 38

¹¹³ ACCI, *Submission 63*, p. 13.

¹¹⁴ Mr Clark, ACCI, *Committee Hansard*, Canberra, 14 July 2014, p. 17.

¹¹⁵ Mr Clark, ACCI, *Committee Hansard*, Canberra, 14 July 2014, p. 19–20.

- 4.75 ACCI stressed the importance of the role of post-implementation assessment to ensure that the predicted economic benefits eventuate.¹¹⁶ To assist this goal ACCI proposes that all trade agreements contain a requirement that all parties collect and share data on the utilisation rates of each agreement.¹¹⁷ This data could then be evaluated by an independent body such as the Productivity Commission to provide a realistic analysis of the overall impact of the agreement on the Australian economy.¹¹⁸
- 4.76 Asked what monitoring and evaluation of FTAs is taking place, DFAT informed the Committee that it was difficult to specifically measure the impact of individual FTAs as the effect of the removal of tariff barriers could not be isolated from broader influences on the economy:
- ... the government's role is to eliminate the border barriers, and the market dynamics of what then happens in the absence of government imposed tariffs, what happens in any particular trade area, will depend on global circumstances.¹¹⁹
- 4.77 However, DFAT said that there are internal processes in place to regularly review and assess policy trends but admitted that this process did not amount to a systematic collection of data that could be made publicly available.¹²⁰

116 ACCI, *Submission 63*, p. 37.

117 ACCI, *Submission 63*, p. 37.

118 ACCI, *Submission 63*, pp. 39–40.

119 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 14.

120 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 14.

Conclusion

- 5.1 KAFTA is expected to be worth \$5 billion in additional income to Australia between 2015 and 2030 and to provide an annual boost to the Australian economy of approximately \$650 million after 15 years of operation. In its first year of operation, it is expected to create 1 700 jobs. Eighty-four per cent of Australia's current exports (by value) will enter Korea duty free. In addition to substantial tariff reductions, KAFTA is expected to significantly increase market access and improve Australia's competitive advantage for a range of Australian exporters.
- 5.2 Despite ongoing theoretical debate over the benefits of bilateral trade agreements, such agreements are playing an increasing role in the push to liberalise world trade. In practical terms Australia is compelled to utilise these agreements to retain and improve its trading position while supporting continuing efforts to conclude more inclusive multilateral agreements.
- 5.3 As with previous trade agreements it has examined, the Committee found KAFTA to be controversial. The nature of these agreements implies compromise, even if the aim is an overall net benefit for the Australian people and the Australian economy. Many of the issues raised during this inquiry reflect the ongoing concerns of both stakeholders and the community at large.

Investor-state dispute settlements

- 5.4 The evidence suggests that the escalated use of investor-state dispute settlement (ISDS) mechanisms has produced unintended consequences for governments globally. While the Committee notes DFAT's assurance that ISDS mechanisms are evolving to address the changing environment it

would appear that there is some reason for concern. Australia, like other affected parties, is attempting to mitigate the risks by introducing appropriate safeguards to trade agreements.

- 5.5 The Committee notes that Australia has ISDS provisions with 28 other economies and recognises that the protective measures incorporated in KAFTA go further than safeguards in previous FTAs. The Committee also notes that the Australian Government will consider the inclusion of ISDS mechanisms in future agreements on a case-by-case basis. The Committee acknowledges that the context of each individual set of negotiations is different and suggests that the Government exercise a cautious approach regarding the inclusion of ISDS provisions in upcoming FTAs.
- 5.6 The Committee notes DFAT's statement that Korea would not have agreed to finalise KAFTA without the inclusion of an ISDS mechanism.
- 5.7 The Committee will continue to monitor developments in this area and watch closely the outcome of the current inquiries being conducted by various bodies including the European Commission.

Intellectual property rights

- 5.8 The Committee notes ongoing concerns regarding the inclusion of intellectual property rights in FTAs. While it is not in a position to comment on the legal argument it does understand the need for flexibility to respond to the fluid nature of many areas affected by intellectual property rights. A less prescriptive approach may be beneficial and forestall future difficulties in responding to ongoing social and technological change.
- 5.9 The Committee notes concerns over the lack of recognition of the broader public interest in the intellectual property provisions in KAFTA regarding access to knowledge and information and suggests that the interests of both non-rights holders and rightsholders need protection.
- 5.10 The Committee also notes the Productivity Commission's recommendation that the costs and benefits of changes to intellectual property rights resulting from intellectual property provisions in trade agreements should be modelled on a standalone basis so that the broader benefits of reduced tariff barriers can be assessed:

... the Commission's view is that Australia's ... support for any measures to alter the extent and enforcement of IP rights should be informed by a robust economic analysis of size and distribution of the resultant benefits and costs.

The Commission considers that Australia should not generally seek to include IP provisions in further BRTAs, and that any IP provisions that are proposed for a particular agreement should only be included after an economic assessment of the impacts, including on consumers, in Australia and partner countries. To safeguard against the prospect that acceptance of ‘negative sum game’ proposals, the assessment would need to find that implementing the provisions would likely generate overall net benefits for members of the agreement.¹

- 5.11 Given the concerns identified in the report regarding the transparency of these agreements and the inclusion of intellectual property provisions in such agreements, this modelling might usefully increase public confidence in the merits of *future* agreements.

Certificates of origin

- 5.12 The Committee is aware that, notwithstanding concerns over nomenclature, the debate over the advantages and disadvantages of Certificate of Origin *versus* Declaration of Origin has been raised previously.²
- 5.13 While the Committee does not doubt the security provided by third-party certification, it recognises that self-certification, whether it is termed a Certificate of Origin or a Declaration of Origin, is advantageous for many rural or remote producers dealing with time sensitive goods.
- 5.14 The Committee suggests that this is one area where specific data regarding use would be beneficial in determining if there is any detrimental effect resulting from the type of document lodged.

Economic modelling

- 5.15 The Committee acknowledges arguments that the predicted benefits to the overall Australian economy from the implementation of KAFTA appear minimal in statistical terms. However, the overwhelmingly positive response from business and industry indicates that the impact on individual sectors is expected to be substantial and significant.

1 Productivity Commission, *Bilateral and Regional Trade Agreements*, November 2010, p. 264.

2 See for example Joint Standing Committee on Treaties (JSCOT), *Report 130: Treaty tabled on 14 August 2012: Malaysia-Australia Free Trade Agreement done at Kuala Lumpur on 22 May 2012*, pp.17-19.

- 5.16 The Committee cannot overlook the flow-on effects to other sectors and the potential increase in employment and economic activity, particularly in rural and remote areas.

Utilisation of FTAs

- 5.17 The Committee notes reports of possible underutilisation of Australia's bilateral trade agreements. It is aware that the proliferation of regulatory requirements arising from the growing number of these agreements may present problems for some end users, an issue it has examined before.³
- 5.18 The Committee suggests that this is another area that would benefit from a structured process of monitoring and evaluation of such agreements and the collection of data for independent analysis and assessment.

Treaty making process

- 5.19 The Committee acknowledges ongoing dissatisfaction with the treaty making process but recognises the constitutional constraints on the process in Australia and highlights the progress that has been made in improving the process over the last two decades.
- 5.20 The Committee notes the conflicting evidence over the level of consultation received by stakeholders and understands the frustration caused by a lack of access to the final draft treaty text for KAFTA (and other such agreements). The tension between the need for confidentiality and the need for transparency presents a conundrum that goes to the heart of the treaty making process.
- 5.21 However, the Committee notes that DFAT received 66 submissions and consulted 181 individual stakeholders during the negotiations for KAFTA. The Committee urges stakeholders to take full advantage of the existing opportunities for consultation during the negotiations of bilateral trade agreements and to be proactive in putting their case to the negotiators.
- 5.22 The Committee acknowledges DFAT's ongoing attempts to make the consultation process inclusive but suggests that negotiators take all possible measures to provide detailed information to stakeholders wherever possible.

3 JSCOT, *Report 130*, pp. 15–17.

Monitoring

- 5.23 The Committee found the lack of reliable, publicly available information on the implementation and impact of FTAs frustrating.
- 5.24 The Committee is conscious that a significant amount of time and resources go into negotiating and implementing these agreements. In order to justify that time and effort it would be useful to determine both the economic impact of the implementation of these agreements and the utilisation rate.
- 5.25 The Committee recognises that the removal of tariff barriers is only one factor that influences economic activity however, it would expect that a certain amount of relevant information on FTAs is available to establish if the anticipated outcomes are being achieved.
- 5.26 The Committee also considers that such information would enable future negotiators to identify issues and difficulties with existing agreements and improve both the process and the terms and provisions of future agreements.
- 5.27 The Committee therefore supports calls for systematic, structured monitoring and evaluation of FTAs and reminds the Government of its previous recommendations urging regular review of the economic, social, regulatory, employment and environmental impacts of such agreements.⁴

Implementation

- 5.28 The Committee recognises that the implementation of KAFTA is only the starting point for some sectors of the economy. The financial services sector welcomed the agreement but told the Committee that it only provides the framework to enable access to the Korean market. More work will be required at government-to-government level for the industry to take full advantage of the agreement.⁵
- 5.29 The Committee is aware that a range of non-tariff barriers including phytosanitary regulations remain to be addressed.
- 5.30 The Committee understands the urgency expressed by stakeholders directly affected by phased tariff reductions for implementation of KAFTA before the end of the 2014 calendar year.
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⁴ JSCOT, *Report 130*, pp. 32–33.

⁵ Mr Andrew Bragg, Director of Policy and Global Markets, Financial Services Council, *Committee Hansard*, Sydney, 29 July 2014, p. 47.

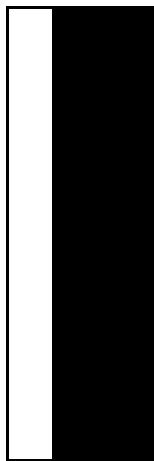
- 5.31 Notwithstanding the importance of the broader issues raised regarding the provisions contained in FTAs generally and the more specific concerns regarding KAFTA, the Committee agrees that the Treaty should be ratified and binding treaty action be taken.

Recommendation 1

The Committee supports the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea* and recommends that binding treaty action be taken.

Mr Wyatt Roy MP

Chair



Dissenting Report—The Hon Kelvin Thomson MP and The Hon Melissa Parke MP

As members of the Joint Standing Committee on Treaties (JSCOT), we cannot support the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014)* (KAFTA) in its present form.

Summary Overview

Many submissions from agriculture and business organisations supported KAFTA on the grounds that it provides increased market access for Australian goods and services into Korean markets, especially for agricultural goods.

However, the task of the Committee and the Parliament is to assess whether the agreement is in the overall national interest, not only in the interest of particular industries. The National Interest Analysis does not provide convincing evidence about the benefit of KAFTA to the overall national interest.

The CIE report done for the National Interest Analysis, which estimates the overall benefit to the Australian economy, uses general equilibrium modelling based on assumptions which the Productivity Commission 2010 *Report on Bilateral and Regional Trade Agreements* concluded overestimate the economic gains from trade liberalisation and underestimate the losses. The overall predicted increase in GDP after 15 years is minute, an increase of just \$650 million or 0.04% in 2030. Dr Tom Skladzien, a former economic modeller with experience of these models, now serving as the National Economic Adviser for the Australian Manufacturing Workers' Union provided evidence that this magnitude could not be considered as anything but insignificant in such models.¹

¹ Transcript available at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Public_Hearings

The modelling assumes away the impacts on the vehicle industry of the implementation of zero tariffs from 2015, two years before the predicted closure of the industry, which may well accelerate job losses and allow less time for retraining and other transition programmes.

The National Interest Analysis does not weigh the estimated minuscule gain of 0.04% in GDP after 15 years against any of the losses which may well be experienced as a result of the agreement, either in employment losses or in other losses. These include regulatory risks and costs to government arising from ISDS, possible unfair competition from goods produced without enforceable labour rights for workers and without enforceable environmental standards, increased costs to business and consumers resulting from copyright changes, and losses to government revenue from tariff reductions. Overall, these losses mean that the KAFTA is not in Australia's national interest.

Specific areas of concern

There were 74 submissions and 11 letters sent to the committee. Concerns were raised by 34 submissions and letters about the inclusion in KAFTA of the right of foreign investors to sue governments over domestic legislation, known as Investor State Dispute Settlement or ISDS (chapter 11). These submissions came from a wide range of community organisations, including the Australian Fair Trade Investment Network (AFTINET), representing 60 community organisations, the Conference of Leaders of Religious Institutes of New South Wales, the New South Wales Nurses and Midwives Association, the Australian Guild of Screen Composers, the Australian Digital Alliance, the Australian Manufacturing Workers Union, and from academic specialists.

Four submissions from experts in copyright law (Professor Matthew Rimmer, Professor Kimberlee Weatherall, the Australian Digital Alliance and the Electronic Frontiers Foundation) and a number of other submissions strongly criticised the intellectual property chapter of KAFTA and disagreed with the recommendation of the national interest assessment that the KAFTA requires changes to Australia's copyright law to nullify the High Court decision *Roadshow Films Pty Ltd versus iiNet Ltd*

Concerns were also raised by a number of submissions about the lack of enforceable labour rights (Chapter 17) and environmental standards (chapter 18), and the lack of requirements by the Australian government to enable local labour market testing before permitting the entry of temporary migrant workers (Chapter 10).

The submission from the Australian Chamber of Commerce and Industry criticised the system of Rules of Origin in the KAFTA text and claimed that they would prevent many Australian exporters from taking advantage of additional market access to Korean markets. The submission recommended that the passage

of implementing legislation and ratification of the agreement be delayed pending re-negotiation of the rules of origin.

Investor State Dispute Settlement - Australian Labor Party Platform

Labor is committed to opposing low-quality piecemeal trade agreements in favour of fair and transparent, multilateral agreements that are based on widespread consultation, provide for appropriate, minimum and enforceable labour and environmental standards, take account of the social and economic impacts of the agreement and allow for sovereign governments to continue making decisions in the interests of their citizens. (Chapter 2, paragraph 73).

Labor supports the principle of national treatment – that foreign and domestic companies are treated equally under the law. Labor does not support, however, the inclusion of provisions in trade agreements that confer greater legal rights on foreign businesses than those available to domestic businesses. Nor does Labor support the inclusion of provisions that would constrain the ability of the government to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. Labor will not ask this of its trading partners in future trade agreements. (Chapter 2, paragraph 80).

Summary of submissions and recommendation on ISDS

Thirty four submissions objected to the inclusion of ISDS in KAFTA. These submissions argued that ISDS gives additional special rights to foreign investors to sue governments for damages in international tribunals over domestic legislation, rights which are not available to domestic investors. This represents a breach of the principle of competitive neutrality with respect to the home country of a business, with Korean businesses gaining potential competitive advantage over Australian businesses due to their country of origin. It is important to note that this competitive neutrality violation exists regardless of ‘safeguards’ used to protect the democratic right of Australians to implement social and environmental policies.

Additional problems with the inclusion of ISDS included how these clauses are practically used and implemented. Submissions argued that the ISDS tribunal system has two fundamental flaws:

- 1) ISDS has no independent judiciary. ISDS arbitration panels are made up of investment law experts, most of whom represent investor complainants, since only investors can take actions in the ISDS system. ISDS panellists can be an advocate one month and an arbitrator the next. In Australia and in other countries, judges cannot continue to be practising lawyers, because of obvious conflicts of interest. Unlike permanently employed, independent judges, arbitrators are also paid by the hour, which gives an incentive for cases to drag on. Most cases take from 3 to 5 years and some take longer.

- 2) ISDS has no system of precedents or appeals, so decisions can be inconsistent. In Australia and other domestic legal systems, independent judges are required to take account of previous decisions or precedents in a structured and systematic way. There is also an appeal system to higher courts. This helps to ensure that decisions are consistent. The lack of precedents or appeals in the ISDS system means that arbitrators are completely unfettered in their decision-making.

The AFTINET submission quoted Juan Fernandez-Armesto, an arbitrator from Spain who observed:

“When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all. Three private individuals are entrusted with the power to review, without any restrictions or appeal procedure, all actions of the government, all decisions of the courts and all laws and regulations emanating from Parliament.” (Eberhardt and Olivet 2012:34)

In addition to the lack of independent judiciary and lack of precedents in appeals, the ISDS system has developed legal concepts which are not found in domestic legal systems. Originally, ISDS was designed to compensate investors for the actual taking of real property. However, it has developed and elaborated the concept of “indirect expropriation” which does not exist in most national legal systems, including in Australia. This means that many changes in domestic law or policy which adversely affect investors can be argued to be indirect expropriation and therefore eligible for compensation. Concepts like “fair and equitable treatment” have also evolved into a standard which requires governments to have a higher level of transparency and consultation with foreign investors than that which is available to domestic ones.

These submissions argued that, given the fundamental flaws in the system, the proposed “safeguards” for health and environmental law and policy in KAFTA are not adequate.

The first “safeguard” sentence in the KAFTA reads: “except in rare circumstances non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations” (KAFTA, 2014: Chapter 11, annex 2B). Many legal experts have pointed out that the phrase “except in rare circumstances” leaves a very big loophole, to the discretion of arbitrators which recent cases in other agreements with this clause have used to advantage (Public Citizen, 2010).

The second “safeguard” is a more limited definition of “fair and equitable treatment” for foreign investors (KAFTA, 2014, chapter 11, clause 11.5.2 and

Annex 2A). However case studies show that tribunals have again exercised a wide discretion, ignored these limitations and applied the previous higher standard (Public Citizen, 2012a)

These two clauses are identical to those contained in the Central American Free Trade Agreement and the US-Peru Free Trade Agreement. Case studies show that clauses in these agreements have not deterred investors from suing over environmental regulation. For example, the Renco mining company is using ISDS to sue a Peru court decision which required the company to deal with pollution from its lead mine (Public Citizen, 2010, 2014).

A third “safeguard” is a reference to the general protections for “human, animal or plant life” in article XX of the WTO General Agreement on Tariffs and Trade (KAFTA, 2014, Article 22.1). This article puts the burden on governments to prove that the law or policy is not a disguised restriction on trade and is “necessary” for the protection of health or the environment compared with other possible measures. Governments have tried to use this clause in WTO government-to-government disputes to defend health and environmental legislation, but have only been successful in one out of 35 cases in the WTO (Public Citizen, 2012b).

The committee heard evidence that, as a result of widespread community concern about the inclusion of ISDS in the proposed Trans-Atlantic Trade and Investment Partnership agreement between the US and the EU, the European Commission launched a public consultation about ISDS. A submission by over 100 legal experts from Europe and North America has assessed proposed safeguards for health and environmental legislation which could be included in the TTIP. These safeguards are far more extensive than those included in the KAFTA. However, the submission found that these were not sufficient to exclude ISDS cases against health and environmental legislation (Schepel *et al*, 2014).

The committee heard evidence about US Lone Pine mining company using ISDS to sue the provincial government of Québec claiming damages of \$250 million for an environmental review of shale gas mining. This review was introduced in response to community concerns about environmental impacts.

In New South Wales, three environmentally controversial mining developments are owned by Korean investors. The New South Wales government has introduced additional environmental regulation of mining in response to community concerns. If the Korea FTA is ratified and contains ISDS, and these mines were refused permission to proceed, it would be possible for those companies to use ISDS to sue the New South Wales government for damages (Ranald, 2014).

A recent paper by Australian High Court Chief Justice French has also raised concerns about the impact of ISDS cases on national judicial systems and decisions. He notes that

"Professor Brook Baker of North Eastern University School of Law in a note about the Eli Lilly case, posed a rather rhetorical question, but one which fairly arises when considering proceedings of that kind in relation to well-established, respected and independent judiciaries:

'After losing two cases before the appellate courts of a western democracy should a disgruntled foreign multinational pharmaceutical company be free to take that country to private arbitration claiming that its expectation of monopoly profits had been thwarted by the court's decision? Should governments continue to negotiate treaty agreements where expansive intellectual property-related investor rights and investor-state dispute settlement are enshrined into hard law?' " (French 2014:9)

Several witnesses made the point that successive Australian governments have managed to negotiate the Australia-US Free Trade Agreement, the Malaysia Free Trade Agreement, and the Japan Australia Economic Partnership Agreement without the inclusion of ISDS.

All of this evidence suggests that the inclusion of ISDS in the KAFTA presents major risks and potential costs which could result from the Australian government being sued for damages over domestic legislation or policy at local, state or Federal level, and over court decisions.

Recommendation:

- 1. That the Parliament delays passage of the implementing legislation for KAFTA pending re-negotiation to exclude ISDS provisions from KAFTA.**

Copyright Australian - Labor Party National Platform

Labor will vigorously oppose any WTO rules or other trade agreements, interpretations or proposals or other trade agreements that would require Australia to privatise its health, education and welfare sectors, undermine the Pharmaceutical Benefits Scheme, reduce government rights to determine the distribution of government funding within these sectors, or which would require us to remove protection of our cultural industries. Labor will oppose attempts to privatise water services under WTO rules. As part of Australia's forward trade objectives Labor believes that federal, state, territory and local governments should retain the flexibility to implement effective policies to encourage industry development, research and development, regional development and appropriate environmental, employment and procurement standards. Labor will not support the expansion of intellectual property rights, which would extend monopoly patent rights to charge higher prices and would give copyright holders greater rights, at the expense of consumers. (Chapter 2, paragraph 86)

Summary of submissions and recommendations on Copyright

Four submissions from experts in copyright law (Professor Matthew Rimmer, Professor Kimberlee Weatherall, the Australian Digital Alliance and the Electronic Frontiers Foundation) and a number of other submissions strongly criticised the intellectual property chapter of KAFTA

Professor Kimberlee Weatherall argued that chapter 13 of KAFTA “contains provisions which reflect bad policy and are contrary to the trends in IP law reform internationally, including provisions explicitly criticised by expert committees established to consider reform of Australian IP law.” (Weatherall, 2014: 2)

These submissions also disagreed with the recommendation of the national interest assessment that the KAFTA requires changes to Australia’s copyright law to nullify the High Court decision *Roadshow Films Pty Ltd versus iiNet Ltd*, which found that ISPs are not liable for authorising the infringements of subscribers

All made the point that this would be a fundamental change in the balance of Australia’s copyright law in favour of copyright holders. Such a major change should be proposed and debated through the normal Parliamentary process, not rushed through Parliament as part of implementing legislation for a trade agreement.

Recommendations:

- 2. Australia’s negotiating stance on intellectual property should depend on an assessment of Australia’s national interest, based on evidence not assumption, and be informed by analysis focused specifically on (a) whether Australian stakeholders are experiencing specific issues in IP in the other negotiating Party or Parties, (b) whether those issues can be (best) addressed through a trade agreement, and (c) the impact of any solutions on Australian interests, including the interests of other stakeholders and the broader public interest in freedom to make innovation policy.**
- 3. The Committee should not support the many constraints which chapter 13 of KAFTA places on Australian innovation and IP policy-making;**
- 4. The Committee should reject the assertion in the National Interest Analysis that Australia’s existing free trade agreements with Singapore and the US, and KAFTA chapter 13, require reversal of the High Court’s decision in *Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16*. Australia does not have an obligation to impose liability on internet access providers for their users’ copyright infringements.**
- 5. The Parliament should oppose the amendment of the Copyright Act 1968 to nullify the High Court’s decision in *Roadshow Films Pty Ltd versus iiNet Ltd*.**

Summary of submissions and recommendation on Rules of Origin

Several organisations, including the Australian Chamber of Commerce and Industry (ACCI), the AMWU, and the Australian Export Council (AEC), raised concerns regarding the ability of Australian businesses to access preferential trade treatment under KAFTA.

Citing evidence from the Productivity Commission, the AMWU raised the general point that past preferential trade agreements have not been utilised by Australian businesses to the degree the government would expect. This has meant that the expected benefits from these agreements have not been realised.

The ACCI and AEC raised specific concerns regarding the rules of origin chapter that they view as undermining the ability of Australian industry to properly access concessional treatment that they are entitled to under the KAFTA.

In their submission, the AEC state:

“The AEC is of the view that further work will be necessary on a number of fronts, including advancing the agenda for our exporters, assisting with trade facilitation and assisting with work to further streamline the Rules of Origin (ROO) under the KAFTA. The ECA notes with interest the position of other submissions that the ROO would benefit from improvement and would encourage Government to appoint members of relevant agencies to immediately establish full engagement with industry to further improve those ROO.”

The ACCI state:

“the draft treaty text of KAFTA Chapter 3 (Rules of Origin chapter) contains several procedural requirements that are not only inconsistent with a number of Australia’s other PTA, but are also inconsistent with customary international trade documentation for ordinary trade occurring outside the PTA. With the growing importance of supply chains and multiple movements of goods through trade zones, such needless inconsistency risks an obstruction to trade, rather than being trade facilitating”

A chief concern is the certification of a “Certificate of Origin” which allows Australian exports to gain preferential tariff treatment. In their submission, ACCI state:

“The requirement of KAFTA Article 3.15 for a ‘Certificate of Origin’ to be completed by the exporter or producer *without* Certification actually occurring is inconsistent with international procedural conventions relating to this document type. The KAFTA document is, properly, a Declaration of Origin, and should be titled as such.”

It is thus claimed that Australian industry will not receive the benefits from KAFTA that are intended due to poorly designed rule of origin provisions. These

are serious issues that cannot and should not be avoided or swept under the rug. They undermine the benefits of the KAFTA and need to be addressed.

Without a proper Certificate of Origin, certified under government backed procedures, Australian exports to Korea seeking preferential tariff treatment can and will be questioned on their country of origin and Australian exporters will not be able to provide government backed certification, leading to long and costly additional certification procedures. Australian businesses will be discouraged from taking advantage of preferential treatment under KAFTA, and the agreement will be of little benefit to.

The AMWU submission and past research by the Productivity Commission makes clear, Australian businesses already rarely take advantage of existing preferential trade agreements.

This finding has been confirmed by an August 2014 survey of Australian exporters by the Hong Kong and Singapore Banking Company, which found that

“Australian exporters have been slow to take advantage of the business benefits of FTAs. On average each FTA signed by Australia is used only by 19% of Australian exporters” (HSBC, 2014).

Placing additional barriers to access to the KAFTA by having inadequate rules of origin procedures, only serves to increase the likelihood this agreement will be less utilised by Australian business than past agreements.

Recommendation:

- 6. That the Parliament delays passage of implementing legislation for KAFTA pending a re-negotiation of Chapter 3 of the draft agreement to address the concerns raised by stakeholders regarding the rules of origin, their certification and commercial dispute resolution procedures.**

Labour Rights and Migrant Worker Program

The Construction, Forestry, Mining and Energy Union’s (CFMEU) submission to JSCOT on KAFTA raised serious and legitimate concerns in relation to the migrant worker program and KAFTA’s impact on the movement of people.

The CFMEU stated KAFTA appears to expand the areas where employers can be granted access to 457 visas for Korean nationals without Labour Market Testing (LMT), diminishing the need to look for qualified Australian workers first and show that none are available to do the work.

The CFMEU state the extent to which KAFTA removes the LMT requirements is not clear, and the Deputy Chair has placed Questions on Notice to DFAT officials to try and clarify the uncertain issues around this component of the Treaty. The CFMEU is concerned that KAFTA appears to show Australia is granting LMT-exempt status in the 457 visa program to all categories of Korean nationals covered by the agreement. On the other hand however, the Korean Government

appears to be retaining the right to apply LMT, numerical quotas and other restrictions to Australian citizens and permanent residents under its temporary visa program.

Australia's Migrant Worker Programs should not be used as part of the negotiations for bilateral Trade Agreements. Migrant Worker Programs should be a matter for the Australian Parliament and should be reviewed and adjusted according to the economic and social circumstances Australia may be experiencing in any given period. Australia's unemployment rate has now increased to 6.4%, with over 790,000 Australian currently out of work, and a combined total of over 1 million reported to be underemployed. Opening our labour market to foreign nationals who are exempt from local LMT requirements will increase our current unemployment levels, place downward pressure on domestic workplace wages, conditions and standards, and damage the work prospects of young Australians.

Recommendation

- 7. That the Parliament delay passage of implementing legislation for KAFTA pending a re-negotiation to ensure Australian workers are not adversely disadvantaged through diminished Labour Market Testing provisions.**

Manufacturing

KAFTA has the potential to bring forward the closure of Ford, Holden and Toyota automotive manufacturing. The announced closure of Ford, Holden and Toyota manufacturing in 2016-17 does not guarantee the companies will continue operating until then. The AMWU states the timing of closure will depend largely on volumes up until then. A significant drop in volumes could potentially cause an early departure of more of these manufacturing operations. The AMWU states KAFTA and similar bilateral agreements with Japan and China will have impacts on the competitiveness of Australian made cars and will contribute to a decline in volumes.

Early closure will have devastating consequences for the employees and supply chain businesses. It is vitally important Government measures are appropriately implemented and given time to help retrain and reskill employees so they can be linked in with new employment opportunities, and that supply chain operations are given time to invest and develop new products, and to be linked in with new markets.

Australia's economy should be diverse, robust and highly skilled. The shrinking of our manufacturing sector will damage Australia's ability to develop, design, manufacture and produce large scale, high quality manufacturing products; and have broader economic and social implications.

Recommendation

8. That the Government provide opportunities for Australian automotive workers to be re-skilled and find new employment, and supply manufacturers the opportunity to diversify and find new markets.

Conclusion

As members of the Joint Standing Committee on Treaties (JSCOT), we cannot support the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014)* (KAFTA) in its present form. We believe that re-negotiation needs to take place in order to resolve the issues we have raised in this Dissenting Report regarding ISDS, Copyright, Rules of Origin and Labour Market Testing. These are all serious issues that if handled poorly could have adverse consequences for our sovereignty our economy and our legal system, as well as for IP providers, consumers, and unemployed Australians.

The Hon Kelvin Thomson MP
(Deputy Chair)

The Hon Melissa Parke MP

References

Australian Labor Party (2013) 46th National Conference National Platform [Online]

http://d3n8a8pro7vhmx.cloudfront.net/australianlaborparty/pages/121/attachments/original/1365135867/Labor_National_Platform.pdf?1365135867

AMWU (2014) Submission to the JSCOT Inquiry into KAFTA [Online]

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Submissions

CFMEU (2014) Submission to the JSCOT Inquiry into KAFTA [Online]

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Submissions

Eberhardt, P., and Olivet, C., (2012) *Profiting from Injustice: how law firms, arbitrators and financiers are fuelling an investment arbitration boom*, Corporate Europe Observatory, Brussels.

French, R.F Chief Justice (2014), "Investor-State Dispute Settlement-a cut above the courts?" Paper delivered at the Supreme and Federal Courts Judges conference, July 9, 2014, Darwin.

<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>

HSBC (2014) "Australian companies under-utilising Free Trade Agreements", found at

<http://www.hsbc.com.au/1/2/about/news/14/140819#sthash.hj8vpPlu.dpuf>

Productivity Commission, (2010) *Bilateral and Regional Trade Agreements Final Report*, Productivity Commission, Canberra, December.

Public Citizen, (2010) *CAFTA Investor Rights Undermining Democracy and the Environment: Pacific Rim Mining Case*, Washington found at
http://www.citizen.org/documents/Pacific_Rim_Backgrounder1.pdf [accessed November 1, 2013]

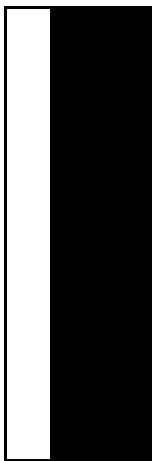
Public Citizen, (2012a) *Rebutting Misleading Claims Made by Industry with Respect to RDC v. Guatemala and CAFTA Annex 10 b's definition of Customary International Law and Minimum standard of Treatment*, Washington, found at
<http://www.citizen.org/documents/rdc-v-guatemala-rebuttal.pdf>

Public Citizen, (2012b) *Only One of 40 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" Has Ever Succeeded*, Washington, found at
<https://www.citizen.org/documents/general-exception.pdf>

Public Citizen, (2014) *Table of Foreign Investor-State Cases and Claims under NAFTA*, August, Washington, found at
<http://www.citizen.org/documents/investor-state-chart.pdf> [accessed February 24, 2014].

Ranald, P., (2014) 'KAFTA enables Korean miners to sue states over environmental regulation' Canberra Times, July 14.

Schepel, H., et al., (2014) *Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)*, found at
https://www.kent.ac.uk/law/isds_treaty_consultation.html



Dissenting Report— Australian Greens

The Australian Greens do not support the recommendation of the majority report. We do not support the *Free Trade Agreement between the Government of Australia and the Government of Korea* in its current form. The process by which trade deals are negotiated in this country doesn't allow changes to be made to the details and texts of trade agreements before they are finalised and signed by Cabinet- rather they must be accepted or rejected in whole by the Parliament.

Investor-State Dispute Settlement Clauses

The Australian Greens are in favour of trade and investment flows between countries that constitute 'fair trade.' However we strongly oppose the inclusion of Investor-State Dispute Settlement (ISDS) clauses in modern trade agreements which allow foreign corporations the right to sue sovereign governments if they feel changes to policy or Parliamentary laws negatively impact on their profits.

Although no explanation was provided by the Department of Foreign Affairs and Trade (DFAT) as to why the Koreans insisted on its inclusion, this agreement contains ISDS clauses.

After so many years of successive governments refusing to allow their inclusion, accepting a trade deal that includes ISDS is a dangerous precedent for Australia going into the finalisation of the multilateral Trans-Pacific Partnership (TPP) agreement.

To put the importance of including the dangers of ISDS clauses in perspective, evidence has been provided by DFAT that the reason the KAFTA deal was finally completed after 4 years of negotiation was because unlike the previous government, this government was willing to include ISDS in the agreement.¹ As outlined in the majority report the beef producers lobbied the current government to compromise on the previous no ISDS policy to allow the deal to be signed and completed.

¹ Mr Braddock, Foreign Affairs, Defence and Trade Legislation Committee, Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, *Committee Hansard*, 6 August 2014, p.46.

The Greens believe Minister Robb is prepared to trade away our national sovereignty by allowing ISDS to be used as a negotiating tool in the negotiations of future and current deals.

The Greens also note that Australia is currently being sued by the tobacco company Phillip Morris through an ISDS clause in an investment agreement Australia has with Hong Kong. The Government and DFAT claim that there are safeguards built into the agreement that would ensure ISDS clauses couldn't be used in KAFTA as they are currently being used by Phillip Morris.

The Regulation Impact Statement (RIS) that assesses the agreement states in relation to ISDS concerns:

"Substantive carve-outs and safeguards have been included for key public policy concerns including public welfare, health, culture and the environment."²

The committee has accepted this evidence from the RIS without questions despite the advice of experts in submissions and during the hearings such as, Dr Kyla Tienhaara who stated:

"The government has tried to calm concerns about ISDS and KAFTA by pointing to the existence of so-called safeguards or exemptions, as they have been referred to this morning, in the agreement. I would like to stress to this committee the point that dangerous loopholes in the text of KAFTA remain despite the government's efforts to preserve the right to regulate under the agreement."³

This Government and particularly the current Minister for Trade and Investment (the Minister) has so far been misleading or demonstrated very little understanding of the issues surrounding ISDS in trade and investment agreements.

Following the signing of the Korea–Australia Free Trade Agreement (KAFTA), the Minister stated regarding ISDS:

In the Korean Free Trade Agreement that I've just concluded, we did insist on explicit safeguards to ensure that regulation or law that's passed in public interest areas, such as health and the environment, cannot be covered by this ISDS... you could not have the plain packaging exercise repeated there because it has been essentially carved out those areas of public policy interests, especially to do with health and the environment."⁴

² RIS,para 76.

³ Dr Kyla Tienhaara, *Joint Committee Hansard*, 14 July 2014, p. 8

⁴ Andrew Robb, Interview with Linda Mottram, 702 ABC Sydney, February 19 2014.

[<http://www.andrewrobb.com.au/Goldstein/LocalIssues/tabid/123/articleType/ArticleView/articleId/1602/INTERVIEW-WITH-LINDA-MOTTRAM--702-ABC-SYDNEY.aspx>](http://www.andrewrobb.com.au/Goldstein/LocalIssues/tabid/123/articleType/ArticleView/articleId/1602/INTERVIEW-WITH-LINDA-MOTTRAM--702-ABC-SYDNEY.aspx)

This assertion was disputed during hearings convened by the Senate Foreign Affairs, Defence and Trade Legislation Committee on the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014. Professor Luke Nottage, when asked whether the ISDS clause in KAFTA would preclude a Phillip Morris type case occurring again responded:

"The answer is no under the current wording. If that sort of claim by tobacco companies is a particular concern, the obvious way to preclude it completely is to have a carve-out for measures in relation to tobacco."⁵

As outlined in the majority report there are a number of risks inherent in including ISDS clauses. The Australian Greens believe these risks are too great to allow ISDS to be included in KAFTA or future trade deals. Recently the Greens introduced a bill to the Senate to have such clauses banned from all future trade deals.

Intellectual Property

The majority report provides a summary of the opposition to the Intellectual Property provisions in KAFTA between paragraphs 4.23 – 4.36. It appropriately sums up the concerns raised in submissions and by witnesses at the hearings. However it is disappointing that the committee has decided not to engage at all with these criticisms including the potential threat to access to reasonably priced medicines and failure of the agreement to not recognise the broader public interest in access to knowledge and information.

The majority report's recommendations don't assert anything about how the Government should address these concerns and it has not specifically identified which areas of the KAFTA intellectual property (IP) chapter have been identified by witnesses as going against the national interest. Professor Weatherall in her submission makes sensible suggestions for the committee that:

"JSCOT should recommend that DFAT's negotiating stance in IP depend on an assessment of Australia's national interest, based on evidence not assumption, and informed by analysis focused specifically on (a) whether Australian stakeholders are experiencing specific issues in IP in the other negotiating Party or Parties, (b) whether those issues can be (best) addressed through a trade agreement, and (c) the impact of any solutions on Australian interests, including the interests of other stakeholders and the broader public interest in freedom to make innovation policy. "⁶

The majority report fails to recognise or even comment on the fact that previous Parliamentary committees, the Productivity Commission and IP Australia have all asserted the importance of cost benefit analysis for trade agreements and IP. For example:

⁵ Professor Luke Nottage, Sydney Law School, University of Sydney, *Committee Hansard*, 6 August 2014, p. 22.

⁶ Associate Professor Kimberlee Weatherall, Sydney Law School, *Submission 49*, p. 2

"The Government should ensure that future trade negotiations are based on a sound and strategic economic understanding of the costs and benefits to Australia and the world and of the impacts of current and proposed IP provisions, both for Australia and other parties to the negotiations."⁷

"IP provisions should only be included in cases where a rigorous economic analysis shows that the provisions would likely generate overall net benefits for the agreement partners."⁸

The Regulation Impact Statement (RIS) and the National Interest Analysis (NIA) provide no comment on the impact of the IP chapter in this trade agreement on the broader public interest in access to knowledge and information.

It is about time JSBOT used its position seriously as an oversight mechanism for trade agreements. If the Parliament is going to be treated seriously by the executive it needs to produce critical recommendations based on both the benefits and negative aspects of agreements.

Automotive Industry

The majority report acknowledges the controversy about the impact of KAFTA on the automotive industry. In February 2014 Toyota announced that from the end of 2017 they would stop producing cars in Australia. They stated that amongst other factors:

"with one of the most open and fragmented automotive markets in the world and increased competitiveness due to current and future Free Trade Agreements, it is not viable to continue building cars in Australia."⁹

In relation to the complete closure of Australia's automotive industry, public commentary was suggesting that the Korean trade deal would be a game changer before it was signed by this government.¹⁰ It appears from evidence presented to the committee that DFAT and the Government ignored, or were discounting the role played by trade agreements in the decline of the car industry. The Greens were disappointed that only the Australian Manufacturing Workers Union gave evidence on the impacts of this trade deal on the car industry, and what it has cost our country, workers and communities.

⁷ Harris, T., Nicol, D., Gruen, N., *Pharmaceutical Patents Review Report*, 2013, Recommendation 3.2, p. 58.

⁸ Productivity Commission Research Report, *Bilateral and Regional Trade Agreements*, November 2010, Report Recommendation 4 (b), p. 285.

⁹ Toyota Australia Announces Future Plan For Local Manufacturing, February 2014.

<http://m.toyota.com.au/toyota-news/article?articleId=18gd89tfh>

¹⁰ Alan Kohler, 'Time to decide if we really need a car industry' October 17 2013.

<http://www.theaustralian.com.au/business/opinion/time-to-decide-if-we-really-need-a-car-industry/story-fng7vg0p-1226741274219>

There is no evidence that the Government assessed the risk to the car industry of signing KAFTA either prior to or after the signing. The majority report makes no comment on the fact that the Government amended the original modelling to reflect costs to the car industry, but only following the Toyota announcement. This amended data, rather than the original modelling, was provided only after an Order for Production of documents motion passed by the Senate. The Greens discovered it wasn't the original modelling done by the Government and then the Senate had to pass another Order for Production of documents to gain access to the original modelling. Clearly potential risks and costs to the car industry by signing the KAFTA were not considered or included in the original analysis by the Government. The Greens were cynical of attempts to "play catch up" in the Government's later analysis.

It is not clear which modelling was used to assess the impact of KAFTA on the automotive industry or was used in the Regulation Impact Statement (RIS) or National Interest Analysis (NIA). The assessment process should not be allowed to be repeated in this way.

It was disappointing that the NIA also made no real attempt to outline the potential and real risks and costs to the Australian automotive sector when signing KAFTA. In answering questions, DFAT seemed to suggest that potential access to lower cost imported cars (under a lowering of tariffs) was an acceptable trade off to the potential loss of our automotive sector. This classical "input-output" approach to both the modelling and ideology that drives our trade deals ignores important value judgements that should be debated in our community and Parliament, not just determined by the Government and politics of the day. The Greens feel more scrutiny and transparency around the decisions that are made during trade negotiations is necessary before we will ever achieve 'fair trade' outcomes in these deals.

Side Letters

The majority report makes very little comment on the side letters to the agreement. Side letters are common place in trade agreements. However one of the side letters in reference to cross border trade in gambling and betting services preserves regulatory space only for Korea.

It is concerning that neither the NIA nor the RIS made a note on what this means for the agreement on this issue.

Process

The Australian Greens support many elements of the KAFTA, however we share the significant concerns of many Australians regarding the ISDS clauses and the IP chapter.

The trade agreement structure for ratification is set up in such a way that the Greens are unable to negotiate with the Government over these concerns.

Parliamentarians can either vote for or against the deal, they cannot attempt to amend it.

This occurs despite the fact that the Government negotiates in secret, seeks approval through Cabinet and then signs the deal with the foreign government. Only then does the Parliament get access to assess the text.

The Greens believe this is unacceptable. On the 11th of December 2013 the Senate passed an Order for Production of Documents motion calling on the Government to make available the final draft text of the KAFTA agreement 14 days prior to signing so that important consideration could be given to the agreement including issues outlined in this dissenting report. This was rejected by the Government with the justification that such transparency was "not in the national interest."

This policy and process around trade deals puts Parliament in a very difficult situation. The Greens agree with previous Parliamentary committees and the Productivity Commission that inadequate research is being presented to Parliament and the public prior to Australia ratifying trade agreements. In 2005 the Select Committee on the Free Trade Agreement between Australia and the United States of America commented that it was:

"alarmed by the lack of adequate research being undertaken prior to Australia committing itself to trade agreements. Balanced and comprehensive research on the economic, social, cultural and policy impacts of any trade treaty Australia proposes to enter into is a vital part of ensuring that there is proper scrutiny of the agreement and would contribute greatly to the quality of the public debate on these issues." ¹¹

In 2010 the Productivity Commission stated:

"[The Government] should commission and publish an independent and transparent assessment of the final text of the agreement, at the conclusion of negotiations, but before an agreement is signed." ¹²

A more transparent and effective Parliamentary voice would involve these elements:

- JSCOT should produce a fully independent report that outlines the costs and benefits of a trade deal taking into account important factors beyond just possible GDP growth reflected in simple "input -output" models. This will assist the Parliament in properly assessing the impact of trade agreements.
 - JSCOT should make recommendations to the Government advocating for the renegotiation of sections of trade agreements that are not in the national interest (such as ISDS).
-

¹¹ Select Committee on the Free Trade Agreement between Australia and the United States of America. – August 2004, p. 30 para 2.97

¹²Productivity Commission Research Report, *Bilateral and Regional Trade Agreements*, November 2010, Report Recommendation 5 (c), p. 312.

- The National Interest Analysis and Regulatory Impact Statement should be independently produced. The same institution, the Department of Foreign Affairs and Trade that negotiated the agreement on behalf of Government should not then assess it.
- Parliament should have a copy of the final draft agreement before it is signed by Cabinet, with a chance to suggest changes to the final treaty (rather than only be able to accept or reject it as a whole).
- The entire process of trade negotiations needs to be reworked, allowing more transparency and input from all stakeholders. JSCOT should hold a separate inquiry to explore what could be a “model” trade negotiation process.

Senator Peter Whish-Wilson

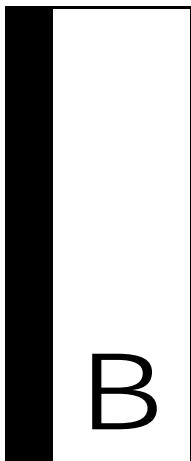
A

Appendix A – Submissions

- 1 Dr Kyla Tienhaara
- 1.1 Dr Kyla Tienhaara
- 2 Dr Romaine Rutnam
- 3 Mr Mike Callaghan
- 4 Winemakers Federation of Australia
- 4.1 Winemakers Federation of Australia
- 5 Canegrowers
- 6 CONFIDENTIAL
- 7 Australian Sugar Industry Alliance Limited
- 8 Australian Sugar Milling Council
- 9 Australian Bankers' Association Inc
- 10 Queensland Sugar Limited
- 11 Financial Services Council
- 12 Business Council of Australia
- 13 Australian Macadamia Society
- 14 Australian Dairy Industry
- 14.1 Australian Dairy Industry
- 14.2 Australian Dairy Industry
- 15 Mr Charles Sowerwine
- 16 Mr Peter Green
- 17 Dr Bill Genat
- 18 ANZ
- 19 Engineers Australia
- 20 Almond Board of Australia

- 21 Cherry Growers Australia Inc
- 22 Wine Australia Corporation
- 23 Ms Lyndal Sullivan
- 24 AusVeg Limited
- 25 Minerals Council of Australia
- 26 National Farmers' Federation
- 27 Citrus Australia Ltd
- 28 Sheepmeat Council of Australia
- 29 New South Wales Nurses and Midwives' Association
- 30 Conference of Leaders of Religious Institutes NSW
- 31 Australian Pork Limited
- 32 Australia Korea Business Council (AKBC)
- 33 Apple & Pear Australia Limited (APAL)
- 34 Australian Lot Feeders' Association
- 35 Swisse Wellness Pty Ltd
- 36 ITS Global
- 37 Office of Horticultural Market Access
- 38 Australian Food and Grocery Council
- 39 Complementary Healthcare Council of Australia
- 40 Australian Nut Industry Council
- 40.1 Australian Nut Industry Counci
- 41 Selector Group
- 42 Australian Fair Trade and Investment Network (AFTINET)
- 43 Australian Chamber of Commerce in Korea
- 44 Meat & Livestock Australia (MLA)
- 44.1 CONFIDENTIAL
- 45 Dr Matthew Rimmer
- 45.1 Dr Matthew Rimmer
- 46 Cattle Council of Australia (CCA)
- 47 Financial Services Council
- 48 The Foundation for National Renewal
- 49 Associate Professor Kimberlee Weatherall
- 49.1 Associate Professor Kimberlee Weatherall
- 50 Media, Entertainment & Arts Alliance

- 51 Tax Justice Network Australia
52 The Music Trust
53 Australian Guild of Screen Composers
54 Electronic Frontiers Australia, Inc
55 NSW Farmers Association
56 Australian Digital Alliance
57 Mr Nathaniel Roach
58 Mr Jonathan Peter
59 Mr Peter Murphy
60 Ms Helen Burn
61 Mr Roger Jowett
62 Mr Barry Fitzpatrick
63 Australian Chamber of Commerce and Industry
63.1 Australian Chamber of Commerce and Industry
63.2 Australian Chamber of Commerce and Industry
64 Australian Industry Group
65 Australian Agricultural Company Limited
66 Export Council of Australia
67 Pirate Party Australia
68 Woodside Energy Ltd
69 Australian Manufacturing Workers' Union
69.1 Australian Manufacturing Workers' Union
70 Mr James Wight
71 Construction Forestry Mining & Energy Union (CFMEU)
72 Grain Growers
73 Music Rights Australia Pty Limited
74 News Corp Australia
75 Attorney-General's Department
76 Department of Foreign Affairs and Trade
76.1 Department of Foreign Affairs and Trade
76.2 Department of Foreign Affairs and Trade
77 Australian Meat Industry Council
78 Committee to Protect Vietnamese Workers

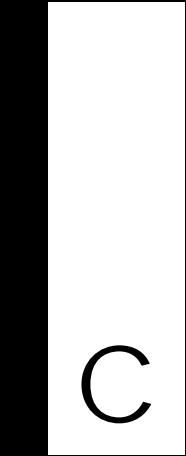


B

Appendix B - Exhibits

1 Australian Macadamia Society

Australian Macadamias, The world's finest nut: A Star in the Making (Related to Submission No. 13)



C

Appendix C – Witnesses

Monday, 14 July 2014—Canberra

Australian Chamber of Commerce and Industry

Mr Bryan Clark, Director of Trade and International Affairs

Australian Dairy Industry Council Inc

Mr Noel Campbell, Chairman

Mr David Losberg, Senior Policy Manager

Dairy Australia

Mr Peter Brendan Myers, International Trade Development Manager,
Trade and Strategy Division

Individuals

Dr Matthew Rimmer, Private Capacity

Dr Kyla Tienhaara, Private Capacity

Tuesday, 29 July 2014—Sydney

Australian Fair Trade and Investment Network

Dr Patricia Ranald, Convenor

Australian Manufacturing Workers' Union (AMWU)

Dr Tom Skladzian, National Economic and Industry Advisor

Financial Services Council

Mr Andrew Bragg, Director of Policy & Global Markets

Mr James Bond, Chief Economist

Individual

Associate Professor Kimberlee Weatherall

Meat and Livestock Australia

Mr Andres McCallum, Manager - Trade & Market Access

Mr Malcolm Foster, Chairman (KAFTA Beef Industry Taskforce)

Mr Jed Matz, CEO (Cattle Council of Australia)

Mr Steve Martyn, National Director Processing (Australian Meat Industry Council)

Mr Ross Keane, Chairman (Red Meat Advisory Council)

National Farmers' Federation

Mr Brent Finlay, President

Mr Tony Mahar, General Manager – Policy

Office of Horticultural Market Access

Mr Chris Langley, Market Access Manager

Mr Hayden Moore, National Manager - Export (AUSVEG Ltd)

Mr David Daniels, Market Access Manager (Citrus Australia Ltd)

Mr Jeffrey Scott, Chief Executive Officer (Australian Table Grape Association)

Wednesday, 30 July 2014—Brisbane

Australian Agricultural Company

Mr Jason Strong, Managing Director

Australian Nut Industry Council

Ms Chaseley Ross, Executive Officer

Mr Christopher Joyce, Board Director

Australian Sugar Industry Alliance

Mr Dominic Nolan, Chief Executive Officer (Australian Sugar Milling Council) & Joint Secretary (The Australian Sugar Industry Alliance)

Mr Gregory Beashel, Managing Director and Chief Executive Officer (Queensland Sugar Ltd)

Mr Warren Males, Head-Economics (Canegrowers)

Tuesday, 5 August 2014—Canberra

Attorney-General's Department

Mr Andrew Walter, Assistant Secretary, Commercial and Administrative Law Branch, Civil Law Division

Department of Agriculture

Mr Simon Murnane, Trade and Market Access Division, Bilateral Engagement and Regional Trade Negotiations branch

Department of Foreign Affairs and Trade

Ms Jan Adams, Deputy Secretary

Mr Richard Braddock, Director, Office of Trade Negotiations

Mr Simon Farbenbloom, Assistant Secretary, North Asia Investment and Services Branch

Ms Frances Lisson, Assistant Secretary, North Asia Goods Branch

Mr David Mason, Executive Director, Treaties Secretariat, Legal Branch

Department of Industry

Mr Paul Trotman, General Manager, Trade and International Branch

Winemakers Federation of Australia

Mr Anthony Battaglene, General Manager, Strategy & International Affairs