Civil Liberties Australia submission:

CLA

# Trade and Investment Growth Committee enquiry: *Benefitting from Australia's Free Trade Agreements*

Terms of Reference:

> *"The Committee will examine the opportunities and challenges faced by Australian businesses arising from Australia's existing FTAs with a view to identifying how Australia might best benefit from recent and proposed North Asia FTAs".*

Neither the title nor the terms of reference invite the parliament or the public to debate the question of whether or how the FTA text with China (CFTA, finalised last year) or the Trans Pacific Partnership free trade Agreement (TPPA, expected to be finalised soon) serve the national interest.

It is a fair interpretation of the terms of reference for the parliamentary enquiry that it is an invitation to parliament and the public to make submissions about how domestic policies might be modified so that Australia maximises the benefits which will flow from these agreements – i.e. promote a more competitive economy by deregulation of capital, labour and goods and services markets.

*Civil Liberties Australia is a not-for-profit association which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies and forces to ensure they match the high standards that Australian has traditionally enjoyed and continues to aspire to.*

*We work to keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority'. Our civil liberties are all about balancing rights and responsibilities, and ensuring a 'fair go' for all Australians.*

It could hardly be otherwise. At the time of preparing this submission (early June) the text of the CFTA has not been released, although it was finalised last year…and has been promised "soon". The text of the TPPA has not been finalised, although an early draft of the highly controversial chapter on Investor State Dispute Settlement had been leaked to WikiLeaks, and draft chapters on copyright, environment and the health annex have emerged.

On June 2nd the Government offered access to a draft copy of the TPPA to members of Parliament on the basis they didn't take notes and would not reveal what they saw for four years. Greens Senator, Peter Whish-Wilson, rightly refused to accept the terms of the access and was not allowed to see the documents.

Given the years taken to negotiate the TPPA and its complexity, it is clear that executive government is not interested in independent analysis by parliament or the public of the Chinese FTA or the TPPA.

As the situation now stands it will be impossible for the government to allow a meaningful debate leading to rejection or amendment of the two agreements even if it wanted too.

The conservative Economics editor of the *Australian Financial Review* Alan Mitchell points out (June 3rd):

> *"the coming examination of the Parliamentary Joint Standing Committee on treaties is little more than a formality. Tony Abbott would no more go back to the Chinese with new demands than John Howard would have withheld his signature from the US free trade agreement even though it manifestly failed to meet his criteria for approval. The period of consultation is a sop to the public's anxiety about the secrecy surrounding the negotiation of trade agreements".*

Former Deputy Governor of the Reserve Bank, Stephen Grenville, makes the same point in the *Business Spectator* (March 4th) but he first asks the question: who writes the TPP Agreement rules?

> *"You might think that the rules of the lofty 'platinum-standard' TPPA would be hammered out by a group of high-minded technocrats. Unfortunately this is not so. Proposals on intellectual property, for example, reflect the vested interests of pharmaceutical manufacturers who want longer patent protection. Hollywood (famous for engineering the Micky Mouse Protection Act giving Walt Disney products a century of royalties) will undoubtedly influence the outcome."*

As opposed to WTO multilateral trade negotiations, Grenville notes in these sort of negotiations Australia's interests can be more easily "overridden" by the much more powerful US, especially where the US is seen by a significant proportion of Australian public opinion as the guarantor of our security against Islamic terrorism and the growing military and economic power of China.

According to Grenville: *"Just as we had no choice (for political reasons) but to sign off on the Australia-US FTA, not signing up to the TPPA if it is finalised would be an admission of failure at the political level. We will sign on, even to a disadvantageous treaty"*.

The biggest hurdle facing the TPPA is that it still has to get a majority of the Congress to vote to 'fast track' the agreement, meaning that the Congress can approve or disapprove of the TPPA but it cannot amend of filibuster the agreement. The 'fast track' legislation has passed the Senate but its passage through the House of Representatives is more problematic.

Opponents of the TPPA, including American opponents, argue that it is not US interests which are being promoted, but the interests of global corporations which have their nominal headquarters in the US.

Despite the nomenclature, the TPPA is not primarily a trade pact but a push for US global governance with particular relevance to the growing American geopolitical rivalry with China.

A review of the modelling of the TPPA by *The Economist* (May 30th June 5th) shows that "the gains from freeing trade are far from exhausted. But that does not make the TPPA the right way forward. Almost all the studies agree that the principal limitation is size. Specifically the exclusion of China is costly…a more inclusive Pacific free-trade deal with weaker rules on state-owned firms would lift the income gains for the original 12 TPPA members, including America, to $760 billion – more than double the boost from the TPPA".

According to Paul Krugman (*New York Times* May 22 2015) most of the benefits of free trade have already been realised, thanks to past trade agreements going back 70 years so that any effect trade restrictions may have are swamped by changes in currency values.

Krugman said: "The TPPA isn't really about trade…The main thrust of the proposed deal involves strengthening intellectual property rights – things like drug patents and movie rights – and changing the way companies and countries settle disputes. And it is by no means clear that either of these changes is good for America…the fact that the administration evidently doesn't feel that it can make an honest case for the TPPA suggests that this isn't a deal we should support".

Ditto. The same case can made with even greater force against the Australian government enthusiasm for joining the TPPA. Arguably, in both Australia and the US, it is not the public interest which is being promoted but the interests of global corporations, which for the most part at least are nominally headquartered in the US.

Critics of the TPPA recognise that it is not so much aimed at promoting free trade but more at limiting government rights to deal with present and emerging problems, especially those associated with climate change and the environment.

The TPPA and the bilateral FTAs such as the CFTA are seen by the critics as sham, designed to facilitate the growth of the corporate state at the expense of the welfare state.

The major instrument in the extension of corporate power via regional and bilateral FTAs is the section dealing with Investor State Dispute Settlement or ISDS. The ISDS rules trump local democracy and law, including US law and democracy in commercial disputes between governments and foreign corporations.

According to the Trade Minister, Andrew Robb (7.30 Report March 17th), : "The ISDS is there to give investors protection in those markets where we don't understand the legal system; where the legal system may not, you know, be as fair as we think it should be".

This is not the view of US Senator, Elizabeth Warren. Writing in the Washington Post (republished SMH Feb.27) she said "From 1959 to 2002 there were fewer than 100 ISDS claims worldwide. But in 2012 alone, there were 58 cases. Recent cases include a French company that sued Egypt because Egypt raised its minimum wage, a Swedish company which sued Germany because Germany decided to phase out nuclear power after Japan's Fukushima disaster and a Dutch company that sued Czech Republic because the Czechs didn't bail out a bank that the Company partially owned. Phillip Morris is trying to use ISDS to stop Uruguay from implementing new tobacco regulations intended to cut smoking rates".

Warren concluded: "Giving foreign corporations special rights to challenge our laws outside of our legal system would be a bad deal. If a final TPPA agreement includes ISDS, the only winners will be multinational corporations."

In October 2012 the High Court rejected a claim for damages by Phillip Morris on the grounds that the government's plain packaging legislation was effectively government acquisition of Phillip Morris property rights. The Court ruled that the plain packaging law did not, of itself, constitute an acquisition of property according to the constitution.

After a corporate restructuring, which made Phillip Morris Asia the holding company of Phillip Morris Australia, the plain packaging legislation was challenged under the provision of the Australia Hong Kong FTA on the grounds that it was an expropriation of its investments, according to the FTA. This appears to be an example of nationality shopping by companies which create subsidiaries abroad specifically to take advantage of the agreement in the expectation that the secret arbitration process set up under ISDS will trump the High Court judgement.

It is up to the ISDS tribunal set up under the AHKFTA to decide whether Phillip Morris can get an "order for the suspension of the plain packaging legislation and compensation for the loss as a result of it. In the alternative, the company sought compensatory damages in an amount to be quantified, but in the order of billions of Australian dollars", according to a speech by the Chief Justice of the High Court, RS French, at the Supreme and Federal Courts Justices Conference July 9th 2014.

French made a scarifying evaluation of the powers and record of these tribunals "which are not courts. Nor are they required to act like courts. Yet their decisions may include awards which significantly impact on national economies and regulatory systems within nation states. Questions have been raised about the consistency, openness and impartiality made in ISDS arbitrations".

Amongst concerns listed by the European Parliamentary Research Service and quoted by French include:

- vague treaty provisions leaving a wide range of interpretations open to arbitrators;
- loopholes which enable abuses such as nationality shopping by companies which create subsidies abroad specifically to take advantage of the agreements;
- lack of transparency;
- role-swapping by arbitrators who appear from time to time as counsel in ISDS cases;
- high cost of ISDS cases –estimated by the OECD as averaging about $8 million each; and, associated with the high cost and potentially high awards,
- a growing phenomenon of third party funding of claims by banks, hedge funds and insurance companies in exchange for a share of the proceeds ranging from 20% to 50%.

The scope for rich powerful corporations to bully poor small countries to ensure a favourable legislative environment, ignoring legitimate health and environmental concerns is evidenced by the Phillip Morris attempt to stop plain packaging legislation by the Uruguay government as well as the Australian government.

It took real courage for Uruguay to stand up to Phillip Morris, even though it is backed up by being a signatory to the WHO 2005 Framework Convention on Tobacco Control – Uruguay's GDP is $53 billion compared to Phillip Morris's annual revenues of $80 billion.

New Zealand has apparently abandoned its decision to follow Australia to introduce plain packaging laws on tobacco products.

According to Dr Kyla Tienhaara, research fellow at the Regulatory Institutions Network, ANU College of Asia and the Pacific, in an article posted on the ABC Drum March 26th 2015, points out the draft of the TPPA investment chapter, while better than the bilateral investment treaties drafted in the 1980s and 1990s, cannot be said to 'safeguard' domestic regulatory authority.

"The provisions in the chapter largely follow an American model that has proven insufficient to prevent investors from challenging environmental legislation. For example, the draft TPPA has a standard clause on 'expropriation' which covers direct

takings (when a government seizes property) as well as indirect or regulatory takings (when a government's actions have an impact on an investment but nothing is directly seized). An additional clause states that non-discriminatory public policy measures will not be considered an expropriation except 'in rare circumstances'. This caveat leaves the door open to investors and creative lawyers to argue that their case is such a rare circumstance".

Teinhaara concludes that rather than quibbling over footnotes, qualifications and special exemptions, it would be much safer to stick with the position of the Howard government in 2004 when it refused to sign up to the ISDS provision in the AUSFTA. It would be much safer to stick with the previous government's position on ISDS and just say so.

If the government is confident the general safeguards in the draft ISDS will work, why are the special health policy exemptions (PBS and Medicare) being protected? Why is environmental policy or any other area of public interest such as minimum wage regulation not similarly carved out?

The government rhetoric is that the government will not sign anything which is against the public interest. But how the Coalition (and its American-owned Murdoch media cheer squad) with their joint commitment to climate scepticism and labour market deregulation view these issues is, at best, a moot point.

Robb has said that signing on to ISDS would give Australia leverage to open up markets to Australian agriculture and services exports.

The US Department of Agriculture recently released a report that assessed how much additional economic growth would be generated over a decade in each of the 12 TPPA countries if tariffs and all forms of import restrictions were removed. It found that in this 'best case' scenario, the increase in GDP would be zero (0.0%) for six of the countries, including Australia, and tenth of a percent or less (0.1%) for four countries.

According to AFTINET (Australian Fair Trade & Investment Network Ltd) "the report did not attempt to assess the economic effects of the deal's non-tariff provisions, some of which , like higher medicine prices and higher copyright costs could be negative for Australia. In other words our government may be agreeing to the right of foreign investors to sue governments over changes to domestic law, higher medicine prices, higher copyright costs and much more for an economic growth potential of precisely zero".

Based on this analysis, there are three possible explanations why the government is apparently determined to sign onto the TPPA, either:

1. the US has successfully threatened the Coalition with far more costly sanctions if it refused to sign up to the TPPA; or
2. the domestic policy adjustments necessary to minimise the cost to Australia of meeting the TPPA obligations are measures which the coalition believes to be in

the nation's interest in any case and are much more likely to be imposed by a TPPA rather than the government relying on a domestic mandate; or,

3. Australia is already in thrall to the same corporate interests which are driving US policy.

In terms of what should drive parliamentary treaty processes, mandatory changes needed include:

- five- and 10-yearly robust evaluations of existing FTAs and like treaties, covering fairly both gains and losses, with the reports presented publicly and to JSCOT before a final decision is made on any new treaty with the same nation, or a similar treaty is made with a new nation;
- wider consultation by DFAT with entities suffering potential losses, as well as with bodies likely to profit, under a proposed agreement;
- better Ministerial instruction and consultation with Department of Trade officials including, in particular, giving Australian departmental negotiators the right to withdraw from negotiations at any stage if net gains are not potentially overwhelmingly positive (that is, eliminating the "you MUST get an agreement" mentality which currently both drives negotiations, and hampers flexibility) and/or if demands from the other party are intolerable to Australian society and culture.
- the ability of the people of Australia and Members of Parliament to have at least one real opportunity to amend or reject an agreement before it is signed by the Executive: this process should comprise at minimum a period of three months of public debate and consultation.

These provisions should apply before the TPPA is finalised.

CLA Civil Liberties Australia Inc. A04043
Box 7438 Fisher ACT Australia

Web: www.cla.asn.au
150612

Lead author: Kenneth Davidson; associate author: William Rowlings

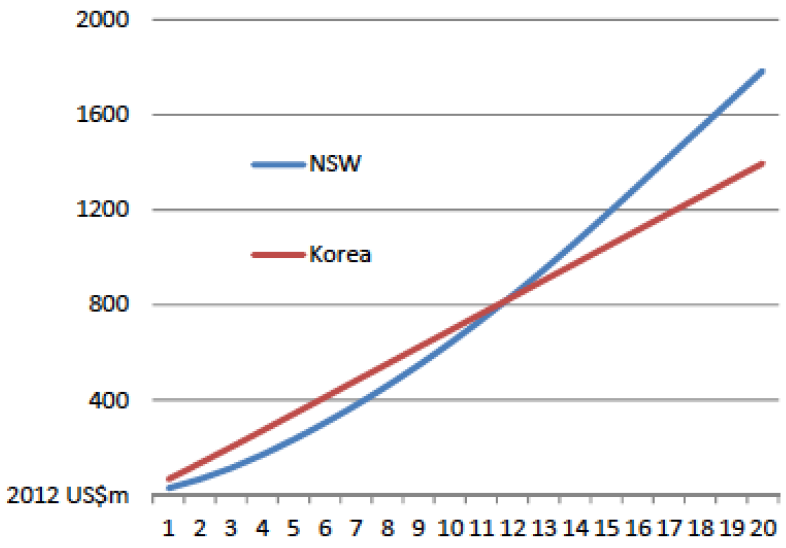
# Appendix A: Pollyanna projections…lessons from KAFTA

The problem with all aspects of trade negotiations by Australia are that they are accompanied by Pollyanna projections which upsize the positive and potential benefits and eliminate, or ignore, the negative and potentially deleterious impacts. A report of the NSW Parliament clearly indicates the technique:

> NSW Trade with South Korea: Outcomes for exporters from the KAFTA – NSW Parliamentary Research Service, March 2014 e-brief 3/2014
>
> "It should be noted that this paper relates only to tariff reductions under Chapter 2 of the KAFTA. Economic gains related to other components of the KAFTA (e.g. from easing of foreign investment regulation and reductions to barriers in other non-merchandise trade) are not estimated. While there are significant potential benefits for Australian exporters from the KAFTA, it may impact negatively on domestic business in terms of increased competition resulting from cheaper South Korean merchandise imports. This aspect of the KAFTA is not assessed in this paper." *(underline added)*

Comment: Virtually all commentary and departmental/state/industry boosting of potential and past trade agreements is based on such one-side views and presentations of the benefits. Potential negatives are ignored, or dismissed in agate-like type in footnotes.

**Figure 17: Cumulative value to exporters from tariff reductions[29]**




From the same document, the above chart indicates that Korea is advantaged over NSW for the first 12-13 years of KAFTA. If we were NSW, we would expect Korea to be preparing to renegotiate KAFTA about 2022…so that any projected advantages beyond that, under a probable new and different agreement, are quite possibly illusory.

The following quotes are from the report on the Joint Standing Committee On Treaties (JSCOT) review of KAFTA, the Korean-Australia FTA, 13 months ago, in May 2014: statements and claims made at that time should now be investigated and reported on as to real impacts and outcomes a year later, before any other agreement is finalised. The outcomes – positive and negative – of other FTAs concluded before KAFTA should be subject to regular robust analysis and reporting, to JSCOT and to the Australian public, at least five-yearly, with even more detailed reporting every 10 years.

**JSCOT Report 142, Treaty tabled on 13 May 2014 (KAFTA), various pages:**

2.8 The Productivity Commission found that commercial benefits for Australian businesses from Bilateral and Regional Trade Agreements (BRTAs) were limited as the agreements did not address the non-tariff barriers that prevented market access.

2.9 The Productivity Commission called for a more realistic, transparent process, including a post-negotiation analysis to identify possible adverse impacts.

*(for references, please see original report)*

**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.

Comment: Again, only the positives are emphasised. This is akin to measuring the profit of a company by recording the selling price of goods only, ignoring the cost of production.

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.

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…"*

Comment: As much as the above provides "comfort" in relation to ISDS in KAFTA, it raises loud alarm bells in the majority of 28 other similar FTAs with what DFAT clearly acknowledges are "weaker" safeguards.

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'. 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.

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

## 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 *(underline added)* provide an annual boost to the Australian economy of $650 million after 15 years.

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.

AFTINET questioned the significance of these figures considering that it represents only 0.04 per cent of GDP. 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.

4.41 Further the model relies on a range of favourable assumptions. 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 modelling for KAFTA. They claim that the economic modelling assumes that the operations would already have ceased at the time of the implementation of KAFTA.

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.

4.51 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.

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.

**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.

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.

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.

Comment: DFAT has no difficulty in assessing the positive projections of trade gains under potential FTAs (despite "global circumstances" possibly changing) but is incapable of providing assessments where the assessments may be negative. That is hypocritical.

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.

**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. (underline added)

**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.

**– from JSCOT, Report 130, pp. 32–33.**

It should be acknowledged that there was a robust dissenting report in relation to KAFTA: like in 5.15 above, it seriously questioned the benefit to Australia of agreeing to FTAs which have no benefit or are detrimental to Australia.

**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 (underline added). 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.

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 miniscule 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.

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 )

ENDS APPENDIX