



**MINERALS COUNCIL OF AUSTRALIA**  
**SUBMISSION TO JOINT STANDING COMMITTEE ON**  
**TREATIES INQUIRY INTO THE PERU-AUSTRALIA**  
**FREE TRADE AGREEMENT (PAFTA)**

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## EXECUTIVE SUMMARY

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The Peru-Australia Free Trade Agreement (PAFTA) will provide an important boost to Australia's economic relationship with one of the fastest-growing economies of the Latin American region. It will provide direct benefits to Australian business by eliminating virtually all tariffs on exports of goods to Peru, providing greater access for Australian services in the Peruvian market, reducing trade costs through more streamlined customs and administrative arrangements, and delivering greater certainty and stability around two-way investment links between Australia and Peru.

Australia's trade relationship with Peru is relatively under-developed, suggesting there is significant potential for growth. Two-way trade between Australia and Peru was valued at \$646 million in 2016-17, or less than 0.1 per cent of total Australian two-way trade.<sup>1</sup> Mining and mining equipment figure prominently in the bilateral trade. Australia's biggest merchandise import from Peru was the 'other ores and concentrates' commodity category, worth \$249.7 million in 2016-17. Australia's goods exports to Peru are dominated by specialised mining equipment, technology and materials.

PAFTA will create new market access for Australian goods exporters through the elimination of tariffs on Australian goods representing 99.4 per cent of Peru's tariff lines. Minerals and energy resource exports generally face relatively low applied tariff barriers in Peru. However for several significant Australian minerals commodities, Peru's most favoured nation (MFN) applied duties on individual tariff lines are 6 per cent. PAFTA will eliminate Peru's applied tariffs of 6 per cent on Australian iron ore, copper, nickel, cobalt, lead, zinc, tin, molybdenum, silver and some mineral fuels and oils, including some forms of coke, tar oils and bituminous mixtures. Given the importance of mining for both economies and potential complementarities and supply chain linkages, eliminating these tariffs may have a positive effect on two-way resources trade, albeit from a current low base in terms of Australian minerals exports.

Australia's main goods exports to Peru currently include specialised mining equipment, technology and materials. Many of these products currently have relatively low or zero tariffs in Peru. However there are several product groups that include equipment used in mining where Peru imposes applied tariffs of up to 6 per cent (and has higher tariff bindings) on several tariff lines. Under PAFTA, Peru will eliminate tariffs on all product groups that include mining equipment. This will provide a boost to Australian exports, reducing the cost of supplying mining equipment to customers in Peru by up to 6 per cent and improving the competitiveness of Australian products in that market.

PAFTA will also help Australian mining equipment, technology and services (METS) businesses looking to deliver mining services to the Peruvian resources industry. Under the agreement, Peru will provide market access with no limitations or conditions for Australian businesses providing services related to mining. Similar market access commitments have been provided for the following services which are directly relevant to mining: engineering services, research and development services for the natural sciences, technical testing and analysis services, scientific and technical consulting services, consulting services relating to construction and environmental services.

The Australian mining industry's strongest engagement with Peru is in the form of direct investment in that country's resources sector, including operational mining and processing facilities and exploration activities by major Australian miners and junior miners. PAFTA will support such Australian investments through its Investment Chapter and related measures. These will provide modern disciplines and protections for Australian investors in Peru, enhancing business certainty and predictability around regulatory matters, while including extensive safeguards to ensure the Governments of Australia and Peru retain scope to implement public policy and regulate in their respective countries' public interest.

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<sup>1</sup> References for statistics and information cited in the Executive Summary are provided in the main text of the submission.

## BENEFITS OF TRADE AND INVESTMENT LIBERALISATION

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### Benefits of trade and investment liberalisation

International trade and investment deliver economic and social benefits to Australians. Australia has long been a trading nation. Trade now accounts for 42 per cent of economic output and one in every five jobs rely on trade.<sup>2</sup> Trade liberalisation over the past 35 years has increased the income of the average Australian family household by an estimated \$8,448 a year.<sup>3</sup> These increases in income have come from the contribution of trade liberalisation to economic growth and through reducing tariffs on imported goods and services. Tariffs hurt the purchasing power of low and middle income earners more than high income earners. That means tariff cuts have a positive impact on the living standards of lower income households.

Liberalised international investment arrangements have also been critical for Australia's economic development. With the annual gap between national savings and investment averaging around 4 per cent of GDP over the last four decades, Australia has relied on foreign investment to build and expand local businesses, create jobs and boost economic growth.<sup>4</sup>

For these reasons, it is in Australia's national interest to support continued trade liberalisation, access to international investment and open markets, particularly in the current environment of rising protectionist sentiment. Trade agreements – ranging from multilateral trade liberalisation negotiated through the World Trade Organization, to regional trade deals like the Trans-Pacific Partnership (TPP-11) and the ASEAN-Australia-New Zealand Free Trade Agreement, to Australia's network of more than a dozen bilateral free trade agreements – play an important role in boosting trade and maintaining trade liberalisation and market opening.

The Peru-Australia Free Trade Agreement (PAFTA) will provide an important boost to Australia's economic relationship with one of the fastest-growing economies of the Latin American region. It will provide direct benefits to Australian business in the form of reduced tariffs on exports of goods to Peru, greater access for Australian services in the Peruvian market, reduced trade costs through more streamlined customs and administrative arrangements, and greater certainty and stability around two-way investment links between Australia and Peru.

In addition to these direct and immediate benefits, PAFTA can deliver broader and longer-term strategic benefits for Australia and its economic, political and cultural links with Peru and other countries in South America and the wider Pacific Rim. In terms of the evolving Asia-Pacific trade architecture, PAFTA will be a building block, along with the TPP-11 and a possible free trade agreement between Australia and the Pacific Alliance group of countries, towards the long-term goal of a Free Trade Area of the Asia-Pacific (FTAAP).

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<sup>2</sup> Department of Foreign Affairs and Trade, *Composition of Trade 2016-17*, Canberra, January 2018; ABS, *Australian National Accounts: National Income, Expenditure and Product*, December 2017, Cat No 5206.0; Centre for International Economics, *Australian trade liberalisation: Analysis of the economic impacts*, Report prepared for the Department of Foreign Affairs and Trade, Canberra, October 2017, p. 8.

<sup>3</sup> Centre for International Economics, *ibid.* pp. 13-14.

<sup>4</sup> Treasury, 'Foreign Investment into Australia', Treasury Working Paper 2016-1, January 2016, p 10.

## AUSTRALIA'S ECONOMIC RELATIONSHIP WITH PERU

### Australia-Peru trade relationship

Australia's trade relationship with Peru is relatively under-developed, suggesting there is significant potential for growth.

Two-way goods and services trade between Australia and Peru was valued at \$646 million in 2016-17, or less than 0.1 per cent of total Australian two-way trade.<sup>5</sup> Table 1 provides the breakdown of Australia's trade flows with Peru between goods and services and imports and exports. This shows that merchandise and services imports from Peru to Australia accounted for over 80 per cent of the value of the bilateral trading relationship.

**Table 1: Australia's trade with Peru, 2016-17**

	<b>Merchandise (A\$ million)</b>	<b>Services (A\$ million)</b>	<b>Total goods and services (A\$ million)</b>
<b>Exports from Australia</b>	57.6	64	122
<b>Imports from Peru</b>	377.5	147	525
<b>Two-way trade</b>	435.1	211	646

*Source: Department of Foreign Affairs and Trade, Composition of Trade Australia 2016-17. May exclude selected confidential commodities.*

Peru was Australia's 70<sup>th</sup> largest export market and its 45<sup>th</sup> largest source of imports in 2016-17.

The two-way goods trade is dominated by minerals and mining equipment (examined in the next section).

Services trade between Australia and Peru is dominated by travel services which accounted for \$139 million of Peru's \$147 million in services exports to Australia (Australians travelling to Peru) and for \$54 million of Australia's \$64 million in services exports to Peru (Peruvians travelling to Australia).

### Role of mining in trade with Peru

Mining figures prominently in the merchandise trade relationship between Australia and Peru.

Australia biggest merchandise import from Peru was the 'other ores and concentrates' commodity category which was worth \$249.7 million in 2016-17, or two-thirds of total goods imports from Peru.

This was predominantly comprised of zinc concentrate (supplying Nyrstar's Tasmanian zinc smelter) and lead.<sup>6</sup> Other significant goods imports included animal oils and fats (\$21.3 million), animal feed (\$16 million), coffee (\$9 million) and prepared or preserved fruit (\$8.3 million).

On the exports side of the ledger, Australia's goods exports to Peru are dominated by specialised mining equipment, technology and materials.

Australia's six biggest merchandise exports in 2016-17 were: prepared additives for minerals (\$11.4 million), measuring and analysing instruments (\$4.9 million), civil engineering equipment and parts (\$4 million), iron and steel bars and rods (\$3.7 million), pumps for liquids and parts (\$3.7 million) and mechanical handling equipment and parts (\$3.6 million).

<sup>5</sup> Department of Foreign Affairs and Trade, *Composition of Trade Australia 2016-17*, Canberra, January 2018, p. 39.

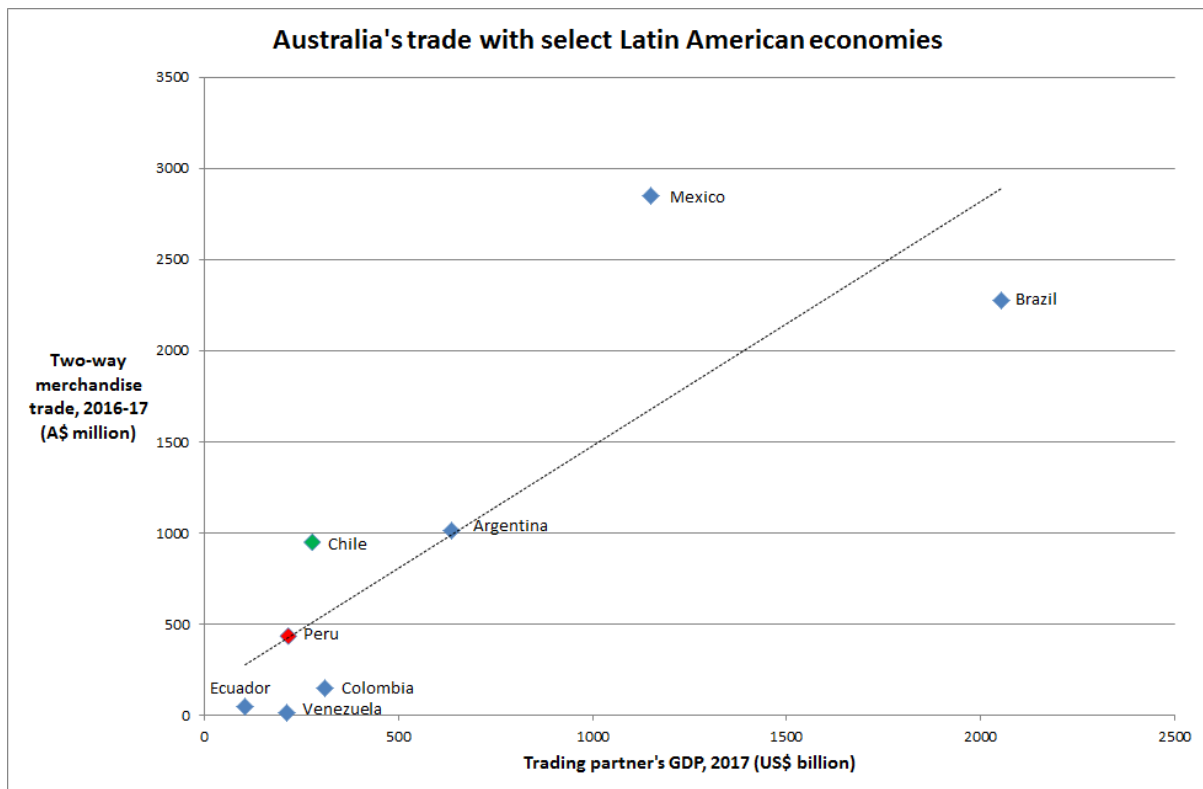
<sup>6</sup> United Nations [Comtrade Database](#), accessed 17 April 2018.

## Potential for growth

The well-known gravity model posits that bilateral trade relationships are driven by the size of each country's economy and their geographic distance, which is a proxy for transport costs and broader trade costs. Trade agreements can boost trade by because they reduce trade costs through cutting and removing tariffs, easing non-tariff barriers and streamlining customs and other administrative procedures and costs associated with trade.<sup>7</sup>

Chart 1 plots Australia's two-way merchandise trade with selected Latin American economies against their GDP. This suggests there is potential to grow trade with Peru through both of the gravity model's channels. Peru is a relatively fast-growing economy and as its GDP expands in coming years there will be scope to grow Australia's trade. Furthermore, by reducing trade costs, PAFTA is likely to contribute further to growth in trade. Chile is the only Latin American country with which Australia currently has a bilateral free trade agreement. While Chile's economy is about 25 per cent larger than Peru's, Australia's trade with Chile in 2016-17 was more than double the value of its trade with Peru (and Australian exports to Chile were worth eight times the value of exports to Peru).

**Chart 1: Potential for trade growth with Peru**



Source: IMF (GDP), Department of Foreign Affairs and Trade, Composition of Trade Australia 2016-17 and associated pivot tables (merchandise trade).

## Australian mining investment opportunities in Peru

There is also significant potential to grow the investment relationship between Australia and Peru, including in the mining industry. Mining is a significant sector in Peru's economy and there are major opportunities for inward investment in developing that country's minerals and energy resources. Peru has been identified by Austrade as a significant future market for Australian mining investment and for the delivery of mining services by Australian mining equipment, technology and services (METS)

<sup>7</sup> Head, K. and Thierry Mayer, 'Gravity Equations: Workhorse, Toolkit and Cookbook', in Gita Gopinath, Elhanan Helpman and Kenneth Rogoff (eds), *Handbook of International Economics: Volume 4*, Elsevier, 2014, pp. 131-95.

firms. According to Austrade's analysis mining concessions have been granted for more than 14 per cent of Peruvian territory, but less than 2 per cent is being used for exploration and production, meaning there are significant opportunities for mining investors in the remaining prospective areas.<sup>8</sup>

Several Australian mining companies already have a presence in Peru with the investments ranging from exploration, to partnerships with local companies in developing projects, to operational mining activities. According to Austrade, Australia is the fifth largest foreign investor in Peru's mining sector. By 2016 there were more than 80 Australian mining or mining services businesses with a presence in Peru, including 25 with a mining investment or project (including exploration projects), 35 METS companies with Peruvian offices, and 30 METS companies supplying goods or services through local distributors.<sup>9</sup>

Examples of substantial investments in Peru by major Australian mining companies, and mining companies with significant presences in Australia, include:

- Rio Tinto is conducting technical and commercial evaluation of the La Granja copper project in northern Peru and has a number of early stage copper exploration projects in Peru.<sup>10</sup> Rio has also been involved in exploration for iron ore, zinc, borates and precious metals deposits and has contributed to the discovery of several ore deposits in Peru in areas including Pampa de Pongo, Carhuacayan, Yanque-Accha, Pukaqaqa, El Aguila, Justa, Constancia, Corani and Ollachea.<sup>11</sup>
- BHP owns 33.75 per cent of Antamina, a large, open-cut copper and zinc mine in north-central Peru, in a joint venture with Glencore, Teck and Mitsubishi. The Antamina project had a capital cost of US\$2.3 billion and has been in production since 2001. In addition to copper and zinc, it also produces lead, silver and molybdenum. BHP is also engaged in exploration for new copper deposits in Peru.<sup>12</sup>
- Glencore has a 33.75 per cent interest in Antamina. In addition it has copper and zinc assets in Peru, including the Antapaccay and Corocohuayco copper projects in southern Peru and interests in the Iscaycruz and Yualiyacu zinc mines in the central highlands. In November 2017 Glencore invested US\$734 million to increase its equity in Peru's Volcan Compañía Minera from 20.7 per cent to 63 per cent of voting shares. Volcan produces zinc, lead and silver, operating 10 mines and associated processing facilities in central Peru.<sup>13</sup>
- MMG Ltd has a 62.5 per cent interest in Las Bambas, a large, newly-developed copper mine located in the Apurímac region of Peru. Construction was completed in early 2016 and the mine commenced commercial production in mid-2016. MMG expects Las Bambas to be one of the world's largest copper mines when it reaches full production.<sup>14</sup>

In addition, junior Australian mining and exploration companies which have established project offices in Peru in recent years include Latin Resources, Metminco, Minera Gold, Laconia Resources and Minera IRL.<sup>15</sup>

<sup>8</sup> Austrade, 'Mining to Peru: Trends and Opportunities', <https://www.austrade.gov.au/australian/export/export-markets/countries/peru/industries/mining>, accessed 17 April 2018.

<sup>9</sup> Austrade, op. cit.

<sup>10</sup> Rio Tinto, Annual Report 2017, pp. 46-7.

<sup>11</sup> Rio Tinto, 'Rio Tinto welcomes Peru-Australia Free Trade Agreement', Media Release, 10 November 2017.

<sup>12</sup> BHP, Annual Report 2017, p. 32, 59 and 240.

<sup>13</sup> Glencore, Annual Report 2017 p. 66, 175; [Volcan](https://www.glencore.com.au/media/2017/11/volcan-compania-minera/), accessed 17 April 2018.

<sup>14</sup> MMG, <http://www.mmgroup.com/en/Our-Operations/Mining-operations/Las-Bambas.aspx>, accessed 17 April 2018.

<sup>15</sup> Department of Foreign Affairs and Trade, 'Peru country brief', accessed 17 April 2018.

## MARKET ACCESS FOR GOODS

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### Tariff reductions will boost trade

PAFTA will create new market access for Australian goods exporters. Under the agreement, Peru will eliminate its tariffs on Australian goods representing 93.5 per cent of its tariff lines when PAFTA enters into force. Peru will then make further cuts to the remaining tariffs on Australian goods over 10 years, which will ultimately result in Australian goods in 99.4 per cent of Peru's tariff lines being able to enter the market duty-free.<sup>16</sup>

These are significant outcomes for two reasons. Firstly, Peru has relatively high tariff barriers, certainly in terms of bound rates. While its average applied most favoured nation (MFN) tariff rate in 2015 stood at 2.4 per cent, the average bound rate was 29.5 per cent. Applied rates on many agricultural goods and on textiles, clothing and footwear products were as high as 11 per cent with bound rates for these sensitive products considerably higher.<sup>17</sup> Eliminating virtually all tariffs for Australian goods, and binding duty free access, will make Australian products more competitive in the Peruvian market.

Secondly, as noted above, Australia's trade with Peru is relatively under-developed. This no doubt reflects a range of factors including the size, structure and levels of development of both economies, the geographic distance between the markets and its impact on transport and freight costs, and relatively underdeveloped business, cultural and people-to-people links. Reducing trade costs by eliminating tariffs will encourage further growth in trade between the two countries, as will other measures to improve bilateral links and engagement.

### Market access for mining and energy resources

By contrast with Australian agricultural exports, minerals and energy resource exports generally face relatively low applied tariff barriers in Peru, as they do in most other markets. Peru's average applied MFN tariff for minerals and metals commodities was 0.8 per cent in 2015. However for several significant Australian minerals commodities, Peru's MFN applied duties on individual tariff lines are 6 per cent (and bound rates are significantly higher again).<sup>18</sup>

PAFTA will eliminate Peru's applied tariffs of 6 per cent on Australian iron ore, copper, nickel, cobalt, lead, zinc, tin, molybdenum, silver and some mineral fuels and oils, including some forms of coke, tar oils and bituminous mixtures.<sup>19</sup>

So while Peru is not a significant outbound market for Australia's major resources commodities, PAFTA does improve market access. Given the importance of mining for both economies and potential complementarities and supply chain linkages (such as the use of Peruvian zinc ores and concentrates as inputs to Nyrstar's Tasmanian zinc smelting operations), eliminating these tariffs may have a positive effect on two-way resources trade, albeit from a current low base in terms of Australian minerals exports.

### Market access for mining equipment

A significant part of Australia's METS sector is the manufacture, supply and maintenance of mining equipment. Examples of items of mining equipment include: explosives and chemicals; drilling, boring, crushing and sorting equipment; machinery, conveyors and elevators; transport equipment and

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<sup>16</sup> Department of Foreign Affairs and Trade, National Interest Analysis [2018] ATNIA 4, paragraph 5.

<sup>17</sup> World Trade Organisation, *World Tariff Profiles 2017*, Geneva, 2017, p.141.

<sup>18</sup> WTO, *op cit*, p. 141.

<sup>19</sup> National Interest Analysis, *op. cit.*, Attachment II; Regulation Impact Statement, paragraph 19. PAFTA, Annex 2-B, Tariff Schedule of Peru. Data from World Trade Organisation, Tariff Download Facility for applied tariff rates on minerals and energy resources.

infrastructure; professional, scientific, technical, testing and measuring apparatus; and specialised safety equipment.

Australia's main goods exports to Peru currently include specialised mining equipment, technology and materials. Many of these products currently have relatively low tariffs in Peru. However there are several product groups that include equipment used in mining where Peru imposes applied tariffs of up to 6 per cent (and has higher tariff bindings) on several tariff lines. Examples of these product groups include inorganic chemicals, explosives, articles of iron and steel used in mining (such as line and drill pipes, casing and tubing), tools, boilers, machinery and mechanical appliances, and optical, measuring, checking and precision instruments. There are also a small number of tariff lines covering products which can be used in mining where Peru's tariff stands at 11 per cent, including air or vacuum pumps, air or other gas compressors (HS 8414) and taps, cocks and valves for pipes, boilers, tanks and vats (HS 8481).

Under PAFTA, Peru will eliminate tariffs on all product groups that include mining equipment (Table 2). This will provide a boost to Australian exports, reducing the cost of supplying mining equipment to customers in Peru by up to 6 per cent and improving the competitiveness of Australian products.

**Table 2: Peru's MFN tariffs for select product groups that include mining equipment**

Product Group (HS 2012)	Commodity descriptor	Number of tariff lines	Average and maximum applied duty (per cent)	Peru's PAFTA commitment
28	Inorganic chemicals; organic or inorganic compounds of precious metals, of rare-earth metals, of radioactive elements or of isotopes	287	0.6, 6	Duties eliminated for 280 tariff lines on entry into force and for all remaining lines by Year 5.
36	Explosives; pyrotechnic products; matches; pyrophoric alloys; certain combustible preparations	17	3.9, 6	Duties eliminated for 11 tariff lines on entry into force and for all remaining lines by Year 5.
40	Rubber and articles thereof	129	0.8, 6	Duties eliminated for 119 tariff lines on entry into force and for all remaining lines by Year 5.
65	Headgear and parts thereof	11	3.8, 6	Duties eliminated for all tariff lines on entry into force.
73	Articles of iron or steel	150	2, 6	Duties eliminated for 109 tariff lines on entry into force and for all remaining lines by Year 5.
82	Tools, implements, cutlery, spoons and forks, of base metal; parts thereof of base metal	90	1.5, 6	Duties eliminated for 81 tariff lines on entry into force and for all remaining lines by Year 5.
84	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof	756	0.4, 11	Duties eliminated for 734 tariff lines on entry into force and for all remaining lines by Year 5.
85	Electrical machinery and equipment and parts thereof, etc.	443	1.3, 6	Duties eliminated for 410 tariff lines on entry into force and for all remaining lines by Year 5.
87	Vehicles other than railway or tramway rolling- stock, and parts and accessories thereof	152	1.6, 6	Duties eliminated for 144 tariff lines on entry into force and for all remaining lines by Year 5.
90	Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus, etc.	214	0.9, 6	Duties eliminated for all tariff lines on entry into force.

Sources: WTO Tariff Download Facility (Peru's MFN applied tariffs as notified to WTO in 2015). PAFTA, Annex 2-B, Tariff Schedule of Peru.

## MARKET ACCESS FOR SERVICES

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Recent studies have highlighted the role of Australia's METS businesses in contributing to economic growth and in providing skilled jobs, advanced technologies and sophisticated services to support our mining industry. It is well-known that Australia has a world-class, global-scale extractive mining industry. However, Australia also has a world-class METS sector. The importance of mining in our economy means that thousands of METS businesses have emerged to support and supply the extractive mining industry. These businesses range from those involved in exploration and geoscientific services, to those providing a range of equipment and supplies used in mining; from developers of innovative technologies, data analysis and software solutions, to those providing professional, financial, legal and business services to the mining industry. A study by Deloitte Access Economics has found that when mining and METS are considered together, they contribute around 15 per cent of Australian GDP and support 1.14 million full-time equivalent jobs in Australia.<sup>20</sup>

Australia's METS sector is increasingly looking to export its services to international markets. There are opportunities for mining services exports to countries which have significant mining projects already in production or which have significant resources which are likely to be developed in coming years. Peru is such a market. Austrade has noted that it is already a major mining province, ranking third in global copper production, second for silver and sixth for gold. Furthermore there is a pipeline of US\$58 billion (\$ 74 billion) in new mining investment projects expected to be delivered over the period from 2016 to 2020.<sup>21</sup> Austmine, the industry association representing Australia's mining services sector, has Peru on its schedule of METS trade missions for 2018.

PAFTA will help Australian METS businesses looking to deliver mining services to the Peruvian resources industry. Under the free trade agreement, the Australian Government has secured specific services market access commitments from Peru that will create new opportunities for mining and related services. Peru has agreed to provide market access with no limitations or conditions for Australian businesses providing services related to mining. Similar commitments have been provided for the following services which are directly relevant to mining: engineering services, research and development services for the natural sciences, technical testing and analysis services, scientific and technical consulting services, consulting services relating to construction and environmental services.<sup>22</sup>

In addition, Peru's market access commitments for professional services more broadly, which cover legal services, accounting, auditing and bookkeeping, taxation services and computer and related services, may also be beneficial to Australian professional services firms in these areas with expertise in providing such services to clients in the resources sector.

PAFTA's market access provisions for services will be supplemented by the agreement's Chapter on Temporary Entry for Business Persons. Services exports are often delivered by the presence of Australian personnel in the relevant markets. The commitments under this chapter will provide more scope for Australian skilled personnel and technicians to work in Peru delivering mining services. Peru has committed to provide up to 12 months temporary entry for Australian personnel, including:

- Mining and quarrying supervisors
- Oil and gas drilling and services supervisors
- Mineral and metal processing supervisors
- Petroleum, gas and chemical processing supervisors
- Mining and extraction equipment supervisors and contractors
- Oil and gas well drillers, servicers and testers
- Land survey technologists and technicians.

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<sup>20</sup> Deloitte Access Economics, *Mining and METS: engines of economic growth and prosperity for Australians*, Report prepared for the Minerals Council of Australia, 2017.

<sup>21</sup> Austrade, op. cit.

<sup>22</sup> PAFTA, Article 9.5 Market Access; Annex II: Schedule of Peru.

Peru's broader temporary entry commitments for professionals also provide scope for Australian geologists, geoscientists and mining engineers to deliver services and work in Peru.<sup>23</sup>

Peru's commitments to provide market access for Australian mining services under PAFTA go further than the services commitments it has made in this area in the plurilateral Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11). They will build on TPP-11 mining services market access commitments by Mexico and Chile, assisting Australian METS businesses looking to expand into Latin American markets more broadly.<sup>24</sup>

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<sup>23</sup> PAFTA, Annex 11-A, Schedule of Peru, definitions of professional and technician.

<sup>24</sup> Under TPP-11, Chile and Mexico will provide market access for Australian suppliers of mining-related consulting, research and development, engineering, environmental, mining and technical testing and analysis services. See Department of Foreign Affairs and Trade, TPP-11 Outcomes: Services, 23 February 2018, <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Documents/tpp-11-outcomes-services.pdf>

## INVESTMENT

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The Australian mining industry's strongest engagement with Peru is in the form of direct investment in that country's resources sector, including operational mining and processing facilities and exploration activities by major Australian miners and junior miners. PAFTA will support Australian investments into the future through its Investment Chapter and related measures. These will provide modern disciplines and protections for Australian investors in Peru, enhancing business certainty and predictability around regulatory matters, while including extensive safeguards to ensure the Governments of Australia and Peru retain scope to implement public policy and regulate in their respective countries' public interest.

This represents a welcome updating and improvement of the existing Australia-Peru Investment Promotion and Protection Agreement (IPPA), a bilateral investment treaty negotiated more than 20 years ago. Australia and Peru have agreed that PAFTA's entry into force will terminate the bilateral IPPA.

PAFTA's investment commitments broadly require Australia and Peru not to discriminate against each other's investors compared to domestic investors and to provide each other's investors with basic legal rights and equitable treatment. These commitments are subject to specific exceptions set out in each country's schedules of non-conforming measures. The Investment Chapter's main provisions are summarised below.

### Non-discrimination

Peru and Australia have agreed to provide non-discriminatory treatment to each other's investors. This comprises two obligations. Article 8.4 provides that neither country will treat investors from the other country less favourably than it treats its own domestic investors in 'like circumstances'. This is known as the *national treatment* obligation. Article 8.5 provides that neither country will treat the other's investors less favourably than it treats investors from any other country in 'like circumstances'. This is known as the *most-favoured nation* obligation.

### Due process and compensation for expropriation

Article 8.8 of PAFTA provides that if either country expropriates investments of each other's investors they will only do so for a public purpose, in a non-discriminatory manner, observing due process and with payment of market value compensation. This reflects the standard that Australia is obliged to follow under international law. The obligation encompasses both direct and indirect expropriation. Direct expropriation means expropriation of assets through direct transfer of title. Indirect expropriation means expropriation through an action or series of actions that have an effect equivalent to direct expropriation without formal transfer of title.

### Minimum Standard of Treatment

Article 8.6 provides that Australia and Peru will accord each other's investors a Minimum Standard of Treatment. This comprises an obligation to treat investors fairly, such as by affording due process in court proceedings, and to provide protection to investments, such as by providing police protection to physical assets. This reflects the standard Australia is already required to provide under international law. The chapter contains safeguards to ensure the requirement to provide the Minimum Standard of Treatment remains consistent with the customary international law standard.<sup>25</sup>

### Non-conforming measures

Peru and Australia have both nominated an extensive series of non-conforming measures or exceptions to their investment commitments. These include, for example, Australia's foreign investment screening rules, its limits on foreign ownership of businesses such as Qantas, Telstra and

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<sup>25</sup> Article 8.6.2.

CSL, and its regulations in areas such as foreign ownership of land, local content rules for broadcasting, gambling, coastal shipping and investment in airports.<sup>26</sup>

### **Investor-State Dispute Settlement**

Section B of PAFTA's Investment Chapter sets out investor-state dispute settlement (ISDS) provisions. These provisions will allow investors of either country to seek mediation and arbitration where they claim the other country's government has not complied with its commitments under the Investment Chapter. From the point of view of Australian companies considering investing in Peru, the ISDS provisions will mean there is greater certainty that the investment commitments can be enforced – and the same certainty will be provided to Peruvian investors in Australia. In this way ISDS is an important supporting mechanism for the agreement's substantive investment commitments. The substantive commitments supported by the ISDS arrangements will act to encourage two-way investment flows which, in turn, will contribute to each country's economic growth and development.

It should be noted that ISDS provisions such as those in PAFTA do not create a wide-ranging ability for foreign investors to challenge any government policies they disagree with or which they view as not being in their commercial interests. Disputes under ISDS provisions can only be initiated where it is claimed that there is a breach of the substantive investment commitments under the relevant agreement. As noted above, these commitments cover issues such as expropriating property without adequate compensation or imposing protectionist measures which discriminate against foreign investors compared to domestic businesses. Furthermore, as noted above, Australia and Peru have both listed an extensive series of non-conforming measures, or exceptions, for their PAFTA investment commitments, covering a range of existing public policies, legislation and regulations. ISDS provisions cannot be used to challenge such non-conforming measures.

Finally, PAFTA's ISDS provisions contain extensive substantive and procedural safeguards. The substantive safeguards mean the ISDS provisions cannot be used to challenge government policies and regulations in healthcare, the environment, social welfare, education, public utilities, the arts, cultural heritage and Indigenous traditional cultural expressions. The procedural safeguards ensure that any claims under the PAFTA ISDS provisions will be conducted in an open and transparent manner, subject to clear procedural rules and legal standards.

The inclusion of these safeguards represents a significant improvement on the existing ISDS provisions in the bilateral Australia-Peru IPPA, which was concluded in December 1995. Australia and Peru have agreed that the bilateral IPPA will be terminated on PAFTA's entry into force.<sup>27</sup>

<sup>26</sup> PAFTA, Annex I: Schedule of Australia and Annex II: Schedule of Australia.

<sup>27</sup> The Hon. Steven Ciobo MP, Minister for Trade, Tourism and Investment, Letter terminating the Agreement Between Australia and the Republic of Peru on the Promotion and Protection of Investments, 26 January 2018.