THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Joint Standing Committee on Treaties

Report 18

Multilateral Agreement on Investment: Final Report

March 1999

ISBN

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2 Replaced Senator K Carr from 4 December 1996.

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TERMS OF REFERENCE

38th PARLIAMENT

- The potential consequences for Australia arising from the matter known as the MAI.

(Referred to the Committee by the Hon Alexander Downer MP, Minister for Foreign Affairs, on 5 March 1998.)

- Advantages and/or disadvantages for Australia arising from the MAI currently being negotiated in secret by the Australian Government at the Organisation for Economic Co-operation and Development, with particular reference to:

  (a) the ability of countries to impose conditions on foreign investment;

  (b) the ability of countries to establish limits on foreign investment;

  (c) the implications arising from the 'roll back' and 'standstill' provisions;

  (d) the ability of countries to pursue social, environmental, labour, cultural, human rights and indigenous protections and the impacts for each of these sectors resulting from foreign investment regimes under the MAI;

  (e) any implications for Australia's national debt and current account deficit of the growth in foreign investment the MAI is expected to bring;

  (f) the MAI's dispute handling procedures;

  (g) the issue of the constitutionality of the MAI for Australia;

  (h) the impact on agricultural and manufacturing sectors;

  (i) the impact on State, Territory and local governments; and

  (j) the impact on Australian investors seeking to invest overseas.

(Referred to the Committee by resolution of the Senate on 9 March 1998.)

TERMS OF REFERENCE

39TH PARLIAMENT

Noting that the text of the draft Multilateral Agreement on Investment (MAI) was tabled in Parliament on 31 March 1998, the Committee resolves to inquire into and produce a final report on:

1. the potential consequences for Australia arising from the matter known as the draft MAI; and

2. the advantages and/or disadvantages for Australia which may have arisen from the draft MAI, with particular reference to:

   (a) the ability of countries to impose conditions on foreign investment;

   (b) the ability of countries to establish limits on foreign investment;

   (c) the implications arising from the 'roll back' and 'standstill' provisions;

   (d) the ability of countries to pursue social, environmental, labour, cultural, human rights and indigenous protections and the impacts for each of these sectors resulting from foreign investment regimes under the MAI;

   (e) any implications for Australia's national debt and current account deficit of the growth in foreign investment the MAI is expected to bring;

   (f) the MAI's dispute handling procedures;

   (g) the issue of the constitutionality of the MAI for Australia;

   (h) the impact on agricultural and manufacturing sectors;

   (i) the impact on State, Territory and local governments; and

   (j) the impact on Australian investors seeking to invest overseas.

(These terms of reference were adopted by the Committee on 21 December 1998.)

RECOMMENDATIONS

The Joint Standing Committee on Treaties recommends that, if there are negotiations for an across countries agreement for the regulation of international capital:

- **Australia continue to be involved in those negotiations (paragraph 8.41);**
- **the Department of the Prime Minister and Cabinet assume the lead role in coordinating the Australian Government's negotiations;**
- **the Department of the Prime Minister and Cabinet actively and effectively involve all relevant Commonwealth agencies from the beginning of any negotiations;**
- **the Department of the Prime Minister and Cabinet ensure that all Australians have the opportunity to put their views on all aspects of any negotiating text as part of an open and public process, and**
- **from the beginning of any negotiations towards such an agreement, the Department of the Prime Minister and Cabinet forward written reports on a six-monthly basis to the Committee about their content and progress (paragraph 8.47).**

ABBREVIATIONS AND ACRONYMS

ABA	Australian Broadcasting Authority
ABC	Australian Business Chamber
ACF	Australian Conservation Foundation
ACFOA	Australian Council for Overseas Aid
ACCI	Australian Chamber of Commerce and Industry
ACM	Australian Chamber of Manufactures (now the Australian Industry Group)
ACOSS	Australian Council of Social Services
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
AGs	Attorney-General's Department
AI	Amnesty International Australia
AIG	Australian Industry Group
ALGA	Australian Local Government Association
APA	Australian Publishers' Association
APEC	Asia-Pacific Economic Cooperation forum
ASEAN	Association of South-East Asian Nations
ASA	Australian Society of Authors
ASX	Australian Stock Exchange
ATC	Australian Tourist Commission
ATO	Australian Taxation Office
ATSIC	Aboriginal and Torres Strait Islander Commission
AusAID	Australian Agency for International Development
AVCC	Australian Vice-Chancellors' Committee
BCA	Business Council of Australia
BOP	Balance of payments
CAA	Community Aid Abroad

CAP	Common Agricultural Policy (of the EU)
CER	Closer Economic Relations (between Australia and New Zealand)
CFMEU	Construction, Forestry, Mining and Energy Union
CIE	(Australian) Centre for International Economics
Commentary	Commentary to the MAI Negotiating Text (as at 24 April 1998)
DFAT	Department of Foreign Affairs, Defence and Trade
DHFS	Department of Health and Family Services (to October 1998)
DIST	Department of Industry, Science and Technology (to October 1998)
DOFA	Department of Finance and Administration
DOCIEA	Department of Communications, the Information Economy and the Arts (to October 1998)
DPIE	Department of Primary Industries and Energy (to October 1998)
DTRD	Department of Transport and Regional Development (to October 1998)
DWRSB	Department of Workplace Relations and Small Business (to October 1998)
ECOSOC	Economic and Social Committee (of the UN)
EEZ	Exclusive economic zone
EMDG	Export Market Development Grants
EU	European Union
FATA	(Australian) *Foreign Acquisitions and Takeovers Act 1975*
FDI	Foreign direct investment
FIRB	(Australian) Foreign Investment Review Board

FOI	Freedom of Information
FRG	Federal Republic of Germany
GATS	General Agreement on Trade in Services (under WTO)
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
IBRD	International Bank of Reconstruction and Development
ICSID	*International Convention on the Settlement of Investment Disputes between States and Nationals of other States*
IFI	International financial institutions
ILO	International Labour Organisation
IMF	International Monetary Fund
IPPA	Investment promotion and protection agreement
JCPAA	Joint Committee of Public Accounts and Audit
LGSA	Local Government and Shires Association of NSW
MAI	(Proposed or Draft) Multilateral Agreement on Investment
MCM	(OECD) Ministerial Council Meeting
MEA(s)	Multilateral environmental agreement(s)
MFN	Most favoured nation
MTIA	Motor Traders' Industry Association (now the Australian Industry Group)
NAFTA	North American Free Trade Agreement
NCC	National Civic Council
NGO(s)	Non-government organisation(s)
NT	National treatment
NTEU	National Tertiary Education Union

NZ	New Zealand
ODA	Overseas development assistance
OECD	Organisation for Economic Cooperation and Development
OSB	Office of Small Business, Department of Workplace Relations and Small Business
PLR	Public lending right
PM&C	Department of the Prime Minister and Cabinet
QCC	Queensland Conservation Council
R&D	Research and development
REIOs	Regional Economic Integration Organisations
RIRDC	Rural Industries Research and Development Corporation
SCOT	Standing Committee on Treaties
Text	The MAI Negotiating Text (as at 24 April 1998)
TNC(s)	Trans-national corporation(s)
TRIPS	Trade Related Aspects of Intellectual Property Rights
UK	United Kingdom of Great Britain, Scotland and Northern Ireland
UN	United Nations
UNCED	United Nations' Conference on Environment and Development
UNCITRAL	United Nations' Commission on International Trade Law
UNCTAD	United Nations' Conference on Trade and Development
UNDP	United Nations' Development Program
USA	United States of America
VLGA	Victorian Local Governance Association

VTHC	Victorian Trades Hall Council
WTO	World Trade Organisation

CHAPTER 1

INTRODUCTION

Purpose of this Report

1.1 This is the final Report of this Committee into the matter known as the draft Multilateral Agreement on Investment (MAI). Before dealing with the perspective it will take, it will be necessary to give some background on the negotiations for this matter, and on the Committee's earlier Report on the subject.[1]

Negotiation of the draft MAI

1.2 At its Ministerial Council Meeting in May 1995, the Organisation for Economic Cooperation and Development (OECD) decided to launch negotiations for a draft MAI. This built on earlier work on rules for foreign investment already undertaken in a number of other forums. Negotiations were to be completed by the end of April 1998. In May 1997, the Council extended them for a further year until May 1998 and, in April 1998, agreed that the work on the text would continue, with the next meeting of the officials' Negotiating Group to be held in October 1998. The draft Agreement would then have been considered at the OECD Ministerial Council Meeting scheduled for April/May 1999.[2]

1.3 The draft MAI was being negotiated by the 29 members of the OECD, and the European Commission (EU). Eight non-member nations were also involved in these negotiations.[3]

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1 The terms 'the draft Agreement' and 'the draft MAI' will be used interchangeably to describe the matter known as the MAI: an international treaty on foreign investment being negotiated by members of the OECD and other interested nations. A copy of the text of the draft Agreement as at 13 February 1998 was tabled by the Assistant Treasurer on 31 March 1998: Senate, *Hansard*, p. 1597.

2 Submissions, pp. 1294, 1283-1284, 2206; Interim Report, paragraph 1.3.

3 Submissions, p. 1308. OECD membership is at Appendix 4. The eight non-member nations were: Argentina, Brazil, Chile, Hong Kong (China), the Slovak Republic, Estonia, Latvia and Lithuania.

The Interim Report

1.4 In the 38th Parliament, the Joint Standing Committee on Treaties tabled its 14th Report: *Multilateral Agreement on Investment: Interim Report* on 1 June 1998.[4]

1.5 The inquiry in the 38th Parliament resulted from references to this Committee from both the Minister for Foreign Affairs and from the Senate. Both references sought a report to the Parliament 25 May 1998.[5]

1.6 The Interim Report summarised progress of the inquiry into the then draft MAI, and dealt with a number of issues, including:

- consultation;
- Commonwealth-State relations;
- issues raised in the submissions received;
- evidence given by Treasury and other Commonwealth Departments;
- Australia's approach to the negotiations, and
- the status of the draft Agreement.

1.7 It recommended that:

> Australia not sign the final text of the Multilateral Agreement on Investment unless and until a thorough assessment has been made of the national interest and a decision is made that it is in Australia's interest to do so.[6]

1.8 Further, it recommended that the inquiry into the draft Agreement continue and that the Committee 'provide a fuller report to Parliament at a later date'. This Report honours the previous Committee's commitment to that task.[7]

1.9 The Interim Report did not deal with vital issues such as globalisation and its impact or the movement of foreign direct investment

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4 For ease of reference, the term 'Interim Report' will be used hereafter.

5 These references are at p. xi, and were also set out at paragraphs 1.6 and 1.10 respectively of the Interim Report.

6 Interim Report, paragraph 1.69.

7 *ibid*, paragraph 1.70.

(FDI) from country to country. These were important issues in the consideration of the draft MAI. This Report will examine them before describing in some detail the draft MAI and what its implications for Australia might have been.

Cessation of negotiations

1.10 On 2 November 1998, the Assistant Treasurer announced that it was clear that the draft Agreement would not go ahead in the form in which it was being negotiated. A meeting of officials at the OECD in October 1998 had supported the need for a transparent and certain global investment framework. They had agreed to continue work on developing an international framework of rules for investment, but the text of the draft MAI would 'now only be a reference point for any further work'.[8]

1.11 Subsequent advice from the Assistant Treasurer stated that:

- negotiations on the draft MAI were not proceeding on a 'business as usual' basis;
- the April 1998 text had no status, and negotiations on it would not continue;
- there was broad support for continuing discussions on a multilateral set of rules for investment, and
- ongoing work within the OECD would be complementary to anything that might be undertaken in the World Trade Organisation (WTO).[9]

1.12 He added that any future work on the matter known as the MAI needed to address the OECD Ministers' requirement to protect the sovereign right to regulate and to ensure citizens were not harmed by efforts to liberalise foreign investment. There was also a need to continue to engage 'civil society', and to expand participation in the process by countries that were not members of the OECD.[10]

1.13 At a public hearing in December 1998, Ms Janine Murphy of Treasury was unable to give advice about the future of any work to develop international rules for investment. No decisions had been taken

8 Exhibit No 61, Transcript, 21 December 1998, p. 450. On 2 November 1998, the Deputy Prime Minister said that the text was 'now on ice, deep frozen ice': Exhibit No 62, p. 1.

9 Submissions, pp. 2572-2573, Transcript, 21 December 1998, pp. 450-451.

10 Submissions, p. 2573.

on preparations for advice to the next OECD Ministerial Council meeting, scheduled for April/May 1999. She added that it was not clear whether foreign investment would be included within the proposed new round of multilateral trade negotiations. Some OECD members were in favour of this course.[11]

Resumption of the inquiry

1.14 Following consideration of the status of the inquiry begun in the 38th Parliament, we decided that this inquiry should be reopened and a further, more detailed report tabled as soon as practicable in 1999. The terms of reference approved for the inquiry in the 38th Parliament were re-adopted in the 39th Parliament with minimal changes.[12]

1.15 A wide range of submissions and exhibits had already been received, and five public hearings had been held, before the dissolution of the 38th Parliament on 31 August 1998. We did not believe, therefore, that it was necessary to delay completion and tabling of this Report. While a final public hearing was held in Canberra on 21 December 1998, we did not see a need to hold additional hearings on this matter.

1.16 Dealing with a subject as large and complex as the draft MAI demanded examination of a great deal of material. The submissions we received for this inquiry are listed in Appendix 1. Appendix 5 contains some statistical analysis of these submissions. In addition, we received a large number of 'form' letters which were not counted as submissions, but which have been retained with the other papers from this inquiry.

1.17 In the 38th and 39th Parliaments, witnesses gave evidence at six public hearings. They represented a range of organisations, such as government agencies, local government, non-government organisations (NGOs) and unions. Numbers of private citizens also gave evidence at some of these hearings. All those people who appeared are listed in Appendix 2.[13]

The perspective of this Report

1.18 This Report has taken as its starting point the fact that globalisation exists with particular costs and benefits. There is a belief that, within this international trend, the movement of capital between

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11 Transcript, 21 December 1998, p. 451.

12 These terms of reference for the inquiry are at pages xi and xiii respectively.

13 Information about the conduct of the inquiry can also be found at pp. 2-4 of the Interim Report.

nations needs certain and transparent rules. This belief seems to have been gathering strength for some time, but negotiation of such an agreement began within the OECD in 1995. Serious problems within the international financial system, since the middle of 1997, may well have strengthened calls for a multilateral agreement to regulate the movement of international capital, but did not start the negotiation process.

1.19 The draft MAI, when it was being negotiated by OECD members and other interested non-members, was one way which was suggested to regulate international investment. In accordance with the terms of reference for the inquiry, we have examined the draft Agreement and its implications for various areas and groups within the Australian economy. This Report also expresses views about the suitability of the draft MAI for the purpose it was designed, and makes some observations on ways the movement of international capital might be regulated.

1.20 Reports of Parliamentary Committees serve many purposes, and they generally have a wide readership. This is particularly so in such cases as a report on the draft MAI. It not be possible therefore to table a report which equally satisfies the casual reader, someone who is looking for information on a particular topic, let alone the specialist who already has detailed information on such a matter.

1.21 A great deal of material has been distributed and published, in many different ways, about the draft MAI, in this country and in overseas countries. The Exhibits received during this inquiry, listed in Appendix 3, give some indication of its range and variety, without in any way pretending to be a survey, of the literature and other material about the draft MAI.

Text of the draft Agreement

1.22 This was an unusual inquiry, in that it dealt with the text of a draft Agreement which was destined not to be finalised. The discontinued OECD draft of the document dated 24 April 1998 has been used in this Report, together with the Commentary to the negotiating text of the same date.[14]

Conclusions

1.23 While work has now ceased on the OECD's draft MAI, we believe that the issues it raised, and the concerns it generated, in the

14 Hereafter 'Text' and 'Commentary' respectively.

Australian community were sufficiently important for this Committee to resume and complete its inquiry into this matter as soon as practicable.

1.24 We would like to thank all those who forwarded submissions to this inquiry and gave evidence at public hearings. All these people and organisations have contributed to what was an open and public inquiry process. Without these individual contributions, this process would have been less effective, and this Report less comprehensive. The Committee is aware that, in accordance with the revised treaty-making procedures introduced in 1996, it provided a means for the expression of concerns about the draft MAI felt by many Australians.

CHAPTER 2

GLOBALISATION

2.1 This Chapter will define and set out some of the characteristics of globalisation, before giving some information on foreign direct investment (FDI) which is central to this concept. It will then detail a range of views and initiatives on the matter, and list some of the benefits and implications of globalisation. Finally, our views will be given on these matters.

The concept and brief history

2.2 Globalisation is a word or concept which has been used in many ways, principally in an economic context, over the past few years. While there is considerable variation between possible definitions, it is often used interchangeably with such terms as 'the global economy' and 'the single global marketplace'. These terms are all related to such concepts as 'the global village' or 'the new global age'.[1]

2.3 In this Report, the general definition of the International Monetary Fund (IMF) will be used: 'the rapid integration of economies worldwide through trade, financial flows, technology spillovers, information networks and cross-cultural currents'.[2]

2.4 The IMF has pointed out that globalisation is not a new phenomenon. It saw post-Second World War developments as a resumption of a trend observed in the world economy a century ago. By some measures, it asserted, international economic integration increased as much in the 50 years before 1914 as in recent decades, and reached comparable levels. Then, as now, integration was driven by the proliferation of markets and rapid technological change. This process was interrupted and reversed from 1914 until after 1945.[3]

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1 Exhibit No 41, p. 2. See Exhibit No 5, p 1, for a discussion of the application of the term 'global village' by Marshall McLuhan in 1964 to the use of technology to link remote areas of the world, and the more recent impact of technology via international markets on domestic stock markets and interest rates. See also Exhibit No 17, p. 45.

2 Exhibit No 17, p. 3. See also Exhibit No 10, p. 16. See Submissions, p. 1701, for Community Aid Abroad's brief definition of globalisation as 'the integration of economic activities across national borders'.

3 Exhibit No 17, p. 112. The Annex, *Globalisation in Historical Perspective*, at pp. 112-116, is a useful and detailed summary of economic integration from the mid-Nineteenth Century.

2.5 Professor Jeffrey Sachs has drawn attention to increased trade linkages between Europe, Japan and the USA since the 1960s. What is new is the 'veritable economic revolution' of the past 15 years which came along so suddenly that its fundamental ramifications for economic growth, the distribution of income and wealth, and patterns of trade and finance are only dimly understood.[4]

2.6 In other eyes, the global trend towards 'democracy and market economics' was the fruit of victory in the Cold War.[5]

2.7 According to Professor Alberto Tita, there are a variety of causes of globalisation, such as:

- the end of Communism and the opening of markets to competition;
- the development of new rules on market access as a result of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) and the establishment of the WTO, and
- the boom in transmission of news and data, in 'real time' and to every corner of the globe, as a result of developments in information technology.[6]

2.8 One of the great novelties of the current situation is the extent to which the poorer nations of the world were incorporated into the global system of trade, finance and production as partners and participants in the market, rather than as colonial dependencies.[7]

2.9 Globalisation raises a number of important issues, including:

- the repudiation of national or local particularities;[8]
- the meaninglessness of national borders;[9]

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4 Exhibit No 32, p. 98.

5 Exhibit No 58, p. 46.

6 Exhibit No 49, pp. 47-48.

7 Exhibit No 32, p. 98. The term 'developing nations' was not used.

8 Exhibit No 41, p. 1.

9 *ibid*.

- the challenging of state sovereignty;[10]
- the free movement of goods and services and, more importantly, of ideas and capital between nations;[11]
- reductions in the relative costs of international transport, and especially in communications so that costs of international transactions have fallen;[12]
- the expansion, and the declining cost, of information on international trade and investment opportunities;[13]
- the dismantling of trade and payments barriers;[14]
- strong international institutions;[15]
- increasing international inter-dependence;[16]
- the inter-penetration of socio-cultural systems,[17] and
- the contraction of social time and space.[18]

2.10 In an address to the WTO in May 1998, President Clinton noted that globalisation was a fact, not a policy choice. He pointed out that the 'dynamic, idea-based new global economy' offered the possibility of lifting billions of people into a world-wide middle class. The way trade was conducted, however, affected the lives and livelihoods, the health and safety of families around the world. The trading system for the 21st Century must honour values as it expands opportunity.[19]

2.11 More must be done, the President said, to ensure that the new economy lifts living standards around the world. Spirited economic

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10 *ibid*.

11 Exhibit No 29, p. 20.

12 Exhibit No 33, p. 216.

13 *ibid*.

14 *ibid*.

15 Exhibit No 10, p. 15.

16 *ibid*, p. 16.

17 i*bid*.

18 *ibid*.

19 Exhibit No 44, pp. 2, 3.

cooperation should not become a race to the bottom in environmental protections, consumer protections and labour standards: 'level up, not level down'. Without such a strategy, he added, the necessary public support cannot be built for the global economy. Working people would only assume the risks of a free international market if they were confident that this system would work for them.[20]

2.12 Such a range of issues, gathered from several sources, gives an indication of the complexity of globalisation and the impact it could have on a nation and its people.

Foreign direct investment

2.13 FDI is seen as an essential element in globalisation. The OECD stated that global flows of FDI reached an historic high of $US340 billion in 1996. The Australian Council of Trade Unions (ACTU) noted that the FDI flows had increased steadily throughout the post-Second World War period. It quoted data which indicated that the stock of FDI had increased from $US67.7 billion in 1960 to $US1949 billion in 1992. Much of this increase had occurred in the 1980s and had coincided with a shift to FDI in services.[21]

2.14 Examples can readily be provided of the impact of the movement of FDI: five of the most currently affected Asian economies experienced a switch from a net inflow of $US93 billion in 1996 to a net outflow of $US12 billion year later. Flows of this scale and rapidity were new in the global economy which was still monitored by international institutions created after the Second World War, and explained in ways derived from less relevant experience.[22]

2.15 The ACTU quoted information which asserted that, over the decade from 1987, FDI had grown four times as fast as GDP and three time as fast as trade. According to Community Aid Abroad (CAA), FDI has grown twice as fast as world trade and four times as fast as domestic production. CAA asserted that FDI has been fuelled by a small number of

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20 *ibid*, p. 3.

21 Exhibit No 59, p. 7, Submissions, p. 1670. No details were given of the GDP or trade to which the ACTU referred. An OECD News Release in October 1998 stated that international investment is 'an engine of growth', see Exhibit No 60. The ACTU's submission included a quotation which referred to the growth of TNCs and FDI as 'the main engine' of globalisation; see Submissions, p. 1670. DFAT, Submissions, p. 1275, referred to FDI as 'an engine of global growth' and as 'a visible embodiment of global liberalisation'.

22 *The Australian Financial Review*, 23 October 1998, p. 40.

trans-national corporations (TNCs), the top 500 of which account for 80 per cent of international investment and 70 per cent of global trade.[23]

2.16 FDI will be examined in more detail in Chapter 3.

The benefits of globalisation

2.17 In 1997, the IMF argued that, by enabling a greater international division of labour, globalisation raised productivity and average living standards, while broader access to foreign products allowed consumers to enjoy a wider range of goods and services at lower cost. It could also allow a country to mobilise a larger volume of financial savings because investors had access to a wider range of financial instruments in various markets.[24]

2.18 Just as there are many definitions of globalisation, so many benefits are ascribed to it. From a range of sources, these benefits could include:

- the creation of wealth through greater liberalisation of trade and investment;[25]
- the benefits of the international division of labour, 'so clearly proved by the theory of comparative advantage';[26]
- economies of scale;[27]
- the spread of capital and technological innovations from one country to another;[28]
- lower prices for imports;[29]
- the freedom of choice associated with the international movement of goods, capital and people;[30]

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23 Submissions, pp. 1670, 1701. CAA did not include a time frame in which the increases quoted have occurred.

24 Exhibit No 17, p. 45.

25 Exhibit No 29, p. 20.

26 *ibid.*

27 *ibid*.

28 *ibid*; Exhibit No 17, p. 59.

29 Exhibit No 17, p. 59.

30 Exhibit No 29, p. 20.

- the freedom of thought associated with the international movement of ideas;[31]
- the ability to minimise taxation payments;[32]
- the discovery of trends before competitors,[33] and
- the exercise of influence over governments because of sheer size.[34]

The IMF's views

2.19 The IMF noted that, while globalisation contributed enormously to global prosperity, the public debate often focused on its perceived negative aspects. These included its effects on employment and real wages, especially of the lower skilled group, in advanced economies. As with any form of technological or structural change, globalisation 'may adversely affect the living standards of some in the short run'.[35]

2.20 It also noted that globalisation had been viewed with concern in many advanced economies. The IMF referred to a common belief that globalisation harmed the interests of workers, especially the unskilled, either directly through migration or indirectly through trade and capital outflows. It asserted that, with reference to trade, these beliefs appeared to be at odds with the evidence that import competition had generally only had modest effects on wages, employment and income equality in the advanced economies.[36]

2.21 The Fund conceded that, although advanced economies as a whole benefited from increased economic integration, gains were typically distributed unevenly between groups within countries. Those adversely affected were likely to experience 'adjustment costs and social dislocation'.[37]

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31 *ibid*.

32 Exhibit No 45, p. 40.

33 i*bid*.

34 *ibid.*

35 Exhibit No 17, p. 3. The IMF added: 'However, it does not seem to be the principal force behind the unfavourable developments in employment and income distribution observed in some advanced economies'.

36 *ibid*, p. 59.

37 i*bid*. The IMF's views on the benefits of globalisation have been included in the list in paragraph 2.18.

2.22 It noted that national policy-makers may be tempted to forgo some gains from globalisation to improve certain sectors or groups. It believed that restrictions on trade flows and capital movements were second-best policies compared with measures which directly compensated parties who did not share in its gains. According to the IMF, policies which sought to limit or delay the effects of globalisation would dilute its benefits.[38]

2.23 In the IMF's view, the 'appropriate' policy response would be to address the underlying structural rigidities which prevented the adjustment of labour markets to technological change or external competition. The IMF stated that education and training, and well-targeted and cost effective social safety nets, should be in place to provide assistance to those who had been displaced, and to ensure that they did not become marginalised.[39]

2.24 With reference to developing countries, it pointed out that the economies of nations such as Chile, Malaysia and Thailand had benefited enormously from globalisation. Such nations had demonstrated the great successes which could be achieved when policies took advantage of the forces of globalisation. Many poor countries had fallen relatively further behind, and the IMF stated that the key lesson seemed to be that the pressures of globalisation had accentuated the benefits of good policies and the costs of bad ones.[40]

2.25 Countries which had aligned themselves with the forces of globalisation and embraced the necessary reforms, liberalising markets and pursuing disciplined macro-economic policies, were likely to put themselves on a path of convergence with advanced economies. The IMF stated that these countries may expect to benefit from trade, gain global market share and be increasingly rewarded with larger private capital flows.[41]

2.26 Countries which did not adopt such policies were likely to face declining shares of world trade and private capital flows, and to find themselves falling behind in relative terms.[42]

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38 *ibid.*

39 *ibid.*

40 *ibid*, p. 72. The IMF's work appears to have been finalised before the downturn in the world economy (also known as the 'Asian crisis') began in Thailand in July 1997.

41 i*bid.*

42 *ibid.*

The OECD's views

2.27 An OECD Working Paper echoed the IMF approach: poor countries which have oriented their economies towards participation in world trade, investment and technology flows have grown and reduced poverty. Coupled with sound domestic policies, trade and investment linkages have become the fast track to economic growth.[43]

2.28 The OECD pointed out that globalisation affected different parts of the world in different ways. It has had an important impact on employment structures, particularly the kind and the number of jobs available to women. In the past two decades, more women than ever before had moved into the economically active population, in many cases reflecting a move from unpaid domestic farm work to employment for wages. This had, in general, raised their bargaining power with the family, the workplace and society at large. By contrast, in those areas which had been left behind by globalisation, women had been the first to suffer from the decline in economic activity, job loss and lower incomes.[44]

The Prime Minister's initiative

2.29 Delivering an address to a conference in October 1998, the Prime Minister, the Hon John Howard MP, said that Australia confronted an unprecedented degree of instability in international financial markets, the impact of which on the region had been 'colossal'. It was vital that the Asia-Pacific Economic Cooperation (APEC) group supported proposals for the reform of the international financial architecture.[45]

2.30 During that speech, the Prime Minister also said that he had established a task force to report to him with 'substantive and imaginative suggestions' for discussions on making improvements to the international financial system. Chaired by the Treasurer, the Hon Peter Costello MP, both the public and private sectors were represented on this task force. Some of the most senior figures in Australia's banking and financial services were included in its membership.[46]

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43 Exhibit No 52, p. 4.

44 *ibid*, p. 14. Annex 1 of this paper deals with the impact of globalisation on women in the developing world.

45 Exhibit No 57, pp. 1, 3.

46 *ibid*, p. 4. See *The Courier Mail*, 24 October 1998, p. 59. Membership of the task force is listed at p. v of Exhibit No 68.

2.31 This task force was asked to make recommendations on measures to promote transparency and accountability in the private sector, national authorities and international financial institutions (IFI). It was also to make recommendations on how Australia could best contribute to reform and strengthening of the international financial system. It reported to the Prime Minister in December 1998.[47]

2.32 The report of the task force recommended that support should be given for the continuation of the movement towards open international capital markets. In some countries, liberalisation will need to be gradual and consistent with the development of financial infrastructures. There may be a need in some cases for temporary measures to ensure stability and to protect the domestic financial system from large, short term capital flows until the foundations were in place. The overall aim of efforts to reform the international financial system should not be to restrict capital flows, but to make them more soundly based and more stable.[48]

2.33 Australia had the experience, the expertise, the opportunity and the will to continue to be an important contributor, the report said, in efforts to reform the international financial system. It should work towards ensuring that the momentum for reform is maintained, and that consideration is given to the position of emerging markets, especially those in Asia. The Australian private sector should be encouraged to participate as appropriate in the reform process.[49]

Parliamentary interest

2.34 Among the other Parliamentarians who have dealt with the issue of globalisation in speeches and articles, particular mention can be made of a book by Mr Mark Latham MP.

2.35 In *Civilising Global Capital***,** he defined globalisation as 'the accelerated movement of capital and information internationally'. He noted that it had left political parties and politicians across the spectrum struggling for solutions. He pointed out that the 'small government' policies of the political Right had not been able to show, once the active role of government was withdrawn, how individual liberty alone could answer the insecurity and remorseless inequity of an open economy. Equally, he noted, the Left had found it difficult to sustain the

47 Exhibit No 68, p. 21.

48 *ibid*, p. 2. See *The Canberra Times*, 22 December 1998, p. 15, and *The Sydney Morning Herald*, 22 December 1998, p. 21.

49 Exhibit No 68, p. 4.

conventional functions and fixed structures of government as a workable response to new sources of social and economic exclusion.[50]

2.36 Mr Latham suggested that policies were needed to 'address the broadening of life's responsibilities' as people struggled to reconcile their involvement in local institutions with the spread of globalisation, with new pressures on family, community and citizenship. This can only be achieved by strengthening the basis of social and economic security, arising from the virtues of 'public mutuality and collective governance'. These concepts, he wrote, dismissed some ideologies which emphasised individualism and conservatism as inadequate responses to the political economy of a post-industrial society. They only served, he concluded, to add to the spread of social fragmentation and insecurity.[51]

Reserve Bank Governor's views

2.37 In a speech in Singapore in October 1998, the Governor of the Reserve Bank of Australia, Mr Ian Macfarlane, said that more and more people were asking whether the international financial system as it had operated for most of the 1990s was 'basically unstable'. The majority of observers had concluded that it was and that changes had to be made. Some had suggested that greater transparency would help, through more frequent and accurate publication of figures for international reserves. Improving the quality of bank supervision in emerging market countries had also been suggested.[52]

2.38 An increasing majority of those observers also thought that that 'burden sharing' with the private sector was the most promising way to deal with what has been called the 'Asian crisis' by creating a system which involved cooperation between the host country, private lenders and the IMF. While this used to be seen as 'repudiating the entire theoretical basis underpinning the current global financial system', Mr Macfarlane said it was becoming 'reasonably conventional thinking'.[53]

2.39 In another speech in October 1998 in Sydney, the Reserve Bank Governor noted that the international financial system was prone to periods of 'extreme financial turbulence' which left lasting economic

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50 Exhibit No 63, pp. xix, 362.

51 *ibid*, pp. xlii-xliii.

52 Exhibit No 54, p. 2. See *The Australian Financial Review*, 20 October 1998, p. 19 and *The Australian*, 21 October 1998, p. 13.

53 Exhibit No 54, pp. 3, 4. See *The Australian Financial Review*, 20 October 1998, p. 19 and *The Australian*, 21 October 1998, p. 13.

costs. He asked how the new international financial architecture could be devised, and offered a few observations. On balance, he believed, access to the international capital market bestowed enormous benefits on participating countries, particularly developing countries. He also believed, however, that it was simplistic to insist on the totally free movement of capital in all countries and in all circumstances.[54]

2.40 In this speech, Mr Macfarlane noted that the challenge for those involved in international finance was to devise a better system for the longer term. He again referred to private sector burden sharing: in this case as, in some senses, the international equivalent to domestic bankruptcy arrangements.[55]

Some implications of globalisation

2.41 Professor Sachs noted that the implications of globalisation, for both the developed and developing countries, were the subject of 'intensive research and heated policy debates'. He stated that four main sets of issues were under investigation:[56]

- would globalisation promote faster economic growth, especially among the four-fifths of the world's population in developing countries?
- would globalisation promote or undermine macro-economic stability? Were the collapses of emerging market economies the result of deep flaws in the globalisation process, or were they manageable, perhaps avoidable bumps on the road to greater prosperity?[57]
- would globalisation promote growing income inequality and, if so, is it limited to the lower skilled in the advanced economies, or is it a deeper result of intensifying market forces in all countries?
- how should government institutions at all levels, national, regional and international, adjust their powers and responsibilities with the emergence of a global market?

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54 Exhibit No 55, pp. 3, 4, 5. See *The West Australian*, 22 October 1998, p. 35 and *The Australian Financial Review*, 22 October 1998, p. 3. See *The Australian Financial Review*, 29 October 1998, p. 15, for another reference to the need for 'new economic architecture'.

55 Exhibit No 55, pp. 3, 7. See *The Australian*, 22 October 1998, p. 1.

56 Exhibit No 32, p. 99.

57 Professor Sachs referred to Mexico in 1994 and East Asia in 1997.

2.42 The last point was the focus of much interest and concern. Professor Sachs noted the deep effect globalisation was having on politics at many levels. In particular, the national market place was seen to be losing its place because of the growth of international markets. This was causing 'a sea change' in the role of the nation state for both local and regional governments on one side, and for multi-national political institutions on the other.[58]

2.43 The nation state, he argued, was increasingly being displaced by the international market place. 'Almost all countries' had realised that the national market was too small to permit an efficient level of production in most areas of industry, and even in many service areas. Efficient production had to be geared towards world markets, and globalisation had proved to be a catalyst for internationally agreed rules of behaviour in areas such as trade, finance and taxation. This development had prompted the rise of bodies such as the WTO and other international institutions as bulwarks of the emerging international system.[59]

2.44 At the same time, communities, local governments and regions within nations were increasingly asserting their claims to cultural and political autonomy. The nation no longer protected them and was no longer seen as the critical instrument of security.[60]

2.45 An Essay in *New Statesman* in June 1998 commented that, while there was a profoundly fatalistic attitude to the 'inevitability' of globalisation, the countries which declared themselves devoted to free markets deployed enormous effort and expenditure to maintain barriers to free entry of labour. National sovereignty, it continued, must bow down before the agility and fleetness of capital.[61]

2.46 It pointed out that the 'ravages' of globalisation had violently disturbed those who sought a livelihood within their own country, uprooting whole populations in the Third World and sending their people in search of a sufficiency of which they have been robbed. This Essay drew attention to what it saw as the partial, rigged and highly selective version of globalisation, on which 'no alternative' was inscribed on the

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58 *ibid*, p. 108.

59 *ibid*, p. 109. In this view, international institutions are therefore both characteristics and protectors of globalisation.

60 i*bid*.

61 Exhibit No 42, p. 25.

banners of all TNCs, international financial institutions and almost every government in the world.[62]

2.47 Dr Graham Dunkley noted the general view that in many countries, within the globalised framework trade, finance and labour had been addressed. Trade and investment were increasingly linked because TNCs had integrated these activities into their own processes. Foreign investment had not been deregulated and needed to be to complete the globalisation process.[63]

2.48 He outlined various theories about the benefits of FDI, noting that the traditional view was that countries tended to have gaps between what they need and their resources in five areas: savings, foreign exchange, employment, technology and skills. The draft MAI, he said, assumed that these gaps existed and that nations would always need to fill them. In practice, many nations judged whether or not they would fill them.[64]

2.49 Dr Dunkley considered that the two most contentious issues raised by globalisation were its inevitability and its desirability. The inevitability thesis held that factors such as global production by TNCs, trans-boundary pollution, resource management requirements and other technological imperatives were creating a 'borderless world' beyond the control of any one government. This threatened to bring to an end the so-called Westphalian system of autonomous nation states. If far-reaching globalisation was not inevitable, he suggested, it may be that largely supportive governments are committing 'sovereignty suicide', rather than accepting the real situation.[65]

2.50 Referring to the desirability of globalisation, Dr Dunkley drew attention to its costs, including:

- instability arising from mechanisms such as floating exchange rates, mobile capital, speculative finance or 'hot' money, and resultant loss of sovereignty;
- loss of control over fiscal policies which, together with excessive reliance on tight monetary and interest rate policies, often resulted in a macro-contractionary bias and thus higher unemployment;

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62 i*bid*, pp. 25, 26.

63 Transcript, 16 July 1998, p. 152. Dr Dunkley appeared as a voluntary adviser for CAA.

64 *ibid*, p. 153.

65 Exhibit No 10, pp. 233, 235.

- the ability of TNCs to manipulate exchange rates, taxes or other policies, thus undermining national economic sovereignty;
- loss of export opportunities where TNC strategies favoured other locations;
- the capacity of organised crime to launder funds in global financial markets;
- loss of environmental amenities and community structures because of investment priorities controlled by foreign interests;
- promotion of consumerism, and
- degradation of local cultures and pressure on customary values.[66]

2.51 An article in *Business Review Weekly* in August 1998 was frank about the threat to national sovereignty: under the draft MAI, national governments would have less control over their treasuries when billions of dollars could flow in and out of a country because of financiers' interpretations of economic data. The article noted that such financiers considered the decline of government to be unambiguously good, but were the first to complain when their transactions were not protected.[67]

2.52 Professor Stephen Zorin specifically linked globalisation with the draft MAI, noting that use of the Internet, especially by those opposed to it, meant that 'a much broader range of groups' would have to be included in the negotiation of future international treaties. What he called the battle over the draft MAI was a reminder that, although the pace and structure of globalisation were still open to debate, the phenomenon itself was a fact.[68]

2.53 He observed that opponents of the draft Agreement could not pick and choose, selecting the emergence of what he called 'global civil

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66 *ibid*, pp. 235-236.

67 Exhibit No 45, pp. 42, 43.

68 Exhibit No 50, p. 99. See also p. 105 for a list of concerns about the draft MAI which demonstrated a range of anxieties about globalisation. In Exhibit No 1, p. 20, Ms Patricia Ranald referred to use of the Internet by critics of the draft MAI. She stated that a loose global network of NGOs had had an impact on negotiations, successfully pressuring the OECD to release officially the February 1998 draft of the text via its website. See also an article from *The Independent* by Paul Vallely, 'How the Net exposed a world 'secret', in **Panorama,** *The Canberra Times*, 16 January 1999, pp. 9-10, which also drew attention to the role of the Internet in 'the undoing' of the draft MAI, and Exhibit No 67, p. 24, which referred to the victory of the 'grass-roots' organisations in this matter.

society' as a good thing, and increased economic integration or loss of local control as bad things. He also pointed out that globalisation could not be a top-down process or one driven by elites. Because a new economic order with the free flow of trade, capital and direct investment was not universally supported, he added, there would be a continuous public referendum of sorts on such issues.[69]

2.54 Professor Tita pointed out that, as a result of the causes of globalisation, a new cluster of relationships had been built which evaded the governing capabilities of states and, more importantly, the traditional international institutions of political and economic cooperation between States. This new network of relationships needed laws, the protection of rights and the identification of values. None of the currently available instruments of government on the international scene, he contended, were capable of satisfactorily fulfilling these needs. He then differentiated between universal and regional models.[70]

2.55 Universal institutions were not endowed with the comprehensive powers and had limited capacity to interfere in the internal economic affairs of states. Such universal institutions as the GATT, the IMF and the World Bank had previously operated essentially at an inter-governmental level to foster international economic exchanges.[71]

2.56 Such institutions were contrasted with the results of the regional model, like the EU, where international cooperation had developed institutions endowed with wider and more general competencies. Operating at the inter-governmental level, such bodies can also intervene directly in the lives of individuals, particularly in such areas as agriculture, industrial relations and social and fiscal matters.[72]

2.57 Professor Tita argued that because globalisation had created a level of interdependence between countries comparable to that which existed within the EU, such interdependence could not be regulated by classic institutions. Even if the latter were intended to be universal, globalisation had to be regulated by institution which were ultra-national or semi-federal.[73]

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69 Exhibit No 50, p. 106.

70 Exhibit No 49, p. 48. Some of the causes of globalisation were set out at paragraphs 2.4 to 2.7.

71 *ibid*.

72 *ibid*.

73 *ibid*, p. 49.

2.58 In *The Global Trap: Globalization and the assault on prosperity and democracy*, published in 1996, Hans-Peter Martin and Harald Schumann provided another perspective on the European view of globalisation. They drew attention to what they saw as reformers operating in the name of globalisation serving notice on the unwritten social contract of the Federal Republic of Germany (FRG). Its citizens are ceaselessly exposed to demands for sacrifices, as bureaucrats, economists and ministers complained that Germans worked too little, earned too much, took too much sick leave and had too many holidays. All round the world, the authors asserted, the owners of capital are contributing less and less to the financing of public expenditure.[74]

2.59 In an article published in January 1998, the international financier and philanthropist Mr George Soros also dealt with the transition to globalisation and its consequences for nations. He considered that what he called the global economy should really be thought of as the 'global capitalist system'. As well as the benefits he saw in globalisation, it had the following deficiencies:

- the uneven distribution of benefits to capital;
- the instability of the (international) financial system;
- the incipient threat of global monopolies and oligopolies;
- the ambiguous role of the state, and
- the question of values and social cohesion.[75]

2.60 Referring to the role of the state, Mr Soros asserted that its capacity to look after the welfare of its citizens had been severely impaired by globalisation which allowed capital to escape taxation much more easily than labour could.[76]

Mr Soros' 'open society'

2.61 In what he called 'the most nebulous problem area', Mr Soros observed that, while every society needed shared values to hold it together, market values could not do this on their own. They reduced

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74 Exhibit No 53, pp. 6, 5, 7.

75 Exhibit No 29, pp. 20, 22, 24. The benefits Mr Soros saw were included in those listed in paragraph 2.18.

76 *ibid*, pp. 22-24.

everything to commodities, whereas society needed institutions to serve a variety of goals such as political freedom and social justice. These institutions did not exist in what he called 'the global society' because it had lagged behind the growth of the global economy. Unless that gap was closed, he stated, the global capitalist system would not survive.[77]

2.62 He put forward the notion of the 'open society' as a universal principle that recognised the diversity inherent in the global society, yet provided a conceptual basis for establishing the institutions which were needed. The principles of open society, he stated, could be found in the Declaration of Independence by the USA in 1776: the rule of law, respect for human rights, minorities and minority opinions, the division of power, a market economy, etc. Whereas the principles in the Declaration of Independence were held to be self-evident, those of the open society were anything but self-evident and had to be established by convincing argument.[78]

2.63 As the global society was characterised by diversity, so the open society celebrated it. Recognition of the universal human condition of fallibility is necessary but not sufficient to establish the concept of the open society. It must be combined with some degree of altruism, some concern for fellow human beings, based on what Mr Soros called 'the principle of reciprocity'.[79]

2.64 The open society was seen as a more comprehensive framework than the markets and competition. It recognised the merits of the market mechanism without idealising it, but also recognised the roles of other than market values in society. The global economy has deficiencies, but the real deficiencies are outside the economic field:

- while this is in many ways a blessing, the state is unable to play the role it once did;
- more importantly, some of its functions remain unfilled,
- the UN is constitutionally incapable of fulfilling the promises in the Preamble to its Charter, and

77 i*bid*, p. 24.

78 *ibid*. See also his discussion of 'the open society' in Exhibit No 26.

79 *ibid*, p. 32.

- there is no consensus on the need for better international institutions.[80]

2.65 Mr Soros suggested that, while there had been little consideration of how to do these things, certain standards of behaviour had to be established to contain corruption, enforce fair labour practices and protect human rights. The liberal democracies ought to take the lead and forge a global network of alliances which could work with or without the UN. For the global capitalist system to survive, Mr Soros concluded, it needed a society that constantly strove to correct its deficiencies: a global open society.[81]

2.66 In a book published late in 1998, Mr Soros repeated and expanded these views, noting that our understanding of the world was inherently imperfect and that a perfect society was unattainable. We must content ourselves with second best: an imperfect society that is capable of infinite improvement. He referred to the threat to the open society from a lack of social cohesion and the absence of government. He quoted testimony he had given to Congress in September 1998 that pointed out that the global capitalist system, responsible for the remarkable prosperity of the USA in the last decade, was 'coming apart at the seams'.[82]

2.67 This 'thorough elaboration' of his ideas examined the global capitalist system, its current crisis and how to prevent a collapse. It discussed the inadequacies of the non-market sector of society before analysing the international context for the open society and, finally, setting out its agenda.

2.68 Mr Soros' book concluded that:

- financial markets are inherently unstable and they need supervision and regulation;

- the remaining question was whether international financial authorities should be strengthened, or should individual countries be left to fend for themselves;

- a global open society cannot be brought into existence by people or NGOs acting on their own;

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80 *ibid.*

81 *ibid.*

82 *The Crisis of Global Capitalism: Open Society Endangered* by George Soros (Little, Brown and Co, London, 1998), pp. ix, xi.

- to do this, states had to cooperate and this required political action, and

- statesmen in well-functioning democracies needed to show leadership in mobilising public opinion to form a coalition of like-minded countries committed to the creation of a global open society.[83]

Discussion

2.69 As even the limited survey in this Chapter has demonstrated, actions by governments and companies in the globalised environment must have effects, however delayed by time or distance, on aspects of financial services and businesses operating or seeking to operate outside a nation.

2.70 At the human level, the individuals working in these areas will be most affected. Nations such as Australia must take globalisation into account in their planning, in financial and a range of related activities. Some Australian companies are already actively involved, and those which wish to stay there and succeed will need to learn these and other lessons about the costs and benefits of involvement in the globalised economy.[84]

2.71 As Mr Leigh Hubbard of the Victorian Trades Hall Council (VTHC) commented that, while the pace of globalisation had increased, in the 1990s nations were now more closely inter-related than they had been in the comparatively recent past. Mr Michael Roche of the Australian Stock Exchange (ASX) noted that it was not possible for Australia to close itself off from the rest of the world, and referred to the increasingly global operation of Australian corporations.[85]

2.72 Globalisation is the framework within which agreements such as the draft MAI would operate. The draft MAI was both a result of and an instrument for globalisation. It represented one way of regulating the movement of international capital, a prominent feature of globalisation. Without an understanding of globalisation, the purpose of the draft MAI

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83 *ibid*, pp. 194, 239.

84 For example, Councillor Malcolm Brooks of Gosford City Council spoke of the need to protect Australia from 'the downside' of globalisation: Transcript, 21 August 1998, p. 447. See also Mr Latham's views at paragraphs 2.35 and 2.36. Some Australian companies are making the necessary transitions to globalisation: see, for example, Exhibit No 45, pp. 38-39.

85 Transcript, 16 July 1998, p. 118. Mr David Barnett also commented on increasing globalisation: *ibid*, p. 173. Transcript, 21 August 1998, p. 378.

was largely meaningless. It is not for us to prescribe how each nation should handle the various impacts of globalisation, as this would raise matters which were quite outside the scope of this inquiry.

2.73 From the matters set out above, the role of the nation state is one of those areas which has already been powerfully affected by globalisation. Nations do not now have the same control over their citizens, and their companies, that until the last few years was the case. One of the topics of interest for many in this inquiry, concerns about sovereignty, reflected concerns about this change.

2.74 An example of the impact of significant developments in one relevant area of activity is that of electronic commerce. The Joint Committee of Public Accounts and Audit (JCPAA) stated that Internet commerce offered new and challenging opportunities to advance international trade. It believed it was essential that there was an effective domestic and international regulatory environment to encourage the growth of this commerce. It pointed out that, in the final years of the Twentieth Century, government and industry were just beginning to comprehend its dimensions and implications. In the next century, there will be advances both in technology and in the way Internet commerce is conducted. The JCPAA's report highlighted some of the challenges for government, in particular taxation issues, which would need close attention by nations as Internet commerce developed further.[86]

2.75 The JCPAA undertook that inquiry because of the rapid advances which had occurred in Internet communications, reports of dramatic advances in usage of the Internet, and expectations that Internet commerce would continue to grow exponentially. The USA, EU and OECD had prepared reports on Internet commerce, but these had all dealt with its taxation implications.[87]

2.76 The range of difficulties, economic and others, being experienced currently by a number of nations has reinforced concerns about both the continuing process and the direction of globalisation. Benefits for nations, and for TNCs, seem to be clear but there are also impacts on the powers of nation.

2.77 Benefits for individual citizens are less obvious. They may gain directly as members of nations which are benefiting from globalisation,

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86 Joint Committee of Public Accounts and Audit, Report 360, *Internet Commerce: To buy or not to buy?*, May 1998, p. iii.

87 *ibid*, pp. 1, 72.

as outlined by the IMF for example, but there also appear to be considerable disadvantages. These include reduced job security, increasingly uneven distribution of income and wealth and consequently widening gaps between rich and poor, skilled and unskilled, those with jobs and those without.[88]

2.78 The Davos World Economic Forum held its annual meeting in January/February 1999. Disillusionment with the process of globalisation and market solutions to economic problems, by governments and citizens, were reported to have increased sharply because of recent turmoil in the international financial system. The Forum was reported to have been told of an urgent need to restore confidence in economic reform, rather than retreating from it.[89]

2.79 President Nelson Mandela of South Africa was also reported to have warned that globalisation was leading to greater disparities between the rich and poor people of the world. A leading unionist from the USA, Mr John Sweeney, was reported to have said that job losses caused by globalisation which were now 'wracking the world' were causing huge human costs.[90]

2.80 Such anti-market sentiments at the Forum followed other warnings from advocates that there must be immediate action to promote growth in key economic and longer-term measures to ensure that the benefits of growth and prosperity were more widely shared, and the growing gap between rich and poor was reversed.[91]

2.81 Globalisation is a feature of the 1990s and the effects of its course, however unclear at a given time, are and will be inescapable. As President Clinton pointed out, it is avoiding reality and the inevitability of change to pretend that globalisation does not exist. The challenge for national governments could be seen as participating in a world economy over which they have, and can have, little control while at the same time, with reduced powers, protecting their citizens from its worst effects. This seems to be more easily set out as an intention or as policy than put into practice, especially as nations do not seem to have been able yet to assess what is required to reassert themselves in effected areas.

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88 See paragraph 2.18 for some of the benefits of globalisation.

89 See *The Age*, 1 February 1999, p. B1.

90 *ibid*.

91 *ibid.*

2.82 There are particular problems for nations if for example the evidence, cited by the OECD, about the plight of women in regions which have not received the benefits of globalisation remains valid.[92]

2.83 President Clinton's words about honouring values at the same time as opportunities expand, and his reference to protection for environmental and consumer protections and labour standards, were important. A great deal has been written and spoken about the opportunities globalisation would create, very little about the need to keep faith with those in the current system.[93]

2.84 Mr Soros' views are instructive, coming from one of the beneficiaries of the market, but they are short on detail. His view that the market needed supervision and regulation would probably surprise many of his readers. It remains to be seen whether Professor Zorin's view of the global civil society will or can coexist with Mr Soros' open society.

2.85 In the context of the difficulties some nations currently face, the IMF's words about safety nets and provision of assistance could be read as a reflection of the callous spirit of globalisation, rather than as a prescription for rectifying its consequences. [94]

2.86 Since the beginning of the so-called 'Asian crisis' in July 1997, there have been concerns about both the direction and the pace of globalisation. If these problems continued and were to become world-wide, it is far from clear that there would be continuing support from many nations for globalisation in its current form, without some imposed controls. In fact, aspects of globalisation have been blamed for the parlous positions in which some nations have found themselves. It would not be surprising to see them take whatever measures they could to protect themselves against further inroads against their local markets.

2.87 While it would not be possible to undo all the features which have given rise and effect to globalisation, the 'Asian crisis' may cause a re-evaluation of its costs and benefits. This would probably not have occurred but for the events of the past year or so, especially as the fruits of what is seen as victory in the Cold War could be threatened. It is possible that the successes of globalisation, what is seen by some as

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92 See paragraph 2.28.

93 See paragraphs 2.10 and 2.11. Areas of great concern about the draft MAI for many people were its possible impact on developing countries, and environmental and labour standards.

94 See paragraph 2.23.

increasing domination of all parts of the world economy, could be wholly or partly reversed by nations seeking to regain control of their markets.[95]

2.88 It does appear that a re-assessment of the costs and benefits of globalisation is required, but issues such as who could undertake such a task, or whether existing behaviour could be modified in any way, suggested the difficulties of setting up such a process and then enforcing the outcomes.

2.89 In view of the current circumstances of a number of nations, it is reassuring to note that attention is being devoted to 'the architecture' of the international financial system. How long it will take for acceptable corrections to existing practices to be incorporated into the existing system, and adopted, remains to be seen.

95 See paragraph 2.6.

CHAPTER 3

FOREIGN DIRECT INVESTMENT

3.1 This Chapter will define and attempt to quantify FDI, before setting out its benefits and briefly analysing aspects of its role in the modern Australian economy. The role of FDI in developing countries will be examined, and our brief views on some of the matters raised will then be given before considering the draft MAI itself in Chapter 4.

Definition and global amounts

3.2 As was pointed out in the previous chapter, FDI has been seen as vital to gobalisation. It has been defined as the stock and capital transactions of a nation's liabilities owed to non-residents and can take many forms, including transactions from the private and the public sector. The form of debt can also differ: it could be securities, debts, or a transfer of control. Private FDI is a specific category of foreign liabilities, where capital is invested in an enterprise with the express purpose of gaining actual or potential influence over that enterprise.[1]

3.3 According to OECD, outflows of FDI have risen 25 times over the last quarter of a century, from $US19 billion to $US350 billion per year. This growth has now outstripped the global expansion of trade, as the volume of the world's merchandise trade has only increased 16 times in the much longer period since 1950. The global stock of FDI was estimated, in 1996 by the United Nations' Conference on Trade and Development (UNCTAD), at $US3.2 trillion.[2]

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1 See paragraphs 2.13-2.15. This definition has been adapted from Exhibit No 13, p. 2. The term is widely used but not often defined. See Submissions, p. 1961, for an alternative definition: 'cross-border investment in companies, production, facilities or property'. Yet another definition can be found in *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer* by Professor Keith E Maskus, p. 7, in Exhibit No 12: FDI 'is the act of establishing or acquiring a foreign subsidiary over which the investing firm has substantial management control. By definition, firms that engage in FDI operate in more than one country and are called multinational enterprises'.

2 Submissions, pp. 1295, 1275, 1309. The latter reference is to the Executive Summary of an OECD report: *Open Markets Matter: the Benefits of Trade and Investment Liberalisation* which was included as Annex C (pp. 1309-1313) to the Treasury's submission to the inquiry. Some 35 per cent of the $US350 billion went to developing countries: Submissions, p. 1275. Other figures on FDI were quoted in Chapter 2, demonstrating both the variety of statistics which exist and its potential impact on developing nations.

3.4 This amount was seen, by DFAT, as a 'visible embodiment' of global liberalisation. It also suggested that international production had become a more significant element in the world economy than domestic production.[3]

3.5 In 1996/97, levels of Australian investment abroad increased from $A170 billion to $A199 billion. While over two-thirds of this was invested in OECD countries, investment levels in non-OECD countries were also increasing.[4]

Benefits of FDI

3.6 FDI was usually associated with significant benefits to both host and exporter of investment, including:

- new technology;
- management skills;
- world best practice;
- financial risk management;
- prudential supervision;
- work-force skills;
- larger and new export markets, and
- increased employment.[5]

3.7 The benefits of liberalised investment can therefore have an effect on domestic and world economic growth, and on living standards through their positive impact on productivity and competitiveness. Countries increasingly both export and import capital which reflected, for example, their comparative advantage in developing certain industries or products and a desire to spread the risk of investing geographically.[6]

3.8 An OECD report concluded that trade and investment liberalisation could work to improve the environment by promoting a

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3 Submissions, pp. 1275-1276. See the footnote to paragraph 2.13.

4 Transcript, 6 May 1998, p. 6.

5 Submissions, p. 1294; Transcript, 6 May 1998, pp. 6, 7.

6 Transcript, 6 May 1998, p. 6.

more efficient allocation of resources, removing restrictions and distortions which damage it. Liberalisation could also improve the speedier transfer, adoption and diffusion of environmentally friendly technologies. Wealth creation associated with liberalisation should also reduce poverty, which was often an underlying cause of environmental degradation.[7]

3.9 This OECD report also recognised that there could be painful periods of adjustment from structural changes, including those from trade and investment liberalisation. Protectionist policies were not, however, an effective response or long-term solution as they depressed growth and reduced job creation and innovation.[8]

3.10 DFAT noted the importance of FDI for developing nations, pointing out that development processes were likely to be held back badly by lack of access to international capital. Mr Richard Sanders of the Stop MAI Coalition later observed that such nations often included performance requirements on foreign investors to ensure that they left some of the benefits of their investments in the host country.[9]

3.11 CAA also acknowledged the importance of FDI to developing countries but said that, given its increasing significance, it was imperative that investment rules did not weaken the possibility of contributing to environmentally and socially sustainable development.[10]

Foreign investment in Australia

3.12 Treasury believed that foreign debt and foreign equity investment in Australia reflected the shortfall between this country's domestic savings and investment decisions. It also believed that liberalisation of investment and trade was good for economic growth, domestically and world-wide.[11]

3.13 Australia's existing foreign investment regime was frequently described as 'liberal' in that it was regarded as an attractive, open and friendly environment, perhaps because of a need for foreign investment in this country. This regime was characterised as similar to those in other

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7 Transcript, 6 May 1998, p. 7.

8 *ibid*.

9 *ibid*, pp. 52-53, 76. See paragraphs 3.20-3.21.

10 Submissions, p. 1699.

11 Transcript, 6 May 1998, pp. 6, 27.

OECD countries. In particular, it was characterised by the administrative flexibility allowed in its legislation. Complaints were rare because laws, rules and regulations were public and the process was very transparent.[12]

3.14 It was also suggested that the review power of the Foreign Investment Review Board (FIRB) was 'fairly weak' and not exercised very often. Procedures and standards were described as a 'mish-mash' because of the legal situation where the FIRB was exempt from normal administrative review processes, and depending on whether an investor was Australian or not.[13]

3.15 The National Civic Council (NCC) quoted an article which stated that 86 per cent of Australia's high level of foreign investment was used to acquire existing companies. Only one per cent of such investment was put towards greenfields development and job creation. It also pointed out that, while it was not clear how the average Australian had benefited from foreign investment, the level of dividends on such investments repatriated from this country had increased from $A5 billion in 1992 to $A12 billion in 1996.[14]

3.16 Given that Australia's foreign liabilities had grown at a compound rate of 15 to 16 per cent since the early 1980s, the NCC saw this increase as a reminder that a price can be paid for foreign investment. It argued that it was essential to attract only the type of foreign investment the country needed.[15]

3.17 Mr Robert Downey pointed out that, in the 1980s, Australia had the highest flow of FDI measured as a percentage of gross domestic product (GDP) of all the developed economies. It now had the highest levels of foreign ownership of its economy of the developed economies, with net foreign liabilities of 59 per cent of GDP. This made Australia, according to Mr Downey, the second most indebted country in the world after New Zealand.[16]

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12 See, for example, Transcripts: 6 May 1998, pp. 19, 21, 89-90, 16 July 1998, pp. 135, 139, 14 August 1998, pp. 300-301, 308.

13 Transcripts: 6 May 1998, p. 70, 24 July 1998, p. 223. It was also suggested that the administrative flexibility of the process was such that it would 'virtually prevent' the rejection of any proposal: Transcripts: 16 July 1998, p. 133 and 24 July 1998, p. 207.

14 Submissions, pp. 843-844.

15 *ibid*, p. 844. Professor Mary Hiscock, however, thought Australia needed capital 'from whatever source' it could be obtained: Transcript, 24 July 1998, p. 228.

16 Transcript, 24 July 1998, p. 199.

3.18 By contrast, the Business Council of Australia (BCA) stated that FDI was beneficial to both the host and the recipient countries. It was important to large companies, and to ordinary Australians through the economic benefits it provided and through their indirect involvement in such investments as shareholders and investors in superannuation funds. The Council saw the development of an international agreement on FDI as a natural progression of similar agreements on the international trade in goods and services. It believed that liberalisation of FDI would lead to similar benefits to countries which participated in globalisation.[17]

3.19 Overall, Australia has benefited from a free and open trading and investment environment, and was seen as one of the more liberal nations in this area. While there could be problems for some Australian investors overseas, this country was often unable to assist except perhaps in those 15 countries with which there was a bilateral investment protection agreement. Such bilateral agreements would have continued if the draft MAI had been adopted.[18]

FDI and developing countries

3.20 Dr Peter McCawley of the Australian Agency for International Development (AusAID) pointed out that there was a debate about the 'quality' of FDI in developing countries, about who benefited in those countries. Regulatory regimes varied from country to country and, while these were meant to protect weaker groups, the legal environment in most developing countries was weak. He added that many factors, such as domestic peace and law and order, affected international capital flows. While there had been a great jump in capital flows over the past few years, most of this had gone to a relatively small number of developing countries. In particular, he suggested, the current economic and social turmoil and uncertainty would cause flows of FDI to Asian countries to plummet.[19]

3.21 CAA noted that dramatic increases in private investment flows to developing countries over the past few years had been accompanied by corresponding decreases in development assistance.[20]

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17 Submissions, p. 1960.

18 Transcripts: 21 August 1998, pp. 370, 382-383, 14 August 1998, p. 300, 6 May 1998, pp. 26, 40.

19 *ibid*, pp. 53, 54. See Submissions, p. 1701, for CAA's confirmation of the concentration of FDI in ten countries, and of the generally weak legal/regulatory frameworks in developing countries.

20 Submissions, p. 1699, Transcript, 16 July 1998, pp. 160-161.

Discussion

3.22 The ability to move capital from country to country without hindrance is vital to globalisation. Developing countries need foreign capital and so do others, such as Australia. Performance measures may ensure that foreign capital is tied to a nation for specified periods or in particular ways, but these same measures may discourage investment from occurring at all. As has been shown in the recent past, just as the benefits of investment can be given to a host country, so there can be serious consequences when funds are removed.

3.23 Events in a number of nations have also shown that there is a need to increase protections against the impacts of the arbitrary removal of capital from national markets. The previous chapter showed that new international 'financial architecture' is beginning to be being discussed. It is also clear that the provision of workable solutions to the difficult issues globalisation raises, such as the need for controls on the movement of capital and the role of the nation state in a global context, is not imminent.

CHAPTER 4

PROVISIONS OF THE DRAFT MAI

4.1 In this Chapter, some of the background to negotiation of the draft MAI and its concept will be given. There will be a brief examination of its basic provisions, and some comparison with the provisions of other international investment agreements.

Background

4.2 Negotiations for a draft investment protection Agreement began in 1995. This used work done in the OECD since 1991, and followed moves to regulate international investment which go back to the Nineteenth Century. Five OECD working groups were set up in 1994 to explore the major issues of, and the results of these formed the basis for negotiations for, a draft MAI.[1]

4.3 The OECD's mandate for these negotiations was:

> to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures, and
>
> to be a free-standing international treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries, which will be consulted as the negotiations progress.[2]

The concept

4.4 The draft MAI was to be an international, 'top-down', stand-alone treaty which was initially being negotiated by OECD member countries, and by other countries which were willing to sign its commitments and obligations. It dealt with international investment flows widely defined, covering such matters as direct investments, portfolio investments and acquisition of assets.[3]

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1 Information is provided on previous negotiations for international rules for the regulation of foreign investment at Submissions, pp. 1277-1281, 1283, 1307-1308. Some information on the negotiation of the draft MAI was set out in paragraphs 1.2 and 1.3.

2 Quoted at Submissions, p. 1283. Transcript, 6 May 1998, p. 7.

3 Senate Economics Legislation Committee, *Hansard*, 25 February 1998, p. E74 (hereafter 'Senate Committee'), Submissions, pp. 1295-1296, Transcript, 6 May 1998, p. 56. Members of

4.5 It sought:

- to codify what countries' policies were in relation to restrictions on and treatment of international investors and investments. This codification was expected to bring greater transparency to the rules which applied to the flow of FDI around the world;

- to bring some sort of protection for international investors and how they are treated by host countries, protection which would give the right of access to law and judicial process. If assets were expropriated, there would be processes for compensating investors;

- to put in place dispute resolution processes so that, if a country or an investor had a problem about the treatment of an investment, a process would be available to resolve the dispute.[4]

4.6 The basic commitment of the draft treaty was to give international investors what is termed 'national treatment' (NT): that is, it would seek to have such investors treated in a non-discriminatory way by each country as investors of that country are treated. To require international investors to comply with the same laws as domestic investors would not infringe the NT principle. As most, if not all, countries have restrictions of some kind on international investment, countries had to be able to make specific exceptions or reservations to that basic obligation of national treatment. These exceptions formed the second key element of the draft MAI.[5]

4.7 The draft Agreement therefore had three broad planks:

- to indicate clearly how countries should treat international investors and investments;

- to provide protection for international investments within host countries which would grant access to due process of law and, where expropriation occurred, ensure there were processes for timely and market-based compensation. International investors

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the OECD are listed in Appendix 4, and the non-member countries involved in the negotiation process are listed in the footnote to paragraph 1.3.

4 Senate Committee, p. E74.

5 Senate Committee, p. E75; Submissions, pp. 1295-1296, 2329-2330; Transcript, 6 May 1998, p. 7. The draft MAI used the word 'exceptions': see Footnote 1 to Article A. 'Reservations' seems to have been used more generally, including in Australia's preliminary list which was tabled in the Parliament on 31 March 1998. 'Exceptions' will be used in this Report.

would be required to comply fully with the host country's laws and regulations, and

- to put in place systems of dispute resolution so that a process is available if a country or investor experienced problems with the treatment of an investment. Disputes could be resolved through consultations, as well as through binding arbitration.[6]

4.8 The nature of the draft MAI was such that, because it sought to be wide ranging, it would have touched on policies other than international investment. One example of this wide coverage was provided in matters relating to immigration: international investors would have been able to bring key personnel into a country for the duration of an investment.[7]

Specific provisions in brief

4.9 **National treatment**. The fundamental requirement in the draft MAI was for nations to give international investors NT: that they would be treated in the same way as domestic investors. It was combined with most favoured nation (MFN) status: that a nation treat all other nations in the same way. Thus, if MFN applied and special privileges had been given to investors of a nation, investors of every other nation would have to be treated no less favourably, subject to any relevant exceptions taken out by Australia. Both these core concepts of international trade law are included in the GATT and other WTO agreements.[8]

4.10 NT requires that international investors be treated in the same manner as domestic investors. Laws, regulations or policies must not have imposed different standards of treatment or obligations, or provide preferential treatment between nationals and international investors. Differential treatment in laws, regulations or policies in favour of nationals only would not offend MFN, provided that there was no differential treatment between international investors from different countries. A transparency provision would have required that all laws, regulations, administrative practices and policies relating to the treatment

6 Submissions, p. 1296.

7 Senate Committee, p. E75.

8 Submissions, p. 2286, Transcript, 14 August 1998, p. 279. See also p. 1296. The Australian Chamber of Commerce and Industry (ACCI) attached to its submission a useful item-by-item analysis of the draft Agreement: see Submissions, pp. 1244-1271.

of international investors would have to have been made available to the public.[9]

4.11 **'Investor' and 'Investment'.** The draft MAI sought to apply broad definitions for both investor and investment. 'Investor' was defined as:

> '(a) a natural person having the nationality of, or who is permanently residing in, a Contracting Party in accordance with its applicable law, or
>
> (b) a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation.'[10]

4.12 'Investment' was defined as: 'Every kind of asset owned or controlled, directly or indirectly, by an investor, including:

- an enterprise as a legal person or any other entity;
- shares, stocks or other forms of equity participation in an enterprise, and rights derived from them;
- bonds, debentures, loans and other forms of debt and rights derived from them;
- rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- claims to money and claims to performance;
- intellectual property rights;
- rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits, and

9 Submissions, pp. 2286-2287, 1296.

10 *ibid*, p. 2291. Text, Section II, Article 1. Senate Committee, p. E78.

- any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges'.[11]

4.13 The draft MAI would have applied within the land territory, internal waters, territorial sea and maritime zones beyond the territorial seas, including the exclusive economic zone (EEZ) and the continental shelf. Its investment regime would therefore have applied to investments in the fishing industry, or offshore oil and gas exploration activities.[12]

4.14 The draft Agreement would have applied to any overseas territories for which a Party had responsibility for international relations. It would also have covered measures affecting international investors at all levels of government, including federations. It would therefore have had particular implications for Australia as a federation with three tiers of government.[13]

4.15 If the draft MAI had been accepted without exceptions, it would have been necessary to modify Australia's domestic arrangements by, for example, repealing the *Foreign Acquisitions and Takeovers Act 1975* (FATA). There would not then have been any discriminatory treatment of international investors. During the negotiations, it was clear that NT would have been limited to ensure that the existing regime would have remained in place.[14]

4.16 **Investment Protection**. The draft Agreement provided that countries would have had to accord to investments from other Parties fair and equitable treatment in protecting those investments. It was proposed, but not resolved, that it would not have been permissible for a country to impair the operation, management, maintenance, use, enjoyment or disposal of the investments from another Party in its territory 'by unreasonable or discriminatory' measures, or 'by unreasonable and discriminatory' measures. Expropriation of an investment could not occur unless it was for a public interest purpose, in accordance with due process of law. It would have been subject to prompt, adequate and effective

11 Text, Section II, Article 2. Submissions, pp. 1296-1297.

12 Submissions, p. 2291.

13 *ibid*, pp. 2291, 1297.

14 Transcript, 14 August 1998, pp. 279, 283-284.

compensation equivalent to the fair market value of the expropriated investment, and would have to have been fully transferable.[15]

4.17 The intention behind the draft Agreement was not to establish a new requirement that governments would be required to pay compensation for losses which an investor, or an investment, might incur through regulation, revenue raising and other normal government actions in the public interest. Investment-related payments, including capital, profits and dividends, had to be permitted to move freely to and from a host country. Nor would a country have been able to take measures to prevent the transfer, or the processing of, information outside the territory of a host country.[16]

4.18 **Dispute Settlement**. The draft MAI would have provided for 'effective dispute settlement procedures', involving both consultation and binding arbitration, for alleged breaches of obligations by Parties. It would not have compelled a signatory to change any law found to be inconsistent with obligations under the draft Agreement, and for which an exception had not been made. According to Treasury, there was a view that investors into and out of a Party that consistently breached the draft Agreement might have had its protections withdrawn as the ultimate sanction.[17]

4.19 AGs pointed out that, like the *International Convention on the Settlement of Investment disputes between States and Nationals of other States* (ICSID), the draft Agreement had provided for state-to-state, and for investor-state dispute resolution. There were 'substantial similarities' between its provisions and those of ICSID, the GATT and the Dispute Settlement Understanding (DSU) from the WTO Agreement.[18]

4.20 **Exceptions.** The draft Agreement was seen as a package which would have contained general exceptions, as well as obligations. These exceptions would have served both to protect sovereign rights to determine and maintain domestic policies, and to provide transparency to domestic policies which would have been inconsistent with obligations

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15 Submissions, p. 2300, 1297, 2301, Transcript, 6 May 1998, p. 67.

16 *ibid*, p. 1297. The first mentioned provision was included as a result of the so-called Ethyl case against the Canadian Government, brought under the provisions of the North American Free Trade Agreement (NAFTA).

17 Submissions, p. 1298, Transcript, 6 May 1998, p. 7.

18 Transcripts: 14 August 1998, p. 279, 21 December 1998, p. 455, Submissions, p. 2314. See paragraphs 4.44 to 4.50 for some comparison of the draft MAI with other international investment agreements.

under the draft MAI. This mechanism could only have been used to qualify national treatment provisions and MFN status.[19]

4.21 It was proposed that exceptions would have been explicitly recorded so that certain actions or activities would not be covered by the text of the document. In summary, these would have included:

- protection of essential security interests;
- maintenance of public order;
- taxation measures, except where they have implications for expropriation and transparency;
- prudential measures necessary to protect investors and the integrity of financial systems;
- transactions relating to monetary and exchange rate policies carried out by a central bank or monetary authority, and
- temporary safeguard measures which are adopted in serious balance of payments (BOP) or external financial difficulties. Such measures were to be consistent with the IMF's Articles of Agreement.[20]

4.22 While there was broad general agreement about these issues, there were other proposals for exceptions for which there were differing views among the negotiators. Two of these were for:

- regional economic integration organisations (REIOs), which would permit countries in such a grouping to grant better investment treatment to the other countries within that organisation. Some nations opposed this proposal because they believed it was a fundamental breach of MFN.
- culture. Countries such as France and Canada sought a general exception from the provisions of the draft MAI for investment in culturally sensitive areas. Other nations believed that any exceptions in this area should have been country-specific.[21]

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19 Transcripts: 6 May 1998, p. 7, 16 July 1998, p. 121.

20 Submissions, pp. 1298-1299.

21 *ibid*, p. 1299.

4.23 There was also to be scope for Parties to take out country-specific exceptions against particular provisions, to maintain laws, regulations and policies which did not conform to the provisions of the draft MAI. During the negotiations, a possible two-tiered approach had been identified:

- those laws, policies or regulations that Parties were willing to subject to standstill, and that would remain at their current level without changing to a more restrictive or non-conforming level with the draft Agreement, would be placed in Annex A, and

- where Parties required freedom to change settings over time, those policies would be placed in Annex B.[22]

4.24 As the NCC and Mr Ted Murphy pointed out, the only provision for exceptions in the draft Agreement was in its Annex A. This confined the impact of country-specific exceptions to those measures, policies, procedures and regulations which existed at the time the draft treaty was finalised.[23]

4.25 It was also noted that:

- exceptions related only to NT and MFN and could not be used, for example, to qualify the expropriation provision, and

- while Annex B had been proposed, it had not been included in the draft document when negotiations ceased. The 24 April 1998 version of the text included the following footnote:

> It was agreed to withhold the drafting of the introduction of 'Annex B' until the Negotiating Group had taken a political decision on the status and coverage of Part B of the Article. Moreover, a number of delegations felt that the wording of such an introduction might need to be drafted in a limited way (ie. to cover only cases of privatisation or demonopolisation).[24]

4.26 **Standstill and Rollback**. Standstill and rollback obligations were important parts of negotiations on the handling of measures that did not comply with the basic obligations of the draft Agreement. They were seen as common terms in many international trade agreements. It was stated

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22 *ibid*, p. 1300.

23 Submissions, p. 1791, Transcript, 16 July 1998, p. 120.

24 Transcript, 16 July 1998, pp. 121, 124, Text: Footnote 11 to Section IX: Country Specific Exceptions. Exhibit No 1, p. 13. Doubts about the status of Annex B in the negotiations contributed to some confusion, occasionally reflected in evidence, about the scope and admissibility of exceptions.

that, while these principles were also included in the WTO, they were more powerful in the draft MAI.[25]

4.27 Standstill would have required a Party not to make a particular measure, or sets of measures, inconsistent with the draft MAI or more restrictive in the future. Once liberalisation had occurred, standstill would have come into operation for that measure. Rollback would have required a Party to limit or reduce the application of a particular measure, or set of measures, over time. Exceptions would also have had to be justified against the rollback provision, so that non-conforming measures would gradually have been reduced and eventually eliminated.[26]

4.28 Rollback with standstill would have equalled the so-called ratchet effect, so that any new liberalised measures would be 'locked in' and could not be rescinded or nullified over time. Standstill would therefore have applied, with the ratchet effect, to any measures which were included in Annex A. When measures listed there were liberalised, the new level of the measure would itself have been subject to standstill.[27]

4.29 AGs advised that rollback and standstill could only have related to topics, such as equity and investment, which were covered in the substantive provisions of the draft MAI. It also pointed out that there was no retreat from the combination of standstill, rollback and the ratchet effect, other than by denunciation of the Agreement.[28]

4.30 Periodic peer reviews would have been required of any non-conforming measures in each member country. These examinations by other OECD members could only have led to recommendations, as no country would have been compelled to liberalise any measure included in its exceptions. No agreement was reached on a structure for negotiation of the regular review and rollback of exceptions.[29]

4.31 **Performance requirements.** The draft Agreement forbade the imposition, enforcement or maintenance of a range of requirements, or the enforcement of any commitment or undertaking, against investments in the territory of a Party. These prohibitions would have been applicable

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25 Submissions, p. 1300, Transcripts: 6 May 1998, pp. 65-66, 14 August 1998, p. 284.

26 Submissions, pp. 1300, 1679, Transcripts: 6 May 1998, p. 66, 14 August 1998, p. 284.

27 Transcript, 14 August 1998, p. 284, Commentary, p. 60, Submissions, p. 1300.

28 Transcript, 14 August 1998, pp. 291, 284.

29 Submissions, p. 1300, Transcript, 6 May 1998, p. 28.

to all phases of investment, and related to investors of other Parties and of non-contracting Parties and covered such matters as:

- exporting a given level or percentage of goods or services;
- achieving a given level or percentage of domestic content;
- transferring technology, except where a court enforced a commitment to remedy an alleged violation of competition laws;
- location of regional or world headquarters in the territory of a Party;
- achieving a given level or value of research and development (R&D) in its territory;
- hiring of a given level of nationals;
- establishment of a joint venture with domestic participation, or
- achieving a minimum level of domestic equity participation, other than nominal qualifying shares for directors, etc, of corporations.[30]

4.32 AGs commented that this list was very comprehensive. In effect, it provided unconditional freedom for international investors to carry out their activities in host countries, at least as far as any conditions which might have related to production, domestic content or ownership, export performance targets and labour hire conditions.[31]

4.33 One of the ultimate goals of the draft Agreement was achieving NT and eliminating such things as performance requirements. During negotiations, they had been subject to some limitations which had not been agreed when negotiations ceased. As drafted, paragraph 4 of this part of Section III would have provided that Parties were not precluded from taking measures that were necessary to protect human, animal or plant life or health necessary for the conservation of living or non-living exhaustible natural resources. These measures included environmental

30 Section III, Article dealing with Performance Requirements. Consideration of this issue has obvious elements in common with national treatment. Submissions, pp. 2295-2296.

31 Submissions, p. 2296.

measures necessary to secure compliance with laws and regulations not inconsistent with the draft MAI.[32]

4.34 Finally, if the draft Agreement had come into force, AGs believed that it should not have been necessary to change domestic law. Exceptions would have been taken out because of the policy to retain control over certain matters, and to impose performance requirements as far as local inputs were concerned.[33]

4.35 **Expropriation and compensation.** A Party 'should not expropriate or nationalise directly or indirectly' an investment in the territory of another Party, or 'take any measure or measures having equivalent effect'. This would have applied unless the action was:

- for a purpose which was in the public interest;
- on a non-discriminatory basis;
- in accordance with due process of law, and
- accompanied by payment of prompt, adequate and effective compensation.[34]

4.36 **Withdrawal.** A Party would have been allowed to give a notice of withdrawal from the draft MAI five years after its entry into force for that Party, with withdrawal taking effect six months after notice to withdraw was received by the depositary. Existing investments within the territory of the former member would have continued to be protected for 15 years after the date of notification of withdrawal.[35]

Other provisions

4.37 **Labour and the environment**. Treasury noted that there were several references in the draft Agreement to labour and environment issues:

- in the Preamble to the negotiating text;

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32 Transcript, 14 August 1998, p. 287, Submissions, pp. 2297-2298.

33 Transcript, 14 August 1998, pp. 280-281, Submissions, p. 2273.

34 See Section IV, Article 2.1. Submissions, pp. 2300-2301, Transcript, 6 May 1998, p. 25. The ACCI agreed that inclusion of the right for investors to sue governments was 'going further than the existing regime of treaties': *ibid*, p. 89.

35 Submissions, pp. 2329, 1297, Transcripts: 6 May 1998, pp. 21-22, 14 August 1998, pp. 284-285, 290.

- in a draft obligation not to lower standards to attract or retain investment;
- in the proposed attachment to the draft MAI listing the OECD's *Guidelines on Multinational Enterprises*, and
- a draft provision that made it clear that governments would have had the ability to regulate, in a non-discriminatory way, to protect the environment.[36]

4.38 Many OECD countries, however, sought binding provisions in the draft Agreement to address concerns that competition to attract investment would impact adversely on environmental protection and labour standards. This was called 'the race to the bottom' effect.[37]

4.39 Australia had seen no need to include labour matters in the draft MAI, stating that the International Labour Organisation (ILO) was the appropriate forum for such issues. AGs pointed out that the draft Agreement had not been centrally concerned with matters such as labour and environment standards. These are matters which are dealt with in other international forums, and by other international agreements.[38]

4.40 Australia was also concerned that attempts to widen the scope of the draft Agreement would have made the accession of nations that were not members of the OECD more difficult. As Treasury's submission noted, this would have been counter to a key objective of the draft Agreement.[39]

4.41 **Temporary entry of personnel.** The draft MAI required Parties to grant temporary entry, stay and authorisation to work to an investor or employee who was essential to an investment enterprise, subject to the application of national law and regulations. Such people were often referred to as 'key personnel'. If relevant national laws contained provisions applying restrictions on work permits for labour market reasons or related to economic needs, or imposed a simple numerical

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36 Submissions, p. 1301. The reference in the Preamble was to renewing a commitment 'to observance of internationally recognised core labour standards'. It continued by noting that the ILO was the competent body to set and deal with 'core labour standards world-wide'. The contents of the Preamble would not have been legally binding for Parties to the Agreement.

37 Submissions, p. 1301.

38 *ibid*, pp. 1301, 2329. See paragraph 5.56.

39 *ibid*, p. 1301.

restriction on immigrant numbers, those laws could not have been relied upon to prevent the entry of key personnel.[40]

4.42 The draft Agreement also provided for temporary entry permits to be given to the spouse and minor children of the investor and key personnel. Parties would also have been encouraged to grant work permits to spouses.[41]

4.43 The Minister for Immigration and Multicultural Affairs advised that the provisions in the draft Agreement, relating to investors and key executive and specialist personnel, could have been accommodated under Australia's existing temporary business entry arrangements. Spouses and dependant children, part of the family unit of the principal applicant, could have been granted visas with the same conditions and period of validity as the principal applicant. They would also have been able to work while in Australia.[42]

Comparison with other international investment agreements

4.44 While it was intended that the draft MAI be compatible with other international agreements, its scope was wide and it covered areas also dealt with by other agreements. A particular example was the WTO's General Agreement on Trade in Services (GATS). In its submission, Treasury noted that some countries had expressed concerns that, for example, country-specific reservations under the draft MAI did not involve retreating from existing obligations under the GATS.[43]

4.45 AG's submission included frequent and detailed comparisons with Australia's other international investment agreements which make provision for:

- standards of treatment for international investors;
- protection of investments against expropriation, and
- dispute resolution between international investors, host governments and domestic investors.[44]

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40 *ibid*, p. 2294.

41 *ibid.*

42 *ibid*, pp. 2019-2020.

43 *ibid*, p. 1302.

44 *ibid*, p. 2272.

4.46 It also stated that there were 'many examples' of State legislation which approved large-scale investment and development projects and which provided for dispute resolution by arbitration between a host government and an investment consortium.[45]

4.47 None of these existing investment treaties involved notions which were novel in either domestic or international law. As observed above, many of the provisions in the draft MAI drew on established precedents in bilateral investment treaties, ICSID and the DSU under the WTO.[46]

4.48 The draft Agreement had differed in a significant way from other investment agreements in:

- its NT requirements for foreign investors;
- its measures to limit investment incentives being offered to domestic investors;
- its measures to prevent performance requirements relating to exports, use of local labour and materials and related matters being imposed on international investors, and
- enabling international investor participation in privatisations of government enterprises on an equal footing with domestic investors.[47]

4.49 Australian domestic legislation had traditionally treated international investment differently to domestic investment, in particular by requiring that many international investment proposals be examined to determine whether they were in the national interest. Australia's policy had been to impose limits on international ownership of entities operating in areas such as civil aviation, telecommunications and the media. Negotiations on the draft MAI had been approached on the basis that these restrictions would have continued in the form of exceptions.[48]

4.50 Finally, AGs pointed out that, if the Australian Government had decided to accept the disciplines in the draft MAI without the extensive

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45 *ibid.*

46 *ibid*. Professor Hiscock commented that while NT, MFN and transparency had been transposed from the WTO, they 'lose a lot in the translation': Transcript, 24 July 1998, p. 222. See paragraph 4.19.

47 Submissions, p. 2273.

48 *ibid.*

exceptions it proposed, a review of all existing international investment legislation and policy at Commonwealth, State/Territory and possibly local government levels would have been required.[49]

49 *ibid.*

CHAPTER 5

AUSTRALIA AND THE DRAFT MAI

5.1 This Chapter will assess the advantages and disadvantages of the draft MAI for Australia, as specified in the terms of reference for this inquiry. In the 38th Parliament, all Commonwealth Departments were invited to forward submissions to the inquiry, setting out their views on the likely implications of the draft Agreement on their responsibilities. The views of those Departments that responded will be found below. The views of Treasury as the lead Department, DFAT and AGs on the draft Agreement have been set out in detail throughout this report.

5.2 The provisions of the draft Agreement were explained in Chapter 4. The issues which arose from a range of the other submissions received during this inquiry will be set out in Chapter 6.

Imposition of conditions and limits on foreign investment

5.3 At international law, all countries have the ability to prescribe the conditions under which international investors will operate in their jurisdictions, subject to any relevant rules of customary international law and any treaties into which the particular country has entered. Such investors must observe the laws of the country in which they carry out their investment activities.[1]

5.4 There are a number of legislative measures which restrict foreign investment in Australia, notably the FATA/FIRB mechanism, which enables the Treasurer to prevent international investment considered to be contrary to the national interest. It allows orders to be made which requires international investors to divest themselves of shares or property, if this is required in the national interest.[2]

5.5 As set out in Chapter 4, the draft MAI would have allowed nations to impose conditions and limits on international investment but these would have been subject to a number of its provisions, including:

- national treatment and most favoured nation status, and
- standstill and rollback.

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1 Submissions, pp. 2273-2274.

2 *ibid*, p. 2274, Transcript, 14 August 1998, p. 283.

5.6 Any performance requirements which could have been imposed by host governments were forbidden by the draft Agreement.[3]

5.7 Australia's negotiating position was that all of its current policies would have been maintained. Areas such as the operation of the FATA would have been protected by exceptions and, because of a relatively open and transparent international investment regime, any adverse implications were expected to be minimal. Treasury also pointed out that any international investor had to abide by Australia's domestic laws in the same way as domestic companies did. The same legal processes would be available against international investors as against a domestic investors. [4]

Implications of rollback and standstill for a range of rights

5.8 During the negotiations, Australia indicated 'a strong preference for non-binding rollback provisions'. It would also have supported peer review, periodic examinations of non-conforming measures by other OECD members. As part of such a process, Australia's non-conforming measures would have been examined and recommendations could have made about them.[5]

5.9 The Government's position, 'in the negotiations and more widely', was that it would not have agreed to the draft MAI unless it was 'satisfied that the benefits for Australia and the balance of the commitments in the agreement are such as to make it in the national interest to agree'. Australia participated in the negotiations 'on the basis that it can lodge all exceptions necessary to ensure that current policies are protected and that no current policy is overridden'.[6]

5.10 On 31 March 1998, Australia's Revised Schedule of Preliminary Reservations, as at October 1997, were tabled in the Senate. These were grouped into Annex A and Annex B. The latter were country-specific exceptions, as suggested in the negotiation process, and assumed the eventual inclusion of that Annex in the document. For example, an exception had been included covering Australia's overseas development assistance (ODA) program. An exception had also been proposed which would have limited national treatment to ensure that Australia's existing

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3 See paragraph 4.31.

4 Transcripts: 6 May 1998, pp. 6, 44, 21 December 1998, pp. 462, 470.

5 Submissions, p. 1300, Transcript, 6 May 1998, p. 28. See paragraph 4.30.

6 See, for example, Submissions, p. 1295, Transcript, 6 May 1998, pp. 8, 6.

international investment regime, under the FATA, would have remained in place.[7]

5.11 It was pointed out that all exceptions were likely to have been significantly revised if negotiations had proceeded, because of:

- changes to the draft MAI;
- the outcome of ongoing consultations with Commonwealth and State/Territory agencies about the application of the draft Agreement which might apply more stringent requirements on international investors than on domestic investors and for which exceptions would have been required, and
- the outcome of the negotiations on the form of country-specific exceptions.[8]

5.12 AGs pointed out that if Australia had signed the draft Agreement without taking out the exceptions it had proposed, and if it had accepted NT, MFN and restrictions on performance requirements, 'fairly extensive changes' would have been required to domestic legislation. Before negotiations had ceased, it was clear that Australia would not fully have accepted NT, nor the requirement in the draft MAI that a government could not impose performance requirements on investors.[9]

5.13 Treasury stated that it had consulted the States and Territories as part of the identification of particular government policies and practices which may have conflicted with the draft MAI, and for which it could have been necessary to seek exceptions.[10]

Impacts on the Australian economy

5.14 Treasury stated that it had not attempted to make any assessment of the likely impact of the draft MAI on particular sectors of the Australian economy, Australian investors overseas or Australian governments. It believed that these matters would have been best assessed

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7 See Senate, *Hansard*, 31 March 1998, pp. 1597-1598, for the Assistant Treasurer's statement. Transcripts: 6 May 1998, p. 55, 14 August 1998, pp. 279, 287.

8 Senate, *Hansard*, 31 March 1998, p. 1598.

9 Transcript, 14 August 1998, p. 281.

10 Transcript, 6 May 1998, pp. 13, 41.

'if and when' the draft Agreement was signed and submitted for formal treaty-making procedures.[11]

5.15 While it believed that there would be 'no negative implications' for Australia's national debt or current account deficit, Treasury had not done any modelling of the potential impact on the balance of payments resulting from increased foreign investment in and out of the country.[12]

Dispute handling procedures

5.16 While Australia supported effective dispute settlement procedures, it had had some concerns about those in the draft MAI. These included the availability of dispute resolution procedures in the pre-establishment phase of an investment. Australia was concerned that such a mechanism could provide scope for the unacceptable erosion of sovereignty relating to the approval process on investment matters.[13]

5.17 Australia had also taken the view that whether or not a non-complying measure fell within the scope of an exception was a decision that should not be subject to the dispute settlement process.[14]

Constitutionality

5.18 If it had been finalised, the draft MAI would have been a multilateral treaty of the type Australia is already a Party to in a number of areas. Some of these include similar provisions to those in the draft Agreement. Under the Australian Constitution, the Commonwealth Government concludes treaties, and to the extent that domestic law required change before accession, legislation would have been required. This would normally have been based on any of the relevant heads of powers, rather than simply the external affairs power under Section 61 of the Constitution.[15]

5.19 AGs advised Treasury that Government policy required that domestic law should be in accordance with obligations undertaken by Australia in treaties to which it is a party. In some treaties, such as the draft MAI and in trade or investment treaties, NT or market access is

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11 *ibid*, p. 6.

12 *ibid*, pp. 6, 27.

13 Submissions, p. 1298.

14 *ibid.*

15 Submissions, p. 2278, Transcripts: 14 August 1998, pp. 294-295, 21 December 1998, pp. 455, 469.

required. If it is not intended that other nationals should be treated in the same way as Australian nationals in a particular area, those negotiating such treaties should ensure that the text excludes that matter from general obligations.[16]

5.20 Provided the appropriate exceptions were taken out about NT during the negotiations, AGs advised that 'there should be no question in domestic litigation that Australia had an obligation to accord national treatment' in the area where an exception was taken out.[17]

5.21 AGs confirmed that the Commonwealth Government had the constitutional power to legislate to enable the draft MAI to be signed and to 'apply over and above State and Territory laws'.[18]

5.22 The Commonwealth would also have had to rely upon action by the States and Territories to implement their obligations under the draft MAI pursuant to the general power of each of their Parliaments to make laws for the 'peace, order and good government' of that State or Territory.[19]

Impact on agriculture

5.23 In a report prepared for the Rural Industries Research and Development Corporation (RIRDC), the Centre for International Economics (CIE) noted that foreign investment accounted for about one-fifth of Australia's total annual investment. The CIE pointed out that most international investment in Australia is in services and manufacturing although, of the investment in mining, half is from overseas sources. Agriculture accounted for only 0.2 per cent of total international investment.[20]

5.24 There have been concerns that international investment in agriculture was in bulk commodities only, rather than in transformation into value-added products. The CIE suggested that the evidence indicated that the list of overseas companies involved in adding value in agriculture was a long one. For example, international investment in the food, beverages and tobacco sector amounted to 5 per cent, or $A21 billion, of

16 Submissions, p. 2570, quoted in Transcript, 14 August 1998, pp. 285-286.

17 Submissions, p. 2570, quoted in Transcript, 14 August 1998, p. 286.

18 Transcript, 14 August 1998, p. 295.

19 Submissions, p. 2278.

20 Exhibit No 65, p. ix.

the total, in Australia. If international investment in value-adding was insufficient, the CIE pointed out that it was likely that domestic investment was also insufficient. This was not a criticism of international investment, but a problem of making investment in certain activities profitable.[21]

5.25 Historically, Australia's comparative advantage in agriculture was based on broadacre farming, and on selling a narrow range of bulk commodities to largely uncomplicated global markets. Cheap and abundant land underpinned this export supply advantage. Escalating tariffs and natural trade barriers, such as high transport communications and other transaction costs, rendered it uneconomical to service individual export markets with more elaborately transformed agricultural goods. The production and supply of land-intensive and processed agricultural products was limited to the domestic market, where producers did not face these barriers.[22]

5.26 Half of Australia's agricultural exports were now made up of input-intensive agriculture, compared with only 25 per cent in the 1970s. Exports of horticultural and highly processed foods had grown strongly over the past five years.[23]

5.27 In explaining the change from broadacre farming to more intensive agriculture, the CIE referred to the growing importance of:

- product innovation and differentiation;
- the role of marketing and the need for foreign investment, and
- lower transaction costs and closer contact with consumers.[24]

5.28 The CIE saw the major benefits for the rural sector from the draft MAI as facilitating international investment which would help to add value to bulk commodities by transforming them through more marketing, more skills and more intellectual property. It also noted that the Australian rural sector had already seen trade in most goods and

21 *ibid*, pp. xi, 16-17.

22 *ibid*, p. 22.

23 *ibid.*

24 *ibid*, pp. 22-24.

services liberalised well beyond measures taken for agricultural commodities.[25]

5.29 If the draft MAI had given the market access Australia's rural sector needs, it would have to have been active. While some exceptions would have been necessary, they represented costs in lost opportunities. The CIE believed that the rural sector had had an incentive to ensure that it was able to invest freely in the marketing networks and other facilities it would have needed in other countries to ensure it could add value and be more competitive in overseas markets.[26]

5.30 The CIE pointed out that a range of other policies might still have been needed, including for the rural sector:

- effective resource rent taxes to guarantee a sufficient return from overseas development of Australian resources;
- a more effective national savings policy so more can be invested abroad and domestically;
- standard tax policies to reduce incentives to transfer price, and
- standard and more liberal import restrictions.[27]

5.31 The CIE believed that not proceeding with the draft MAI would have meant that international investment would have been less likely to go to areas which were considered to be risky, such as value-adding activities needed by Australia's rural sector. Not proceeding would also have aggravated unequal treatment for investors and would have been unhelpful in Australia's attempts to convince other nations of the benefits of free trade and improved market access.[28]

5.32 Emeritus Professor Hugh Paterson, a retired professor of entomology, drew attention to the difficulties the draft Agreement could have caused in maintaining adequate quarantine control on the importing of diseases of farmed animals, such as weeds in imported grain, virulent bluetongue virus in sheep and other viruses devastating to bloodstock. He referred to assertions, used by overseas competitors, that Australia's

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25 *ibid*, pp. 30, 31.

26 *ibid*, p. 31.

27 *ibid.*

28 *ibid*, p. 32. CIE's report was published in August 1998, before work ceased on the draft Agreement.

quarantine controls were only camouflage to limit competition from imported materials.[29]

5.33 He believed that the exceptions which could have been argued for were 'ultimately useless' because they could only have had a temporary effect and, in any event, would have had sunset clauses attached to them.[30]

5.34 Professor Paterson noted that there was a general and highly dangerous pressure to limit quarantine regulations because they are perceived to be an obstacle to free trade. He mentioned the consequences of reductions to such controls in 1988, and stated that no free trade agreement, such as the draft MAI, should have been agreed to without the most detailed consultation with agriculture, fisheries and veterinary authorities.[31]

5.35 Dr James Goodman, of the Stop-MAI Coalition of NSW, asserted that the draft Agreement would have permitted free access to agricultural and industry support schemes for international investors. Because these investors could have argued that such schemes were discriminatory under the provisions of the draft Agreement, these schemes would have become redundant unless they were covered by country-specific exceptions. On this basis, he stated that the provisions of the EU's Common Agricultural Policy (CAP) would have to have been wound back or extended to international investors. He believed that Australia would also have had to wind back selective agricultural or industrial support schemes.[32]

Impact on manufacturing

5.36 The Department of Industry, Science and Tourism (DIST) supported the broad objectives of the draft Agreement, promotion of international investment flows by providing greater transparency and certainty to international investors. This support was to some extent conditional on the final text of the Agreement. DIST stated that, provided

29 Submissions, p. 522.

30 *ibid*, p. 522-523.

31 Transcript, 24 July 1998, p. 213.

32 Submissions, p. 1749, Transcript, 21 December 1998, p. 482.

Australia's exceptions were comprehensive, the draft MAI would have caused no change to Australia's investment or industry environment.[33]

5.37 DIST added that, as the general approach of and exceptions lodged by other OECD countries appeared to be similar and equally comprehensive, the relative attractiveness of those economies would have remained unchanged. Its submission listed policies and programs for which a country-specific exception might have been required. It expressed concern that there might be 'an explicit provision' that exceptions might be subject to rollback under the provisions of the draft MAI.[34]

5.38 Specific areas of the draft Agreement had been of interest to DIST:

- performance requirements;
- investor incentives;
- expropriation and dispute settlement;
- temporary entry of workers, and
- intellectual property.

5.39 DIST believed that, given Australia's 'fairly liberal' international investment regime, the draft MAI probably would not have done much to attract more such investment here. The Department used performance requirements in a number of industry programs and was developing a comprehensive list of exceptions to protect them This list would have been finalised as a result of the negotiations and resulting changes to the draft Agreement.[35]

5.40 Because of acute competition for international investment, some countries offered incentives to corporations to locate operations within their borders. Such actions were seen as distorting investment flows. To reduce such distortions, it had been proposed to include disciplines on

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33 Transcript, 14 August 1998, pp. 298, Submissions, pp. 2384-2385. The titles and functions of a number of Departments changed following the October 1998 election. Unless otherwise indicated, material in this Report dates from before those changes.

34 Transcript, 14 August 1998, pp. 300, 301, 302, 307, Submissions, p. 2390-2394.

35 Transcript, 14 August 1998, pp. 308, 303, Submissions, p. 2386.

investment incentives in the draft MAI. During the negotiations, alternative clauses had been proposed.[36]

5.41 DIST had not supported inclusion of any additional text on this matter because Australia competed for investment with countries which offered such incentives. Some of these were not members of the OECD and would not have been bound by the draft Agreement. It considered that it was not in Australia's interest to limit itself from offering such incentives in the absence of international agreements restricting their use by all countries. DIST had advised Treasury to include in the negotiating position a country-specific exception from investment incentive clauses.[37]

5.42 DIST believed that the draft Agreement sought to restrict direct expropriation through nationalisation, or partial or indirect appropriation through measures which would have had the same effect. Concerns had been raised that it could have been possible for overseas governments or corporations to challenge the actions of a government that adversely affected the profitability of an investment. A communique from the April 1998 OECD Ministerial Council meeting had allayed these concerns.[38]

5.43 The Invest Australia program, administered by DIST, extended preferential treatment to investors in specified sectors, or those making specified investments such as research and development and regional management operations. DIST had advised Treasury to make a country-specific exception to ensure that Invest Australia could continue to provide this preferential treatment to specific investors.[39]

5.44 DIST stated that effective protection of intellectual property facilitated trade in goods, services and technology. This was reflected in the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement being a key issue in the establishment of the WTO. Intellectual property constituted a very important component of many investment decisions, and it would have been crucial for it to have been afforded adequate protection under the draft MAI. Before negotiations on the draft Agreement ceased, DIST was aware that many issues relating to intellectual property rights had remained to be resolved.[40]

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36 Submissions, p. 2386.

37 *ibid.*

38 *ibid*, p. 2387.

39 *ibid.*

40 *ibid*, p. 2388.

Impact on State, Territory and local governments

5.45 While Treasury did not have a view on the impact of the draft MAI on other levels of government in Australia, material which was provided to the inquiry on this topic from other witnesses is set out in Chapter 6.

5.46 To the extent to which any State, Territory or local government measure was inconsistent with obligations under the draft Agreement, AGs stated it would have been necessary to bring these measures into conformity with its provisions. This could have been done by appropriate legislative or administrative action by the particular jurisdiction, or possibly by Commonwealth legislation.[41]

5.47 Thus, for example, performance requirement provisions in the draft MAI would have required Parties not to impose or enforce measures relating to the export of a given level of goods or services, the achievement of a specified quantity of local content, or the hiring of a given level of nationals. Some agreements between governments and investors for resource development approved by legislation of various State Parliaments included such measures which would have been inconsistent in some respects with the provisions of the draft Agreement.[42]

Impact on Australian investors overseas

5.48 As a result of its discussions, Treasury was aware of some genuine concern among business groups about difficulties for Australians investing overseas, particularly in developing countries. While Australian investment was still largely in OECD countries, there was increasing interest in investing in non-OECD countries. While nations such as the Republic of Korea were moving to liberalise their investment regimes, the draft MAI had been seen as a further mechanism for encouraging that process within non-OECD countries.[43]

5.49 AGs pointed out that all countries which could have become parties to the draft Agreement, subject to any exceptions they might have made, could have been obliged to implement its obligations. Thus, while they have to take the law in a host country as it is, under the draft MAI Australian investors overseas would also have had to be treated in the

41 Submissions, p. 2279.

42 *ibid*, Transcripts: 14 August 1998, pp. 288-289, 21 December 1998, p. 455.

43 Transcript, 6 May 1998, pp. 16-17, 18. The Republic of Korea is a member of the OECD.

same manner as local investors. Australian investors would have been able therefore to sue host governments for any losses sustained because of any breach by that government of its obligations under the draft MAI.[44]

5.50 DIST believed that, given Australia's international investment regime, the benefits of the draft Agreement would probably have been 'more on the side of Australian companies investing offshore'. It also pointed out that, as the draft MAI would have been open to accession by non-members of the OECD, this would also have benefited Australian investment overseas.[45]

5.51 There was agreement that the benefits of the draft Agreement for Australian investors were outside this country. For example, Mr Piccinin of the BCA agreed that the only benefit to Australian companies from the draft Agreement would have been the inclusion of non-OECD countries in its operations.[46]

5.52 Ms Filling of the Australian Industries Group (AIG) noted that the draft Agreement had had the potential to encourage significant opportunities for Australian investment in some overseas markets, particularly if non-OECD countries in Asia had acceded. The AIG also believed that negotiations had largely excluded developing countries, and that this lack of engagement had been a failure of the process.[47]

5.53 Mr Roche of the ASX referred to a belief that the draft MAI would have been in the interests of Australians seeking to invest overseas to be provided with greater transparency and certainty in those overseas jurisdictions. He pointed out that such investments by Australian corporations had generated wealth and benefits for this country, and that this gave certainty to investors here. He could not be certain that there would have been additional benefits from the draft Agreement in attracting investment to Australia.[48]

5.54 In its submission, ACOSS took a wider, more philosophical view of this issue, and drew attention to its belief that rights and obligations/responsibilities frequently went hand-in-hand. It also noted the need for specific identification of obligations and responsibilities of

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44 Submissions, pp. 2279-2280, Transcript, 14 August 1998, pp. 283, 290.

45 Transcript, 14 August 1998, pp. 300, 309, Submissions, p. 2385.

46 Transcript, 16 July 1998, pp. 141-142.

47 Transcript, 14 August 1998, p. 340, Submissions, p. 2041.

48 Transcript, 21 August 1998, pp. 376, 380, 386.

international investors. Mr Graeme Evans suggested that there had been an attempt underlying the proposed MAI to separate the rights of individuals and corporations from their responsibilities.[49]

Views of other Commonwealth Departments

5.55 The **Department of Workplace Relations and Small Business** (DWRSB) had two areas of interest in the draft MAI: inclusion of a labour standards provision, and small business issues.

5.56 DWRSB was of the opinion that the investment liberalisation aims of the draft Agreement had not required the inclusion of a provision for labour standards. It believed that such an investment agreement should not have been concerned with these standards, nor should the OECD have been in the position of defining and arbitrating them. It supported DFAT's position that this was an area for the ILO, the competent body to set and determine international labour standards. DWRSB was strongly opposed to the inclusion of human rights clauses in trade and investment agreements.[50]

5.57 The Office of Small Business (OSB) within the Department found a diversity of views about the draft MAI, ranging from qualified support to outright opposition. OSB considered that the draft document had the potential to affect Australia's domestic policy settings. Government policies had therefore needed to be carefully considered to determine the impact of the draft Agreement, and the implications of any resulting changes on the economy and small business. OSB had concerns about three areas of the draft MAI.[51]

5.58 It believed that the investment protection provisions in the draft Agreement could have limited the ability of a government to pass new legislation that had the effect, directly or indirectly, of increasing business costs. It referred to the so-called Ethyl Case, in which a USA company had sued the Canadian Government under the provisions of a similar clause in NAFTA. Small business noted that, if implemented, Section IV of the draft MAI could have been used to prevent the Australian Government from enacting fair trading amendments to trade practices legislation.[52]

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49 Submissions, p. 1505, Transcript, 21 August 1998, pp. 413, 417.

50 Submissions, p. 1118.

51 *ibid.*

52 *ibid*, p. 1120.

5.59 OSB believed that the draft Agreement should not have limited a government's ability to introduce legislation, even if it increased costs. It could have limited the ability to introduce legislation that discriminated against international business, for example, by increasing their costs without increasing them for domestic businesses. OSB considered that Section IV should have been re-drafted to ensure that new, non-discriminatory measures were not precluded.[53]

5.60 Under a sub-section of Section III of the negotiating text, both Parties and Non-Contracting Parties had to receive non-discriminatory treatment. This may have meant that Australian businesses investing in non-contracting countries may not have received the benefits of non-discriminatory treatment. Businesses from non-contracting countries investing in Australia would have received the benefits of the draft Agreement.[54]

5.61 OSB noted that that some Government policies may have needed to be revised or excluded from the provisions of the draft MAI. It noted that the Export Market Development Grants (EMDG), used by a large number of small businesses, could have been incompatible with the provisions of the draft Agreement, as only Australian residents are eligible for its benefits. The draft Agreement could also have had the effect of ensuring that the general business services provided by Austrade and the Australian Tourist Commission (ATC) would have to have been made available to companies from any country.[55]

5.62 OSB believed that a sub-section on performance requirements within Section III of the draft Agreement would have had the effect of limiting the ways in which Australia treated international investors. A number of Government policies and programs which are aimed at small business may have been inconsistent with this provision.[56]

5.63 It also believed that the preamble to this sub-section could have prevented the Commonwealth or States/Territories from enforcing any existing commitments or undertakings made by an investor, including voluntary commitments made to the Commonwealth in return for investment incentives. This sub-section appeared to be inconsistent with

53 *ibid.*

54 *ibid.*

55 *ibid*, pp. 1120-1121.

56 *ibid*, p. 1121.

current purchasing arrangements and R&D policies, both of which directly involved small and medium-sized businesses.[57]

5.64 Finally, DWRSB believed that it would have been worthwhile for the Government to ensure that development of its position on the draft MAI was carried out in full and open consultation with interested parties, including industry and professional groups such as members of the National Small Business Forum.[58]

5.65 The **Department of Health and Family Services** (DHFS) drew attention to uncertainty about the detail of the draft Agreement. It saw as a central issue in the negotiations Australia's ability to maintain policy flexibility in areas of national interest. DHFS strongly supported the view that there should be flexibility under the process of exceptions to enable government measures to be tightened where required, ie. no standstill requirement. Allowable exceptions should therefore be extended to include, among other things, public health and safety. If general exceptions could not have been achieved, the Department said country-specific exceptions should have been sought.[59]

5.66 DHFS noted that Australia's list of country-specific exceptions had covered pharmaceuticals. It believed that public health measures, such as Australia's restrictions on the advertising of tobacco, could not have been challenged under Section IV of the draft MAI as 'unreasonable' and subject to dispute resolution. Other areas of public health action, such as alcohol strategies, environmental health and food standards, raised similar issues.[60]

5.67 The Department referred to what it saw as a growing convergence of views on the need to have ensured that the draft MAI did not result in the lowering of standards or protections in order to encourage investment. It believed that improving health and safety standards was important in underpinning social and economic development. It saw a strong aspiration within the draft Agreement not to lower standards for investment purposes as essential.[61]

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57 *ibid.*

58 *ibid*, p. 1123.

59 *ibid*, p. 1841.

60 *ibid*, pp. 1841-1842 and 1843-1844. See p. 23 of the tabled material for the draft exception for pharmaceuticals.

61 Submissions, p. 1842.

5.68 The submission from **Environment Australia** pointed out that investment flows promoted economic growth and could facilitate the transfer of environmentally benign technology. Investment could also cause environmental damage if it was not subject to obligations and standards.[62]

5.69 It stated that the draft MAI raised a number of potential issues, relating to the ability of countries to pursue environmental protection. Australia's environmental policies and laws did not appear to be *de jure* discriminatory, and therefore it should not in general have caused conflict with environmental regulations and regulators. This organisation believed that it was important that the draft Agreement did not have any unintended consequences through inadequate legal definitions of issues such as discrimination or expropriation. It also saw it as important that the draft MAI did not lead to a lowering of environmental standards, either in the OECD or in developing countries.[63]

5.70 Without appropriate safeguards, there was no guarantee that investment liberalisation would make people better off so that according to Environment Australia, if environmental and investment policies were to support each other, the following principles had to be observed:

- investment rules must not be allowed to prevent or over-ride environmental regulation, and

- environmental regulation should not be used in an arbitrary way to discriminate against international investment for 'green protectionism'.[64]

5.71 An international investor could have argued that, in some instances, there could have been *de facto* discrimination in the application and enforcement of Australia's environmental laws. While these standards would also have applied to a domestic investment of a similar type at a similar place, Environment Australia observed that this might have been difficult to demonstrate conclusively if no such domestic investment was proposed.[65]

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62 *ibid*, p. 2054.

63 *ibid*, p. 2055.

64 *ibid*.

65 *ibid*, p. 2056.

5.72 It also referred to legal advice about the expropriation provisions of the draft Agreement which suggested that claims for bans on the use of natural resources could not have been ruled out. Such claims would have been unlikely if such bans were reasonable and did no more than further the environmental objective for which the ban had been implemented. Based on that advice, it had concluded that it was unlikely that product bans based on reasonable environmental considerations would have been considered as expropriation under the draft MAI.[66]

5.73 Environment Australia saw multi-lateral environment agreements (MEAs) as another area of potential conflict between the draft Agreement and environmental regulators. It referred to a paper, prepared by the OECD Secretariat, which had noted that there were uncertainties about the compatibility of measures taken in support of MEAs with the draft MAI. These related to provisions for:

- national treatment;
- most favoured nation;
- expropriation;
- performance requirements, and
- dispute resolution.[67]

5.74 According to this submission, MEAs were seen as probably the most effective means of addressing global environment issues. Their use had been encouraged in forums ranging from the United Nations' Conference on Environment and Development (UNCED) to the WTO. Potential conflicts between the draft MAI and MEAs were not in the best interests of environmental protection or investment liberalisation. The submission set out a number of ways environmental issues had been addressed in the negotiating text.[68]

5.75 Environment Australia noted that the draft Agreement had included some clauses to protect the power of governments to regulate to protect the environment, provided such regulation was not arbitrary or unjustified discrimination. It recommended that this protection could be enhanced by inclusion of:

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66 *ibid.*

67 *ibid.*

68 *ibid*, pp. 2057-2060.

- interpretative notes for all environmental protection clauses in the text;
- a GATT-style general exceptions clause, expressly providing that 'legitimate action' in support of environmental regulation would have been permitted;
- specific exceptions for MEAs in Section X of the text, and
- a 'proportionality' clause in the dispute settlement provisions, requiring dispute settlement tribunals to balance the effects of environmental and investment rules on any disputed environmental measure.[69]

5.76 The Minister for **Transport and Regional Development** (DTRD) stated that his Department had raised with Treasury the need to ensure that Australia's international aviation interests were not adversely affected by the draft Agreement. There are substantial ownership and effective control requirements of bilateral aviation treaties. International aviation 'hard rights', such matters as capacity, route rights and ownership and control provisions, should have been excluded from the draft MAI.[70]

5.77 The first illustrative OECD aviation annex draft text was released in March 1998. It was not consistent with the international air services agreements between Australia and other major aviation countries. Treasury was advised of the need to amend this draft text, to ensure that Australia's international aviation agreements were not covered under the draft MAI.[71]

5.78 The Minister for **Finance and Administration** (DOFA) pointed out that the Treasury was responsible for the negotiations. Issues of importance for Australia had been preserved in the Revised Schedule of Preliminary Reservations in the following areas:

- procurement;
- monopolies/state enterprises/concessions, and

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69 *ibid*, p. 2061.

70 *ibid*, p. 2062.

71 *ibid.* In the 38th Parliament, this Committee considered air service agreements with a number of countries.

- privatisation.[72]

5.79 He added that countries with high levels of public ownership were also keen to ensure that their national interests were accommodated, and were likely to be listing exceptions in the area of privatisation.[73]

5.80 The **Department of Communications, the Information Economy and the Arts** (DOCIEA) was keenly aware that it operated in areas subject to rapid technological change. This would have caused it to reconsider and redraft its approach, and the exceptions it had sought, as a result of continuing changes to Government policy.[74]

5.81 It noted that in some areas, such as communications and broadcasting, the exceptions Australia needed were quite clear. Existing legislation was clear about ownership provisions and the exceptions which would have been sought would have had to reflect it. For other sectors, such as the arts and heritage, the issues were not so clear and it had continued to review the measures listed in Annexes A and B to the draft MAI. It was aware that this approach was not agreed during the negotiations.[75]

5.82 Measures listed in Annex A would have been subject to standstill provisions from the date of effect of the Agreement, and potentially to rollback provisions. As standstill provisions prohibited new or more restrictive exceptions to the draft MAI than those which had been initially specified, they presented particular problems for audio-visual industries in which technological change was rapid and where the Government needed to retain policy flexibility.[76]

5.83 Rollback provisions were also a cause of concern for Australia's capacity to maintain existing support mechanisms in this Department's areas of interest. They provided for the reduction and eventual elimination of non-conforming measures from the draft Agreement.[77]

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72 Submissions, pp. 2260-2261.

73 *ibid*, p. 2261.

74 Transcript, 14 August 1998, p. 323.

75 Submissions, p. 2332, Transcript, 14 August 1998, pp. 311, 313, 312, 322. At pp. 2335-2336, the submission included details of the exceptions which would have been sought for Telstra. See also Transcript, 14 August 1998, p. 324. See paragraphs 4.24 and 4.25 for the status of Annex B during the negotiations.

76 Submissions, p. 2333, Transcript, 14 August 1998, p. 324. See paragraphs 4.26-4.29 for descriptions of the rollback and standstill provisions.

77 Submissions, p. 2333.

5.84 DOCIEA would have had significant concerns if the draft Agreement had only included Annex A, and had made no provisions for either Annex B or general exceptions.[78]

5.85 Nearly all Australia's exceptions would have been sought under Annex B whose eventual existence had been assumed. Measures relating to support for Australian content in the audio-visual/broadcasting, telecommunications, arts and heritage would not therefore have been subject to standstill and rollback. Governments would have been allowed to introduce new, non-conforming measures after the draft Agreement had come into force.[79]

5.86 DOCIEA noted that printing and press activities would not have been covered by an exemption for the audio-visual area, and care would have been needed in the phrasing of the exceptions that would have been sought.[80]

5.87 In its evidence, the Department re-stated Government policy to protect current policies and to ensure none were over-ridden or subsumed by the draft MAI. It believed that, provided exemptions were properly framed, there would have been no disadvantages to Australia in its areas of interest. It pointed out that there had been some community and cultural sector advocacy in support of a general exception for cultural industries. In this area, there had been less clarity about what exemptions were required.[81]

5.88 It was conscious that a general exception for cultural industries might have lost both the transparency which was sought through the negotiating process, and would have been interpreted far too broadly. There were also concerns about the unintended consequences of possible exemptions. It believed that there were good reasons for a general exception for the audio-visual sector:

- the unique and integral role it plays in developing and reflecting a sense of national and cultural identity in modern society;
- international precedents for the exemption of the sector from multi-lateral agreements;

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78 Transcript, 14 August 1998, p. 323.

79 *ibid*, pp. 322, 324, Submissions, p. 2333.

80 Transcript, 14 August 1998, p. 313.

81 Submissions, pp. 2333-2334, Transcript, 14 August 1998, pp. 311, 320, 318.

- the need to retain maximum policy freedom at a time of rapid technological development, and
- retention of maximum policy flexibility to introduce new policy measures to address market failures that might have occurred in the future.[82]

5.89 DOCIEA supported clarification within the draft Agreement of its relationship with other international agreements, including:

- references to agreements already in place under the WTO, and
- whether the draft MAI or the GATS would have taken precedence in the event of a conflict between their provisions.[83]

5.90 It noted that some sections of the draft Agreement, such as in Section VII relating to investment incentives, alluded to the establishment of additional disciplines within three years of signature of the agreed text. The Department had understood that the WTO was likely to pick up investment services in its next round. If negotiation of the draft Agreement had proceeded, it believed that 'some process' would have been required to minimise confusion between commitments under the OECD and the WTO.[84]

5.91 None of these departments seemed to have prepared a comprehensive analysis of the policies and programs which might have been effected by the draft MAI. Some also had substantial concerns about the provisions of the draft Agreement.[85]

5.92 The Australian Broadcasting Authority (ABA), an agency within the DOCIEA portfolio, drew attention to the possibility of challenges under the draft MAI to such Australian policies as:

- government funding for Australian cultural production;
- Australian content rules;
- regulation of children's television;

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82 Submissions, p. 2334, Transcript, 14 August 1998, pp. 312-313, 314. See paragraph 4.22.

83 Submissions, p. 2334.

84 *ibid.*

85 See, for instance, evidence from DIST and DOCIEA at Transcript, 14 August 1998, pp. 298, 300, 301-302 and 311, 326, respectively.

- foreign ownership limits, and
- immigration rules for foreign artists.[86]

5.93 Cultural products formed part of the growing services sector in Australia. The ABA believed that the potential impact of any trade or investment agreement on culture warranted consideration in the negotiations. One way of ensuring this, it believed, was to include a general exception for cultural industries. This had been the approach of France and Canada which sought to 'carve-out' cultural industries completely from the obligations of the draft MAI. If a general exception was not accepted, the alternative was to include an exception for television in Annex B where film financing was already listed.[87]

5.94 The ABA noted that local content rules for the electronic media went beyond what was identified in the draft exception tabled in Parliament on 31 March 1998. The description of local content requirements for commercial television was limited to the overall transmission quota, excluding specific annual quotas for minimum amounts of first release Australian drama, documentary and children's programs. Neither Australian content for pay television nor the regulation of children's television programs had been included in this exception. The ABA suggested that it could have been redrafted to cover all relevant, existing measures.[88]

5.95 It believed that consideration could also have been given to an exception that ensured the framework of codes developed by parts of the cultural industry was safeguarded, including the ABA's ability to develop standards where codes had failed, or were not developed where needed.[89]

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86 Submissions, p. 2068.

87 Submissions, p. 2068. For the exception for film financing, see p. 34 of the material tabled on 31 March 1998.

88 Submissions, pp. 2068-2069.

89 *ibid*, p. 2069.

CHAPTER 6

ISSUES RAISED BY THE DRAFT MAI

6.1 This Chapter will focus on the range of issues which were raised during this inquiry, in both submissions and at public hearings. Some issues have already been dealt with in the previous Chapter, and some other larger issues of principle will be considered in Chapter 7. The terms used, such as rollback and standstill, were explained in the consideration of the provisions of the draft Agreement in Chapter 4.

Major issues raised in the inquiry

6.2 The two issues raised most frequently in the submissions received during the inquiry were:

- the invasion of Australian sovereignty which the draft MAI was seen by many to represent, and
- the secret and/or conspiratorial way in which, it was asserted, the draft MAI had been negotiated by Australia.[1]

6.3 Other significant issues which were causes of concern, and which will also be addressed in turn below, included:

- rollback, standstill and country-specific exceptions. Discussion of the latter was often phrased in terms of concerns about various rights and the lack of 'guarantees' in particular areas, such as for cultural, environmental or labour standards;
- expropriation and compensation provisions;
- the dispute resolution process;
- the length of time required to withdraw from the draft Agreement, once notice had been given;
- performance requirements;
- broad definitions of 'investor' and 'investment';

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1 For some analysis of the submissions received during this inquiry, see Submissions, pp. 2443-2444 and pp. 2672-2676.

- investment protection;
- the constitutionality of the draft MAI, and
- the impact the draft Agreement could have had on State/Territory Governments, and on local government in Australia.

6.4 Many of these concerns were also the result of what was clearly a widespread perception that the draft Agreement conferred extraordinary rights on international investors and, at the same time, severely limited the options of governments and individuals.[2]

Other issues

6.5 There were a number of other issues which were raised by some witnesses. For example, Dr James Goodman, Coordinator of the Stop-MAI Coalition of NSW, saw the draft MAI as elevating property rights above all others, including democratic rights. While this organisation emphasised that it was not against a treaty on international investment, it sought one which imposed obligations as well as rights on international investors. Dr Goodman also stated that the draft Agreement would have provided such investors with an enforcement mechanism which would not have been available to others.[3]

6.6 Other witnesses were convinced that many TNCs paid little or no taxation in Australia, or only came here because this country was rich in natural resources. In April 1998, it was reported from Australian Taxation Office (ATO) figures that 55.3 per cent of TNCs paid no tax in 1995/96, up from 53.3 per cent in 1994/95.[4]

6.7 Broadly, these witnesses argued that as so many TNCs paid no tax now, the necessary burden of contributing revenue for the operation of

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2 See, for example, Transcripts: 6 May 1998, pp. 66, 75, 16 July 1998, pp. 173, 175, 178, 24 July 1998, pp. 257, 264, 268-269, 14 August 1998, p. 340, 21 August 1998, pp. 390-391, 403, 446.

3 Transcript, 21 December 1998, pp. 473, 478, Submissions, pp. 1747-1748.

4 See, for example, Submissions, pp. 1747, 2459, Transcripts: 16 July 1998, pp. 184, 187, 188, 24 July 1998, pp. 199, 241, 259, 260, 262, 21 August 1998, p. 443. Exhibit No 65, p. 1, put the other side of the argument: that TNCs provide capital and technology which raise output, employment and incomes. The report on TNCs and tax was in *The Australian Financial Review*, 3 April, 1998, p. 1. It should be pointed out that the figures on which this article was based used raw data and did not distinguish between Australian and internationally controlled TNCs. See also Senate, *Hansard*, 7 April 1998, pp. 2166-2167, for a Question without Notice on this matter.

government came from ordinary citizens. There would be no incentive for additional payments from these firms if the draft MAI were introduced.[5]

6.8 Another group of witnesses noted the reported comment of Mr Renato Ruggiero, Director-General of the WTO, in December 1996: 'We are writing the constitution of a single global economy'. This was linked to concerns about 'government by faceless people in other countries', or government by 'the new world economic order'.[6]

6.9 Perhaps more significantly, many of those who gave evidence were at pains to point out that they were not opposed to an international agreement to regulate the movement of FDI. They were opposed to the general approach of, or specific provisions in, the draft MAI.[7]

Sovereignty

6.10 The first submission received by this inquiry in the 38th Parliament stated that the Queensland and Australia First Campaign believed that the draft Agreement was 'a mandate to impose international trusts upon this nation and to destroy our sovereignty and our ability to choose in a free market'. Many submissions expressed this point of view in succinct statements. A number of other witnesses were concerned about the impact of the draft MAI on the right of the nation state to regulate the movement of international capital.[8]

6.11 Mr Robert Downey argued that, without economic independence, no nation state can have political independence. He saw the draft MAI as evidence of the gradual process towards 'one world economic order', in the sole interests of a few TNCs and not in the interests of the people of the world in general.[9]

6.12 Mr Rick Brown of the NCC saw the draft Agreement as 'demonstrably' eroding sovereignty and opposed 'any further undermining' of Australian sovereignty. The ACTU believed that the

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5 See Transcript, 24 July 1998, pp. 259, 260.

6 See Submissions, p. 39 and Transcript, 24 July 1998, p. 264; Submissions, pp. 206, 1739, for Mr Ruggiero's reported comment. For examples of 'government by faceless people/new economic order' comments, see Transcript, 24 July 1998, pp. 199, 241, 261, 264, 268.

7 See, for example, Transcripts: 6 May 1998, pp. 68, 74, 16 July 1998, pp. 118, 122, 24 July 1998, p. 228, 21 August 1998, pp. 390, 401, 416, 21 December 1998, p. 473. Submissions, p. 1914.

8 Submissions, p. 1. Many of those who expressed concerns about sovereignty also referred in their submissions to what they saw as the secrecy surrounding the negotiation of the draft MAI.

9 Submissions, p. 102, Transcript, 24 July 1998, p. 199. Mr W A Edwards, Submissions, p. 465, expressed the same view.

draft Agreement was not in Australia's interests: it represented a bill of rights for TNCs with no provision for sovereign national governments. In the era of globalisation, it argued that these governments needed to provide public infrastructure and social services to help the community to adjust to changes. It asserted that the draft MAI limited governments' capacity to do this, and added that it potentially undermined trade liberalisation.[10]

6.13 Mr Claude Piccinin of the BCA, however, was not convinced of the risk to sovereignty because the intention in the draft Agreement had been that the same laws that applied to Australian companies ought to apply to any international investor in this country. The Council noted that other submissions had asserted that the draft MAI would have reduced Parliamentary sovereignty by restricting the way in which foreign investment was to be treated. It believed that the issue was not whether governance was restricted, but whether it was restricted in a desirable manner.[11]

6.14 Mr Mark Paterson of the ACCI noted that it had been said that the process of negotiating the text might threaten Australia's sovereignty. It referred to the number of other treaties Australia had previously signed, including the bilateral international instruments that deal with investment, so that this country was already a participant in the existing international investment regime. It questioned why Australia's sovereignty had not been threatened when it had entered into this range of other international treaties.[12]

6.15 Dr Graham Dunkley of CAA stated that the draft Agreement would seriously limit the ability of governments to regulate investment in the public interest, transferring control over decisions to unaccountable companies. It observed that it would like to see national sovereignty maximised at the same time as 'some sort of useful uniform regulations' for foreign investment were introduced.[13]

6.16 In his consideration of the provisions for withdrawal from its provisions, Mr David Grace noted that the effect of the draft Agreement was to remove from a government's successors the right to review the security of a nation. Signature of such an agreement, he believed, would

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10 Submissions, pp. 841-842, 2458, Transcript, 16 July 1998, p. 106.

11 Transcript, 16 July 1998, p. 144, Submissions, p. 2661.

12 Transcript, 6 May 1998, pp. 89-90.

13 Submissions, p. 1699, Transcript, 16 July 1998, p. 159.

have been contrary to the democratic principle that no government may bind its successors.[14]

The 'secrecy' of the negotiation process

6.17 Treasury pointed out that the OECD, and Australia, had been involved in international treaties or agreements related to the movement of capital since the 1960s. The decision to move into negotiations on the draft MAI was made public by a communique in May 1995. While it was not usual to release early drafts of the texts of multilateral agreements, it had never been a secret that negotiations on this matter were under way.[15]

6.18 Mr Downey believed that there had been 'a sense of secrecy' about the draft Agreement in its early stages, and that this was 'obscene'. He also observed that there was a lack of trust and a fear that whatever this Committee recommended would not have an impact on Government.[16]

6.19 The BCA pointed out that an ALP Information Sheet had publicised the fact that the text of the draft Agreement was available from, and regularly updated on, the OECD's web site. The schedule of Australia's reservations to the draft MAI was also available on Treasury's web site. These facts suggested to the BCA that the negotiations could not have been secret.[17]

6.20 Ms Ranald stated that, until February 1998, the Australian Government had not produced one substantial document on the draft MAI. On 20 February, in response to 'growing public concern', Treasury had released a summary document of the Government position which incorporated a general defence of the draft Agreement. She also stated that for two years, the OECD and national governments refused to release an official version of the draft text of the document.[18]

6.21 The ACTU agreed with Ms Ranald, and asserted that there had been 'grossly inadequate' opportunities for public debate in Australia regarding the 'intention, provisions and merits' of the draft MAI. This

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14 Submissions, p. 1322, Transcript, 24 July 1998, p. 267.

15 Transcript, 6 May 1998, pp. 20-21, Submissions, p. 1294.

16 Transcript, 24 July 1998, p. 198, Submissions, p. 99.

17 Submissions, p. 1963.

18 Exhibit No 1, pp. 13, 20.

document also listed the areas of Australia's exceptions, but it provided no details of what legislation would be exempted.[19]

6.22 In its submission, ACOSS referred to the revised procedures for treaty-making which were introduced in 1996, and of which the creation this Committee was a part. It drew attention to the level of dissatisfaction in many sections of the community about the information which had been provided about the draft MAI. It suggested that we should establish whether the spirit and letter of the 1996 reforms were followed in the supply of information to those with an interest in the draft MAI.[20]

Rollback, standstill and exceptions

6.23 The provisions for rollback, standstill and exceptions which were to have been included in the draft MAI attracted a range of comments during the inquiry. These also related to concerns about various rights and guarantees in a number of areas.

6.24 In general comments in its submission, the Aboriginal and Torres Strait Islander Commission (ATSIC) stated its considered judgement was that the draft MAI would have seriously impeded its ability to carry out its functions in law, as well as preventing it from meeting its corporate goals. It also stated that Australia should not be a party to an agreement which granted TNCs the same status as democratically elected governments, and which favoured TNCs' rights above the rights of its citizens.[21]

6.25 This submission noted that the apparent intentions of standstill and rollback provisions had been to ensure that there could be no increase in the scope of country-specific exceptions, and that these would be eliminated over time. It also noted that Australia had included 'Indigenous persons' as an exception, but added that concerns remained about the effect of standstill and rollback on this exception. It asked, if this exception had been subject to these provisions, what safeguards would have remained to ensure the rights of Indigenous persons in such legislation as, for example, the *Native Title Act 1993*.[22]

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19 Submissions, pp. 1668-1669.

20 Submissions, p. 1504.

21 *ibid*, pp. 1441, 1445.

22 *ibid*, p. 1441. Australia's 'Revised Schedule of Preliminary Reservations (October 1997)', tabled on 31 March 1998, included an exception for 'indigenous persons'. This exception covered national treatment, most favoured nation treatment, performance requirements and dispute settlement. Australia reserved 'the right to adopt or maintain non-complying measures in

6.26 ATSIC pointed out that, as tabled, the exception provided little information about its implications. There had been no consultation with Australia's Indigenous peoples to determine the rights and interests to be protected, regardless of whether or not it would have been possible to maintain this exception. It called for clarification of:

- the intent of standstill and rollback provisions;
- the right of governments to apply additional exceptions according to national circumstances, and
- the extent to which any exceptions would have been able to stand permanently outside standstill and rollback provisions.[23]

6.27 ATSIC's submission referred to recognition in the preamble to the draft Agreement of environmental protection and observance of core labour standards. It then expressed serious concerns about the effect its provisions would have had on human rights: in particular, the lack of recognition of the intrinsic rights of Indigenous peoples of any nation. It held grave concerns about the Australian Government's ability to protect the rights of its Indigenous people, especially given this lack of recognition in the preamble.[24]

6.28 It believed that the draft MAI's capacity to override national legislation suggested that Australia's ability to pursue human rights for its Indigenous people, through the recognition of native title and the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*, could have been seriously undermined. There could also have been ramifications for the protection of indigenous cultural heritage if foreign investors had been able to challenge legislation, such as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, in order to pursue their interests within Australia.[25]

6.29 ATSIC's specific concerns related to:

- land rights and native title;

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relation to preferences provided to indigenous persons.' The legal sources for this measure were given as Australia's foreign investment policy and the 'Native Title Act and any other existing or future measure': see Page 35 of the tabled material.

23 *ibid*, p. 1441.

24 *ibid*, p. 1442.

25 *ibid.*

- economic development
- industrial relations, and
- the issue of rights versus obligations.[26]

6.30 As a minimum, ATSIC believed that the Australian Government should have clarified the status of Indigenous peoples in terms of the employment requirements and the performance requirements in the negotiating text. The Australian Government should also have ensured that the preamble and the text of the draft MAI had given effective weight to environmental and social development considerations.[27]

6.31 AI noted that the draft Agreement had potential implications for the regulation and protection of human rights. Its principal weakness was that it afforded rights to TNCs without imposing any obligations. AI noted that TNCs are not bound by any international human rights treaties and that, under the draft MAI, they received the rights while governments were given the responsibilities.[28]

6.32 AI's position was that any international agreement relating to trade 'must act to protect and uphold human rights principles'. There were no provisions in the draft MAI that ensured protection and enforcement of the rights of individuals against TNCs for anti-competitive business practices, poor labour practices, behaviour damaging to local communities or other unethical behaviour. AI noted that Australia was bound by international obligations to ensure such protection and enforcement.[29]

6.33 Dr Goodman compared the strength of the enforcement mechanisms in the draft MAI with international conventions on human rights, and conventions on environmental matters such as the Rio Declaration. He noted that the draft Agreement had provided very strong enforcement mechanisms at the expense, potentially, of those other areas of rights. He expressed the view that, if obligations under the draft Agreement had come into conflict with other international obligations, the former would have taken precedence.[30]

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26 *ibid*, pp. 1442-1443.

27 *ibid*, p. 1443.

28 *ibid*, pp. 1932, 1933.

29 Transcript, 21 August 1998, p. 401, Submissions, p. 1933.

30 Transcript, 21 December 1998, p. 477, Submissions, p. 1745.

6.34 Dr Goodman stated that documents obtained through FOI requests had revealed that Australia argued for a treaty which would have been about property rights solely. Any reference to environmental or labour rights would simply have been in the form of recognising that these were issues, but not that they were enforceable.[31]

6.35 Mr Sanders argued that the draft Agreement should have fully protected Australia's culture; the environment, including the resource base; labour standards; health; education; social services, and other public sector activities at all levels of government.[32]

6.36 Ms Ranald expressed the view that the rollback and standstill provisions of the draft Agreement would have made it very comprehensive and powerful in its impact on current and potential legislation, and on other government measures.[33]

6.37 Mr Brown of the NCC did not have any faith in the protection afforded by the provisions that were included in the draft Agreement for exceptions. He noted the stated position of the negotiators: all Parties' non-complying matters were to be removed from the document over time. He commented that, among other measures, standstill and rollback provisions would have meant that any exceptions submitted by Australia were unlikely to have been effective. He also pointed out that exceptions would not have been allowed once the draft Agreement had been signed, and that no guarantee could have been given that Australia would not have been pressured to reduce the number of its exceptions.[34]

6.38 Mr Ted Murphy supported the NCC's view on the effectiveness of exceptions by pointing out that the only provision in the draft Agreement for them had been for matters included in Annex A. This would have confined the impact of such country-specific exceptions to preserving measures, policies, procedures and regulations which had existed at the time of the entry into force of the draft Agreement. These would only have been preserved, he said, to the extent to which there had been no increase in the level of non-conformity with its provisions.[35]

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31 Transcript, 21 December 1998, p. 480.

32 Transcript, 6 May 1998, p. 75.

33 *ibid*, p. 66.

34 Submissions, pp. 840, 2457, Transcript, 16 July 1998, pp. 108, 103-104, Submissions, p. 845.

35 Transcript, 16 July 1998, p. 120. His views on exceptions to the draft Agreement were set out more fully at Submissions, pp. 1790-1793.

6.39 Further, because of the ratchet effect operating under Annex A, an Australian government could not have subsequently returned policy or regulation to the level of non-conformity which had been in operation when an exception had been entered. Mr Murphy suggested that, rather than preserving political autonomy, a government could not have nominated new regulations or policies which would have increased the degree of non-conformity with the draft MAI.[36]

6.40 Secondly, if a government at any time liberalised to some degree, that would have been the benchmark at which the draft Agreement continued to apply. A later government could not have reversed that policy while the draft MAI had been in place. Even if that later government had withdrawn from the draft Agreement, he said that investments benefiting from those additional liberalising measures would have been protected by its provisions for a further 15 years.[37]

6.41 Mr Murphy saw this as a proposal which went well beyond the domestic political cycle of governments in a democratic system. He observed that the suggestion that exceptions would have given a Party the capacity to deregulate and exercise political sovereignty in particular areas was based on Annex B which had not been included in the draft document.[38]

6.42 Mr Murphy also expressed the view that supporters of the draft MAI should not convey the impression that country-specific exceptions would have allowed governments to exercise full policy discretion in any of the nominated fields. He said that this was not supported by the text.[39]

6.43 Mr Leigh Hubbard of the VTHC noted that the nature of Australia's draft exceptions had been indicated by the Government without much consultation of other tiers of government, or the community. He added that he believed that rollback and standstill provisions were 'excessive'.[40]

6.44 Mr Paterson of the ACCI had major problems with some of the country-specific exceptions. The inclusion of environmental measures, the proposed inclusion of labour standards and the proposed inclusion of

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36 Transcript, 16 July 1998, p. 120.

37 *ibid*, pp. 120-121.

38 *ibid*, p. 121. See paragraph 4.24.

39 Submissions, p. 121.

40 Transcript, 16 July 1998, pp. 119, 123, Submissions, pp. 1916-1917.

extra-territorial application of laws, particularly by the USA, were examples of these concerns.[41]

6.45 Mr Piccinin of the BCA expressed concern that the exceptions which Australia had planned would have been 'a very bad example' to other nations which were negotiating the text, and ought to have been transparent. It would also have been preferable if the exceptions proposed had been industry-based, rather than expressed in such loose, general terms which, in any event, would have been difficult to enforce. The BCA saw such loosely defined exceptions as inviting subsequent disputation, possibly in international forums.[42]

6.46 The BCA also agreed with Mr Murphy in seeing little point in signing a treaty designed to provide equality of treatment for foreign investors and, through exceptions, then seeking to exclude sectors of a national economy from its provisions.[43]

6.47 Ms Lisa Kent of CAA pointed out that the growing list of exceptions before the cessation of negotiations had added to the case being mounted against the draft MAI, if only because there was a possibility that it would have been unable to function. Mr Ralph Evans and AUSTCARE's Major General Warren Glenny (Rtd) supported this view, with the latter expressing concern about the certainty of exceptions with the accompanying features of standstill and rollback.[44]

6.48 Mr David Barnett expressed the view that existing laws which conflicted with the draft Agreement would be subject to rollback. This would have meant the gradual phasing out of those laws. He said that under the standstill provisions, governments would not have been able to enact and enforce new laws to protect Australia's culture, environment and indigenous and economic rights. His views were supported by a number of the private citizens who gave evidence to the inquiry.[45]

6.49 The Queensland Conservation Council (QCC) objected very strongly to the approach in the draft Agreement to exceptions. It believed

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41 Transcript, 6 May 1998, pp. 92-93.

42 Transcript, 16 July 1998, pp. 135, 138, 136, Submissions, pp. 1967, 2662. Footnote 12 to Section IX of the negotiating text set out the format which had been followed when initial lists of country-specific exceptions were submitted.

43 Submissions, p. 2662.

44 Transcripts: 16 July 1998, pp. 151, 158, 21 August 1998, pp. 368, 389-390, Submissions, p. 1707.

45 Transcript, 16 July 1998, p. 173.

that because of standstill it would have prevented Australia from filing any exceptions in future, and that any exceptions which had been accepted would have been subject to rollback and peer review.[46]

6.50 Its Chair, Dr Carol Booth, noted that an exception on environmental standards was proposed, but had not been agreed. She believed Australia should have proposed a very general exception, covering existing and future environmental regulations. Such an approach would have avoided exposure to rollback. Dr Booth suggested that the draft MAI had appeared to inhibit the capacity of governments to enact and enforce regulations to protect the environment.[47]

6.51 Associate Professor Jan McDonald, of Bond University Law School, noted the conspicuous absence of environmental protection laws from the list of Australia's exceptions. She commented that this list highlighted concerns about the in-roads that the draft Agreement might make on Australia's democratic processes.[48]

6.52 Professor McDonald agreed that the draft Agreement had needed a broad environmental exception embedded into the text, rather than a country-specific exception. Such an exception should have covered explicitly inconsistent measures that might have been taken pursuant to an MEA such as the Montreal Protocol or the Basel Convention. This arrangement would have provided a means of dealing with a situation where disputants were both Parties to the MAI, but only one was a Party to the particular MEA.[49]

6.53 Ms Vivienne Filling of the AIG stated it would have opposed accession to the draft MAI if the list of Australia's exceptions was negotiable. The AIG recommended that Australia participate in negotiations on the basis that all of its exceptions would be accepted, and that this position be non-negotiable. Its submission drew attention to the lack of agreement on a number of key issues relating to exceptions during the negotiations.[50]

6.54 Mr Brendan Hartnett, representing the Local Government and Shires Association of NSW (LGSA), had concerns about rollback,

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46 Submissions, p. 2354.

47 Transcript, 24 July 1998, pp. 211, 215-216, 217.

48 Submissions, pp. 2178-2179.

49 Transcript, 24 July 1998, p. 220.

50 Transcript, 14 August 1998, pp. 344, 339, Submissions, pp. 2037-2038, 2041.

standstill and the fact that an exception had not been proposed for local governments' operations in Australia. He believed that such an exception would have been needed in such areas as planning and environmental provisions. Local government needed to be able to make decisions for their communities, rather than in the interests of TNCs. They might also wish to support local preference.[51]

6.55 Mr Stuart Hamilton of the AVCC saw no case for rollback of an exception on government grants and subsidies as these should have been ongoing, with no requirement for change. He pointed out that, while there had not been a specific exception proposed for private education, Section III of the draft Agreement had included a provision which would have allowed the maintenance of quality standards between a international investor and a domestic investor. This would have allowed Australia to take action to maintain standards within the tertiary education sector.[52]

6.56 Mr Ralph Evans noted that there were a number of exceptions which built into the draft Agreement as nations had tried to protect areas where they had concerns, and commented that the text had become 'quite incoherent' after a time.[53]

6.57 Mr Roche of the ASX thought that it was appropriate for Australia to propose exceptions which would protect its interests and reflect the views of its community.[54]

6.58 Mr Graeme Evans of ACOSS noted that, in spite of what had been in the text, it was likely that what had been proposed for the rollback and standstill provisions would have had to be amended as a result of experience of the document in action.[55]

6.59 The Australian Broadcasting Authority (ABA) stated that the potential impact of any trade agreement on the cultural industries sector warranted consideration during negotiations. One way of assuring this would have been to include a general exception for cultural industries. Professor David Flint, Chairman of the ABA, said that it had been that body's belief that regulation of broadcasting to protect local content

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51 Transcript, 14 August 1998, pp. 354-355, Submissions, p. 1893. Local government's other concerns about the draft Agreement will be addressed later in this Chapter.

52 Transcript, 14 August 1998, pp. 348, 347-348, Submissions, p. 1826.

53 Transcript, 21 August 1998, p. 368.

54 *ibid*, p. 380.

55 *ibid*, p. 414.

should have been included in the exceptions in Annex B to the draft Agreement.[56]

6.60 The Australian Society of Authors (ASA) called for Australia to insist on the introduction of a cultural exception in the draft Agreement. Without such an exception, Australia would have been deprived of its right to determine its own national and cultural sovereignty.[57]

6.61 Mr Hamish McDonald of the ASA agreed with the point made by Mr Hamilton of the AVCC about an exception on government grants, noting that such matters as broadcasting, newspapers and television would have been included in Annex A and would therefore only have been subject to standstill. Mr McDonald also referred to the need for either a general or a country-specific exception for cultural matters in the draft MAI.[58]

6.62 He outlined the situation in the USA, where a large proportion of cultural grants are made by private foundations and charities. As private entities, these would not have been bound by the national treatment, most favoured nation or performance requirement provisions of the draft Agreement. They would have been able to continue to discriminate in favour of bodies or citizens of the USA, and Australian investors there would not have had any recourse. By contrast, private cultural philanthropy was not well developed in Australia and, without protection by exception, cultural bodies here would have been at a comparative disadvantage.[59]

Expropriation and compensation provisions

6.63 Mr Sanders stated that the definition of expropriation was too broad and said that the words ‘having equivalent effect ‘should have been deleted from the text. He expressed the view that protection by nations was required, in particular, against expropriation or other measures which international investors could have taken through the right to sue governments, conferred by the provisions of the draft Agreement. This, he believed, would actually have given international investors coercive powers over governments.[60]

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56 Submissions, p. 2068, Transcript, 21 August 1998, p. 421.

57 Submissions, p. 1659.

58 Transcript, 21 August 1998, pp. 432-433. See also paragraphs 5.87-5.88 and 5.93.

59 Transcript, 21 August 1998, p. 433.

60 Submissions, p. 641, Transcript, 6 May 1998, p. 75.

6.64 The NCC's Mr Brown was also concerned about the wide definition of expropriation in the text of the draft MAI. Since all levels of government would have been bound by the draft Agreement, it appeared, for example, that a re-zoning decision by a local government authority could be defined as expropriation. Such a situation could have placed international investors in superior positions to Australian investors. He pointed out that it would not have been possible to include an exception which objected to a definition in the text.[61]

6.65 He believed that, to deal with these concerns, it would have been necessary to remove the words 'directly or indirectly' and 'having equal effect' from the definition in the draft text. Alterations would also have been required to the dispute resolution process.[62]

6.66 Mr Murphy pointed out that the exception mechanism could not have been used to qualify the expropriation provision. The negotiating text was widely defined to go beyond nationalisation and could have included certain taxation measures. Among other things, this provision reflected on the adequacy of the exception mechanism.[63]

6.67 Councillor Andrew Rowe of the VLGA was also concerned about the expropriation provision. He believed that, because TNCs could have sued for damages for any legislation which increased their costs, such as wages, social and environmental standards, governments would have been hampered in the introduction of measures to improve local conditions. If an international investor had been successful in an action, he stated, the award of damages could have posed a significant threat to the viability of a local government body.[64]

6.68 Dr Booth of the QCC saw the expropriation and compensation provisions representing the potential for international investors to challenge existing and future environmental legislation. They would have enabled compensation demands for any regulations or actions which reduced profitability. The definition in the text gave such scope that she

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61 Submissions, pp. 840-841, Transcript, 16 July 1998, pp. 103, 108-109. There was support from Mr W E Edwards and QCC for concerns about the broad definition of 'expropriation': see Transcript, 24 July 1998, pp. 202, 212.

62 Transcript, 16 July 1998, pp. 111-112.

63 *ibid*, p. 121. See Submissions, p. 1299 for the reference to taxation.

64 Transcript, 16 July 1998, p. 173, Submissions, p. 1894.

said it was possible that changes to the conditions of a licence or permit could have been deemed to be expropriation, and attract compensation.[65]

6.69 Associate Professor Jan McDonald said that the expropriation provision had been 'the most concerning' of the draft MAI from the perspective of people concerned with the pursuit of higher environmental management, labour and occupational health and safety issues. It was an area where there had been a real risk of international investors being treated more favourably than local investors. This was so because of the dispute resolution procedures in the text of the draft Agreement, and current constitutional interpretations of what amounted to expropriation or acquisition as matters of domestic Australian law. She believed that this provision would have to have been much clearer about the meaning of 'normal regulation' by governments.[66]

6.70 She pointed out that international investors were to have been given certain rights under the draft MAI for expropriation of investment assets. There would have been certain environmental regulations which would arguably constituted expropriation as a matter of international law under the broad definition in the text. International investors would have been entitled to pursue a claim in a fast-tracked, international dispute resolution process. An Australian investor, subject to the same regulation, would not have enjoyed that right and would have had to pursue a remedy in an Australian court. Australian domestic law does not give compensation where reduced profitability or the overall value of an asset is caused by a change to regulations.[67]

6.71 Ms Anna Reynolds of the ACF noted the broad definition of the expropriation provision, such as use of the phrase 'having equivalent effect', and the possibility of a range of government actions leading to the payment of compensation. She believed that the expropriation rules in the text would have impacted radically on the willingness of governments to enforce existing laws, and the enactment of new laws to improve environmental standards, because of the increased threat of legal action. The implications of this provision would not have been clear until there had been awards of compensation against governments.[68]

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65 Transcript, 24 July 1998, p. 212, Submissions, pp. 2351-2353.

66 Submissions, p. 2174, Transcript, 24 July 1998, p. 220.

67 Transcript, 24 July 1998, p. 224.

68 Transcript, 14 August 1998, p. 331, Submissions, pp. 1754, 1758-1760.

6.72 In his submission, Mr Dennis Rose, an economist from NZ, drew attention to a linkage between the NT and the expropriation and compensation clauses of the draft Agreement. He believed that the combined effect of these provisions would have been to create advantages for international investors over domestic investors. [69]

6.73 He stated that the provisions of Section III, Treatment of Investors, and Section IV, Investment Protection, established two quite different standards. Section III would have required the host country to accord international investors 'treatment no les favourable' than it accords to its own investors. The Commentary to the negotiating text called this a 'relative' principle. Section IV would have required treatment no less favourable than that required by international law, and the Commentary referred to this as an 'absolute' standard.[70]

6.74 Mr Rose pointed out that these were very different reference points. The relative standard was anchored on the law and practice of host countries, whereas absolute standards were those established in international law through treaties, conventions and case law. He then cited cases which suggested that the draft MAI's appeal to treatment in accordance with international law was likely to have reached beyond the standards established by according NT to international investors.[71]

6.75 In some situations, the draft Agreement would have given international investors a greater degree of protection than that accorded by national laws to domestic investors. It was therefore wrong to infer that it would have created, subject to the exceptions submitted, equal treatment for international and domestic investors. He believed that the fundamental point was that, while NT accorded international investors similar or identical rights in terms of exposure to host countries' **national** law, the international investor could also have appealed to standards set in relevant **international** law.[72]

6.76 It seemed clear, therefore, that the draft MAI would have enabled international investors to initiate legal actions for damages in some circumstances where a domestic investor would have had no such grounds for action. Thus, international investors could have been able to secure compensation from host governments in situations where no such

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69 Submissions, p. 2550.

70 *ibid*, p. 2551, Commentary, p. 29.

71 Submissions, p. 2551-2552.

72 *ibid*, p. 2553.

compensation would have been payable to domestic investors. Mr Rose believed that any intentional tilt in the balance of advantage should go to the latter, consistent with the draft Agreement's provisions for country-specific exceptions.[73]

Dispute resolution process

6.77 Ms Ranald referred to the draft MAI in the context of other multilateral agreements, pointing out that governments were usually only able to take action against other governments. The draft Agreement would have allowed corporations or trans-national investors to sue governments for damages if measures had been taken detrimental to foreign investors. The potential to sue, perhaps for very large amounts in many cases if precedents under NAFTA applied, could have exercised a substantial limiting discipline on national governments.[74]

6.78 She said that the draft Agreement had proposed to give corporations the legal right to challenge national laws which protected the rights of individuals. Such challenges would have taken place in tribunals to which only governments and the corporations had access, and would have operated in the narrow framework of trade law contained in the text. It was her belief that only NAFTA operated this way, with the WTO using government-to-government dispute settlement mechanisms. This form of international regulation, she stated, was developed largely without public discussion or democratic participation.[75]

6.79 The NCC noted that an international investor could have chosen not to have a dispute settled by Australian judges in Australian courts, according to Australian law. The text provided for appointment by agreement between the Parties to a dispute of arbitrators who would, 'except for compelling reasons', be persons proposed by the Secretary-General of ICSID. It stated that Australia's national interest required the maintenance of national sovereignty, and that the tribunals which would have been appointed under the draft MAI were therefore unacceptable.[76]

6.80 While dispute resolution processes were seen as common in commercial treaties, the NCC saw that the effect of the mechanism in the draft MAI was resolution of disputes by people who were not Australian,

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73 *ibid*, pp. 2554-2555, 2550.

74 Transcript, 6 May 1998, p. 66, Exhibit No 1, p. 21.

75 Exhibit No 1, p. 21, Transcript, 6 May 1998, p. 68.

76 Submissions, p. 842.

not lawyers, and by tribunals which would not necessarily apply Australian law. Any participant could have prevented the proceedings from being public. Mr Brown saw little difference between the process set out in the text and that of UN human rights committees coming to this country and adjudicating on matters using criteria which were not necessarily consistent with Australia law.[77]

6.81 The ACTU pointed out that the binding dispute settlement procedure could have occurred between nations or between a nation state and a TNC. An aggrieved investor could have taken a nation before a domestic court or the proposed international body. No reciprocal right existed for governments, workers or citizens to take action against a TNC through such a process. Findings would have been binding on nations. It recommended that the draft Agreement be redrafted to allow governments, workers and citizens to have the same rights as TNCs in dispute settlement.[78]

6.82 One of the two areas of concern about the draft Agreement for the BCA was the lack of detail in the dispute resolution process. It believed that it would have been important to avoid the possibility of increasing litigation costs and time associated with approvals for FDI. It saw this process would have been crucial in countries where the foreign investor believed equitable treatment would not have been available in the courts of the host country.[79]

6.83 It saw a need for clarification of a number of issues to provide for the efficient and effective resolution of disputes. While the draft Agreement provided for a clear and exclusive procedural choice between domestic courts and an international forum. The BCA believed that there should be a choice, but that it should not lead to secondary litigation where an adverse decision had been reached in the jurisdiction of first choice. It also believed that third parties should not be recognised or have standing in an international dispute procedure, and that the text should have specifically excluded such recognition or standing.[80]

6.84 The Council asserted that such a position would not have diminished the host country's ability to pursue social, environmental, labour, human rights and indigenous protections, since the foreign

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77 Transcript, 16 July 1998, pp. 103, 111-112, Submissions, pp. 841-842.

78 Submissions, p. 1672, Transcript, 16 July 1998, pp. 126, 118.

79 Transcript, 16 July 1998, p. 134, Submissions, pp. 1962, 1965.

80 Submissions, p. 1965, Transcript, 16 July 1998, pp. 147-148.

investor would have had to abide by all national laws. It believed that recognition of third parties would have restricted the ability of the host country to make domestic law, especially in the period immediately before an investment was made in a foreign country.[81]

6.85 Associate Professor McDonald believed that the process needed a provision for civil actions by members of what she called 'international civil society' to even up the balance of investor rights and obligations. She was also concerned about the likely lack of use of the domestic legal system, because what she saw as the highly pro-investor, fast-track international mechanism would be used for its cheapness and speed. The investor would also get a choice of one of the three people on the panel and, according to Professor McDonald, would have seen this as an infinitely preferable mechanism to use of the Australian legal system.[82]

6.86 Professor Hiscock shared her colleague's concern about the composition of dispute resolution panels. She did not see the point of establishing yet another series of tribunals when there might have been existing bodies which could have been used. She also said that there was not a single, integrated dispute resolution process in the draft Agreement, as there was in ICSID. This situation could have led to a plurality of paths for resolution of a set of events. The text had allowed the complainant a choice in such cases. This raised the question of what measures might be taken by a nation for non-compliance with the results of a chosen process, and if those measures then became the basis of the invocation of a different set of procedures under a different treaty.[83]

6.87 The ACF's submission stated that the dispute resolution process in the draft Agreement should have reflected basic principles of equality under the law. Citizens and governments had to have reciprocal rights to bring claims against international investors who had acted unreasonably and caused damage.[84]

6.88 Ms Reynolds of the ACF expressed concern about 'the culture of litigation' which the draft MAI would have provided. The ACF had had experience of the WTO's dispute resolution process and saw problems with the various protections the draft Agreement had included for national governments which would not be effective in dispute resolution

81 Submissions, p. 1965.

82 Transcript, 24 July 1998, pp. 221, 226, Submissions, pp. 2175-2176.

83 Transcript, 24 July 1998, p. 229, Submissions, p. 2202.

84 Submissions, p. 1767.

processes. She suggested that panels would probably have been made up of investment experts, interested in the implementation of the draft Agreement and ensuring that investment liberalisation occurred around the world.[85]

6.89 Ms Filling said that the AIG recognised the fundamental relationship between certainty and transparency and the need for adequate dispute resolution mechanisms. It would have, however, strongly opposed the implementation of any such mechanism which would have had the effect of removing Australian sovereignty over industry and investment policy.[86]

6.90 Mr Rory Sullivan of AI said that the draft MAI had given TNCs 'incredible' rights without corresponding obligations. The model proposed for dispute resolution had relied on 'closed door' procedures, without providing opportunities for NGOs to participate. AI believed that increasing rights were being given to TNCs so that they would be given the right to challenge any domestic law in an international forum, with the result enforceable in a domestic court.[87]

6.91 Traditionally, the subjects of international law were national governments, and international law was not moving with the increased role that business was now playing in trade and human rights. AI believed that the protection of human and other rights was a fundamental right of Australians which should in no circumstances be open to challenge by TNCs on the basis that these rights were anti-competitive.[88]

6.92 It would like to have seen hearings in public, with public findings and NGOs given standing in the process. AI was also concerned that there was no dispute mechanism for, or monitoring of, TNCs which flagrantly violated human rights.[89]

6.93 ATSIC noted that the only access to the dispute handling system of the draft Agreement would have been by investors or other national governments: there was to have been no access by individuals or other organisations. It said that rights would have been created for investors which would have been enforceable under local law and by international

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85 Transcript, 14 August 1998, pp. 329, 332.

86 Transcript, 14 August 1998, pp. 339-340, Submissions, pp. 2041-2044.

87 Transcript, 21 August 1998, pp. 402, 405.

88 Transcript, 21 August 1998, p. 405, Submissions, pp. 1935-1936.

89 Transcript, 21 August 1998, p. 406.

arbitration. It believed that individuals or organisations which were directly affected ought to have had similar rights to present their cases to any tribunal which might have been considering a dispute between an international investor and a nation.[90]

6.94 The Commission believed that the Australian Government should have ensured the draft MAI's dispute resolution mechanism was democratic in nature, permitting civil society to participate fully in a process which could have held international investors to account for their actions. Australia's Indigenous peoples should also have been fully informed of their right of access to a democratic dispute resolution process.[91]

Provisions for withdrawal

6.95 Mr David Grace did not believe that five years was a reasonable time to be bound by an agreement before notice to withdraw from the draft MAI could be given. He thought that three years should have been the maximum period. Protection of investments for a further period of 15 years was also too long, and he believed that a decade should have been a sufficient period.[92]

6.96 While the time frame in the text was consistent with objectives of transparency and certainty, the AIG saw the extended withdrawal period as a concern about the draft MAI. Binding a government for a minimum of 20 years would have, in its view, placed significant restrictions on a government's ability to exercise control over investment in its national interest.[93]

6.97 Major-General Glenny (Rtd) of AUSTCARE pointed out that, while five, 15 and 20 years might be short periods in the investment community, to the people with whom it existed to help these were long periods when work and daily food were needed.[94]

6.98 The BCA drew attention to the time it took to reap the benefits of investment, particularly given the long approval processes and construction periods for infrastructure or greenfield site projects.

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90 Submissions, p. 1444.

91 *ibid.*

92 Transcript, 24 July 1998, p. 267, Submissions, p. 1322.

93 Submissions, p. 2032

94 Transcript, 21 August 1998, p. 393.

Notwithstanding the electoral cycle in Australia, the Council believed that the times proposed for withdrawal from the draft Agreement and subsequent protection of investments was 'understandable and appropriate' in determining compensation in the event of expropriation. It also noted that legislation often included 'grandfather' clauses to protect individuals who had acted according to the previous legislation.[95]

Performance requirements

6.99 Mr Sanders believed that governments must be free to impose performance requirements on foreign investors to ensure benefits from investment remain in the host country. He pointed out that the draft MAI would have made it illegal to put such requirements on investors and that, in his view, this provision would have had a very negative impact on developing countries.[96]

6.100 The ACCI was of the view that a provision against such requirements was an essential element in such a draft Agreement. They were seen as distorting market-based commercial and industry decisions, as well as undermining competition and efficiency. The Chamber also agreed that the list of activities in the draft text to which these requirements should not apply, exports for example, was appropriate.[97]

6.101 The BCA commented that the draft MAI had gone to some lengths to prohibit performance requirements. At the same time, the Council claimed that the draft text had allowed such things as technology transfers, location of regional headquarters, mandatory regional or world market coverage, R&D expenditure, mandatory joint ventures with local participation and setting of minimum domestic employment levels, and equity participation if the foreign investor had received a compensating advantage from the host country. In addition, country-specific exceptions could have been lodged to define areas where international investment was not allowed or could be restricted.[98]

6.102 The VTHC's submission observed that Australia had been able to pursue comprehensive industry policies to ensure its interests were met, while adapting to the ever-increasing competition in international markets. Under the draft MAI, these policies, some of which were listed

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95 Submissions, pp. 2661-2662.

96 Submissions, p. 641, Transcripts: 6 May 1998, p. 76, 24 July 1998, p. 275.

97 Submissions, p. 1251.

98 *ibid*, pp. 1963, 2663.

in the BCA's submission, could have been challenged by international investors.

6.103 CAA saw the draft Agreement as seriously limiting the ability of governments to regulate investment in the public interest, and transferring control over investment decisions to unaccountable TNCs. It pointed out that this would have particularly affected developing countries. This would have prevented such countries from pursuing policies which involved a significant degree of state intervention, including regulation of international investment and export subsidies. CAA said that such approaches had been adopted by the successful OECD and East Asian economies in the early stages of their development.[99]

6.104 Poor countries were often weak compared to powerful TNCs, and the ability to impose controls was therefore often vital to prevent expropriation of excessive economic benefits from investments. The economies of many developing countries were often dominated by a few important sectors such as mining or agriculture. Governments therefore continued to retain powers controlling ownership and management of such sectors.[100]

6.105 CAA believed that wealthy countries, such as Australia, would also have been affected by a loss of control in this area. Many have restrictions on foreign ownership of key industries or sensitive sectors, require approvals for such acquisitions or insist on joint ventures.[101]

6.106 Dr Dunkley stated that it been proposed that the draft MAI exclude all performance requirements, but that more were restored during negotiations.[102]

6.107 Mr Edwards linked performance requirements with national treatment, observing the former would have limited Australia's ability to demand the things it needed to correct problems with its current account deficit, including such means as increased exports, reduction of debt and the use of local suppliers.[103]

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99 *ibid*, pp. 1699, 1704.

100 *ibid*, p. 1704.

101 *ibid*.

102 Transcript, 16 July 1998, p. 160.

103 Transcript, 24 July 1998, p. 202.

6.108 The QCC noted that the draft Agreement would have forbidden performance requirements, even though they would have treated domestic and foreign investors in the same way. It believed that there was potential for various environmental regulations and standards to be challenged as performance requirements. Its submission quoted evidence before a USA Congressional sub-committee that a 'ban on performance requirements is a slippery slope of environmental deregulation for foreign investors and companies'.[104]

6.109 Further, it said that the WTO and NAFTA experience had demonstrated that performance requirements for environmental outcomes did not usually survive challenge in a trade tribunal. Recent WTO rulings had demonstrated 'the prejudice for freedom of trade over rights of countries to enact legislation for environmental or health reasons'.[105]

6.110 The University of Queensland Student Union noted that the draft Agreement would not allow governments to demand that international investors satisfy certain performance requirements. New technology and research gained by international investors within a country would not have to be shared, and they would have been able to exploit developments without any benefit to the public which might have provided the funds. Universities that were owned overseas could not have been required to achieve given levels of R&D.[106]

6.111 In its submission, the ACF devoted considerable attention to performance requirements. While they were a legitimate tool of all levels of government in Australia, the draft MAI appeared to outlaw some of these measures, even if they were required of domestic investors. This would effectively have provided greater rights to international investors.[107]

6.112 While the right to require these measures had been reserved in all sectors at the Federal level, the ACF was concerned that the same situation did not apply environmental projects. It drew attention to a number of matters, including:

- the impact of the rollback provision;

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104 Submissions, p. 2350, Transcript, 24 July 1998, p. 211.

105 Submissions, pp. 2350-2351.

106 Submissions, p. 1830, Transcript, 24 July 1998, p. 235.

107 Submissions, p. 1760.

- the lack of agreement on a general exception for environmental measures during negotiations;
- possible conflicts for governments acting in accordance with MEAs;
- likely difficulties for governments to prove that measures were justified and in line with community expectations, and
- that attempts by governments under the narrow provisions of the draft MAI to address environmental issues via performance requirements would ordinarily be prohibited.[108]

6.113 The ACF believed that unless the draft Agreement had been drastically amended to create positive environmental outcomes, Australian governments would have been unable:

- to require that certain extraction techniques, or particular equipment, was used to avoid damage to environmentally sensitive areas;
- to require use of a certain domestic supplier whose products met high environmental standards;
- to place restrictions on the export of natural resources;
- to require a certain amount of research into improved environmental technology.[109]

6.114 The ACF had recommended that Australian negotiators extend the exception on performance requirements to all levels of government and oppose the inclusion of the rollback clause in the text. They should also have insisted that the performance requirements' environmental exception was strengthened, to ensure that 'justifiable' actions could not be challenged because they had been deemed to be unnecessary or unjustifiable.[110]

6.115 Ms Reynolds of the ACF expressed the view that governments were meant to be able to set performance requirements if they could

108 *ibid*, p. 1761.

109 *ibid*, pp. 1761-1762.

110 *ibid*, p. 1762.

establish that those measures were necessary to protect human health or the environment.[111]

Definitions of 'investor' and 'investment'

6.116 Several witnesses commented on the inclusion of what they regarded as broad definitions for terms such as 'investor' and 'investment' in the draft Agreement.[112]

6.117 In particular, the NCC suggested that the definition of investment was wide enough to include Australia's foreign debt: loans from international investors. It also pointed out that, given that definition, much more is invested in Australia than Australians invest overseas. At the end of December 1997, according to the NCC's submission, Australia's net foreign debt was $A220 billion and net foreign equity was $A98 billion. It did not think that overseas banks needed greater incentives to lend money to investors to buy shares in publicly listed companies.[113]

6.118 Professor Hiscock suggested that there should not be a characterisation of investment as 'foreign' or 'other'. She mentioned payment of compensation to an overseas joint venturer only as part of the negotiated settlement of the resolution of a dispute over Fraser Island in Queensland in the late 1970s.[114]

6.119 In his submission, Mr Grace noted the existence of processes in Australia to regulate international investment, observing that it was fundamental for the government to make decisions about investment in this country. He believed that present policies and practices should remain, and that there was no justification for entering into the draft MAI.[115]

6.120 Mr Gregory Boyd of the Global Learning Centre referred to a UN Development Program (UNDP) report which stated that 90 per cent of FDI circulated in North America, Europe, Japan and China, 30 per cent of the world's population, while the other 70 per cent of that population received only 10 per cent of that investment. He referred to the 'global

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111 Transcript, 14 August 1998, p. 329.

112 See, for example, Transcripts: 6 May 1998, p. 68, 24 July 1998, p. 202,

113 Transcript, 16 July 1998, p. 109, Submissions, pp. 844, 2458.

114 Transcript, 24 July 1998, pp. 231-232.

115 Submissions, p. 1321, Transcript, 24 July 1998, p. 269.

rhetoric' about universal benefits of liberalising trade and investment, while in reality only a small proportion of the world enjoyed those benefits.[116]

6.121 Mr McDonald of the ASA referred to the public lending rights (PLR) scheme which compensated Australian authors and their publishers for the free availability of books in public libraries. The definition of investment had included intellectual property rights, and this could have had serious consequences for the PLR. He noted that under that definition, and without either a specific exception for the PLR or a general cultural exception, it appeared that Australia would have had to make these payments to overseas authors from any part of the world for the use of their books in libraries on the same basis as Australian authors.[117]

6.122 This, he said, would destroy the PLR: its budget would probably have to be quadrupled or payments to authors scaled back to 'ridiculously low' amounts. Most payments would go to USA and UK authors. Australian authors might have got some return from the UK if its PLR scheme had been subject to the provisions of the draft MAI. Because the USA does not have a PLR scheme, there would have been no return at all.[118]

Investment protection

6.123 Ms Ranald referred to what she saw as the broad definition of investment protection, noting that it was likely to have a discouraging effect on the legislative ambit of governments.[119]

6.124 The BCA was aware of a common thread in some submissions which asserted that TNCs gained the right to equal treatment with other international and domestic investors, while governments were obliged to treat all investors equally. It believed that this was not the whole truth because international investors had had obligations placed on them: they would have had to obey all laws and regulations of the host country. It noted what it saw as the unspoken assumption that only international investors gained from investing in Australia. The Council took the view

116 Submissions, p. 2361, Transcript, 24 July 1998, p. 272.

117 Transcript, 21 August 1998, p. 433, Submissions, p. 1658.

118 Transcript, 21 August 1998, p. 433.

119 Transcript, 6 May 1998, p. 68.

that overseas investment provided net benefits to both those international investors and to Australians.[120]

6.125 The ACF saw the investment protection provisions in the draft Agreement as providing a very broad principle that governments would have had to comply within their treatment of international investors. Moreover, it did not specify an exception for actions taken to protect the environment.[121]

6.126 The ACF was concerned that the draft MAI promoted an international culture of companies litigating with governments when they disagreed, especially on environmental matters. It noted arguments that, as long as rules were applied to domestic and international investors equally, governments could take whatever actions they liked to protect the environment. The Foundation believed that this was a simplistic reading of the text, failing to recognise loopholes which might have allowed for corporations to litigate against government actions.[122]

6.127 The ACF also believed that use of the word 'unreasonable' in the text would have provided a very broad principle with which governments would have to have complied. This provision could have been used to challenge a government decision as a breach of the draft Agreement because it unreasonably affected an international investor, even if the same decision had also affected a domestic investor.[123]

6.128 Ms Reynolds drew attention to the implications of these alternative phrasings noting that, if 'unreasonable or discriminatory' had been agreed, a TNC could have made a case that it had been treated unreasonably and might not have needed to establish that there had been discrimination. She then linked investment protection with the expropriation provision, suggesting that compensation could have been required if it had been shown that government actions had affected a Party's enjoyment or maintenance of an investment.[124]

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120 Submissions, p. 2662.

121 Submissions, p. 1753.

122 Submissions, p. 1758.

123 *ibid.*

124 Transcript, 14 August 1998, p. 331.

Constitutionality of the draft Agreement

6.129 Mr John Wilson was one of a number of witnesses who commented on the draft MAI in terms of Australia's Constitution. He expressed the view that Australia could not have ratified it because an international tribunal, an integral part of the dispute resolution provisions in the text, had the power to over-rule laws made under Section 51 of the Constitution. This allowed the Commonwealth Parliament to make laws 'for the peace, order and good government' of the nation. He said that Section 52 stated that this power was exclusive to the Parliament and that there had to be a referendum, as required by Section 128, to alter this.[125]

6.130 To have ratified the draft Agreement would have been, according to Mr Wilson, an act or thing which sought to overthrow the Constitution 'by revolution', and the Parliament would have become an 'unlawful association'. Such matters are dealt with in the *Crimes Act 1914*. Therefore, he concluded, Australia had to withdraw from any negotiations or discussions posing such a threat.[126]

6.131 Mr D V Galligan QC referred to Section 51(xxix) of the Constitution, which gave the Parliament the power to make laws with respect external affairs, and to decisions of the High Court. He said that these decisions had had the effect of giving the external affairs power a means, independent of the Constitution, of enabling laws to be made on matters limited only by the nature of the particular international agreement. The result had been devastating to the States, but each agreement had also ceded some power to a body external to Australia.[127]

6.132 Mr Galligan stated that the draft Agreement would in effect have given over-riding sovereignty to TNCs. He believed that its aim was to enlarge and reinforce the powers of such bodies. Because of its one-sided nature and the abandonment of sovereignty to foreign bodies, he did not believe that the draft MAI was for the 'peace, order and good government' of Australia.[128]

6.133 Mr Thomas Bartos of Smith and Bartos observed that the application of the draft Agreement to sub-national parts of federations

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125 Submissions, p. 235.

126 *ibid.*

127 Submissions, p. 727. See also *ibid* pp. 129-130, for a similar view on the draft MAI as a breach of Section 51.

128 *ibid*, p. 728.

had been uncertain, and for resolution during further negotiation of the text. He stated that the Commonwealth Government should have decided whether or not the States/Territories would have been exempt from its provisions and, if so, framed an appropriate exception. The EU and USA had made statements or filed draft exceptions relating to sub-national units. Canada had decided that its exceptions would only apply to federal matters, and that provincial matters would have been considered later in the negotiation process.[129]

6.134 Mr Bartos also pointed out that a number of provisions in the Constitution that might have been effected by the draft MAI, in particular Section 51(xxxi), dealing with the acquisition of property. The scope of 'investment' in the draft Agreement might have been broader than the meaning of 'property' in the Constitution. It was possible that international investors might have been placed at an advantage in compulsory acquisitions, and there could therefore have been some tension between the draft MAI and the Constitution.[130]

6.135 Allen Allen & Hemsley referred to those who took a wide view of the potential effects of the draft Agreement in various areas, such as labour and environmental matters. It noted that the draft MAI could have been regarded as an appropriation of the powers given by the Constitution to the government or the Parliament, or both, particularly if the dispute resolution clauses applied.[131]

6.136 In response to these points, Allen Allen & Hemsley observed that labour and environmental matters could be covered by exceptions, and that there could be no abdication or appropriation of Commonwealth powers. The draft Agreement would have created constraints, such as not discriminating against investors, but such constraints via multilateral treaties were seen as a feature of the current world. Some treaties, such as the *Basel Convention for the Transboundary Movements of Hazardous Waste and their Disposal*, can generate very detailed rules that Parties are required to implement. An argument based on abdication of Commonwealth powers could be made as strongly, or more strongly, against such treaties, rather than against the draft MAI. Allen Allen &

129 *ibid*, p. 1549.

130 *ibid*, pp. 1549-1550.

131 *ibid*, p. 1569.

Hemsley concluded that there was not a constitutional issue in relation to the draft Agreement.[132]

6.137 Mr Robert Balzola opposed the draft Agreement on a number of grounds, believing that once ratified it would have resulted in all likelihood in further amendments to domestic laws. These in turn would have caused further corrosion of and conflict with other values which existed implicitly and explicitly within Australia's laws, policies and other treaties.[133]

6.138 He argued that the draft Agreement was an agreement between Parties: a contract enforceable at law, imposing rights and obligations. The subjects of these rights and obligations were the investors, and they would have received positive benefits. Those who were not Parties would have derived no contractual benefit from its provisions. Mr Balzola believed that ratification could only have served the interests of those who had the means to support further application of the draft Agreement over time.[134]

6.139 Some witnesses accused anyone, not excluding Parliamentarians, who was involved in the negotiation of the draft Agreement of treason. Others called for a referendum on this matter.[135]

6.140 A number of witnesses drew attention to the possibility of a future Federal government using the draft MAI as a means of encroaching further on the powers of the States/Territories.

Impact on State/Territory Governments

6.141 In general terms, the Victorian Government supported the attempt to negotiate a multilateral treaty on international investment. Its submission noted that the draft MAI could have had 'very significant ramifications' for Victoria. The Premier, the Hon Jeff Kennett MLA, was 'both surprised and concerned' about the lack of involvement of the States, and thought that the lack of information from the Commonwealth

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132 *ibid.*

133 *ibid*, p. 1952. See *Australian Treaty List, Multilateral* (as at 31 December 1998), Department of Foreign Affairs and Trade, p. 511, for some information about this Convention.

134 Submissions, pp. 1945, 1952.

135 To cite a few of many examples, see Submissions, pp. 72, 257, 315, 434, 574, 630, and pp. 230 328, 330, 335, 399, 417 respectively.

had exacerbated public concern about the potential effect of the draft Agreement.[136]

6.142 Victoria's support for the draft MAI would have depended on satisfactory resolution of these issues, and acceptance of its position on exceptions dealing with its laws and policies. While some briefings had been provided to Victorian Government officials since negotiations on the draft MAI had begun in mid-1995, the process should have involved more frequent consultations of the type provided by the Federal Canadian Government to its Provinces.[137]

6.143 The Premier said that, because of the importance of this matter, it was timely and necessary to establish a continuous process of detailed consultation between senior Commonwealth and State officials. Victoria reserved its final position until the then-current uncertainties were overcome, and it had had an opportunity to consider fully the implications of the draft Agreement.[138]

6.144 The Federal-States Relations Committee of the Victorian Parliament noted that the draft MAI had had the potential to affect the activities of the States during negotiations. It was therefore a prime example of a treaty that had required the input of the States, if their interests in the Federation were to be recognised and advanced.[139]

6.145 That Committee identified the following areas in the draft Agreement which would have been of concern to the States:

- investment incentives and local investment and development;
- regulation of Australia's non-banking financial institutions, and
- possible limits on the proper commercial jurisdiction of State Supreme Courts because of the use of international arbitration to resolve disputes.[140]

6.146 It believed that matters related to the draft MAI were of the utmost importance to Victorians, and that an opportunity to make further

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136 *ibid*, p. 1911. The submission from the Premier was quoted at paragraph 1.39 of the Interim Report.

137 Submissions, pp. 1911-1912.

138 *ibid*, p. 1912.

139 *ibid*, p. 859.

140 *ibid*, pp. 861-864.

presentations of the concerns of its citizens was crucial to a satisfactory conclusion to this inquiry.[141]

6.147 The Chief Minister of the Australian Capital Territory (ACT), Ms Kate Carnell MLA, supported the general principle of liberalisation of international investment, and was aware of its benefits to the nation and to the Territory. She believed that the draft Agreement should contain a satisfactory balance of rights and obligations on all parties.[142]

6.148 She also supported the lodging of all relevant general and specific exceptions to the draft MAI, but was concerned to see expansion and broader definition of the requirement for international investors to adhere to Australian laws and regulations. This included environmental and labour standards, with particular reference to State/Territory legislation. Ms Carnell sought to be informed and consulted about any necessary legislative changes, and variations to the proposed exceptions. The submission noted that these did not address the concerns of the States/Territories and suggested a list which would reflect them:

- investment policies;
- environmental aspects;
- territory monopolies/enterprises/concessions;
- R&D and intellectual property;
- maintenance of local cultural industries and identity;
- maintenance of Canberra's role of providing services to the nation, and
- maintenance of occupational health and safety standards, and other related industrial standards.[143]

6.149 The then Chief Minister of the Northern Territory, Mr Shane Stone MLA, also supported the draft MAI in principle, provided that it remained in the best interests of the Territory and Australian economies.[144]

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141 *ibid*, pp. 864-865.

142 *ibid*, p. 2104.

143 *ibid*, pp. 2105-2107.

144 *ibid*, p. 2236.

6.150 The reduction in barriers to international investment represented by the draft Agreement had the potential to enhance Australia's economic activity by opening Asian markets to such investment. It was likely to be severely diluted by practical complications and the need for exceptions.[145]

6.151 Such an agreement derived from the OECD 'could be viewed as unrepresentative'. This had particular relevance and importance to the Territory because South-East Asian countries were an important source of investment and significant destinations for its produce. The submission observed, however, that there seemed to be no exploration of quantifiable outcomes for Australia. It was difficult, therefore, to appraise the likely impact of such an agreement without that information.[146]

6.152 According to Mr Stone, the effect of the draft MAI would have depended largely on the exceptions put forward by members of the OECD. He supported the use of exceptions to maintain protection of current Australian policies in a range of areas. It had forwarded its draft list of exceptions to Treasury, covering the following areas:

- fisheries;
- land sales;
- mining;
- racing and gambling, and
- industry development.[147]

6.153 The Territory Government noted that final determination by Australia of the draft MAI should have depended on whether it contained an appropriate balance of rights and obligations. Australia had to reserve the right to amend any schedule and submit further exceptions in the light of later developments, or further consideration of issues.[148]

6.154 The NCC was concerned about the impact of the draft MAI on the States/Territories which, it said, appeared to have been given inadequate attention, if not ignored. It also was concerned about the potential for the draft Agreement to centralise more power in the Federal Government, and

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145 *ibid*, p. 2237.

146 *ibid.*

147 *ibid*, p. 2238.

148 *ibid.*

to erode even further the role of the States. It believed its breadth was such that a Federal Government, relying on the external affairs power and High Court interpretations of that power, could have used it to intrude into areas which been the responsibility of State Governments.[149]

6.155 Mr Murphy referred to country-specific exceptions and a belief that he said appeared to be current: that they would have allowed Australian governments to exercise full policy discretion in any of the areas which might have been the subjects of such exceptions. He also referred to 'the uncertain protection' which would have been offered by such exceptions, and to a number of areas of government operation which might have been affected by the draft Agreement.[150]

6.156 Mr David White believed that, if it had been adopted, the draft Agreement would have emasculated severely the legislative processes of all three tiers of government. He referred to the tendency to use the Commonwealth's treaty-making role to centralise power and over-ride States' rights. He disapproved of treaties being used to hinder domestic policies.[151]

6.157 Mr Edward Aldridge stated that there was little evidence that the States had been consulted or even considered in the deliberations about the draft MAI. He drew attention to the reference in the Interim Report that consultation with the States had been inadequate.[152]

6.158 Mr Aldridge observed that the States would have been subject to the provisions of the draft Agreement. He saw this as another case of the use of the external affairs power by the Commonwealth to encroach on the rights of the States and thereby destroying the Federation.[153]

6.159 The AIG believed that investment and industry policy had an important and legitimate role to play in national development. It strongly opposed Australia becoming a signatory to any agreement which would have limited the ability to implement such policies. Among the concerns it had about the draft Agreement were differing State and Commonwealth industry development policies and programs.[154]

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149 Transcript, 16 July 1998, p. 103, Submissions, p. 845.

150 Transcript, 16 July 1998, p. 121, Submissions, pp. 1793-1796.

151 Transcript, 16 July 1998, pp. 179-180.

152 Submissions, p. 500, Transcript, 24 July 1998, p. 262. See paragraph 1.39 of the Interim Report.

153 Transcript, 24 July 1998, pp. 262, 263.

154 Submissions, pp. 2029, 2032, Transcript, 14 August 1998, p. 339.

6.160 Mr McDonald of the ASA drew attention to what he saw as the promotion and protection of Australian culture undertaken by Federal and State/Territory Governments since the early 1970s. While he supported the exclusion of government grants from the draft Agreement, the Society expressed concern that such grants had been included in Annex B and would thus have been subject potentially to the rollback provisions.[155]

6.161 While the ASA was not clear how the draft Agreement would affect State/Territory Governments, it also expressed concern that their grants, and in particular the various Premiers' prizes for literature, might become subject to NT, MFN and performance requirements provisions. The Association believed that these provisions would have opened such grants and prizes to overseas writers.[156]

The impact on local government

6.162 The Australian Local Government Association (ALGA) stated that the draft Agreement had been the subject of widespread concern in local governments and communities around Australia. Representations were generally concerned about the potential for negative consequences from an agreement which was seen as strongly binding. Those representations also referred to:

- the unfortunate dearth of official information on the intentions and proposed operation of the draft Agreement, and
- the lack of impartial and disinterested analysis of its content and the process of negotiation.[157]

6.163 While the ALGA respected the Commonwealth's prerogative to negotiate and ratify treaties, it urged the corollary: consultation with parties that might be affected by their provisions. In general, local government expected a voice on national and regional issues that impacted on local communities. In the case of the draft MAI, the impact could well have occurred in areas where local government had a commitment, such as local democracy, social and economic justice and economically sustainable development.[158]

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155 Transcript, 21 August 1998, p. 432.

156 *ibid*, p. 433.

157 Submissions, pp. 1891, 1894, Transcript, 14 August 1998, pp. 353, 354.

158 Submissions, p. 1891.

6.164 The ALGA had not received any communication about the draft MAI from any other department or sphere of government.[159]

6.165 It said it shared with the community a high level of concern about the implications of the draft Agreement, particularly what was seen as a loss of sovereignty and the unintended effects it might have had. The Association opposed signature of the draft MAI until 'adequate consultation' with community groups and State and local governments had been undertaken, together with an assessment of its costs and benefits. It called on the Commonwealth to recognise the effectiveness of direct controls over international investment, and sought widening of Australia's exceptions to include the environment, planning and local government. It also sought recognition of the imbalance of resources between local governments and many TNCs.[160]

6.166 Mr Chris Bell of the Association spoke of an understanding that the draft MAI would certainly have circumscribed the sovereignty of local governments, and would also have imposed obligations on them. These could have included the need to face courts or tribunals about their decisions, and the possibility of resulting financial penalties. He said that such obligations would have been to the detriment of certainty for and good governance by local authorities.[161]

6.167 Mr Bell, with Mr Hartnett of the LGSA, also raised concerns about the impact the draft MAI might have had on local preference and planning and environmental activities undertaken by local government authorities. They pointed out that decisions in such areas had to be made for the benefit of the local community, rather than in the interests of TNCs. They understood that the draft MAI would have treated as expropriation any removal of rights through zoning changes which might have been taken by a council in the public interest to stop such things as mixtures of incompatible activities.[162]

6.168 The Victorian Local Governance Association (VLGA) was disappointed that, through the development of Australia's position on the draft MAI, local government was left out. With its variety of aims and objectives, and constant delivery of State and Federal programs, the VLGA remained disappointed that no specific consultations with peak

159 Transcript, 14 August 1998, p. 358.

160 Submissions, p. 1894, Transcript, 14 August 1998, pp. 354, 355.

161 Transcript, 14 August 1998, p. 353, Submissions, p. 1894.

162 Transcript, 14 August 1998, pp. 355, 356.

local government bodies had been part of the development of a negotiating position, and development of preliminary exceptions. The VLGA was critical that the community had not been taken into the Commonwealth's confidence in developing negotiating positions for the draft Agreement.[163]

6.169 The Association made a number of recommendations:

- that Australia not proceed with negotiations on the draft MAI until local governments were included in detailed and extensive consultation about its impacts and the development of further exceptions;
- that internationally recognised core labour standards should not be weakened by the signature of the draft Agreement, and that these standards be explicit in the preamble to the text;
- that the preamble specifically identify environmental protection and the obligations of the Rio Summit and Agenda 21, and
- that until such issues as the role of local/regional economic development policies in the globalised economy were resolved, there should be an exception for local government from the draft MAI's provisions.[164]

6.170 The VLGA believed that the draft MAI:

- could have caused some questioning of the support local governments gave to local industries;
- could have led to opportunities for legal challenges by foreign investors to all levels of government about how they dealt with economic development, and
- had needed an exception covering the functions, policy and decisions of local government, even though there were concerns about the strength of such an exception and the possible impacts of rollback and standstill.[165]

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163 Submissions, pp. 1381, 1382, Transcript, 16 July 1998, pp. 164, 172. The Association noted that it had not been consulted by the Victorian Government about the draft MAI: Transcript, 16 July 1998, p. 171.

164 Submissions, p. 1380.

165 Transcript, 16 July 1998, pp. 165, 168-169, 172.

6.171 Even if exceptions could have protected Australia's national interest adequately, the NCC did not believe that they would have provided sufficient comfort to local governments. Nor did it believe that their interests had been adequately protected. Without a general exception, they would not have the resources to predict which of their activities might have been ensnared by the provisions of the draft Agreement. The NCC pointed out that, for example, rezoning decisions by local governments could have been defined as expropriation. It saw this as an extraordinary situation because it would have placed foreign investors in a superior position to domestic investors.[166]

166 Submissions, pp. 841, 845, Transcript, 16 July 1998, p. 103. See paragraph 6.37.

CHAPTER 7

ISSUES OF PRINCIPLE

7.1 This Report has examined a large number of the provisions of the draft MAI in some detail. This Chapter will assess a range of issues of principle, and their consequences or implications, before setting out our conclusions and recommendations in Chapter 8.

7.2 These issues are:

- the need for an 'across countries' agreement to regulate international capital;
- the appropriateness of the OECD to negotiate rules on the regulation of international capital;
- the draft MAI and other international agreements;
- the likely effectiveness of the draft MAI as a means of regulating international capital;
- national sovereignty issues;
- the consultation process;
- Treasury's submission to the inquiry;
- implications of the draft Agreement for other Commonwealth departments;
- future negotiations, and
- Australia's lead Department in any future negotiations.

The need to regulate international capital

7.3 In 1944, at Bretton Woods in the USA, two major international institutions were planned: the International Bank of Reconstruction and Development (IBRD) and the International Monetary Fund (IMF). Known more generally as the World Bank, the first of these was to grant long-term loans for the reconstruction of war-devastated economies and, eventually, for investment in developing countries. The IMF was to have responsibility for managing the structure of exchange rates among the

world's currencies, and also for financing short-term imbalances of payments between countries.[1]

7.4 This arrangement, known as the 'Bretton Woods Agreement', was based on fixed exchange rates between the American dollar and other currencies. It lasted until the USA announced in August 1971 that it would no longer redeem its dollar for gold. Sharp increases in the price of oil in 1973, 1977 and 1979 were significant further shocks to the international economy. Developing nations suddenly faced much larger deficits in their balance of payments (BOPs), while industrialised nations encountered 'stagflation': stagnation of output and employment combined with inflationary price rises.[2]

7.5 The Bretton Woods Agreement was a result of the financial chaos of the Great Depression and took place near the end of the Second World War. It provided stability until there were significant changes to the international financial system in the 1970s. Negotiations for the draft MAI from the middle 1990s could be seen as the beginning of the creation of a new Agreement to regulate the immense amounts of international capital which are now available.

7.6 As the 'Survey of Global Finance' in *The Economist* in January 1999 noted, while today's capital markets are international, they are supervised and regulated largely on a national basis. The world in which they operate is very different to that for which the institutions set up by the Bretton Woods Agreement were designed. Modern economic problems are inter-linked so that the objectives of an ideal financial system form what has been called an 'impossible trinity':

- continued national sovereignty;
- financial markets that are regulated, supervised and cushioned, and
- the benefits of global capital markets.[3]

7.7 This Survey by *The Economist* stated that these three goals were incompatible because any coherent reform proposal for the international financial system must favour any two of them against the third. This

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1 See *A Concise Economic History of the World: From Paelolithic Times to the Present*, by Rondo Cameron (Oxford University Press, New York, 1989), p. 371.

2 *ibid*, p. 394.

3 Exhibit No 75, p. 4.

rendered most radical solutions to that system's problems impossible because of the political choices which would have to be made.[4]

7.8 It noted that the idea of controlling capital flows was currently in vogue. The Survey by *The Economist* referred to nostalgia for the era of the Bretton Woods Agreement, when capital mobility was limited, domestic and international finance was tightly regulated and governments were free to follow their own economic policies. This had lead to calls for control over international capital flows, particularly those generated by short term speculators.[5]

7.9 When negotiations for the draft MAI were abandoned, officials at the OECD's October 1998 consultations :

> …supported the need for a transparent and certain global investment framework and accordingly agreed to continue work on developing an international framework of rules for investment.[6]

7.10 The brief argument in favour of regulating foreign direct investment (FDI) started from the increased amount of capital circulating around the world in the recent past. The growth in such investment had far outstripped the growth in international trade. It has been estimated that investment between the OECD countries accounted for 85 per cent of outflows and 65 per cent of inflows. These flows were regulated by relatively open regimes in the OECD countries, assisted by over 1600 bilateral and regional investment agreements between OECD countries and between these countries and non-members of the OECD.[7]

7.11 There are considerable benefits to host countries, as well as investors, from international investment. Nations are liberalising their investment regimes, and certain and transparent rules would be in the interests of investors and host countries alike. Replacement of bilateral and regional agreements by one international agreement would be in the interests of all involved. It would also encourage liberalisation of the investment process in countries which are short of capital.[8]

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4 *ibid.*

5 *ibid*, pp. 5, 6. See reports in *The Australian Financial Review*, 25 February 1999, pp. 1, 10 and *The Age*, 25 February 1998, p. A13.

6 Exhibit No 61, quoted in Transcript, 21 December 1998, p. 451.

7 Transcript, 6 May 1998, p. 6.

8 *ibid*, pp. 18, 52, 53, 17.

7.12 In Chapter 6, it was pointed out that many witnesses were not opposed to the concept of an 'across countries' agreement to regulate the movement of FDI. Where there was opposition to the provisions of the draft Agreement which was being negotiated by the OECD, many of these provisions were common to other trade and investment agreements.[9]

The OECD and the regulation of international capital

7.13 Article 1 of the Convention which brought the OECD into existence, on 14 December 1960, states that its aims 'shall be to promote policies designed:

> to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus contribute to the development of the world economy;
>
> to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development, and
>
> to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.'

7.14 Those who supported the need for an agreement on international investment seem not to have addressed the following issues adequately:

- whether, regardless of its Aims, the OECD was an appropriate body to be negotiating an agreement to regulate international capital, and
- whether the use by the OECD of provisions from other agreements, such as the North American Free Trade Agreement (NAFTA), were appropriate in this negotiating text.

7.15 The OECD has 29 members and, with the European Union (EU), eight other non-members were involved in the negotiations. There are now nearly 200 nations in the world. The OECD's limited membership has been seen as a club of rich, First World nations to which developing countries do not belong. They are not represented within the OECD, nor are nations from such broad geographic areas as Africa, the Middle East, South East Asia, or the South Asian Sub-Continent. Mr Potts of DFAT

9 See paragraphs 4.44-4.49 and 6.9.

agreed that the OECD's membership 'would reinforce a possible perception that developing countries are being ignored'.[10]

7.16 Mr Sanders of the Stop MAI Coalition believed that the 'real agenda' in the draft MAI was to ensure that developing countries de-regulated FDI. Ms Ranald and Dr Dunkley stated that many developing countries were opposed to the draft Agreement, and any deregulation of FDI, and would not accept it. Ms Ranald also suggested that the draft Agreement had not been pursued within the World Trade Organisation (WTO) because developing countries would not agree to conditions which would have limited their scope to develop their own capacities for industry and service industries.[11]

7.17 The Victorian Trades Hall Council (VTHC) believed that the draft MAI was specifically targeted at Third World countries: it was the intention of the negotiators to pressure these countries, excluded from the negotiations, into signature 'once everybody else' had joined.[12]

7.18 Ms Kent of Community Aid Abroad (CAA) said that it was unacceptable that a treaty which would have had significant implications for developing countries, and was intended to be open for accession by any country, had been negotiated solely within the OECD. CAA also acknowledged the importance of international investment for developing countries, but was concerned that the draft Agreement would have weakened the ability of governments to regulate investment. It would have increased investors' rights without a parallel transfer of responsibilities to protect the environment and human rights.[13]

7.19 Particular concerns were expressed about women in the developing world in the context of the draft MAI. Ms May Lamont, National Representative of Soroptimist International of the South West Pacific, drew attention to the potential danger of the draft Agreement to the economic well-being of women, especially women in the developing world. She referred to the already vast disparity between women's share of the work in that world and their share of the economic benefits.

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10 Transcript, 21 December 1998, pp. 453, 465. At *ibid*, p. 466, Mr Potts suggested that the observers to the negotiation process included developing countries. The list at the footnote to paragraph 1.13 does not altogether support this statement.

11 Transcripts: 6 May 1998, pp. 76, 69, 16 July 1998, p. 157. Mr Sanders noted that the aim could have been to regulate FDI, depending on the view taken of the draft Agreement.

12 Submissions, p. 1919, Transcript, 16 July 1998, p. 124.

13 Submissions, pp. 1702-1703, Transcript, 16 July 1998, pp. 150, 151.

Soroptimists believed that the draft MAI would have made it far more difficult for national governments and the international community to remedy the plight of many women in the world because the exclusion of developing countries from the OECD's negotiating process.[14]

The draft MAI and other international agreements

7.20 The Attorney-General's Department (AGs) noted that a number of provisions in the draft MAI were similar to those of other international agreements, for example:

- rollback was also used in the General Agreement on Tariffs and Trade (GATT) and the WTO;[15]
- elements of the dispute resolution process were in the Dispute Settlement Understanding (DSU) in the WTO, and in the *International Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID);[16]
- Most favoured nation treatment (MFN) combined with national treatment (NT) were core concepts of international trade law. They were included in the GATT and other WTO agreements such as the General Agreement on Trade in Services (GATS);[17]
- Australia's investment promotion and protection agreements (IPPAs) included MFN clauses, but not provisions for NT.[18]

7.21 Ms Ranald commented that the draft MAI was more far reaching than most agreements reached within the WTO, except perhaps for NAFTA. Mr Downey noted that the draft Agreement was based on NAFTA.[19]

7.22 Thus, the provisions of the draft MAI would not have been a great departure from those of other significant international agreements, including IPPAs. What made it different in general terms was the fact that it was 'top down' so that, while there was gradual sectoral liberalisation in the agreements under the WTO, the draft MAI's provisions would have

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14 Transcript, 24 July 1998, pp. 246, 248, Submissions, p. 1417.

15 Submissions, p. 2275, Transcript, 14 August 1998, p. 282.

16 Submissions, pp. 2277-2278.

17 *ibid*, p. 2286.

18 *ibid.* See also p. 2285 for an analysis of the features of Australia's IPPAs.

19 Transcripts: 6 May 1998, p. 65, 24 July 1998, p. 200.

liberalised all international investment unless exceptions were submitted.[20]

Likely effectiveness of the draft MAI

7.23 The text of the draft MAI was never finalised, so that there are many items on which the outcome of the OECD's discussions can now only be matters for conjecture. Some assessment can be made of its likely effectiveness through examining a selection of views on its provisions.

7.24 It is interesting, therefore, to note that even those Australian witnesses who supported the draft Agreement heavily qualified their approvals. Some of them objected to provisions so central to its operation that it is doubtful whether this agreement could have been effective.

7.25 Thus, the Australian Stock Exchange (ASX) believed that any agreement which encouraged the free flow of capital would be of benefit to the Australian economy, assuming adequate prudential considerations. It supported measures to encourage access to markets, subject to safeguards such as capital adequacy and regulatory supervision. It also supported the draft MAI's general thrust of seeking to remove foreign ownership restrictions.[21]

7.26 It referred to criticisms of the draft Agreement for tying the government's hands in pursuit of public policy interests. While it might have had views on the desirability of these rules, it did not object to government making these decisions, seeing them as legitimate reflections of Australia's wish to protect ownership of particular areas such as media or banks.[22]

7.27 The ASX would have been concerned if the draft MAI had had an impact on its ability to regulate its market in any way.[23]

7.28 The Australian Chamber of Commerce and Industry (ACCI) was 'generally supportive' but there were issues to with which it took strong objection, including:

- the inclusion of provisions for environmental matters and labour standards in the text;

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20 Transcript, 21 December 1998, p. 466.

21 Submissions, pp. 1477-1478, Transcript, 21August 1998, p. 376.

22 Transcript, 21 August 1998, pp. 379, 380, 386.

23 *ibid*, pp. 381, 384.

- the potential treatment of monopolies and state enterprises, and
- the absence of a general anti-circumvention provision.[24]

7.29 There were also a number of outstanding matters which the ACCI saw as important to the 'robustness' of any final Agreement, including:

- the treatment of obligations under Regional Economic Integration Organisations (REIOs);
- the standing of investment-related laws with extra-territorial application, and
- the nature and extent of general and country-specific exceptions.[25]

7.30 In its analysis of the draft Agreement, the ACCI frequently did not support particular provisions, or supported them with qualifications. The ACCI believed that this Committee should have adjourned after its hearing on 6 May 1998 and further considered the text of the draft Agreement when it had been further developed. Negotiations should have been pursued under the WTO, as part of the proposed Millennium Round discussions.[26]

7.31 The Business Council of Australia (BCA) endorsed the principles and aims of the draft MAI, but it had some concerns about some issues associated with the dispute resolution provisions and the list of exceptions tabled by Australia on 31 March 1998. It believed that it was important to avoid the possibility of increasing litigation costs and time to resolve disputes, and that Australia would have set a bad example to the international community if its exceptions had been accepted.[27]

7.32 The Australian Industries Group (AIG) had 'significant concerns' about the draft MAI in a number of areas:

- the absence of detailed consultations with industry;
- the scope of the draft Agreement and related principles, and the extended period for withdrawal;

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24 Submissions, p. 1241.

25 *ibid.*

26 *ibid*, pp. 1244-1271, Transcript, 6 May 1998, pp. 88, 90.

27 Submissions, p. 1960, Transcript, 16 July 1998, pp. 133, 134.

- the implications for Australian industry development policies and programs, and for State/Territory programs in this area;
- the lack of involvement of developing countries in negotiations, and
- the operation of the dispute resolution mechanism.[28]

7.33 It 'strongly opposed' signature if this would have limited Australia's ability to implement industry policies in national development. It noted that agreement had not been reached on a number of key issues and, until they were resolved, the AIG could not have supported accession. Further, it recommended Australia's participation in negotiations on the basis that all its exceptions were to be accepted ,and that this position was not negotiable.[29]

7.34 Mr Allan Asher and his co-authors saw the draft MAI as an important step in the liberalisation of investment at the global level. They saw it as leading to the opening of markets and providing equal competitive opportunities for investors, thereby fostering a more productive environment for international capital flows. They accepted that this liberalisation would have bestowed numerous benefits on Australia and the international community. A number of 'straight-forward' amendments would have resolved many of its perceived problems, without jeopardising the goal of liberalising international investment.[30]

7.35 The areas which could have been amended were:

- labour and environmental standards;
- the exceptions to have been allowed, and
- the annexing of other international agreements to the text.

7.36 Mr Asher noted that there was a wide-spread view that international investment was necessarily detrimental to environmental and labour standards. NT and MFN were frequently misunderstood as requiring the dismantling of governmental regulation. The draft MAI would not have deprived national governments of the right to promote

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28 Submissions, p. 2026, Transcript, 14 August 1998, p. 339.

29 Submissions, p. 2026, Transcript, 14 August 1998, p. 339.

30 Submissions, p. 1879.

economic development, or promote a cleaner environment, through regulations or incentives, provided they did not discriminate. Commitments on the environment and labour should have been built into the preamble to the text, where its objectives were set out.[31]

7.37 This submission argued that the draft Agreement had needed to encompass a more flexible system of exceptions, one which met the needs of international investment while recognising the various political, social and cultural aspirations of nations. This submission suggested that an objective test would have been required to demonstrate that an issue not previously the subject of an exception was in a nation's interest. The criteria for acceptance of a matter for an exception would have included the release of a draft proposal for comment by other OECD members. If investors had wished to challenge the exception, they could have used the dispute resolution process.[32]

7.38 Mr Asher and his co-authors noted criticism of the draft Agreement for conferring rights on trans-national corporations (TNCs) while not imposing obligations in return. They believed that existing, self-regulatory international agreements, such as the OECD's G*uidelines on Multinational Enterprises*, should be annexed to the text. These would have recognised the standards which were expected of TNCs, and it was hoped that future agreements would also have been annexed.[33]

7.39 This submission also suggested that, as a longer-term goal, international agreements such as the OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* could be annexed to the draft MAI. These could then be enforced through domestic courts and the 'complaint and review' mechanism of the WTO.[34]

7.40 The Australian Vice-Chancellors' Committee (AVCC) supported the draft MAI, but said that there were a number of issues on which it would want clear answers before it could give unequivocal support. For example, it believed that the draft Agreement should not have, intentionally or otherwise, achieved equal treatment by reducing necessary government regulation and supervision of the higher education

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31 Submissions, pp. 1880-1881.

32 *ibid*, pp. 1881-1882.

33 *ibid*, p. 1882.

34 *ibid*, pp. 1882-1883. This OECD Convention was the subject of the Committee's 16th Report in the 38th Parliament.

framework. It supported subjecting both domestic and international investors to the same regulatory system.[35]

7.41 A number of witnesses observed that TNCs came to this country for their own reasons, and that many did not pay adequate taxation. Their argument suggested that this situation would worsen if the draft MAI were introduced because there was a belief that it was weighted in favour of TNCs. Other witnesses referred to control of Australia via 'the new world economic order'.[36]

7.42 Mr Ralph Evans was hard put to find tangible gains from the draft Agreement. He thought that it might have helped Australian firms making opportunistic investments in the Republic of Korea, but was unsure whether all the conditions and exclusions it would have contained would have helped there. He could see some possible negatives in areas where foreign ownership was sensitive, such as airlines, telecommunications, media, banking and real estate. Some of these would have been covered by exceptions and, in some, the free market might have been better for Australia than intervention.[37]

7.43 It was his view that the draft MAI was not likely to do Australia much good, but it would not have done this country great harm. Mr Evans saw it as 'a solution in search of a problem'.[38]

National sovereignty issues

7.44 The draft Agreement raised the question of the future of the nation state. The discussion in Chapter 2 of the reality and the impact of globalisation concluded, among other things, that the nation state had been powerfully affected by this feature of the late Twentieth Century. It was also clear that nations were unprepared for globalisation, and reacting to it in ways which were largely ineffective.

7.45 Submissions received during this inquiry showed that many Australians were not prepared see control of the nation's affairs given to the OECD, or any other international body. Concerns about the national sovereignty implications of the draft MAI were fanned by the lack of effective consultation of the community and interested organisations.

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35 See Transcript, 14 August 1998, p. 345, Submissions, p. 1821.

36 See paragraphs 6.6-6.8.

37 Submissions, p. 2431-2432, Transcript, 21 August 1998, p. 365.

38 Submissions, p. 2432, Transcript, 21 August 1998, pp. 366, 367.

The consultation process

7.46 As the lead Department on this issue, Treasury asserted that it had undertaken 'a very widespread and extensive consultative process' in the course of negotiations for the draft MAI. Details were provided of the organisations it had consulted, as was a chronology of what it had done. Treasury stated that it had:

- consulted 'all relevant Commonwealth departments';
- briefed all State and Territory Governments orally and provided written material periodically to keep them up to date with developments;
- provided information, and sought comments from, non-government organisations (NGOs), industry and other organisations;
- provided briefing sessions for Parliamentarians and their staff, and
- distributed information on the draft MAI to the wider public through posting the text of the draft Agreement documents and briefings on the OECD and Treasury sites on the Internet.[39]

7.47 Treasury stated that, from the beginning of the negotiations, it had consulted with other Commonwealth Departments and agencies, specifically:

- the former Department of Administrative Services, now part of Department of Finance and Administration (DOFA);
- AGs;
- Australian Agency for International Development (AusAID);
- the Department of Communications and the Arts;
- the Department of Defence;
- the Department of Employment, Education, Training and Youth Affairs;

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39 *ibid*, p. 1302, Transcript, 6 May 1998, pp. 8-9, 10, 12, 13, 34-35. The general issue of consultation was dealt with in the Interim Report: see paragraphs 1.21-1.42. Commonwealth-State consultations were dealt with at paragraphs 1.30-1.42 of that Report. Treasury officials briefed this Committee on 11 March 1998.

- Environment Australia;
- the Department of Finance;
- DFAT;
- the Department of Health and Family Services (DHFS);
- the Department of Immigration and Multicultural Affairs;
- Department of Industry, Science and Technology (DIST);
- the Department of Primary Industries and Energy (DPIE);
- the Department of the Prime Minister and Cabinet (PM&C);
- the Department of Social Security;
- the Department of Transport and Regional Development (DTRD), and
- Department of Workplace Relations and Small Business (DWRSB).[40]

7.48 While DFAT expressed itself as satisfied with its consultations about this matter with Treasury, it is not clear in what form they took place with the other Departments and agencies. Submissions were not received form every agency, nor did they all give evidence at public hearings.

7.49 Ms Murphy said that the Government had always favoured negotiations on developing an MAI, but had never defined its nature. Treasury had therefore consulted with Departments and agencies on the basis that the Government agreed with the philosophy and the approach, but that it had not agreed any of the detail in the negotiating text.[41]

7.50 As the negotiating text was developed, these consultations were extended to State and Territory Governments. Treasury said that they were briefed and consulted on the draft Agreement, with a particular

40 Submissions, pp. 2565, 1302, Transcript, 6 May 1998, p. 8.

41 Transcript, 21 December 1998, p. 457.

focus on identifying their laws and policies which might not have conformed with its obligations.[42]

7.51 In November 1995, the then Acting Prime Minister wrote to State Premiers and Territory Chief Ministers to propose consultation arrangements about the draft Agreement. In late 1995/early 1996, the States and Territories replied with details of those who should be contacted about the matter. In May 1998, further discussions were needed with the States and Territories to establish the exceptions which they thought may have been required. Following these, Treasury would have developed a new list of exceptions for presentation to the OECD's negotiating group.[43]

7.52 Treasury listed the various organisations which it had provided information, and from which it had sought comments, on the draft Agreement:

- the Australian Conservation Foundation (ACF);
- the ACCI;
- the Australian Bankers' Association;
- the Australian Consumers' Association;
- 'the Education Union';
- the AVCC;
- the Australian Council of Trade Unions (ACTU);
- the Australian Mining Industry Council (AMIC), and
- the BCA.[44]

7.53 Information provided by Treasury showed that its officials met with ACCI representatives on 17 May 1995, and with ACTU and BCA representatives on 29 June 1995. The ACCI had provided its analysis of

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42 Transcript, 6 May 1998, p. 10, Submissions, p. 1302. The ALP governed until March 1996, the current Government since then.

43 Submissions, pp. 2599-2601.

44 Submissions, pp. 1302, 2596-2597, Transcript, 6 May 1998, pp. 8-9.

the draft Agreement to Treasury on 17 September 1997. Consultations with a range of NGOs began by letter in October 1997.[45]

7.54 According to Treasury, from its start in 1995, this process was open, appropriate and thorough. Ms Murphy pointed out that its briefings and consultations had been with umbrella organisations, and suggested that information about the draft MAI might not have been passed on from those levels. In addition, she said, there had been a good deal of 'misinformation' on the Internet and in other media which had generated concerns in the Australian community.[46]

7.55 Treasury took issue with a comment that its consultation process had been described as 'one-sided briefings rather than genuine negotiations'. It pointed out that, while some of the earlier meetings may have appeared to be one-sided, it was necessary to inform those who were not very familiar with the text or the negotiating process. At later meetings, dealing with 'well-informed counterparts', there had been a genuine exchange of concerns and ideas.[47]

7.56 The following indicates something of the way consultation occurred with a range of organisations. Some are in Treasury's lists above, and some are significant umbrella organisations:

- DFAT – very satisfied with the regular consultations which occurred;[48]
- ACCI – involved over a significant time as an active participant in Australia's position;[49]
- Victorian Local Government Association (VLGA) – not consulted;[50]
- DIST – quite extensive consultation;[51]

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45 Submissions, p. 2596.

46 Transcripts: 6 May 1998, pp. 11, 36, 21 December 1998, p. 464.

47 Submissions, p. 2563.

48 Transcript, 6 May 1998, p. 47.

49 *ibid*, pp. 94, 89.

50 Transcript, 16 July 1998, p. 167.

51 Transcript, 14 August 1998, p. 299.

- AIG – no opportunity to discuss the matter;[52]
- AVCC – not approached but sought a meeting with Treasury when aware of the matter;[53]
- the Australian Local Government Association (ALGA) – little or no consultation;[54]
- ASX – no formal correspondence from Treasury;[55]
- AUSTCARE – courteous hearing from Treasury, but at the wrong end of the process;[56]
- the Australian Broadcasting Authority (ABA) – not contacted,[57] and
- the Australian Publishers' Association (APA) and the Australian Society of Authors (ASA) – had to get in touch with Treasury.[58]

7.57 Allegations of secrecy about negotiations for the draft MAI were also made against other national governments. Mr Dennis Rose suggested that the NZ Government did not know much, or release much, about the draft Agreement. An article by Noam Chomsky made it clear that in the USA little information had been available until mid-1997. The 'grass-roots' organisations of that community were opposed to it.[59]

7.58 Mr Zanker of AGs commented that the ultimate failure of the negotiations was an interesting lesson in the mobilisation of public opinion on issues of legitimate concern to the community. He said that multilateral negotiations were very complex, involving many different players with different positions trying to come to a comprehensive

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52 *ibid*, p. 343.

53 *ibid*, p. 351.

54 *ibid*, p. 353.

55 Transcript, 21 August 1998, p. 377.

56 *ibid*, p. 395.

57 *ibid*, pp. 421-422.

58 *ibid*, p. 438.

59 Submission No 902, p.1, Exhibit No 67, pp. 23-25. An article from *The Independent* by Paul Vallely, 'How the Net exposed a world 'secret', in **Panorama,** *The Canberra Times*, 16 January 1999, pp. 9-10, gives some support from international sources to the thesis that the draft Agreement was negotiated in secret.

agreement. He noted that, when negotiations on the text began in 1995, OECD tried unsuccessfully to interest 'the media and other people'.[60]

7.59 Details were also given of the OECD's wider consultation process, including outreach activities to extend knowledge of work on the draft Agreement with countries which were not members of that organisation. Seminars had taken place in OECD countries to inform interested parties, notably in Wellington, NZ, in April 1995 and in Brisbane in September 1997. A further workshop was held in Bangkok in November 1998. Consultations were also held within OECD member countries with representatives of industry, union and environmental groups.[61]

7.60 In October 1997, the OECD arranged for informal consultations with NGO representatives. Over 40 organisations, covering a wide range of interests and activities in many parts of the world, attended this meeting.[62]

Treasury's submission to the inquiry

7.61 The Interim Report stated that the Treasury's first submission to this inquiry on the draft MAI was 'a disappointing document', that it did not assist in evaluating the argument and that it provided a quick summary of the issues rather than addressing the draft Agreement in more detail.[63]

7.62 This submission devoted the following, approximate numbers of pages to these topics:

- benefits of an MAI, one page;
- proposed structure and provisions, three-quarters of a page;
- NT and MFN, one-third of a page;
- investment protection, half a page;
- dispute settlement, two-thirds of a page;

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60 Transcript, 21 December 1998, p. 467.

61 Transcript, 6 May 1998, p. 10, Submissions, p. 1308.

62 Submissions, p. 1308, Transcript, 6 May 1998, p. 10.

63 Interim Report, paragraph 1.54. It should be pointed out that Treasury very willingly provided a range of material to this inquiry.

- exceptions, one and a half pages;
- standstill and rollback, half a page;
- environmental and labour issues, two-thirds of a page, and
- the consultative process, half a page.

7.63 There were two major omissions from Treasury's evidence. Commonwealth Departments and the States/Territories were consulted by Treasury, but there is no mention of any contact with local government. Representatives of the Australian, NSW and Victorian Local Government Associations all stated that they were not consulted.[64]

7.64 The title of Attachment D to its submission was *Australia's Paper on the application of the draft Agreement to all levels of Government.* This paper was submitted to the Negotiating Group, detailing how measures applied by State/Territory Governments would be handled under the Agreement. It also included a description of the reformed treaty-making process which has been in operation since May 1996. There was no mention of local government, let alone the likely impact of the draft Agreement on local government in this country.[65]

7.65 The conclusion to this Attachment stated that:

> …the new treaty-making process provides scope for Australia to apply the MAI commitments at all levels of government, provided that the MAI meets Australia's objectives and interests, including in relation to the Australian States and Territories.[66]

7.66 The second major omission stemmed from Treasury's decision not to undertake any assessment of the likely impact of the draft Agreement on particular sectors of the Australian economy, on Australian investors overseas, or Australian governments. Nor did it attempt to model the potential impact on Australia's BOP resulting from increased flows of FDI, in and out of the country, particularly the impact on dividends. As Ms Murphy pointed out, quantifying the latter may have presented some difficulties.[67]

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64 Submissions, pp. 1892, 1894, Transcript, 14 August 1998, pp. 353, 358, 354; Submissions, p. 1381, Transcript, 16 July 1998, pp. 164, 167-168 respectively. See also the Interim Report, paragraph 1.42.

65 Submissions, pp. 1297, 1314-1315.

66 *ibid*, p. 1315.

67 Transcripts: 6 May 1998, pp. 6, 27, 24 July 1998, p. 201, 21 December 1998, p. 462.

7.67 Treasury took the view that the text of the draft Agreement was too much of a draft document to have permitted worth-while cost/benefit analysis of its likely impact on the Australian economy.[68]

Implications for other Commonwealth departments

7.68 A number of Commonwealth departments forwarded submissions to this inquiry and, apart from Treasury, DFAT and AGs, some of these also gave evidence at public hearings.

7.69 None of these departments seemed to have progressed further than an examination of the provisions of the draft MAI against their major activities. In their submissions, there was no evidence of a comprehensive analysis of the policies and programs which might have been effected by the draft MAI.[69]

Future negotiations

7.70 At the first public hearing on this matter, Treasury stated that, if negotiations on the draft MAI moved to the WTO, Australia would have continued to participate. DFAT advised that the WTO already had a committee on trade and investment which was looking at such matters as the exchange of information on investment regimes. That work was to be reviewed, and the WTO would have had to come to a view on a global regime for the treatment of investors. At its Ministerial Council meeting in April 1998, there had been a preference that negotiations should continue within the OECD with a view to seeing how they might develop.[70]

7.71 At the time negotiations on the text ceased in October 1998, it was agreed that rules for international investment were desirable. While there was no agreement on the appropriate forum to develop such rules, some of the officials at that meeting saw the WTO as that forum.[71]

7.72 A number of witnesses believed that the WTO would have been a more appropriate forum for the negotiation of a multilateral agreement on investment, including:

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68 Transcript, 21 December 1998, p. 462.

69 See paragraph 5.91.

70 Transcripts: 6 May 1998, pp. 19, 52, 55, 14 August 1998, pp. 284, 328.

71 Transcript, 21 December 1998, pp. 450, 451.

- Ms Ranald;[72]
- the ACCI;[73]
- Professor Hiscock;[74]
- Mr Ralph Evans,[75] and
- the ABA.[76]

7.73 In particular, Professor Hiscock put forward five reasons for preferring the WTO to the OECD:

- the element of universality in the WTO which leads to some kind of international consensus and willingness to be governed by the participants;
- the established pattern within the WTO, giving a systematic infrastructure which would avoid clashes between Australia's existing multilateral and bilateral obligations;
- use of the same principles from the WTO which have been weakened in transition to the draft MAI;
- recognition of the position of developing countries in the WTO, and
- a correlation of right and responsibility, lacking within the draft MAI, because the WTO was built on the concept of benefit and advantage.[77]

7.74 Mr Ralph Evans drew attention to the 10 year period it would probably take to negotiate an investment agreement within the WTO. This was because of the large number of its members and the probability that it would go back to principles and begin the process afresh.[78]

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72 Transcript, 6 May 1998, p. 69.

73 *ibid*, pp. 90, 92, Submissions, p. 1241.

74 Transcript, 24 July 1998, pp. 221-222, Submissions, p. 2203.

75 Submissions, p. 2432, Transcript, 21 August 1998, pp. 366, 370.

76 Transcript, 21 August 1998, p. 425.

77 Transcript, 24 July 1998, pp. 221-222.

78 Transcript, 21 August 1998, pp. 369, 370.

7.75 ACF was concerned that continuation of negotiations on the draft Agreement, or on something like it, in the WTO would create additional problems for developing countries because of a clash between domestic standards clauses and the provisions for exceptions in the text. ACF also drew attention to information it had received that it was expected that OECD members would introduce an investment agreement into the proposed Millennium Round of WTO negotiations.[79]

7.76 The ACTU's position was that while there should be some form of treaty about international investment, this draft Agreement was not the way to proceed. In its view, a fundamental recasting would have been required to produce a code which included voluntary principles. Appropriate provisions for labour standards, essential public infrastructure and public services, and provision of the same rights for governments and individuals as those afforded to TNCs would have had to be included.[80]

7.77 The Australian Council of Social Services (ACOSS) considered the forum in which negotiations should continue because it believed that the OECD had disqualified itself. It contemplated the WTO and, while there was not a precedent, saw no reason why this should not happen apart from a belief that it would not properly encompass the necessary range of interests.

7.78 It believed that, because of its character, the Economic and Social Committee (ECOSOC) of the UN was in the best position to bring together a range of specialist inputs which would be required to negotiate a viable international investment agreement. AID/WATCH supported ACOSS, believing that such United Nations' forums as ECOSOC or its Conference on Trade and Development (UNCTAD) would be appropriate.[81]

7.79 DFAT set out the arguments in favour of the WTO taking over negotiation of this draft Agreement. It pointed out that the larger number of members in the WTO could be the cause of problems in any further negotiations, as well as providing the advantage of the involvement of a wider number and range of nations. Whether trade and investment could be included in the WTO's existing work program had yet to be

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79 Transcript, 14 August 1998, p. 335, Submissions p. 2647.

80 Submissions, pp. 1688-1689, Transcript, 16 July 1998, p. 123.

81 Transcript, 21 August 1998, pp. 412-413, 414, Submissions, p. 1503. See also Transcript, 21 August 1998, p. 446.

established, especially as this was still only concerned with the definition of issues. It was likely that this matter would not be resolved until close to the OECD's April/May 1999 Ministerial Council Meeting.[82]

7.80 Dr Goodman, however, stated that the main objective of negotiating the draft Agreement was not necessarily to achieve investment liberalisation within the OECD, but to get this matter adopted by the WTO and implemented beyond the OECD.[83]

The lead Department

7.81 AUSTCARE drew attention to the potential domestic and international significance of the draft MAI, and suggested that further refinement and negotiation be coordinated at a central policy level within PM&C. It also suggested that, because of its role in treaty-making, DFAT should have a key role in the process.[84]

7.82 Mr Graeme Evans of ACOSS expressed serious doubts about Treasury's qualifications and suitability to continue as the lead department in negotiation of the draft Agreement. Because of the range of issues and the number of international bodies which could be involved, he suggested that DFAT, or PM&C, could have been appropriate for this coordinating role.[85]

7.83 ACOSS also proposed that an Australian advisory group be formed to provide, on a more formal basis, NGO and community involvement in the development of this country's position on the draft MAI.[86]

82 Transcript, 21 December 1998, pp. 453-454, 465, 461, 463.

83 Transcript, 21 December 1998, p. 476.

84 Submissions, p. 1566, Transcript, 21 August 1998, p. 390.

85 Transcript, 21 August 1998, p. 414.

86 *ibid.*

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

The need to regulate international capital

8.1 Globalisation and, more recently, serious financial problems in a number of countries have demonstrated the need for some regulation of international capital. The benefits of globalisation have been called into question by recent calls to regulate the movement of international capital. The draft MAI was put forward as a solution but, following the abandonment of negotiations, how and when this might be achieved is now another matter.

The OECD as a negotiating body

8.2 It is clear that the negotiation of a treaty like the draft MAI is consistent with the OECD's Aims. Because of its restricted membership, however, and because of the exclusion of developing countries from its drafting stage, we do not believe that the OECD was the most appropriate body to have negotiated an agreement to regulate international investment. It is difficult to argue against the proposition that this Agreement was being negotiated by the wrong group of nations. As a result, there must be significant doubts about the effectiveness of the draft MAI, had it proceeded in its original form.

The likely effectiveness of the draft MAI

8.3 The views of five Australian witnesses about the likely effectiveness of the text of the draft MAI were set out in some detail in Chapter 7. While the Australian Vice-Chancellors' Committee (AVCC) was supportive with significant qualifications, the Australian Stock Exchange (ASX), the Australian Chamber of Commerce and Industry (ACCI), the Business Council of Australia (BCA) and the Australian Industries Group (AIG) could have been expected to be strong supporters of this matter. The range of their reservations, covering both the principle and the detail of the draft MAI, raised valid concerns about the likely effectiveness of such an agreement. Many other witnesses had vehement objections to one or more provisions of the draft Agreement.

8.4 At a more specific level, profound doubts remain about an agreement which allowed for the protection of each participants' existing policies, albeit with rollback and standstill, and then saw the foreshadowing of many exceptions on the range of its provisions. Ms Kent of Community Aid Abroad (CAA) observed that, by the middle of 1998, the draft MAI was looking unworkable.[1]

National sovereignty

8.5 In Chapter 2, we drew attention to the impact of globalisation on the nation state, and to the unresolved issue of how the nation state was to continue to operate effectively in the global environment. While it might be useful to have an agreed international investment agreement, it is doubtful whether it would be effective without a revised framework which includes effective nation states.

8.6 The Australian Government's consistent position about the draft MAI was that it would not accede to anything which was not in the national interest. Many of those who opposed the draft MAI saw any infringement of national sovereignty as against the national interest, and this as the only relevant issue for consideration.[2]

8.7 Had the draft MAI proceeded, there would have been impacts on Australia. Treaties can involve agreeing to limitations on national power or activity for a perceived larger good. Many of the concerns about the likely impact of the draft Agreement on Australian sovereignty were over-stated. They were often linked with objections to what was seen as the secret way in which negotiations were conducted.

Treasury and the draft Agreement

8.8 While Treasury and those it had consulted knew about the draft MAI from as early as May 1995, little information about it seems to have reached the Australian community until late 1997 or early in 1998. Ms Ranald stated that it was not until 20 February 1998 that a defence of the Government's position was released. The February 1998 text of the draft Agreement was not tabled in Parliament until 31 March 1998.[3]

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1 Transcript, 16 July 1998, p. 158.

2 See Transcript, 21 December 1998, pp. 462, 464 for final statements on this matter.

3 Exhibit No 1, p. 13. Noam Chomsky suggested that elements of the business community and the media in the USA had known about the draft MAI for some time: see Exhibit No 67, p. 23.

8.9 As a result of increasing public concern about this issue, the terms of reference for this inquiry were referred to this Committee on 5 and 9 March 1998. Treasury stated that it had accelerated its consultative and briefing process 'quite significantly in the last few months' leading up to May 1998.[4]

8.10 The first source of information for many citizens who became concerned seems to have been from the Internet. It also seems to have spread as a result of personal contacts and later through small groups formed to oppose this draft Agreement. It is also clear that a number of people believe that there was a conspiracy against the Australian people, and that these negotiations were being carried out in secret.[5]

8.11 While Treasury may have accelerated its consultative and briefing process 'quite significantly in the last few months' leading up to May 1998, by then it was reacting too late to a situation which was already out of control. Moreover, it advocated the draft Agreement in such a way that the underlying point of preserving the national interest was often lost.

8.12 Treasury was repeatedly accused of 'secrecy' in the way in which it conducted the negotiations for the draft MAI. Whether the information which was received and spread was correct is not relevant, nor does it matter that Treasury officials expressed themselves as able and willing to provide material on the draft Agreement. For many people, the workings of the bureaucracy in Canberra are quite baffling. In the absence of other material, many believed that what they were able to discover about this matter, or what they were told, was complete and accurate and did not seek further information.[6]

8.13 Undoubtedly, there were difficulties to be faced in managing an effective consultation process, including particularly:

- the confidentiality concerns which arise when negotiating a draft multilateral agreement with a large number of other nations;

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4 Transcript, 6 May 1998, p. 13.

5 See paragraphs 6.17-6.22. The analysis of the membership of the Stop MAI Coalition, see Transcript, 6 May 1998, p. 74, is interesting in this context.

6 See, for example, Transcript, 16 July 1998, pp. 180-181, 187 for the views of Mr Alan Griffiths and Ms Serena O'Meley respectively on this issue.

- practical problems in ascertaining which organisations and people should have be consulted, and
- how that consultation should occur.

8.14 Regardless of what efforts Treasury said that it made, many Australian citizens were outraged by what they saw as a secret process in which information was not made available to those who had concerns. Organisation after organisation told us that they had not been approached, and how they had found out about the draft Agreement by accident.

8.15 One example should be sufficient to make this point. As late as August 1998, Major-General Glenny (Rtd) of AUSTCARE made it clear that while Treasury officials had listened to his concerns, he did not believe that there had been an exchange of information.[7]

8.16 We support the view, taken by many of those who participated in this inquiry, that the consultation process was inadequate. Too little information was made available publicly until too late in the negotiation process.

8.17 Treasury's submission was of indifferent quality, given its crucial role in the negotiating process and to this inquiry. It made no attempt to spell out the detail in the text or, by using material in the Commentary, the likely implications of the draft Agreement for Australia. This submission simply set out the more important provisions in the text in brief, seeming to reveal either a lack of interest in or a lack of knowledge of the needs of the inquiry process. It did point out that some national delegations had proposed quite different approaches to various articles.[8]

8.18 It was particularly unfortunate that local government representatives were excluded from the consultation process. This oversight is especially puzzling in view of Treasury's own description, provided to the OECD Negotiating Group, of the important role played by local government in Australia.[9]

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7 Transcript, 21 August 1998, pp. 389, 390, 392. The Treasury letter was dated 28 August 1998, Major-General Glenny (Rtd) met with its officials on 14 August 1998 and gave evidence on 21 August 1998.

8 Submissions, p. 1293.

9 See paragraphs 7.64 and 7.65.

8.19 The case for the draft MAI would have been far stronger if the likely implications for Australia had been modelled. Allowing for methodological difficulties, and even the possible lack of certainty of the results, we are at a loss to understand why this was not done.

8.20 Two final points need to be made.

8.21 Treasury stressed the **benefits** of the draft Agreement, but never presented the **need** for Australia to be involved. The two were taken to be the same issue and Treasury did not understand that, outside orthodox economic circles, they are not seen as one. Perhaps if there had been modelling of the likely impact on a number of areas of the Australian economy, it would have been easier to demonstrate that a need existed.

8.22 Treasury stressed that Australia's negotiations were on the basis that the draft MAI would not impinge on this country's sovereign right to regulate and to discriminate against international investors in areas where country-specific exceptions would be taken out. It was also clear, however, that the intention behind the draft Agreement was progressively to remove all exceptions and, in fact, to use a peer review process within the OECD to do this.[10]

8.23 Treasury appeared to believe that this situation was appropriate, and it was taken for granted that exceptions would be allowed. There had been no consideration of the impact of a rejection of the approach to exceptions in the negotiating text. Thus, if Annex B had not been included, the draft exceptions Australia had proposed for inclusion would have been irrelevant and there would have been no protection for those matters.[11]

Implications for Commonwealth agencies

8.24 If Australia had acceded to this Agreement, there would have been substantial changes to the operation of the Commonwealth Government. It is alarming that Departments seem only to have made cursory assessments of the likely impacts of the provisions of the draft MAI against their programs, rather than making detailed assessments of its likely impact on each policy and program.

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10 See, for example, Submissions, pp. 1295, 1300, Transcript, 6 May 1998, pp. 25, 28.

11 See Submissions, p. 1300 and paragraph 4.25.

Conclusions

8.25 This was an unusual inquiry because:

- it dealt with the text of a draft Agreement which had not been, and was not destined to be, finalised;
- it came about because of public concerns about this draft Agreement that were, to some extent, generated and sustained by the same technology used in the globalised economy;
- of the number of submissions and the amount of other material received, and
- of the degree of animosity, and even hostility, that it generated within the Australian community.

8.26 The issues in Chapter 6 represent the views of some of the citizens of this country on the provisions of the draft MAI. Their criticisms were set out in some detail to indicate the range and number of questions which were raised about those provisions and the way in which the public process was handled before March 1998.

8.27 For those opposed to the draft MAI, there were issues at stake other than simply its provisions. Acceding to this treaty, according to many of its opponents, would have changed Australia by means imposed from outside and without any detailed consultation of its people. To them, it would have changed the nation and the Federation.

8.28 This view possibly under-estimated the range of protections enshrined in the Constitution and, in particular, the role the High Court could have had in resolving disputes which might have arisen if the draft MAI had entered into force.

8.29 As was pointed out in Chapter 5, there can be no doubt of the Commonwealth Government's powers to negotiate and accede to international treaties and, when any necessary domestic legislation has been enacted, to implement them.

8.30 We have had to concentrate a good deal of attention in this Report on Treasury's role and actions, not to accuse it of wrong doing but to draw attention to how excessive zeal for a cause in which it believes can sometimes blind an organisation.

8.31 Treasury seemed to believe that it owned this document to the point where it did not accept the validity of the concerns of those who opposed it. These people were simply seen as 'misinformed' and largely ignored. In turn, they felt that they were being treated with contempt. Hostility and suspicion was generated against the draft Agreement, and also towards the process of government in the minds of many citizens.

8.32 We were provided with a great deal of information about the consultation process, and Treasury seemed satisfied with both the quantity and the quality of its efforts. This is a very difficult area, because it is not possible to consult with every organisation and reaching the community is also difficult, as this Committee knows. The need for consultation with the community has been one of the most frequent themes in our Reports.

8.33 Nevertheless, Treasury was selective in its early consultations and, while this may have been reasonable at that time, its process cannot have been effective if so many NGOs and other organisations were not consulted. Treasury stated that it dealt with 'umbrella bodies' and that material was not passed on. This may well have been the case, but it was surprising that such organisations as the AIG, the AVCC, Local Government associations and the ASX were not contacted or had to approach Treasury for information about the draft MAI.

8.34 We are aware of the range of concerns about the draft MAI that were expressed by citizens of this country. Some of their submissions used emotional language, accusing anyone involved with negotiations for this draft Agreement of treason. We regret that such accusations were made. Our process undoubtedly provided many citizens with the opportunity to express their views, and may have helped to diffuse some of the emotion generated in the community. Had the consultation process been more effective, those accusations may not have been made.

8.35 Our consideration in Chapter 2 concluded that globalisation is a feature of the 1990s and that it was evading reality to pretend otherwise. Events of the last year and a half in Asia and elsewhere have demonstrated a need for a revised role for the nation state to be devised, but it is far from clear how or when this will occur. The 1999 Davos Forum was told of disillusionment with market solutions to economic problems, and of the growing gap between rich and poor as a result of globalisation.

8.36 Agreements on international investment, however they might be negotiated, will not of themselves address or solve these problems. They are among the most significant challenges for globalisation.

8.37 It is not yet clear what will happen to the OECD's negotiating text. It is likely, however, that its proponents will want to resume the quest for agreed rules for international investment where this draft Agreement was abandoned. There is a need for agreed rules. Many of those who were concerned about the provisions and implications of the draft MAI expect it to reappear in a new forum with the same provisions to which they took exception. It is a fact, however, that many of these provisions are standard in multilateral international agreements.

8.38 The WTO is probably a more appropriate forum for the negotiation of such an agreement than was the OECD. Such negotiations are likely to be a long process and it is a matter for conjecture how, in the increasingly globalised world, the international financial system will cope without internationally agreed rules for the movement of capital.

8.39 We believe that the Australian Government should support, and be involved in, negotiation of an agreement on international investment which may take over from the OECD's work.

8.40 Any such new document should be based on a clear understanding of the features of the draft MAI and which made it unacceptable to so many Australians. It should therefore include clear statements of such matters as the rights **and** obligations of both host countries and international investors and protection of existing rights, together with an equitable dispute resolution processes. These areas were among the greatest deficiencies of the draft MAI. Without such a framework, any successor document would almost certainly fail to gain acceptance in Australia.

8.41 The Joint Standing Committee on Treaties recommends that, if there are negotiations for an across countries agreement for the regulation of international capital, Australia continue to be involved in those negotiations.

8.42 Treasury must have a continuing role in such negotiations, but in the negotiation of the draft MAI its approach was so flawed as to demand another approach. Given the cross-portfolio perspective of the Department of the Prime Minister and Cabinet (PM&C) on the operations of Government, if there were to be further negotiations towards such an agreement, it would be appropriate to ensure that a focus was provided

which was not wholly economic. PM&C may able to include other Government agencies effectively, notably DFAT, from the beginning of any negotiation process.

8.43 PM&C may also be more adept than was Treasury at ensuring all those with an interest, including NGOs and the citizens of this country, are included in arriving at a position on an agreement to regulate international capital. If this is done effectively, and such an agreement is negotiated, it will not be necessary to create an additional advisory body to involve the community or NGOs in the development of Australia's position.

8.44 This Committee was established to ensure Parliamentary scrutiny of treaties, generally between signature and ratification. No other body exists within the Australian process of government to provide this scrutiny. In this inquiry, it has again provided a valuable and public means for many citizens to express their concerns and give evidence on them.

8.45 The draft MAI caused a great deal of concern in the Australian community, as well as suspicion of government and its processes. Periodic reporting to this Committee on any new negotiations, in whatever forum, may go some way to dealing with the philosophical and other concerns which may arise again.

8.46 This would be consistent with our role since the reforms to the treaty-making process in 1996. Our involvement on a regular basis in the future, if negotiations do begin on another agreement, may go some way to avoiding the hostility which was generated about the draft MAI in early 1998.

8.47 **The Joint Standing Committee on Treaties recommends that, if there are negotiations for an across countries agreement for the regulation of international capital:**

- **the Department of the Prime Minister and Cabinet assume the lead role in coordinating the Australian Government's negotiations;**

- **the Department of the Prime Minister and Cabinet actively and effectively involve all relevant Commonwealth agencies from the beginning of any negotiations;**

- **the Department of the Prime Minister and Cabinet ensure that all Australians have the opportunity to put their views on all aspects of any negotiating text as part of an open and public process, and**
- **from the beginning of any negotiations towards such an agreement, the Department of the Prime Minister and Cabinet forward written reports on a six-monthly basis to the Committee about their content and progress.**

ANDREW THOMSON MP
Committee Chairman

9 March 1999

APPENDIX 1

SUBMISSIONS RECEIVED

1	Queensland and Australia First Campaign
2	Mr Myles Kehoe
3	AW Hartwig
4	Mr Graham Lyons
5	Mr TA Morris
6	WL Grant
7	Laurie Kennedy
8	Mr Matt Parker
9	Mr Christopher Bradford
10	SH Allen
11	GO Gorman
12	Mrs Peggy Fredericks
13	Australian Spirit
13a	Australian Spirit
14	Communications Law Centre
15	Ms Jenny Edwards
16	Mr Philip White
17	Mr Richard Ounsworth
18	Mr Patrick David
19	Ms Helen Smith
20	Mr Ian Bovington
21	Mr Norman Mullins
22	Mr Charles Watkins
23	Mr Max Nankervis
24	Mr William Briggs
25	Mr James Johnson
26	Dr Peta Bowden
27	Combined Pensioners and Superannuants Association of NSW, Bathurst Branch
28	Mr Bartle Kempster
29	Mrs Julie Beare
30	Mr Joe Mullins
31	Mrs PJ Porter
32	David and Nell Kitto
33	Ms Penny Hanley
34	Ms Eileen Peters
34a	Ms Eileen Peters
35	Mr Greg Willson
36	B Archibald
37	Mrs J Bourke
38	Toni Payne
39	K Knaus
40	Garrick R Small
41	Mr Leon Francis
41a	Mr Leon Francis
42	Mr John Brady
43	Ms Jenny Walsh
44	David & Hazel Shields
45	RB Hackett
45a	RB Hackett
46	Mr Robert Downey
46a	Mr Robert Downey
47	Mr Robin Bailey
48	AG Howe
49	Mr Derek Palmer
50	Industry (now Productivity) Commission
51	Wendy & Stuart Barfield
52	Mr John Mulholland
53	Mr AF Moore
54	Mr Jan Morski
55	KW Matheson
56	Mr Jim Cassidy
57	Mrs Eileen Kelly
58	J E & J J Bragg
59	Ms Bridget Farrer
60	Ms Josephine Wright
61	Dion Giles
62	Technical Administrative Professional Staff, AWU
63	Mrs A Cattana
64	Ms Janne Marsh
65	Mr Jack Attwood
66	Ms Hilda Fairley
67	Ms Dorothy Trezise
67a	Ms Dorothy Trezise
68	Mr Duane Stanfield

69 Mr Angus Douglas
70 Mr Alan Barton
71 Mrs Edna Lippold
72 Mr Tim Abrams
73 Mrs S J Kuchel
74 S Edwards
75 Mrs Nolah Waller
76 Mr Geoffrey Ives
77 Mrs Margaret Mack
78 KJ Dunne
79 Hedley Scholz
80 AD Clancy
81 Mr Hal Pritchard
82 Mr Terry Halcin
83 Dr Dallas Clarnette
84 Mr Arnold Sandell
85 Mr Guy Westmore
86 Ms Anne Warton
87 Friends of the Earth, Southern Tablelands, NSW
88 Mrs Karen Terry
89 Mr Philip Day
90 Mr K O'Gorman
91 Mr John McAuley
92 Frances Heathfield
93 Mr WSL Bracegirdle
94 BH Connor AM
95 Lower Clarence Teachers Association
96 D E Rochow
97 Mr Arnold Ward
97A Mr Arnold Ward
98 Robin Gaskell
99 RW Ellis
100 Mrs Pat Mcrahan
101 Mrs ED Leet
102 Mr Ian McLeod
103 Dr Eve Addis
104 Mr Tom Hagan
105 Mr Geoff Pickering
106 E Gillespie
107 Mrs Gwen Beale
108 WG Bethage
109 Mr Howard Hodgens
110 Mrs SH Jackson
111 Francis Toni
112 Mr John Wilson
113 Mrs Linda Swindells
114 Miss Pamela van Oploo
115 United Nations Association of Australia Inc
116 JM McCosker
117 Ms Audrey Blackwell
118 Mr Ross Campbell
119 Ms Kerry Brady
120 Mrs S Musgrave
121 C Vock
122 Mr Dennis White
123 Mr Michael Moore
124 Mr Gerhard Weissmann
125 Noel & Alma Underwood
126 The Australian Workers' Union
127 Mr Ron Cini
128 Ms Mary Kenny
129 Sisters of Mercy Australia, Bathurst Congregation
130 National Council of Women of Tasmania
131 Assoc Prof Nicholas Low & Dr Brendan Gleeson
132 Dominican Sisters of Eastern Australia
133 Ms Josephine Joore
134 Mrs Evie Dunlop
135 Miss Margherita Griffin
136 Mrs Ruth Wynter
137 Ms Annette Power
138 Mrs MJ Holmes
139 Otto Mueller
140 Mr Anthony Fitzpatrick
141 Mr Noel Kapernick
142 Mr Shane Elson
143 Ms Alison Bruer
144 Voice of the North Coast
144a Voice of the North Coast
145 Mr Allan Howard
146 Mr Mark Shepherd
147 Mr Leo McManus
148 Mr Harry Lachter
149 R Osmak
150 Mr Frank O'Leary

151 Ms Elizabeth Griffin
152 Mrs S Howard
153 The Australian Family Party
154 Mr Neil McDonald
155 U Jonats
156 P, J & M Wall
157 LDH Chippindall
158 Mr Eric Walker
159 Ms Joan Laing
160 Mr Michael Quain
161 Mrs C Leach
162 Mr Fred Ward
163 JE Clements
164 Mr David Molony
165 Mr David Addison
166 Mr John Tiplady
167 Australia First, Fisher/Caloundra Branch
168 Mr John Gibbons
169 RA Provan
170 Mr Gerald Schumann
171 DJ Helson
172 Mr Ron Barnett
173 Mr WD Hamill
174 MK Hamill
175 J Sorbello
176 Ms Pam Andrews
177 JD & B Poole
178 Mr Robert Stewart
179 Mr Geoff Muirden
180 National Civic Council and Australian Family Association, Hunter/Newcastle Branch
181 Ms Rachel Crea
182 Pilgrim Uniting Church, Adelaide
183 Mr Allan Doak
184 Mr Doug Everingham
184a Mr Doug Everingham
185 Mr Maurice Webber
186 Mr John Lennie
187 Mrs Bronwyn Davis
188 Ms M O'Connell
189 Wildlife Preservation Society of Queensland, Caloundra Area Inc
190 Mr Allan Turton
191 Mr George Bradney
192 Mr Robert Packer
193 H Schneider
194 Mr Hugh Seeds
195 Bathurst Justice Group
196 A Better Compassionate Australia Movement Inc
197 Mr Ian Fisher
198 G Hutley
199 CE Cox
200 Healthy Cities Illawarra Inc
201 Dr Laurence Knight
202 Mr Peter Kamsma
203 Mrs June Ayres
204 Mr Colin Apelt
205 Mr Harry Clark
206 Mr Julian Beasley
207 Mrs Coral O'Hara
208 Atherton Tablelands Chamber of Commerce Inc
209 Mrs Kay Hutley
210 Dr Mary Maxwell
210a Dr Mary Maxwell
211 Mr Scully
212 Kris Hanna MP, South Australian Parliament
213 Ms Jennifer Ellis
214 Mr Leo Rogers
215 Mr F Heenan
216 Mr Alf Lelia
217 M M Wallace
218 DF Brandon
219 Mr Robert MacDonald
220 Mr John Moore
221 Mr Daryl Myatt
222 Mr Peter Beswick
223 Rex Stoessiger, Economic Liberation
224 Mr Thomas Cunningham
225 Ms Annette Hooper
226 Mrs Winsome Rusterholtz
227 Mr Peter Hinchey
228 CM Simondson
229 Wingham Branch/Port Macquarie SEC, ALP
230 Mr Ron Fischer
231 Mr A Dykeman

232 Mr John Massam
233 Mr John Gates
234 E C & Joe Bryant
235 WH & AM Bredhauer
236 Mr John Iggulden
237 Mr Greggory Tapp
238 The Rural Committee of the National Civic Council
239 Albury-Wodonga Environment Centre
240 Mr Harold Paterson
241 W A Edwards
241a W A Edwards
242 Mr Gordon Green
242a Mr Gordon Green
243 Mr Geoff Taylor
244 Mrs Adele Shnier
245 D F Patterson
246 Humane Society International Inc
247 Mr Barrie Ward
248 Mr Gareth Kimberly
249 Sir/Madam
250 Mr Richard Thode
251 L Rowney
251a L Rowney
252 Russell & Janet Williams
253 Mr Mervyn Wickolai
254 JB Douglas
255 Mrs Greta Thomas
256 Ms Deborah Barber
257 Mr Les Clair
258 Ms Heather Beaton
259 P & G Searcy
260 Adrian and Lorraine Miloro
261 EP Aldridge
262 Mrs Carole Hart
263 Mr Alan Ellis
264 Dr Kate Clinch-Jones
265 Mr Scott Andrews
266 Mrs Rachel Miller
267 Mr John Larkin
268 The Fellowship of the Round Table
269 Emeritus Professor Hugh Paterson
270 Mr Mark Hansen
271 Anthony & Grace Moore
272 Mr John Massam
273 Ms Janet Tomlinson
274 Hornsby Shire Council
275 Mr Bruce Hannaford
276 Mr Mike Clarke
277 Mr Mervyn Cork
278 Mrs Pamela Rigby
279 B Wheadon
280 Boulton Cleary & Kern
281 Mr George Veicherts
282 Mrs Margaret Mackay
283 FC Burges
284 Mr Jonathan Young
285 Mr FG Landers
286 ME Sawers
287 Mr Don McNaught
288 Ingham Information Group
289 Mr Scott Balson
290 Mr Charles Connelly
291 Mrs Winsome Rusterholtz
292 Ms Margaret Dingle
293 Warren Sheehan Insurance Agencies
294 Women's International League for Peace and Freedom (WILPF)
295 Mr EB Eiby
296 Margaret & Gerald Hoal
297 Ms Johanna Pope
298 Mr Terry Fleming
299 Mr Philip Graham
300 Mount Saint Benedict Centre
301 CE McFall
302 NSW Synod, Uniting Church in Australia
303 Mr Mal Pettett
304 Mr Colvin Smith
305 Mr Richard Sanders, Stop MAI Coalition
305a Mr Richard Sanders
306 Sherif H Seid, Australian National University
307 Mr Peter Glover
308 Mrs Betty O'Keefe
309 Albury/Wodonga Australians for Reconciliation
310 National Enterprise Federation
311 Mrs Shirley Prato

312 Mr Simon Goodrich
313 Mrs Pamela Harris
314 Mr Michael Mazur
315 The Australian Young Christian Workers Movement
316 Mr David Solly
317 Ross & Lorraine Pearce
318 AF Robert, Beaudesert Garden Estate
319 WC & NK Gardner
320 Mr Ray Brown
321 DP & AM Manthorpe
322 RM Clifford
323 Association of Mine Related Councils
323a Association of Mine Related Councils
324 Mr Graham Ringer
325 Mr Peter Howard
326 Mrs Janet Wilson
327 Mr Colin Glover
328 Mr/Mrs Arwen Birch
329 Dr Donald Grant
330 Mr Ken Duperouzel
331 WT & LD McCarthy
332 Centre for Justice and Spirituality
333 CA Hilder
334 Advance Australia Party, Wollongong
335 Mr Robert Cawley
336 AUSTAND
337 Mrs JE Milligan
338 Mr John Prato
339 Mr Marc Allas
340 Mr Denis Galligan QC
340a Mr Denis Galligan QC
341 Birthie Warburg
342 CE & ME Winton
343 Mr Michael Clough
344 Mr John Reynolds
344a Mr John Reynolds
345 Mr Adrian Barnett
346 Dr Margaret Snare
347 Mr Rick Browston
348 Mrs AP Doolan
349 Mrs BJ Little
350 Miss Dawn Tonks
351 Mrs SM Alger
352 Mrs Joan Benlow
353 JR, EM & RJ Carlson
354 Mrs Meaghan Denholm
355 Mrs Joyce Coupe
356 Mr Rodney Crerar
357 BA Godwin
358 Mr John Buckle
359 RAW Cameron
360 Mrs Rosemary Drabsch
361 M Giles
362 K O'Shaughnessy
363 G Blanch
364 Mr Ron Keim
365 Mr Neil Blick
366 Social Justice Catalyst Committee
367 Mrs Anna Parrar
368 Mrs Isabel Higgins
369 Mr R Marshall
370 Leichhardt Municipal Council
371 Noongar Land Council
372 Mr Adam Johnston
373 Public Interest Advocacy Centre
374 Mr Michael Gogler
375 Mr Brian Matthews
376 Ms Gabrielle Harkin
377 Catholic Social Justice Council
378 Mr Robert Stringer
379 Ms Heather Prendergast, Laos
380 Mr Geoff Rhind
381 Dr Andrew Kelly
382 Mr Michael Burnet
383 Mr Sebastian Giglio
384 Australian Manufacturing Workers' Union
385 Mr Daniel MacKinlay
386 Ms Anne Rayner
387 Mr/Mrs Rooney
388 Mr Colin Smith
389 Ms Helena Walsh
390 Mr Dennis Murray
391 Ms Joslyn Tait
392 Mr John Morrissey
393 DB Smith

394 National Civic Council
394a National Civic Council
395 Mr Arnold James
396 Gillian Middenway
397 PA Harris
398 Mr/Mrs JAE Allen
399 Morriset Branch, Australian Labor Party
400 JA Underwood
401 EH Crimes
402 Mr A Joy
403 Ms Olivia Ball
404 Federal-State Relations Committee, Victorian Parliament
405 Argus Australia Pty Ltd
406 Ms Jan Sims
407 Mrs DE Fuller
408 Diocesan Finance Council, Archdiocese of Adelaide
409 Mr Peter Huck
410 Mrs Elizabeth Back
411 Mrs Diana Yellowby
412 Mr Clive Oldroyd
413 Mr Rene Hardt
414 Mr Frank Happ
415 Mr Arnold Sandell
416 Mrs Betty Pares
417 Mr Brian Blanchard
418 Group of Staff, Flinders University
419 Mrs Johanna Byma
420 Mrs Betty Burrowes
421 Mr Trevor Croll
421a Mr Trevor Croll
422 Mr Silke Collisson
423 Mrs Betty Milne-Ward
424 Ms Elspeth Hull
425 Mr Robert Horman
426 Mr & Mrs Helen & Cowan Keys
427 Mr Martin Oliver
428 Mrs Euleen Phillips
429 Mr Robert Lawler
430 Mr I Irwin
431 Mr David Shanahan
432 Giffin & Shaw Accountants
433 Crew Members **MV Cementco**
434 Margaret & Gerald Hoal
435 Presentation Sisters, Wagga Wagga
436 Mrs Clare Condon
437 Mr Ivan Cox
438 Mrs Julie Walker
439 Mr Geoff Abel
440 Mr Donald Humphries
441 International Society for Human Rights
442 Geelong Community Forum
442a Geelong Community Forum
443 The Francisan Missionaries of Mary
444 BJ Allen
445 Mr Ron Sheen
446 Australian Coalition for Economic Justice
447 Mr Ian Robert
448 AWCOSS
449 Mr Bob Hill
450 Mrs Barbara Kimber
451 Ms Jessie Berryman
452 G Osborne
453 Mr Dan Mathews
454 Ms Victoria Bartolo
455 Ms Norma McNamara
456 Ms L A Burrows
457 Ms Sonia Bartolo
458 Ms Sandra Hill
459 J Raymond
460 Mrs M Janz
461 Ms Clare Colman
462 Mr Charles Bartolo
463 R W Davey
464 Mr James Glamill
465 E & J Flynn
466 Mrs C B Seabrook
467 Mr Peter Trainor
468 Ms Pauline Hanrahan
469 Mr Kevin Broome
470 Ms Maree Pyke
471 Ms Patricia Byrne
472 Ms Annelie Daly
473 Mr G Patch
474 E J Harvey

475 Lake Macquarie Greens
476 Mr John Blake
477 Mrs Glenys Bundy
478 Singleton Shire Council
479 Sir/Madam
480 Susan & Peter Hallam
481 National Association of Practising Psychiatrists
482 Ron & Deirdre Freeman
483 B Abel
484 Rentwatchers
485 Mr Leigh Howlett
486 Mr John Budge
487 Ms Jessamine Elliot
488 Mr Michael Wright
489 Ms Jenny Baker
490 Mr John de Fredrick
491 Mr Norman Byrne
492 Mr Michael Christie
493 Ms Rhonda Ogilvie
494 Professor David Shearman
495 Mr Robert Lawler
496 Mrs Theresa Toomey
497 Mr/Mrs Latu Loudoun-shand
498 Busselton Peace and Environment Group
499 Leslie Feather
500 Mr Jim Downing
501 Mr Edward Paterson
502 Citizens Against MAI
503 TASDEC Inc. Global Learning Centre
504 Mr Robert Armstrong
505 Newcastle Stop MAI Committee
506 Justice Studies, Queensland University of Technology
507 Benbow & Pike
508 Ms Karen Smith
509 FREE Assn Inc
510 Mrs A Scaroni
511 Department of Workplace Relations and Small Business
512 Caritas Australia, Tasmanian Office
513 CREATE
514 Ms Lake et al
515 V Mullin
516 Byron Environment Centre Inc
517 National Book Council Inc
518 Ms Anita Radford
519 Mr David Graham Haining
520 D Radford
521 Mr TM Hogan
522 Ms Judith Ludwig
523 Mr Alfred Gerlach
524 Mr Daniel MacKinlay
525 Australian Stop MAI Coalition, SA
526 Cr Kerrie Christian, Wollongong City Council
527 Mr Damien Sweeney
528 Mr Bruce Ingle
529 Mrs Nancy Brown
530 Mr Ben Smith
531 Carolyn Bates & Bernard Neville
532 Mrs KM Street
533 Mr Michael McDermott
533a Mr Michael McDermott
534 Surfcoast Shire
535 Sr Janet Mead
536 Mrs Pat Ryan
537 Ms Jan Shears
538 Ms Melissa Cloake
539 Progressive Labour Party
540 NTEU
541 Ms RJ Aroney
542 Mr Denis Voight
543 Ms Catherine Hutton
544 Mr David Molony
545 Mr Oddur Oddsson
546 Retired Union Members' Association of SA Inc
547 Kate Eve & Dean Lombard
548 Australian Reform Party
549 PJ Keogh
550 UTS Students' Association
551 Australians for an Ecologically Sustainable Population, Canberra Branch
552 Save Australia
553 JD & MA Morris
554 Network of Women in Further Education
555 HR Howard
556 Joe & Carmel Pittari

557 Ms Alison Amos
558 Ms W Pope
559 Australian Chamber of Commerce and Industry
559a Australian Chamber of Commerce and Industry
560 Department of Foreign Affairs and Trade
560a Department of Foreign Affairs and Trade
560b Department of Foreign Affairs and Trade
560c Department of Foreign Affairs and Trade
560d Department of Foreign Affairs and Trade
561 The Treasury
561a The Treasury
561b The Treasury
561c The Treasury
561d The Treasury
562 Ms Jan Sims
563 Mr Peter Haydon
564 Mr Roger Jones
565 Mr David Grace
566 Mr Christopher Brooks
567 Mr Richard Andrews
568 Ms Elizabeth Pell
569 Mr Max Keating
570 Ms Sylvia Jeffres
571 Mrs J Carson
572 T Frost
573 Mr Lance Jeffres
574 Ms EJ Mateljan
575 Mr S Rodgers
576 Council for the National Interest, WA Committee
577 Mr Jim Slattery
578 Dr Shirley Prager
579 Mr John Ryan
580 Good Shepherd Social Justice Network
581 Dr Patricia Weaver
582 Mr Justin Tutty
583 Miss ME Tonks
584 Ms Ellen Hill
585 Ross & Julie Schuurmans
586 Mr John Slade
587 CICD
588 Victorian Local Governance Association
589 Action for World Development (NSW Inc)
590 Coalition Against the MAI
591 Environmental Defender's Office Ltd, NSW
592 Australians for an Ecologically Sustainable Population, National Office
593 Union of Farmers Inc
594 Mr John Grant
595 Mr Laurence Hagerty
596 Soroptimist International of the SW Pacific
597 Associate Prof Klaas Woldring
598 Mr Paul Hamilton
599 Ms Jocely Robertson
600 Mr Mervyn Vogt
600a Mr Mervyn Vogt
601 Mr Bradley Curry
602 Mr Stephen Taupin
603 Mr Richard Smolarek
604 ATSIC
605 Ms Anne Byrne
606 Ms Filomena Nichols
607 Tony Goodwin
608 TW Ford
609 UN Association of Australia (WA) Inc
610 Ms Helen Lawrie
611 Queenslanders for Constitutional Monarchy Association (Inc)
612 Cooloola Ratepayers and Residents Association
613 Ms Anthea Packer
614 Mr Peter Jones
615 Epping District Peace & Environment Group
616 Australian Stock Exchange
617 Mr Louis Cook
618 North Illawarra Social Justice Network
619 D & M G Connolly
620 Ms Michelle Lindbolm
621 Ian Cohen MLC
622 Australian Reform Party, Warrnambool Branch
623 Ms Eileen Turner
624 Mr Michael Porter
625 Australian Council of Social Service (ACOSS)
626 Ms Patricia Morrow
627 Ms Anne Densley
628 Mr KJ Koster
629 JJ Jeffers
630 Kirsteen Thomson et al

631 RJ Mills
632 Mr Peter Burgess-Orton
633 Ms Patricia Knight
634 Mr Daniel Connell
635 Erskineville Branch, Australian Labor Party
636 Communist Party of Australia Central Committee
637 E Dunphy
638 DF & DE Tudehope
639 Paulian Association
640 Busselton Peace and Environment Group
641 Mr Daniel James
642 Thomas Bartos, Smith and Bartos
643 Bevan Conroy, Conroy & Associates
644 AUSTCARE
645 Allen Allen & Hemsley
646 Australian Doctors' Fund Limited
647 W & P Fleming
648 Ms Monica Barry
649 Mr Harry John
650 Mrs Therese Clair
651 PA McNamara
652 Mr Leonard Warren
653 Mr Kevin Healy
654 LJ Cawley
655 NW Clark
656 Mr Michael Comerford
657 SH Turvey
658 Mr Peter Secombe
659 Miss P Joyce
660 Ms Julie Lawrie
661 Mr Ian Dean
662 John & Helen Casanova
663 Ms Annika Faber
664 Mr Michael Pyke
665 Mr Charles Nightingale
666 AR Thompson
667 L Daly
668 Ms Margaret Findlay
669 Mr Charles Bignold
670 G Murray
671 Mrs Catherine Coleman
672 Ms Gina Manno
673 Ms Mary Mahoney
674 Mr Edward Nieman
675 Mr R Stevenson
676 Ms Antonia Symonds
677 Ms Gail Brunger
678 Mr Geoffrey Wratten
679 Mr Ross McLennan
680 Mr Thomas Bettison
681 Ms M Anne Sanders
682 M R Schutz
683 Mrs Hope Koster
684 Mr Ivan Tilbury
685 Mr Damian McClarty
686 Mr Doug Vanstone
687 Mrs V Pierce
688 Sir/Madam
689 Mr Dennis Faulkner
690 Mrs JF Leslie
691 Mrs Dawn Thompson
692 Ms Cecilia Lee
693 Mrs Marie Barwick
694 Ms Geraldine Croagh
695 Mrs L Sobey
696 Ms Astrid Herlihy
697 Mr Alan R Birchley
698 R Rochelli
699 Mr Brian Magree
700 Ms Jenny Ward
701 Mr Arnold Kalnins
702 Ms Wendy Eggleton
703 R J Macdonald
704 S Hayles
705 Mrs Patricia Johnson
706 Louise & Peter Hobbs
707 Greg & Robyn Smith
708 Mr Neville Ford
709 B Mewburn
710 Mr Glenn Humphreys
711 Ms Theresa Self
712 Women's Electoral Lobby, NSW
713 Australian Society of Authors
714 Australian Business Chamber
715 Mr Robert Mears
716 ACTU

717 Women’s Electoral Lobby, WA
718 Community Aid Abroad
718a Community Aid Abroad
719 Australian Civil Liberties Union
720 National Union of Students, National Office
721 Medical Association for Prevention of War (Australia)
722 TD Thompson
723 Mr Len Humphris
724 Knights of the Southern Cross (NSW) Inc
725 Mr Adrian Hicks
726 Michael & Ingrid Hansen
727 Ms Colleen Kearney
728 Dr James Goodman, Stop MAI Campaign
728a Dr James Goodman
728b Dr James Goodman
729 Australian Conservation Foundation
729a Australian Conservation Foundation
730 Mr Michael Coleman
731 Toowoomba and Region EnvironmentCouncil Inc
732 Economic Reform Australia (NSW Division) Inc
733 Mr Duncan Dey
734 Mrs Lesley Kelloway
735 Ms Jenny Kent
736 Mr Ted Murphy
737 Ms Terrie Templeton
738 Premier's Council for Women, NSW
739 Ms Madonna Greathead
740 Australian Owned Companies Association
741 Australian Vice-Chancellors' Committee
741a Australian Vice-Chancellors’ Committee
742 University of Queensland Student Union
743 Australian Education Union, Federal Office
744 Mrs M Cameron
745 Mr Thomas King
746 Ms Lilly Bowes
747 Liberal Party of Australia (Gosford Branch)
748 Mrs M M Horne
749 Commonwealth Department of Health and Family Services
750 Mr Frank Vavasour
751 Mr Walter MacMillian
752 Ms Fay Lawrence
753 Mr John Hunting
754 World Vision Australia
755 Mr Allen Asher et al
756 Gosford City Council
757 Australian Local Government Association
758 Australian Children's Television Foundation
759 Mr John Williams
760 G A Huett
761 Mr Rodney Peers
762 Mr Ron van de Wiel
763 Premier of Victoria
764 Victorian Trades Hall Council
765 Mr Jim Gladwin
766 Amnesty International Australia
766a Amnesty International Australia
767 The Hon Richard Jones MLC
768 Mrs B M Harding
769 Wollongong City of Diversity
770 Mr David Burnett
771 Mr Robert Balzola
772 MJ & LJ Thompson
773 Ms Christine Carolan
774 Mrs Denise Kiek
775 Philip and Patricia Jones
776 Business Council of Australia
776a Business Council of Australia
777 Melbourne University Student Union Inc
778 SJE Consulting
779 Mr Norman Wiese
780 Communications Law Centre
781 Mr Tim Callaghan
782 Sr Anne Drouer
783 Mr Stan Tutt
784 Ms Margaret Gillespie-Jones
785 Fr Reg Howard
786 CFMEU Mining and Energy Division
787 Minister for Immigration and Multicultural Affairs
788 Mr Ian Wallis
789 Australian Industry Group (formerly MTIA)
790 J O'Neill
791 Moreland City Council
792 Environment Australia

793 Department of Transport and Regional Development
794 Shire of Goomalling
795 Mr David Wilson
796 Australian Broadcasting Authority
796a Australian Broadcasting Authority
797 The Wilson Families
798 Retired Members' Association (Queensland) – Australian Manufacturing Workers' Union
798a Retired Members' Association (Queensland) – Australian Manufacturing Workers' Union
799 St Patrick's College, Goulburn
800 Ms Ute Mueller
801 Mrs M Stuart
802 Ms Rosalie Hennesssy
803 Mr J Byrden
804 Wildlife Preservation Society of Queensland
805 Chief Minister, ACT Government
806 Mr Neville Jones
807 The Oberon Council
808 Mrs W White
809 Australian Council for Overseas Aid (ACFOA)
810 Sutherland Shire Council
811 Hastings Shire Council
812 Mrs AL Barnes
813 Globalisation Action Group and Friends of the Earth, Fitzroy
814 Oatley Flora and Fauna ConservationSociety
815 Southern Cross Software Queensland Pty Ltd
816 Mr Barry Eady
817 CRC Justice Support
818 Leeton Shire Council
819 Mr John Hall
820 Ms Carmel Tinkler
821 Amalgamated Metal Workers Union
822 AID/WATCH
823 Associate Professor Jan McDonald
824 The Coastwatchers Association Inc
825 Mr Peter Wilson
826 St Vincent de Paul Society, Sydney Archdiocesan Council
827 Ms Dorothy Young
828 Sydney Federal Electorate Council, ALP
829 Mt St Benedict College (Year 12 General Studies Class)
830 Baulkham Hills Shire Council
830a Baulkham Hills Shire Council
831 Professor Mary Hiscock
832 UN Association of Australia, Tasmanian Branch
833 Mr Lindsay Peacock
834 The Pharmacy Guild of Australia
835 Conservation Council of the South-East Region And Canberra Inc
836 Chief Minister, NT Government
837 Retired Members Association, AMWU
838 NA Whiffen
839 Mr Arkell
840 Gilgandra Shire
841 Qld Festival of Light/Community Standards Organisation
842 St. Vincent de Paul Society, Holy Spirit Conference, Lismore
843 The Council of the City of Armidale
844 Minister for Finance and Administration
845 The Council of the Municipality of Kiama
846 Mr Gerhard Weissmann
847 Council of Small Business Organisations of Australia Ltd
848 Attorney-General's Department
848a Attorney-General's Department
849 Department of Communications and the Arts
850 W Hollmann
851 Queensland Conservation Council
852 Bev Pattenden
853 Noongar Language & Culture Centre, WA
854 Blue Mountains Conservation Society Inc
855 Global Learning Centre
856 Combined Pensioners and Superannuants Association of New South Wales Inc
857 Mr Stephen Morey
858 Mr Carl Bertelsen
859 United Nations Association of Australia (NSW) Inc
860 Rising Sun Branch - Australian Labor Party
861 RH Franklin
862 Mr Max Wood
863 Ms Lucy Reid
864 Mr Herbert Compton

865 Wildlife Preservation Society of Queensland
866 Mr Peter Davies
867 Department of Industry, Science and Tourism
868 Australian Film Finance Corporation
869 Wyong Shire Council
870 Council of Retired Union Members of New South Wales
871 B'nai B'rith Anti-Defamation Commission
872 Wollondilly Shire Council
873 Pauline Hanson's One Nation Party
874 Ken & Sally Wylie
875 Parramatta City Council
876 Mr Ralph Evans
877 Diocese of Broome
878 Leeuwin Conservation Group (Inc)
879 Ms Fiona Andrews
880 Mrs Pat Webb
881 Mr Ian Barnett
882 Women's Electoral Lobby Australia Inc
883 MP Kelly
884 Mrs Lesley Kelloway
885 Ms Julie Sciberras
886 Ms Tracey La Mude
887 The Western Australian Farmers Federation (Inc)
888 Australian Catholic Social Justice Council
889 Ross G Robinson
890 Australian Services Union, Central & Southern Queensland & Administrative Branch
891 Mrs J E Clarkson
892 Mr David Keane
893 Hume Shire Council
893a Hume Shire Council
894 Ursuline Convent, Dutton Park, Qld
895 Rockdale City Council
896 Mrs Wilma Johnson
897 Queensland Teachers Union
898 Cooloola Shire Council
899 Meander Resource Management Group
900 North Coast Environment Council
901 Country Women's Association of NSW
902 Mr Dennis Rose
903 L Mc Veigh
904 The Council of the City of Grafton

APPENDIX 2

WITNESSES AT PUBLIC HEARINGS

Wednesday, 6 May 1998, Canberra

Department of the Treasury

Mr P Biggs, Director, Secondary Industries Section, Foreign Investment Review Branch, International and Investment Division

Ms J Murphy, Assistant Secretary, Foreign Investment Review Branch, International and Investment Division

Mr R Nixon, Director, Primary Industries Section, Foreign Investment Review Branch, International and Investment Division

Mr C Thorburn, Assistant Director, Primary Industries Section, Foreign Investment Review Branch, International and Investment Division

Department of Foreign Affairs and Trade

Dr W Goode, Director, New Trade Issues Unit

Mr J Hart, Executive Director, Treaties Secretariat

Mr M Potts, Assistant Secretary, Trade Policies Issues and Industrials Branch

AusAID

Dr P McCawley, Deputy Director General, Quality Group

Austrade

Ms H Munro, Senior Adviser, Government and Policy Branch

Australian Chamber of Commerce and Industry

Mr B Davis, Director, Trade and Policy Research

Mr M Paterson, Chief Executive

Stop MAI Coalition

Mr R Sanders, National Coordinator

Private Citizen

Ms P Ranald

Thursday, 16 July 1998, Melbourne

National Civic Council

Mr F Brown, National Secretary

Australian Council of Trade Unions

Mr T Harcourt, Assistant Secretary

Victorian Trades Hall Council

Mr L Hubbard, Secretary

Mr E Murphy

Business Council of Australia

Mr C Piccinin, Assistant Director

Community Aid Abroad

Dr G Dunkley, Voluntary Adviser

Ms L Kent, Policy Coordinator

Moreland City Council

Mrs B Graham, Economic Development

Victorian Local Governance Association

Councillor A Rowe, Chairman, Competition and Financial Issues Working Party

Geelong Community Forum

Ms S O'Meley

Private Citizens

Mr D Barnett

Mr N Ford

Mrs M Gillespie-Jones

Mr A Griffiths

Mr P Rogers

Mr M Vogt

Mr D White

Friday, 24 July 1998, Brisbane

Queenslanders for a Constitutional Monarchy Association Inc

Mr J Gierke, Member

Queensland Conservation Council

Dr C Booth, Chairperson

University of Queensland Student Union

Mr M Carter, Welfare Vice-President

Soroptimist International

Ms M Lamont, National Representative, Australia

Global Learning Centre

Mr G Boyd, Coordinator

Stop MAI Coalition

Mr Richard Sanders, National Coordinator

Private Citizens

Mr E Aldridge

Mr A Birchley

Mr T Croll

Mr R Downey

Mr W Edwards

Mr D Grace

Mr P Graham

Mr G Green

Professor M Hiscock

Mr J Jeffers

Associate Professor J McDonald

Mr N Mullins

Emeritus Professor H Paterson

Mrs E Peters

Mr G Pickering

Mr J Tiplady

Friday, 14 August 1998, Canberra

Attorney-General's Department

Ms F Musolino, Senior Government Lawyer, International Trade and Environment Law Branch

Mr M Zanker, Assistant Secretary, International Trade and Environment Law Branch

Department of Industry, Science and Tourism

Mr J Griffiths, General Manager, Industry Policy Branch

Mr A Weber, Policy Officer, Industry Policy Branch

Department of Communications, the Information Economy and the Arts

Ms M Morris, Assistant Secretary, Film Branch

Mr J Neil, Assistant Secretary, Enterprise and Radio-Communications Branch

Australian Conservation Foundation

Ms Anna Reynolds, National Liaison Office

Australian Industry Group

Ms V Filling, Principal Adviser

Australian Vice-Chancellors' Committee

Mr S Hamilton, Executive Director

Australian Local Government Association

Mr C Bell, Policy Manager, Finance and Micro-Economic Reform

Local Government and Shires Association of New South Wales

Mr B Hartnett, Director, Policy and International Affairs

Friday, 21 August 1998, Sydney

Australian Stock Exchange

Mr M Roche, National Manager, Strategic Planning and Review and Chief Economist

AUSTCARE

Major-General W Glenny (Rtd), Chief Executive Officer

Amnesty International Australia

Mr J Isbister, Strategic Alliance Specialist, National Campaigns

Ms S Lauber, Member, Legal Network

Mr R Sullivan, Convenor, Business Network

Australian Council of Social Service

Mr G Evans, Policy Resource Coordinator (International Treaties)

Australian Broadcasting Authority

Professor D Flint, Chairman

Mr G Grainger, Deputy Chairman

Australian Society of Authors

Mr H McDonald, Business Manager

Australian Publisher' Association

Ms J Fewin, Administrator

National Book Council Inc

Ms P Woolley, Honorary Executive Chair

AID/WATCH

D River, Director

Gosford City Council

Councillor M Brooks

Private Citizens

Mr C Arnold

Mr R Barnett

Mr R Evans

Mr F Landers

Monday, 21 December 1998, Canberra

Department of the Treasury

Ms J Murphy, General Manager, Foreign Investment Policy Division

Department of Foreign Affairs and Trade

Mr M Potts, Assistant Secretary, Trade Policy Issues and Industrials Branch

Attorney-General's Department

Mr M Zanker, Assistant Secretary, International Trade and Environment Law Branch

Stop MAI Coalition of New South Wales

Dr J Goodman, Coordinator.

APPENDIX 3

EXHIBITS

1. *Disciplining Governments? What the Multilateral Agreement on Investment would mean for Australia* by Patricia Ranald, UNSW Public Sector Research Centre and Evatt Foundation, 1998.

2. *Magna Carta for Global Corporations* by Ted Wheelwright, **Arena Magazine**, No 34, April-May 1998, pp. 38-40.

3. *Maigalomania! Citizens and the Environment Sacrificed to Corporate Investment Agenda*: A Briefing by Corporate Europe Observatory (CEO), February 1998. (See also Exhibit No 23 below.)

4. *Open for Business? Australian Interests and the OECD's Multilateral Agreement on Investment (MAI)* by Wolfgang Kasper, No 1, Issue Analysis, The Centre for Independent Studies, 27 April 1998.

5. *Municipalities and the MAI* by Barry Appleton, Appleton & Associates, Toronto.

6. *Social Dimensions of North American Economic Integration: Impacts on Working People and Emerging Responses*, A Report prepared for the Department of Human Resources Development by the Canadian Labour Congress, 1996.

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8. *The WTO and the Proposed Multilateral Investment Agreement: Implications for Developing Countries and Proposed Positions*, Third World Network, 1996.

9. *Globalising Liberalisation without Regulations! - Or, how to regulate foreign investments and TNCs*, Consumer Unity & Trust Society (CUTS), Briefing Paper No 6/July 1996.

10. *The Free Trade Adventure: The Uruguay Round and Globalism - A Critique* by Graham Dunkley, Melbourne University Press, 1997.

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12. Published papers from **Workshop on Research Issues in Foreign Direct Investment**, Flinders University, 14-15 May 1998.

13. *Characteristics and Behaviour of Multinationals in Australia* (Second draft, April 1998) by Bijit Bora.

14. *Foreign Ownership and Wages in Australia* (March 1998) by Bijit Bora.

15. *Human Capital, Foreign Ownership and Wages* (April 1998) by Bijit Bora.

16. Transcript: Lateline (ABC Television program) Tuesday, 28 July 1998: *Big Picture - Impact of Economic Globalisation. World Economic Outlook, May 1997: Globalization – Opportunities and Challenges*, World Economic and Financial Surveys, International Monetary Fund.

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19. *Communicating the Benefits of Liberalisation*, **APEC Currents**, Vol 3, No 3, August 1998.

20. *Does Globalisation Undermine Labour Standards? – Lessons from East Asia* by Chris Manning, **Australian Journal of International Affairs**, Vol 52, No 2, 1998, pp. 133-147.

21. *Services Trade and Foreign Direct Investment*, Staff Research Paper by Alexis Hardin and Leanne Holmes, Industry (now Productivity) Commission, November 1997.

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Wesselius, **The Ecologist**, Vol 28, No 3, May/June 1998, pp. 154-161. (See also Exhibit No 3 above.)

24. *Debate: Transnational Corporations* by Ankie Hoogvelt, New Political Economy, Vol 3, No 2, July 1998, pp. 279-300.

25. *New OECD Study Ignores Evidence that Trade and Investment Liberalization Policies have hurt Workers and the Environment* by Mark Weibrot, Robert Naiman, Neil Watkins, Nick Mabey and Richard McNally, World Wildlife Fund International, 1998.

26. *The Capitalist Threat* by George Soros, T**he Atlantic Monthly**, Vol 279, No 2, February 1997, pp. 45-58, together with letters in reply in Vol 279, No 5, May 1997, pp. 10-11.

27. *Financial Services: The Emerging Industry We Ought to Have* by Ralph Evans with assistance from Paulo D Simoes, **Growth**, No 45, December 1997, pp. 20-34.

28. *Trends in Foreign Direct investment Inflows*, **Economic Round-Up**, Spring 1997, pp. 19-25.

29. *Toward a Global Open Society* by George Soros, **The Atlantic Monthly**, Vol 281, No 1, January 1998, pp.20-32 (*passim*), together with letters in reply in Vol 281, No 4, April 1998, pp. 10-11.

30. *Do Taxes Affect Investment Decisions?* by Mahmood Iqbal, **Policy Options/Options Politiques**, January/February 1998, pp. 26-28.

31. *The Uncontrollability of Globalizing Capital* by Istvan Meszaros, M**onthly Review**, Vol 49, No 9, February 1998, pp. 27-37.

32. *International Economics: Unlocking the Mysteries of Globalization* by Jeffrey Sachs, **Foreign Policy**, Spring 1998, pp. 97-111.

33. *ASEAN and the Regionalization and Globalization of World Trade* by Ross Garnaut, **ASEAN Economic Bulletin**, Vol 14, No 3, March 1998, pp. 215-223.

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35. *The Multilateral Agreement on Investment: A Work in Progress* by Alan Larson, **US Department of State Dispatch**, April 1998, pp. 30-33.

36. *Multilateral investment on Agreement: An Analysis* by Biswajit Dhar and Sachin Chaturvedi, **Economic and Political Weekly**, Vol XXXIII, No 15, 11 April 1998, pp. 837-849.

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38. *Securing the Benefits of Trade and Investment* by Donald J Johnston, **The OECD Observer**, No 211, April/May 1998, pp. 4-6.

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40. *Profits without honour* by Moira Rayner, **AQ (Journal of Contemporary Analysis)**, Vol 70, No 3, May-June 1998, pp. 5-7.

41. *Globalisation, the Law and Australian Sovereignty: Dangerous Liaisons* by Hilary Charlesworth. (Text of an Australian Senate Occasional Lecture Series, 12 June 1998, pp. 1-15).

42. *A global market for all* by Jeremy Seabrook, **New Statesman**, 26 June 1998, pp. 25-27.

43. *Goodbye, Inland Revenue* by Charles Leadbetter, **New Statesman**, 3 July 1998, pp. 27-29.

44. *Address to the World Trade Organization*, 18 May 1998, President William J Clinton.

45. *Globalisation, ready or not* by Adele Ferguson and David James, **Business Review Weekly**, Vol 20, No 33, 31 August 1998, pp. 38-43.

46. *Multilateral agreement: smoothing the flow of international investment?* by Tom Connors, **Beef Improvement News**, September 1998, p. 5.

47. *Time to bring back Keynes* by James Buchan, **New Statesman**, 4 September 1998, pp. 10-12.

48. *Global Capitalism, RIP?* by Robert J Samuelson, (**Bulletin with) Newsweek**, 15 September 1998, pp. 62-64. (See also **Newsweek**, 14 September 1998, pp. 40-42.)

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50. *The MAI and the Clash of Globalizations* by Stephen J Kobrin, **Foreign Policy**, Number 112, Fall 1998, pp. 97-109.

51. *Globalisation and Linkages: Macro-Structural Challenges and Opportunities*, **OECD Working Papers**, Vol V, No 76, Paris, 1997.

52. *Globalisation and Linkages to 2020: Can Poor Countries and Poor People Prosper in the New Global Age?*, **OECD Working Papers**, Vol V, No 90, Paris 1997.

53. Extract from *The Global Trap:Globalisation and the assault on prosperity and democracy* by Hans-Peter Martin and Harald Schumann, translated by Patrick Camiller (Pluto Press, Sydney, 1997).

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63. Extract from *Civilising Global Capital: New Thinking for Australian Labor*, by Mark Latham (Allen & Unwin, Sydney, 1998).

64. *Liberalising capital flows: lessons from Asia* by Pierre Poret, **The OECD Observer**, No 21, October/November 1998, pp. 39-40.

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66. Press Release: *Informal Consultations on International Investment*, OECD, Paris, 3 December 1998.

67. *Power in the Global Arena* by Noam Chomsky, **New Left Review,** No 230, July/August 1998, pp. 3-27.

68. Report of the Task Force on International Financial Reform, 1998.

69. *Towards a Citizens' MAI: An Alternative Approach to Developing a Global Investment Treaty Based on Citizens' Rights and Democratic Control*, prepared by the Polaris Institute (Canada, 1998).

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dated 8 February 1999, and a translation of the recommendations of a French report on the draft MAI dated September 1998.

74. *The MAI: From Neocolonialism to Transnationalism?* by James Goodman, **Arena Magazine**, No 39, February-March 1999, pp. 34-37.

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APPENDIX 4

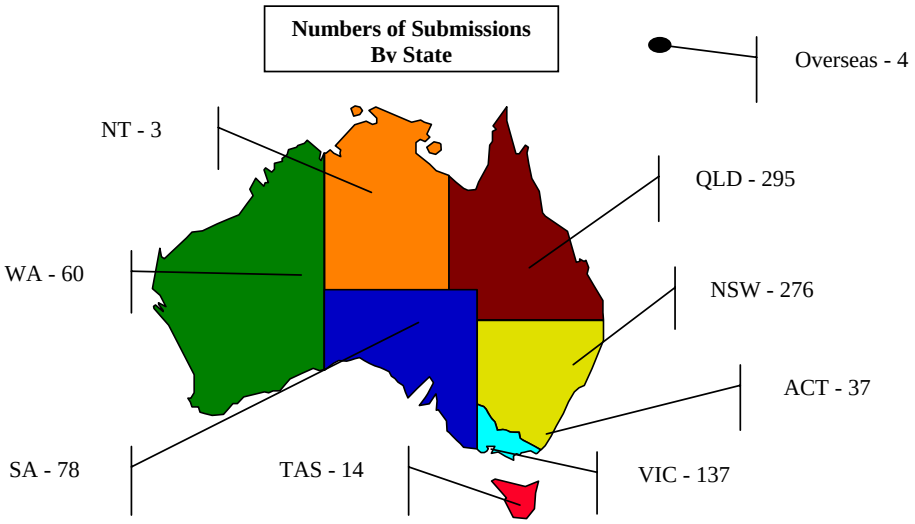
OECD MEMBERSHIP

Australia
Austria
Belgium
Canada
Czech Republic
Denmark
Finland
France
Germany
Greece
Hungary
Iceland
Ireland
Italy
Japan
Belgium-Luxembourg
Mexico
Netherlands
New Zealand
Norway
Poland
Portugal
Republic of Korea
Spain
Sweden
Switzerland
Turkey
United Kingdom
USA

APPENDIX 5

STATISTICAL INFORMATION

DISTRIBUTION OF SUBMISSIONS TO THE INQUIRY



SOME ISSUES IN SUBMISSIONS

More than 900 submissions were received from around Australia and included one from Japan, one from Laos and two from New Zealand.

86% (779) of respondents rejected the proposition that Australia should ratify the draft Agreement. 7% (64) indicated support, with qualifications, for the draft agreement.

23% (212) of respondents raised the issue of the perceived secrecy surrounding the negotiations, or the difficulty in obtaining up to date and accurate information on the draft Agreement.

The impact of the draft MAI was raised in many submissions with 36% (322) indicating their belief that the draft Agreement would infringe Australia's sovereignty in some way.

6% (54) of respondents indicated that ratification should only be considered after a referendum was held, while 2% (21) of respondents considered that a government signing the draft MAI would perpetrate an act of treason.