

## Overview of the Treaty

- 3.1 This Chapter will look at some general issues with regard to the AUSFTA. It is usual practice for the Committee, in its reviews of proposed treaty actions, to consider evidence based in the supporting documentation supplied by the line agency that is proposing that a treaty action proceed. These documents accompany the treaty text when it is tabled in the Parliament. In the case of this treaty, the documents are the National Interest Analysis (NIA), the Regulation Impact Statement (RIS) and the *Guide to the Agreement*, which is designed to be a plain-English explanation of the treaty's articles.
- 3.2 Given the significance of the treaty, the breadth of its obligations and the level of interest in the Australian community, the Committee's usual overview of evidence from those documents will be broadened. From Chapter 4, particular areas of the Agreement will be reviewed, but in this Chapter some more general issues can be examined to give a general overview of the Agreement in its entirety.
- 3.3 Therefore, issues which the Committee would normally cover in the body of its report, such as potential economic benefits (including economic modelling which has been conducted), consultation and implementation, which do not fall into a particular chapter in the Agreement, will instead be looked at here.
- 3.4 The Committee acknowledges the importance of issues regarding the involvement of State and Territory Governments in the consultation and implementation aspects of the treaty, and therefore will outline some of those concerns. While assessing the overall impact of the Treaty and issues surrounding its development, the Committee will

also present some evidence received relating to the potential impact on Australia's Indigenous population.

## Summary of outcomes

3.5 The NIA states that the Agreement will remove 'almost all barriers' to Australia's exports of goods to the United States and provides for a very high degree of economic integration of the Parties' markets through comprehensive commitments on a range of areas including trade in services, investment, government procurement, intellectual property, electronic commerce and competition policy.<sup>1</sup>

3.6 An initial feature of the Agreement to note is its 'GATS-plus' description. The Committee first examined this kind of agreement when it reviewed the Singapore - Australia Free Trade Agreement (SAFTA) in 2003. The Committee understands that for services and investment issues, a GATS-plus agreement means that

the parties negotiate, via the offer and request process, an agreed list of exceptions to which the obligations in the FTA do not apply. This so-called 'negative list' is set out in annexes to the services and investment chapters.<sup>2</sup>

## Market Access

3.7 One of the main outcomes presented by DFAT negotiators as presenting significant economic gains for Australia is the increase in market access. The NIA states that extensive consultation and industry submissions formed the basis of the Australian objectives for negotiations. According to paragraph 7, the Agreement will remove a significant number of direct and indirect trade barriers and will create new market access opportunities.

## Agriculture<sup>3</sup>

3.8 Duties on two-thirds of agricultural tariffs will be eliminated from the day of the Agreement's entry into force. Duties on a further 9 per cent of tariff lines will be eliminated within four years. Greater access has been negotiated for beef and dairy, including immediate elimination of in-quota tariffs. The single-desk marketing arrangement for Australian commodities has been preserved, and Chapter 8 of this

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1 National Interest Analysis (NIA), para. 5.

2 DFAT, Briefing 3, 2003.

3 Information in the following paragraphs is taken from the NIA unless stated otherwise.

Report will demonstrate evidence received by the Committee regarding the maintenance of Australia's quarantine regime.

## **Manufacturing**

- 3.9 Duties on more than 97 per cent of US non-agricultural tariff lines (excluding clothing), worth \$6.48 billion in 2003, will be duty free from day one of the Agreement. By 2015, tariffs on textiles, some footwear and some other items will be phased out, with all trade in non-agricultural goods free of duty. A mechanism to address non-tariff barriers will be established as well as other consultative measures dealing with technical regulations and standards.
- 3.10 Both Parties will eliminate customs duties on almost all automotive products from day one, including the 25 per cent US tariff on utes ('light commercial vehicles'). Australian duties on passenger motor vehicles (PMVs) will be phased out by 2010. Evidence received by the Committee on these issues is discussed at Chapter 5 of this Report.

## **Services**

- 3.11 The Agreement binds liberal access for Australian service suppliers, including for professional, business, education, environmental, financial and transport services. A framework to promote mutual recognition of services has been developed. However, the Committee notes evidence which was critical of the absence of commitments on working visas for professional people, and the lack of mutual recognition arrangements, and has made recommendations that progress in those areas continue to be made.

## **Financial Services**

- 3.12 The Agreement binds liberal conditions of access for Australian financial services providers to the world's largest financial market. Australia and the US will consider ways to integrate their financial services sectors further, through access for foreign securities markets and for foreign collective investment schemes. The Financial Services Committee which would be established under the Agreement would report on these issues within two years of the Agreement entering into force.

## **Investment**

- 3.13 The Agreement contains a stronger framework for investment protection that should continue to promote our largest investment relationship. A range of trade and investment distorting performance requirements are prohibited under the Agreement. There is no investor-state dispute mechanism; ‘in recognition of the robust domestic legal systems in both countries’, there is no provision for investors to use international arbitration to pursue concerns about government actions. Also under the Investment Chapter of the Agreement, Australia is still able to screen foreign investments of significance.
- 3.14 Evidence regarding dispute settlement is discussed at Chapter 4. Evidence received on Financial Services and Investment is discussed at Chapter 12 of this Report.

## **Government procurement**

- 3.15 The US Federal Government procurement market is estimated to be worth US\$200 billion, and is currently closed to Australian firms. Under the Agreement, access for Australian firms would be available for US federal government contracts over US\$58 550; and in construction over \$US6.275 million.
- 3.16 Evidence will be examined in Chapter 15 which weighs the relative ability of Australian firms to successfully conduct business in the US market.

## **Competition, telecommunications and e-commerce**

- 3.17 The Agreement will enable even closer cooperation with the US on competition-related issues. According to the NIA, businesses and individuals will be treated fairly in enforcing competition law. Consumer protection agencies will work together in combating illegal activity. The Agreement will allow greater redress for consumers and investors who have been defrauded or deceived. This issue is covered briefly in Chapter 14 of this Report.
- 3.18 The Agreement contains ‘WTO-plus’ rules on major suppliers and pro-competitive regulatory frameworks for Australian and US firms. There will be a new high level avenue for Government and industry consultations on market access issues. This issue is covered briefly in Chapter 13 of this Report.

- 3.19 In relation to electronic commerce, the Agreement provides that there will be no barriers to trade conducted electronically and Australia will still be able to regulate for public policy purposes. This issue is mentioned at the conclusion of Chapter 16 of this Report, which deals with the possible effects of the Agreement on intellectual property rights.

## Obligations

- 3.20 Obligations cover a range of areas under the Agreement. The NIA states that these provisions will 'liberalise and facilitate trade and investment' between Australia and the US. There will be initial commitments to eliminate tariffs on specified tariff lines that meet the agreed Rules of Origin (ROOs) criteria. There are also commitments and disciplines on government procurement, intellectual property protection, telecommunications, customs procedures, electronic commerce, competition policy, professional services recognition, standards and technical regulations, sanitary and phytosanitary (SPS) measures, labour and the environment.
- 3.21 Obligations will be examined more closely where they arise in each chapter of this Report, under their relevant headings.

## Implementation

- 3.22 A number of legislative and regulatory changes will be needed for Australia to be able to fulfil its obligations under the Agreement. These were provided by DFAT at Annex 8 with the NIA and associated documents. Changes are reproduced here, for reference.
- 3.23 At the time of the consideration of the Committee's Report, there was discussion that proposed legislative changes were to be introduced in the current parliamentary sitting.
- 3.24 The AUSFTA will not come into effect until both Parties have completed their domestic approvals processes, amended and / or passed any necessary legislation, and agreed on a date for entry into force.<sup>4</sup> The following points are taken from the NIA.

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4 [www.dfat.gov.au/trade/negotiations/us.html](http://www.dfat.gov.au/trade/negotiations/us.html), viewed on 20 June 2004.

## Goods, Agriculture and Textiles Chapters

- Amendments to *Customs Tariff Act 1995* by inserting provisions that will allow for a preferential rate of duty to apply to goods from the United States where they meet the rules of origin as set out in the Agreement.
- Amendments to the *Customs Act 1901* and the *Customs Tariff Act 1995* to allow Customs to implement safeguard action, which is a mechanism to stop or slow the decrease in tariff rates where preferential entry harms the local industry. The Productivity Commission will be the competent authority to conduct a safeguard investigation.
- Amendments to the *Customs Act 1901*, to give Customs the power to question and to audit exporters in regard to the production or manufacturing details of goods they are exporting, or have exported, to the United States.
- Amendment to the *Customs Act 1901* to implement the temporary importation provisions of Article 2.5 of the Agreement.
- Amendments to the Dairy Produce Regulations 1986 (Part 2 Export Control) to add as regulated dairy produce all of the items included under the new access arrangements and to identify any conditions that may be necessary for the export of specified categories of dairy produce to the United States. The *Dairy Produce Act* will not require change.
- *Australian Meat and Livestock Industry Act 1997* and the *Australian Meat and Livestock (Quotas) Act 1990* will not require amendment. However, the orders under the Act will need to be changed to reflect additional product category requirements for beef, specifically to administer the tariff rate quotas set out in the Agreement.
- The *Horticulture Marketing and Research and Development Services Act 2000* will not require amendment. However, a new order under the Act will need to be made to reflect additional product categories as regulated horticulture products.

## Rules of Origin

- Rules of Origin (ROOs) determine the goods that qualify for preferential treatment under the Agreement. The Agreement will introduce a new system based on change of tariff classification

whereby each non-originating input must be transformed in the manufacturing process such that it undergoes a particular change in tariff classification. For certain products, the change of tariff classification rule is combined with a local content requirement. This model has also been adopted for the Australia - Thailand FTA. It differs from the ROOs under the Australia - New Zealand CER Trade Agreement which is based on a local content requirement of 50% of the ex-factory value.

- Amendments to the *Customs Act 1901* to outline the general ROOs provisions set out in Chapter 5 of the Agreement.
- The product-specific ROOs in the Annexes 4-A and 5-A will be incorporated in the Regulations made under the *Customs Act 1901*.

## Services and investment

- Amendments to the *Life Insurance Act 1995* and Part 3 of the Life Insurance Regulations 1995 to allow US owned life insurers to operate in Australia through branches.
- Amendments to the *Foreign Acquisitions and Takeovers Act 1975* and Foreign Acquisitions and Takeovers Regulations 1989 to reflect the commitments made in the Investment Chapter in relation to screening of US investment through the Foreign Investment Review Board (FIRB). Specifically, amendments to address the increase in the threshold for FIRB examination of US acquisitions in non-sensitive sectors from \$50 million to \$800 million (indexed to the Australian GDP deflator), as well as to exempt US acquisitions of interests in Australian financial sector companies from notification through the FIRB process (such acquisitions will still be subject to the approval and other requirements of the *Financial Sector (Shareholdings) Act 1998* and other financial sector regulation.)

## Intellectual Property

- Amendments to the *Copyright Act 1968* to address a number of obligations, including, but not limited to, copyright term extension, ISP liability and criminal penalties. Specifically, to address:
  - ⇒ a scheme for immunity of Internet Service Providers (ISPs) for potential copyright infringement in return for compliance with a scheme for the removal of allegedly infringing material on their networks

- ⇒ implementation of copyright term extension
- ⇒ enhanced measures against copyright infringement - particularly on networks, and in support of the technology used by owners in seeking to protect their material in electronic form and
- ⇒ broadening the scope of the remedies and criminal offences in the Act and amendments concerned with related limitations and exceptions.
- Amendments to the *Australian Wine and Brandy Corporation Act 1980* to address geographical indications and trade marks. Specifically to
  - ⇒ make provision for the cancellation of a registered geographical indication, and
  - ⇒ make provision to allow a trade mark owner to oppose an application for a geographical indication.
- Amendments to the *Therapeutic Goods Act 1989* to provide
  - ⇒ measures in the marketing approval process to prevent a person from entering the market with a generic version of a patented medicine before a patent covering that product has expired, unless they have the consent of the patent owner
  - ⇒ that a patent owner be notified of an application for marketing approval in those cases in which the person seeking the approval considers the patent invalid and intends to market a generic version of a patented product before the patent expires.
- Amendments to the *Agricultural and Veterinary Chemicals Act 1994* to change the scheme currently in place, including in relation to the time period for protection of agricultural chemical test data.
- Amendments to the *Patents Act 1990* to ensure that the ground for revocation of a patent will continue to be available.

## Government Procurement

- Amendments may be necessary to the regulations issued under the *Financial Management and Accountability Act 1997* (FMA Act) and to the Commonwealth Procurement Guidelines, promulgated and used under the FMA Regulations.
- Specifically, minor changes may be required to the FMA Act and the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to

ensure compliance across all departments and agencies covered by the GP [government procurement] chapter.

## Costs and benefits

3.25 It is the Committee's usual practice to review the costs and benefits of each treaty action tabled in Parliament, based on information provided in the NIA. The Committee notes criticism that the NIA does not contain specific financial information on costs and benefits.

3.26 Before embarking on a précis of what information the Committee has considered with regard to detailed economic modelling, it is noted that the NIA's statement on costs of the Agreement is stated at paragraph 15 of that document, and is excerpted here for reference.

The Treasury has estimated that the financial cost of the Agreement to the Australian Government will be around \$190 million in 2004/05, \$400 million in 2005/06, \$420 million in 2006/07 and \$450 million in 2007/08. This estimate is based on the expected loss of tariff revenue from imports from the US and assumes that the Agreement will enter into force on 1 January 2005. The estimates do not take account of the scope for additional lost tariff revenue that could arise if imports from the US displace imports from other countries. On the other hand, the estimates also do not take account the potential economic growth that the Agreement may generate and any additional taxation revenue resulting from this growth.<sup>5</sup>

3.27 The Committee received detailed and conflicting evidence on the use and outcomes of economic modelling which has been conducted concerning the Agreement. Modelling has been conducted by various agencies, some of which are discussed in this section, and has received widely varying reactions. Overall the Committee acknowledges the statement in the NIA that notes that costs and benefits are extremely difficult to quantify. The Committee notes the view of the Department that

while economic modelling can provide helpful indicators of the likely direction of change and provide evidence that supports or cautions against a particular course of action,

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5 NIA, para. 15.

results are only estimates based on a range of assumptions about how the world works and how it will change in the future. No single figure for the gains from a free trade agreement can be generated with a high degree of certainty.<sup>6</sup>

- 3.28 As has been mentioned earlier in this Report, the Committee is aware of the extensive amount of public interest in most aspects of the treaty. This interest includes coverage of the economic analysis conducted to date.

## **Types of economic modelling**

### **GTAP**

- 3.29 The Committee understands that the GTAP model is comparative static in nature and does not incorporate the dynamic effects over time and the effects on investment and capital flows, but does incorporate a greater amount of sectoral detail than APG-Cubed.

### **APG-Cubed**

- 3.30 According to Annex 9 of the NIA, the APG-Cubed model ‘does capture dynamic factors to a greater extent than earlier static models.’ The NIA also states that it may also be possible to provide some estimates of the impact of the effects of an FTA in terms of stimulating competition and productivity.

Even so, it is unlikely that a model can capture all the dynamic benefits of integrating Australia with the world’s largest, most dynamic and most competitive economy, as well as the extent to which Australian firms innovate faster, and find and exploit market niches that arise as a result of an FTA.<sup>7</sup>

### **Monash-Global**

- 3.31 An economic study into the potential benefits of a free trade agreement between Australia and the US was conducted by Allen Consulting Group for the Government of South Australia. That report contained economic modelling data conducted by the Centre of Policy Studies (CoPS) at Monash University. CoPS simulation used the

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6 NIA, Annex 9.

7 NIA, Annex 9.

Monash-Global model, which is based on GTAP but incorporated some additional dynamic variables.

## Modelling conducted for this Agreement

### Centre for International Economics Report

- 3.32 The Committee understands that the Centre for International Economics (CIE) prepared analyses of the AUSFTA both before and after the Agreement's finalisation. It is worth noting that, until the Dee Report (see below), the CIE had conducted the only definitive modelling since the Agreement was finalised: this is not to make a judgement as to its accuracy or to its predictive abilities, but to note that it was the first study which looked at completed economic modelling based on the *facts* of the sectors which were included in the Agreement. It is for this reason that the Committee has given this report more focus during the course of its inquiry.
- 3.33 The CIE economic model showed gains in a range from '\$1.1 to \$7.4 billion per annum in 20 years time once all liberalisation and effects have worked through'.<sup>8</sup> The report acknowledged that it was difficult to define a more accurate figure.
- 3.34 Key points of CIE's post-FTA analysis are
- while there are immediate benefits, there are also immediate adjustment costs which partly offset the benefits in the first year
  - investment liberalisation makes the biggest contribution to overall economic growth and welfare
  - merchandise and services trade liberalisation contributes an extra \$1 billion per year to both welfare and real GDP above what it might otherwise be a decade out. This is a large effect, which reflects
    - ⇒ both Australia and the US are already relatively open economies, with average tariffs of 4.5 and 3.6 per cent
    - ⇒ when tariffs are removed preferentially, there is some trade diversion and that offsets some of the gain
    - ⇒ services markets in both countries are also both relatively open; where barriers do exist, the Agreement establishes frameworks for potential further liberalisation. While these frameworks have

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8 CIE, *Economic analysis of AUSFTA*, April 2004, p. x.

the potential for future gains, they do not, as yet, give quantifiable gains to include here.

- the liberalisation of merchandise and services trade initially causes exports to expand faster than imports, but the effect of the investment liberalisation is to cause the opposite. Overall, the expansion of imports peaks a decade out, but exports continue to expand and therefore grow more quickly than imports over the longer term, in order to service the extra foreign investment.<sup>9</sup>

## ACIL Tasman

- 3.35 There was also some debate during the course of the Committee's inquiry with regard to some economic modelling undertaken by ACIL, commissioned by the Rural Industries Research and Development Corporation. The Committee notes the statement in the NIA that

it never received endorsement as an official RIRDC report because of ongoing concerns that the modelling results were far from robust and highly implausible for a country the size of Australia. In particular, ACIL found that unilateral liberalisation of Australia's barriers would generate negative welfare gains for Australia, an outcome not supported by other quantitative analysis of the Australian economy. The logic of ACIL's analysis would suggest that Australia would be better off with increased protection, which is contrary to mainstream economic theory and evidence of the robust growth of the Australian economy over recent years following closer integration with the international economy.<sup>10</sup>

- 3.36 The Committee received evidence from Mr Greg Cutbush, from ACIL Tasman Consulting, with regard to work that ACIL had undertaken on the Agreement. Mr Cutbush stated that while ACIL and CIE had similar views on the economic modelling conducted during the negotiation stage, regarding the assumptions that had been made.

We did not share their view about a couple of assumptions. The particular one ... was their presumption that the service sector, over and above whatever other protections are written into the model, would have a 0.35 per cent productivity jump

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9 CIE, *Economic Analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, Summary, p. ix.

10 NIA, Annex 9, p. 3.

in addition. We felt there was not a basis for that assumption and we did not make that in our own model. It is true that we got a small negative result. The result is not really all that dissimilar to the CIE's 2001 report, but a lot of attention was drawn to the fact that it was below the line, and I think that formed the basis for our being named as opponents of the FTA most particularly.<sup>11</sup>

## The Dee Report

- 3.37 The Committee notes that towards the end of its inquiry, economic modelling which had been commissioned by the Senate Select Committee into the FTA was made available to the Committee. While the Committee notes that there were still positive gains identified by that Report (although not of the same order as those identified by CIE), the Committee recognises the general opinions it received that it is almost impossible to know what will happen in the economic future of two countries like Australia and the United States, and has opted to note the report but not get into close analysis in the time available for the Committee to report to Parliament.

## Conclusions on economic modelling

- 3.38 Some evidence received by the Committee was critical of the decision by the Government not to commission economic analysis of the Agreement from the Productivity Commission. The Committee notes comments by Professor Ross Garnaut, among others, which suggest that the Productivity Commission would have been a preferable agency to complete a report on the economic costs and benefits of this Agreement.

In assessing the benefit for Australia, both before negotiations began and after the Agreement was finalised, the body relied on by successive governments to inform them and us about the effects on our future economic welfare was sidelined. Instead of seeking an assessment from the Productivity Commission in accordance with the approach endorsed by the Prime Minister, a private consulting firm was engaged on both occasions to assess the gains for Australia.<sup>12</sup>

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11 Mr Greg Cutbush, *Transcript of Evidence*, 4 May 2004, p. 71.

12 Professor Ross Garnaut, *Transcript of Evidence*, 3 May 2004, p. 57.

- 3.39 The Committee also notes Professor Garnaut's statements relating to the time which would be required to complete a detailed analysis of the Agreement.

To do a really good job of analysis on this very complicated Agreement, which goes into far more areas than any other set of trade policy decisions in Australia, requires some time ... The Productivity Commission can be asked to report in limited time frames and, on occasions, has done so in the past. However, one has to be reasonable. If one wants a thorough job of analysis, one must allow them adequate time. This is a very complex agreement, with many dimensions, so, realistically, if we want proper analysis and not top of the head work, we have to allow reasonable time—and that is months, not weeks.<sup>13</sup>

- 3.40 The Committee looks forward to continuing debates on these issues, and trusts that any costs or benefits will continue to be monitored should the Agreement come into force.

## Recommendation 1

**To enable the Australian Parliament to assess the economic impact of the AUSFTA, the Committee recommends that a review of its implementation be conducted by the Productivity Commission five years after the Agreement enters into force.**

## Consultation

- 3.41 The Committee considers that consultation with stakeholders about the negotiation of treaties is of great importance and in recent years it has increasingly focussed on this issue. In many cases throughout this Report, where the Committee received evidence in relation to industry-specific aspects of the Agreement, people likely to be affected by the Agreement specifically commended the level of consultation by DFAT officials in regard to their particular area.
- 3.42 The NIA states at paragraph 3.17 that extensive consultations were held throughout the negotiations with agencies, industry groups,

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13 Professor Ross Garnaut, *Transcript of Evidence*, 3 May 2004, p. 63.

non-government organisations and other interested stakeholders through a range of fora and extensive individual meetings. The Committee notes the extensive list of consultations provided in documentation tabled with the NIA, and used the broad range of interested parties to seek feedback on the completed Agreement.

## States and Territories

- 3.43 The AUSFTA will have an impact on States and Territories, and the Committee considers that evidence provided by those governments that have responded to the Committee's call for submissions is valuable in ascertaining the extent of that impact.
- 3.44 The NIA notes at paragraph 3.16 that within the Agreement, Chapter 10 on Cross Border Trade in Services, Chapter 14 on Competition-Related Matters, and Chapter 15 on Government Procurement will be the most significant to States and Territory Governments.
- 3.45 The Committee notes that the services and investment obligations of the FTA, in particular, cover areas of regulation for which the States and Territories carry sole or shared responsibility. Other provisions in an FTA with potential relevance to the States' and Territories' regulatory responsibilities include those on technical standards.

## Economic effects on States and Territories

- 3.46 The Committee notes the CIE Report at page xi, which states
- All states gain from the liberalisation of trade in merchandise, services and government procurement. The largest gains are in New South Wales and Victoria.
- There are far more significantly localised effects. The partial opening of the dairy market benefits all dairy processing regions, but especially those with a heavy export orientation in south-eastern Australia. Similarly, all beef producing regions stand to benefit from the market opening.
- In manufacturing, the increase in motor vehicle and component parts manufacturing contributes to a relatively

large proportion of the increase in gross state product for Victoria and South Australia.<sup>14</sup>

## Consultation with States and Territories

3.47 The NIA notes that

The States and Territories were consulted before, during and after negotiations through meetings in capitals, joint meetings in Canberra, and through other fora such as the National Trade Consultations and Commonwealth-State Standing Committee on Treaties processes.

3.48 The NIA also states that States and Territories participated closely in framing the negotiating objectives for the Government Procurement Chapter, and in ensuring the appropriate framing of reservations to the Cross-Border Trade in Services and Investment Chapters.

3.49 The Committee acknowledges the DFAT Briefing Paper's statement that

While State and Territory representatives have attended some international treaty negotiations, notably those relating to environmental issues, this was the first time of which we are aware that a States and Territories' representative was included in an Australian delegation to FTA negotiations.

3.50 The Committee notes the RIS's statement that

The inclusion of State and Territory representation reflects the Principles and Procedures for Commonwealth-State Consultation on Treaties agreed by the Council of Australian Governments (COAG) in June 1996. The COAG Principles provide that 'in appropriate cases, a representative or representatives of the States and Territories may be included in delegations to international conferences which deal with State and Territory subject matters.'<sup>15</sup>

3.51 The Committee notes DFAT has been conducting regular close consultations with the State and Territory Governments on FTAs over the last two years, particularly since the Singapore - Australia FTA negotiations entered full swing. According to the RIS, during 2003, there have been meetings or teleconferences with the States and

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14 CIE, *Economic analysis of AUSFTA*, pp. xi–xii.

15 RIS, p. 12.

Territories before and after all six of the negotiating rounds, involving representatives of Premiers' departments and departments responsible for industry, trade and business. There have also been separate meetings with agencies responsible for government procurement.<sup>16</sup>

3.52 The Committee acknowledges the informative submissions from six State and Territory Parliaments covering a range of issues.<sup>17</sup> Common to many were a discussion of the potential impacts across provisions in a range of areas such as pharmaceuticals, audio visual, intellectual property, environment, plasma fractionation services, government procurement and the ability of States to regulate services. Others made comments across the entire Agreement. Many of these issues will be raised in the relevant chapter of this Report.

3.53 Most State and Territory Governments that made submissions to the Committee commended DFAT for their 'genuine efforts ... to be more inclusive than during previous negotiations'<sup>18</sup> and for the level of consultation that was achieved.<sup>19</sup> However, the Committee did receive evidence of dissatisfaction with the process, relating particularly to the final stages of negotiation and post-negotiation consultations.

3.54 The Committee notes a statement in the NIA that

State and Territory representatives also joined the Australian delegation to the negotiations as observers. One State and Territory representative attended the third round of negotiations, three attended the fourth round, two attended the fifth round, and one attended the sixth and final round.<sup>20</sup>

3.55 However, the Western Australian Government has stated that this is not 'a strictly accurate description'.<sup>21</sup> The Committee notes evidence from that Government that the third round of negotiations were attended by an observer for the government procurement negotiations, who was a representative from the Australian Procurement and Construction Ministerial Council Meeting, not a

16 RIS, p. 12.

17 The Northern Territory and Tasmanian Governments did not make a submission.

18 Queensland Government, *Submission 206*, p. 2. See also Victorian Government, *Submission 91*, p. 5.

19 South Australian Government, *Submission 198*, p. 2. See also Western Australian Government, *Submission 128*, p. 10.

20 NIA, Annex 1.

21 Western Australian Government, *Submission 128.1*, p. 1.

‘State and Territory Representative’ as such.<sup>22</sup> This same representative is referred to as a ‘state and territory representative’ in the NIA for subsequent rounds.<sup>23</sup> Further, in regard to the third round, it is noted that the nominated State and Territory representative was informed by DFAT ‘at the last moment’ that he was not able to attend the negotiations, and so therefore, there was no actual State and Territory representative at the third round.<sup>24</sup> The Western Australian Government has stated that there was no official ‘State and Territory Representative’ at the sixth and final round.<sup>25</sup> The ACT Government has also stated that there was ‘limited participation of two State and Territory representatives as observers at several but not all negotiating rounds.’<sup>26</sup>

- 3.56 The Committee received evidence of a common complaint from State and Territory Governments that consultation did not occur during the final weeks of negotiations. The ACT Government has stated that

Despite assurances that the Commonwealth Government would ensure that States and Territories remained engaged during the final stages of AUSFTA negotiations, there was virtually no feedback or consultation during the final round of negotiations (except in the area of government procurement).<sup>27</sup>

- 3.57 Similarly, the South Australian Government has noted that

South Australia was disappointed that states and territories were not kept abreast of developments in the final weeks of negotiations for the AUSFTA.<sup>28</sup>

- 3.58 The ACT Government has stated that there were ‘significant deficiencies in [the consultation] process that limited genuine consultation between the Commonwealth, States and Territories’.<sup>29</sup> The Committee notes comments that

Despite a number of requests to DFAT for sight of working texts, States and Territories received access to only four draft

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22 Western Australian Government, *Submission 128.1*, p. 1.

23 Western Australian Government, *Submission 128.1*, p. 2.

24 Western Australian Government, *Submission 128.1*, p. 2.

25 Western Australian Government, *Submission 128.1*, p. 2.

26 ACT Government, *Submission 180*, p. 5.

27 ACT Government, *Submission 180*, p. 5.

28 South Australian Government, *Submission 198*, p. 2.

29 ACT Government, *Submission 180*, p. 5.

chapters (government procurement, cross border trade in services, financial services and investment) during the negotiations. Information on other aspects of the negotiations was limited to general briefings that were an insufficient basis on which to properly evaluate the likely national and regional implications of the Agreement.<sup>30</sup>

3.59 The Queensland Government has stated that

At the conclusion of negotiations, States and Territories had only been provided with drafts of four chapters. These were the chapters on Cross Border Trade in Services, Investment, Government Procurement and Financial Services. It was extremely difficult, if not impossible, to assess the full implications of the treaty when details such as the general exceptions and horizontal commitments were not known. This compromised the Queensland Government's capacity to provide definitive input to the final aspects of the negotiations.<sup>31</sup>

3.60 The Victorian Government has noted that 'there are currently no clear mechanisms for national follow-up to free trade agreements.'<sup>32</sup> Similarly, the Western Australian Government has stated that

It is disappointing that, despite agreeing to do so, the Commonwealth failed to provide the States and Territories with information on the outcomes of the negotiations or the draft text before these were made public.<sup>33</sup>

Further

While the States and Territories were asked to provide their input into Australia's Annex II list (in early January), it is disappointing they were not kept informed of the results of the negotiations in the area, even when they specifically asked the Commonwealth for information during a teleconference after the agreement was announced. Consequently, Western Australia was unaware that the reservations it had requested (and informed by telephone

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30 ACT Government, *Submission 180*, p. 5.

31 Queensland Government, *Submission 206*, p. 3.

32 Victorian Government, *Submission 91*, p. 5.

33 Western Australian Government, *Submission 128.1*, p. 3.

would be covered by Commonwealth reservations) were not in the final Annex II list until the draft text was made public.<sup>34</sup>

- 3.61 The Committee agrees with the points made in the Western Australian and Australian Capital Territory Governments' submissions which suggested that greater use should be made of the Treaties Council. Its role as agreed to by COAG in 1996 is to 'consider treaties and other international instruments of particular sensitivity and importance to the States and Territories'. Although it is supposed to meet every year, it has only met once, in 1997.

## Recommendation 2

**The Committee recommends that there be more consultation with State and Territory Governments in the final stages of negotiations of Free Trade Agreements.**

**The Committee further recommends that the outcomes of any Agreements be made available to State and Territory Governments at the conclusion of negotiations.**

- 3.62 The Queensland Government has raised concerns that there was inadequate consultation with local government bodies, and that discussion between the local and State level governments was prevented by requests from DFAT that all information provided by the Commonwealth Government be kept confidential.<sup>35</sup>
- 3.63 The Committee notes that most States and Territories are in support of the Agreement, notwithstanding the concerns they have raised in evidence. The Committee further notes that while the ACT Government has advised of its decision to participate in the Government Procurement Chapter<sup>36</sup> it has emphasised that this decision

does not constitute an endorsement of the agreement as a whole.<sup>37</sup>

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34 Western Australian Government, *Submission 128.1*, p. 3.

35 Queensland Government, *Submission 206*, p. 3.

36 ACT Government, *Submission 180.1*, p. 1.

37 ACT Government, *Submission 180.1*, p. 1.

## Impact on Indigenous interests

- 3.64 The Committee received several submissions which discussed the impact of the AUSFTA on Indigenous peoples in Australia. Discussion of the impact of Chapter 17 (Intellectual Property) is contained in Chapter 16 of this Report, and there is mention of exceptions under the Agreement designed for cultural protection (see Chapter 5 of this Report). The Committee notes that under the Agreement, there are two specific exemptions relating to Indigenous peoples.
- 3.65 Firstly, in relation to Chapters 10 (Services) and 11 (Investment), Australia reserves the right to
- adopt or maintain any measure according preferences to any indigenous person or organisation or providing for the favourable treatment of any Indigenous person or organisation in relation to the acquisition, establishment, or operation of any commercial or industrial undertaking in the service sector.<sup>38</sup>

### Further

- Australia reserves the right to adopt or maintain any measure with respect to investment that accords preferences to any Indigenous person or organisation or provides for the favourable treatment of any indigenous person or organisation.<sup>39</sup>
- 3.66 Secondly, in Annex 15-G, Australia has exempted both measures for the ‘health and welfare’ and ‘economic and social advancement’ of Indigenous people from the operation of Chapter 15 (Government Procurement).
- 3.67 Lawyers from the Jumbunna Indigenous House of Learning submitted that ‘as a poorer socio-economic group, Indigenous people are vulnerable to economic shifts’,<sup>40</sup> and that any change to the delivery of health services and availability of pharmaceuticals, will, given the documented health problems in Indigenous communities,

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38 AUSFTA Annex II-1.

39 AUSFTA Annex II-1.

40 Larissa Behrendt and Megan Davis, ‘Adverse effects of free-trade deal will hit indigenous groups hard’, *Sydney Morning Herald*, General News, p. 13, 8 March 2004, submitted in Jumbunna Indigenous House of Learning, *Submission 106*.

disproportionately affect Indigenous peoples.<sup>41</sup> On this basis, the Jumbunna Indigenous House of Learning stated that

We acknowledge the importance of [the] exemptions yet submit that it is important for there to be an ongoing role in monitoring the operation and scope of these exemptions particularly in regards to Indigenous peoples health and welfare.<sup>42</sup>

3.68 The Committee received evidence from Aboriginal and Torres Strait Islander Services (ATSIS) that

The reasons for providing any exemption for Indigenous people is because of their unique status as the original occupants of Australia, with their history, culture—indeed their entire heritage—being connected solely to Australia. In addition, the Australian Government needs to be able to continue to adopt a wide range of measures to overcome the serious and pervasive social and economic disadvantage of Indigenous people without fear of breaching AUSFTA.<sup>43</sup>

3.69 ATSIS stated that a broad exemption clause for Indigenous peoples would have been the preferable option.

The potential for unintended consequences, and exemption gaps which may inappropriately limit government policy options for Indigenous people requires, in our view, a broad overarching exemption clause for Indigenous people in AUSFTA. If this is not achievable, the alternative is for a comprehensive range of specific exemptions to be set out in AUSFTA.<sup>44</sup>

3.70 In reference to the exemptions in the Agreement, Dr Paul Kauffman relayed to the Committee advice received by ATSIS

the pointy ends have been removed from the Agreement concerning Indigenous people but they would have suggested—and in fact did suggest—more precise wording in the government procurement and trade in services chapters. They express some concerns as to the investment chapter ... our understanding is that the government have to weigh that

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41 Jumbunna Indigenous House of Learning, *Submission 106*, p. 4.

42 Jumbunna Indigenous House of Learning, *Submission 106*, p. 5.

43 ATSIS, *Submission 188*, p. 6.

44 ATSIS, *Submission 188*, p. 6.

in trying to get an agreement with the United States and balance all interests as they see it.<sup>45</sup>

3.71 The Committee notes comments by Mr Brian Stacey

Firstly, ATIS's view is that the government has had proper regard to the interests of Indigenous people in finalising this Agreement. In particular, they have sought to include in it exemptions such that governments in the future are not stopped from adopting policies, programs or other measures to protect Indigenous people's interests. Secondly, we are comforted by the advice we have received from the Minister for Trade in response to the report to the effect that, in the government's view, there was nothing in that agreement which would stop them from adopting in the future whatever laws, policies or programs they thought were necessary.<sup>46</sup>

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45 Dr Paul Kauffman, *Transcript of Evidence*, 4 May 2004, p. 87.

46 Mr Brian Stacey, *Transcript of Evidence*, 4 May 2004, p. 85.