The Senate

Foreign Affairs, Defence and Trade References Committee

Korea-Australia Free Trade Agreement

October 2014

ISBN 978-1-76010-098-8

Printed by the Senate Printing Unit, Parliament House, Canberra

Members of the committee

Core members

Senator Alex Gallacher, ALP, SA (Chair)
Senator Chris Back, LP, WA (Deputy Chair)
Senator David Fawcett, LP, SA
Senator Anne McEwen, ALP, SA
Senator Sam Dastyari, ALP, NSW
Senator Scott Ludlam, AG, WA

Substitute members

Senator Whish-Wilson, AG, TAS, substituted for Senator Ludlam on 8 September 2014 and 9 September 2014
Senator Wong, ALP, SA, substituted for Senator McEwen on 8 September 2014 and 9 September 2014

Participating members who contributed to the inquiry

Senator Penny Wong, ALP, SA
Senator Peter Whish-Wilson, AG, TAS

Secretariat

Mr David Sullivan, Committee Secretary
Mr Owen Griffiths, Principal Research Officer
Ms Shennia Spillane, Senior Research Officer
Ms Penny Bear, Research Officer
Ms Kimberley Balaga, Research Officer
Mr Joshua Wrest, Administrative Officer
Ms Megan Jones, Administrative Officer

Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: + 61 2 6277 3535
Fax: + 61 2 6277 5818
Email: fadt.sen@aph.gov.au
Internet: www.aph.gov.au/senate_fadt

Table of Contents

Abbreviations

ACCI	Australian Chamber of Commerce and Indusrty
AUSFTA	Australia-United States Free Trade Agreement
CIE	Centre for International Economics
BIT	Bilateral investment treaty
DFAT	Department of Foreign Affairs and Trade
EU	European Union
FTA	Free Trade Agreement
ISDS	Investor State Dispute Settlement
IP	Intellectual property
JSCOT	Joint Standing Committee on Treaties
KAFTA	Korea-Australia Free Trade Agreement
NIA	National Interest Analysis
RIS	Regulation Impact Statement
ROO	Rules of Origin
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

Chapter 1

Introduction

Referral of inquiry

1.1 On 27 March 2014, the Senate referred an inquiry into the Korea-Australia Free Trade Agreement (KAFTA) to the Foreign Affairs, Defence and Trade References Committee for inquiry and report.[1]

1.2 The terms of reference for the inquiry are as follows:

> 1. That the proposed Korea-Australia Free Trade Agreement be referred to the Foreign Affairs, Defence and Trade References Committee for inquiry and report, with particular reference to the impact of the agreement on Australia's economy and trade, investment, social, cultural and environmental policies.
>
> 2. That in conducting the inquiry the committee shall:
>
> > (a) review the agreement to ensure it is in Australia's national interest, and
> >
> > (b) have regard to the report of the Joint Standing Committee on Treaties on the proposed agreement.
>
> 3. That the committee report within one month of the tabling of the report of the Joint Standing Committee on Treaties on the proposed agreement.

1.3 KAFTA was tabled in the Parliament on 13 May 2014 and referred to the Joint Standing Committee on Treaties (JSCOT) for inquiry and report.[2] JSCOT tabled its report into KAFTA on 4 September 2014.[3]

Conduct of inquiry

1.4 The committee advertised the inquiry on its website and in *The Australian* newspaper. The committee also wrote to individuals and organisations likely to have an interest in the bill, drawing their attention to the inquiry and inviting them to make written submissions. The committee received 68 submissions. Submissions are listed at Appendix 1 and available on the inquiry website at: www.aph.gov.au/senate_fadt.

1.5 The committee held public hearings for the inquiry in Canberra on Monday, 8 September 2014 and Tuesday, 9 September 2014. A list of the witnesses who

---

1 *Journals of the Senate*, 27 March 2014, p. 744.

2 House of Representatives, *Votes and Proceedings*, 13 May 2014, p. 452

3 House of Representatives, *Votes and Proceedings*, 4 September 2014, p. 810.

appeared at the public hearings is at Appendix 3, and the *Hansard* transcripts are available through the committee's website.

Structure of the report

1.6 The committee's report is in five chapters. Chapter 2 provides a background to the agreement and a summary of the provisions of the treaty. Chapter 3 deals with Australia's trade relationships, trade outcomes, the implementation of KAFTA and the treaty making process. Chapter 4 discusses some of the specific issues raised during the inquiry including provisions on investor state dispute settlement, intellectual property, certificates of origin and labour rights issues. Chapter 5 contains the committee's conclusion and recommendations.

Acknowledgements

1.7 The committee thanks all those who contributed to the inquiry by making submissions, providing additional information or appearing at the public hearings to give evidence.

Note on references

1.8 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcripts.

Chapter 2

Background

Context to the agreement

2.1 The Republic of Korea (Korea or South Korea) is Asia's fourth-largest economy with a population of around 50 million people. Australia and Korea are economic, political and strategic partners with a number of shared values and interests. Korea is a key market for Australian minerals, energy, agricultural products, travel and education services, while Australia is a major market for Korean cars, petroleum, electronic goods and parts. Korea is Australia's third-largest export market and fourth-largest overall trading partner, with total two-way trade exceeding $30 billion in 2012-13.

2.2 Australia is also seeking trade agreements with other major trade partners in Asia. On 7 April 2014, Australia signed the Japan-Australia Economic Partnership Agreement (JAEPA). Negotiations for an free trade agreement (FTA) with China are also continuing. The 20th round of negotiations were held in Canberra on 5-8 May 2014. Both sides indicated a wish to conclude negotiations by the end of the year.[1] Together China, Japan and Korea represent over 50 per cent of Australia's exports.

2.3 Australia is also currently negotiating bilateral free trade agreements with India and Indonesia and engaging in four multilateral negotiations: the Trans-Pacific Partnership Agreement (TPP), the Gulf Cooperation Council (GCC), the Pacific Trade and Economic Agreement (PACER Plus), and the Regional Comprehensive Economic Partnership Agreement (RCEP).[2]

2.4 Australia is not alone in negotiating numerous FTAs. Many other countries are also seeking to negotiate and finalise preferential trade agreements with partner countries. In the absence of genuine momentum on the Doha Round at the World Trade Organisation (WTO), Australia must compete for preferences in bilateral agreements, or risk losing market share and competitiveness to others. KAFTA is a good example of such a 'competitive bilateral' or 'catch up' agreement. Implementation of KAFTA will help to retain and expand Australia's export markets to Korea rather than losing market share to key competitors such as the US, EU, Chile and soon Canada, all of whom have preferential trade agreements with Korea.

---

1 DFAT, 'Twentieth round of negotiations', May 2014, available at https://www.dfat.gov.au/fta/acfta/140515_subscriber_update.html (accessed 20 August 2014).

2 DFAT, 'Australia's Trade Agreements', available at: http://www.dfat.gov.au/fta/ (accessed 24 September 2014).

Implementation of agreement

2.5 The agreement was signed by the Minister for Trade and Investment, the Hon Andrew Robb MP and his South Korean counterpart the Minister for Trade, Industry and Energy, Mr Yoon Sang-jick in Seoul on 8 April 2014.

2.6 Australia and Korea are aiming to complete their domestic treaty processes, including passage of necessary legislation, towards the end of 2014. After these processes are complete, both countries will exchange diplomatic notes to certify they are ready to commence the agreement. Thirty (30) days after this exchange of notes, KAFTA will enter into force.

2.7 Following JSCOT consideration, legislation was introduced into the Parliament to amend the *Customs Act 1901* and *Customs Tariff Act 1995* as required to give effect to customs duty changes and procedures as agreed to in KAFTA. Korea will undertake its own domestic treaty-making processes during this period, including approval by Korea's National Assembly.

Key aspects of text

2.8 KAFTA is a free trade agreement broadly similar to Australia's other comprehensive agreements, such as with the United States and Singapore. The full agreement comprises 23 chapters with associated annexes, schedules and side letters. Other key documents include the National Interest Analysis, the Regulation Impact Statement and an introduction to the text of agreement (summarised below).

2.9 Chapter 1 establishes KAFTA, consistent with World Trade Organization (WTO) rules, sets out KAFTA's relationship to other international agreements and provides general definitions to guide interpretation of the Agreement.

2.10 Chapter 2, the Trade in Goods, prohibits the Parties from raising any tariff, and obliges the Parties to progressively reduce and/or eliminate tariffs in accordance with each Party's applicable schedule contained in two Schedules of Tariff Commitments (one for Australia and one for Korea). It establishes the framework of rules for trade in goods between the Parties. It affirms a number of WTO provisions that already govern trade in goods among the Parties designed to promote transparency.

2.11 Chapter 3, the Rules of Origin (ROO) chapter and the accompanying Schedule of Product Specific Rules establish the criteria for determining whether goods will qualify for preferential tariff treatment under KAFTA (whether a good 'originates' in Australia or Korea). In general, a good can qualify as 'originating' under KAFTA if: it is wholly obtained or produced entirely in the country; it is produced entirely in either or both Korea and Australia, from materials that conform to the provisions of the ROO Chapter; or the product is manufactured in either or both Korea and Australia using inputs from other countries, and meets the Product Specific Rules and requirements specified in the ROO Chapter.

2.12 Chapter 4 on Customs Administration and Trade Facilitation establishes arrangements for expeditious, predictable, transparent and simplified customs administration aimed at facilitating trade between Korea and Australia. In particular, the Chapter encourages procedures that facilitate the clearance of low-risk goods, and provides for the use of advance rulings to give greater certainty to business, and ensure the availability of review and appeal mechanisms to address disputes.

2.13 Chapter 5 on Technical Barriers to Trade and Sanitary and Phytosanitary Measures affirms the Parties rights and obligations under the relevant WTO agreements and commits them to ensure that technical regulations, including mandatory marking or labelling of products, do not create unnecessary obstacles to international trade.

2.14 Chapter 6 on Trade Remedies affirms Australia and Korea's rights and obligations under the WTO with regard to the application of safeguards, anti-dumping and countervailing measures. It establishes arrangements for a KAFTA specific safeguard measure which may be applied during the transitional period while tariffs are being reduced and/or eliminated.

2.15 Chapter 7 on Cross-Border Trade in Services requires each Party to provide market access, national treatment, and most-favoured-nation (MFN) treatment to service suppliers of the other Party. The chapter also includes the obligation not to impose local presence requirements. Measures which do not conform with these obligations are listed in 'negative lists' contained in schedules of non-conforming measures (NCM Schedules).

2.16 Chapter 8 on Financial Services applies to measures affecting financial institutions of both Parties as well as to investments in financial institutions and cross-border trade in financial services. Core obligations in the chapter require each Party to provide market access, national treatment and MFN treatment to financial institutions and cross-border financial service suppliers of the other Party, unless otherwise listed in the NCM Schedules. The Chapter also requires each Party not to impose nationality requirements on senior management and boards of directors, unless listed in the NCM Schedules.

2.17 Chapter 9 on Telecommunications governs areas including resale, submarine cable access and the allocation of telecommunications spectrum. Chapter 9 requires both Parties to prevent anti-competitive conduct and ensure that major suppliers provide interconnection, leased circuit services and co-location of equipment on reasonable, non-discriminatory terms and conditions. Other key outcomes include commitments on technology neutrality, number portability and network unbundling. There are strong provisions on transparency and review for regulatory decisions.

2.18 Chapter 10 on Movement of Natural Persons provides for coverage of temporary entry of service suppliers and investors. Australia and Korea have made commitments to liberalise access for skilled service suppliers, investors and business

visitors to enter and stay in the territory of the other Party. Australia has agreed not to apply labour market testing.

2.19 Chapter 11 on Investment is in two sections. Section A covers market access and protections for investors of both Parties. The key commitments include:

- non-discrimination through national treatment and most-favoured-nation (MFN) provisions;
- minimum standard of treatment: the foreign investor/investment to be treated in accordance with customary international law, including fair and equitable treatment and full protection and security;
- expropriation and compensation: commitment not to expropriate or nationalise a covered investment unless it is undertaken in a non-discriminatory manner, for a public purpose and on payment of prompt, adequate, and effective compensation;
- transfers: commitment to allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory;
- performance requirements: lists the types of requirements which each Party agrees not to impose as a condition of establishment or operation of an investment in the other Party; and
- senior management and board of directors: prohibition on requiring the appointment of particular nationalities to senior management positions in businesses that are covered investments.

2.20 Chapter 11, Section B includes an Investor-State Dispute Settlement (ISDS) mechanism which allows investors to directly enforce investment obligations. Where an investor from one Party to KAFTA alleges loss or damage as a consequence of the other Party breaching a commitment in the Investment Chapter, the investor can commence arbitration against that Party in a tribunal.

2.21 Chapter 12 on Government Procurement provides that entities of one Party (at the central level of government and, in Australia's case, States and Territories, and, in Korea's case, certain regional governments) are required to afford the suppliers, goods and services of the other Party the same treatment that applies to its domestic suppliers, goods and services.

2.22 Chapter 13 on Intellectual Property Rights reinforces the commitments Australia and Korea have made under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). It builds on TRIPS with provisions for the protection and enforcement of Intellectual Property (IP) equivalent to that provided under Australia's free trade agreement with the United States.

2.23 Chapter 14 on Competition Policy provides that the trade and investment liberalisation intended to be achieved through KAFTA is not undermined by anti-competitive practices. Australia and Korea have committed to:

- address anti-competitive practices, including cartel behaviour, abuse of dominant position and anticompetitive mergers, by maintaining and enforcing competition laws in their respective jurisdictions;
- ensure that competition laws are applied to all businesses and to only permit exemptions where they are transparent and in the public interest; and
- ensure that the enforcement of their respective competition laws are consistent with the principles of transparency, timeliness, non-discrimination, comprehensiveness and procedural fairness.

2.24 Chapter 15 on Electronic Commerce includes a number of commitments to support businesses of both countries in harnessing the efficiencies of electronic commerce, while ensuring the protection of consumers engaging online.

2.25 Chapter 16 on Cooperation supports increased bilateral cooperation in the fields of agriculture, fisheries, aquaculture, forestry, energy and mineral resources. Coverage includes cooperation on innovation, research and development in areas such as sustainable resource management, climate change adaptation and mitigation, animal husbandry practices, productivity enhancement, biotechnology, food safety and the exploration, extraction, processing, transportation and use of energy and mineral resources.

2.26 Chapter 17 on Labour provides for the enhancement of cooperation between Korea and Australia on trade-related aspects of labour issues, while preserving the policy space for each to establish and maintain national laws, policies and priorities. It requires each Party to respect the other Party's right to establish its own labour policies and priorities and to adopt and administer its labour laws, regulations and practices in accordance with those policies and priorities.

2.27 Chapter 18 on Environment also provides for enhanced cooperation between Korea and Australia on trade-related aspects of environment issues. The Parties state their respect for the other's right to establish its own environmental policies and priorities and to adopt and administer its environmental laws, regulations and practices in accordance with those policies and priorities.

2.28 Chapter 19 on Transparency requires the prompt publication of all laws, regulations, procedures and administrative rulings of general application in respect of any matter covered by KAFTA, allowing interested persons and either Party to be aware of them.

2.29 Chapter 20 on Dispute Settlement includes a binding State-to-State dispute settlement mechanism modelled on previous free trade agreements and the WTO system. Most substantive obligations in KAFTA will be subject to this mechanism, except those found in the Technical Barriers to Trade, Sanitary and Phytosanitary Measures, Competition Policy, Labour, Environment and some aspects of the Movement of Natural Persons chapters.

2.30 Chapter 21 on Institutional Provisions establishes a Contact Point to facilitate communications between the Parties. The chapter also establishes a Joint Committee, consisting of representatives of the Parties and co-chaired by each country's Minister of Trade which will oversee implementation and operation of KAFTA and supervise and coordinate the work of all subsidiary bodies. Chapter 21 also establishes a variety of committees and working groups under the auspices of the Joint Committee. The committees and working groups shall inform the Joint Committee of their schedules and agendas and report to the Joint Committee on their activities.

2.31 Chapter 22 on General Provisions and Exceptions sets out exceptions which apply to a number of chapters. These exceptions are intended to ensure that FTA obligations do not unreasonably restrict government action in key policy areas, including to protect essential security interests, the environment and health. There are also exceptions to the Investment Chapter (including that ability to make an ISDS claim) which are aimed to ensure governments can adopt or enforce legitimate measures necessary to protect human, animal or plant life or health, including environmental measures; to protect national treasures; to conserve natural resources; and other matters.

2.32 Chapter 23 on Final Provisions governs the way in which KAFTA operates as a treaty. It establishes the processes by which the Agreement will enter into force, how it may be amended and the conditions under which it may be terminated.

2.33 The four side letters between Australia and Korea cover the areas of:

- gambling and betting services;
- services and investment;
- telecommunications; and
- United Nations Commission on International Trade Law (UNCITRAL) transparency rules.

Joint Standing Committee on Treaties (JSCOT)

2.34 JSCOT tabled its report into KAFTA on 4 September 2014.[3] The majority report described KAFTA to be 'controversial' and discussed several issues in relation to the agreement. These issues included: investor-state dispute settlement (ISDS) mechanisms; intellectual property rights; certificates of origin processes; economic modelling; the utilisation of free trade agreements; treaty making processes; monitoring; and implementation. The majority report supported ratification of the treaty and made only one recommendation - that binding treaty action be taken.

2.35 A dissenting report was made by the Hon Kelvin Thompson MP and the Hon Melissa Parke MP who made a number of recommendations on some of the

3 Joint Standing Committee on Treaties, *Report 142 – Treaty tabled on 13 May 2014*, September 2014 (JSCOT report).

above issues.[4] A dissenting report for the Australian Greens was also made by Senator Peter Whish-Wilson. The Australian Greens did not support the recommendation of the majority report or KAFTA 'in its current form'.[5]

Proposed legislation

2.36 Following the tabling of the JSCOT report, the Hon Scott Morrison MP, the Minister for Immigration and Border Protection, introduced the Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 (Customs bill) and the Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 into the House of Representatives. The Explanatory Memorandum for the Customs bill stated:

> The purpose of this Bill is to amend the *Customs Act 1901* (the Customs Act) to introduce new rules of origin for goods that are imported into Australia from Korea to give effect to the Korea-Australia Free Trade Agreement (the Agreement). The Customs Act amendments will enable goods that satisfy the rules of origin to enter Australia at preferential rates of customs duty.
>
> Complementary amendments will also be made to the *Customs Tariff Act 1995* (the Customs Tariff Act) by the Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 to give effect to the Agreement.[6]

2.37 Also on 4 September 2014, the provisions of the bills were referred by the Senate to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 2 October 2014.[7] The committee tabled its report on 24 September 2014. The committee strongly agreed with submissions to its inquiry that it was in the national interest for KAFTA to come into force before the end of 2014 and recommended the bills be passed 'at the earliest possible opportunity'.[8]

4 JSCOT report, pp 49-61.

5 JSCOT report, pp 63-69.

6 Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014, Explanatory Memorandum, p. 2.

7 *Journals of the Senate*, 4 September 2014, p. 1442.

8 Senate Legal and Constitutional Affairs Legislation Committee, *Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 [Provisions] and a related bill*, September 2014, p. 14.

Chapter 3

Trade outcomes, implementation and treaty making

Introduction

3.1 This chapter will consider issues raised concerning Australia's trade relationships, the trade outcomes achieved by KAFTA, implementation issues, and the treaty making process.

Australia's trade relationships

3.2 KAFTA was frequently assessed by submitters in the broader context of Australia's other trade relationships and those of Australia's competitors. For example, the Australian Chamber of Commerce in Korea stated that 'KAFTA will put Australian exporters to Korea back on a level playing field with exporters from other countries that have already secured free trade agreements with Korea (such as the US, EU and Chile) or who are likely to secure an FTA in the near future (eg Canada, China and New Zealand)'.[1]

3.3 The Minerals Council of Australia described KAFTA as 'the right agreement at the right time'. It stated that KAFTA would provide Australia with 'more certainty that our position in the Korean market will not be eroded over time by preferential arrangements already entered into by Korea with the United States, the European Union, ASEAN and others'. Further, it highlighted the absence of alternatives:

> The Doha Round of Multilateral Trade Negotiations are in limbo (again). Regional Comprehensive Economic Partnership (RCEP) negotiations are still at an early stage and their ambition is yet to be determined. And Korea is not a party to Trans Pacific Partnership (TPP) negotiations, although it is interested in joining them at some stage.[2]

3.4 Similarly, the Export Council of Australia noted that while it would 'prefer international liberalisation of trade to advance on a multilateral basis, in the absence of any foreseeable completion of the WTO's Doha Round of negotiations, advances in liberalisation of international trade must occur, by default, pursuant to regional, bilateral and other Free Trade Agreements (FTAs) or similar agreements'.[3] It noted:

> Without KAFTA being legally adopted, Australian exporters will remain disadvantaged as strong agricultural exporters such as Chile and the United

1 *Submission 42*, p. 1.

2 *Submission 61*, p. 1.

3 *Submission 55*, p. 2.

> States continue to benefit from preferential access, having both secured FTAs with Korea.[4]

3.5 While the National Farmers' Federation (NFF) indicated that it had 'long advocated for trade agreements to be all-inclusive, factoring in all of our important agricultural commodities' and noted that 'protectionist sentiment around agricultural goods is rife in many overseas countries':

> The NFF recognises that trade agreements are a negotiation and it is difficult to reach agreement on all issues particularly across the entire agriculture sector. Notwithstanding this, the agreement represents a strong step towards securing Australia's important trading future with Korea and in improving international market access for Australian agricultural goods.[5]

3.6 Dr Chris Baumann stated that the 'FTA with Korea has to be viewed in context of the Asian Century where a substantial amount of economic power has shifted to the (East) Asian markets'. He considered that KAFTA was of 'greater importance to Australia than for Korea' but considered both sides were likely to benefit from the agreement':

> Given the context (Asian Century, Regionalisation of trade in East Asia), an intensified level of competition for Australia appears unavoidable, and equally so, a need to enhance/regain global competitiveness. The FTA is a fine opportunity for Australia to adapt some of the practices from the highly competitive Korean business and education sectors, an opportunity that should not be missed in light of other FTA with China and Japan that will further intensify the level of competitive pressures in the near future.[6]

3.7 In contrast, other submissions were critical of Australia's approach to trade agreements and policy. For example, the AMWU described Australia's trade policy as 'driven by an unflinching adherence to the doctrine of free trade'. It argued that 'trade policy in Australia continues to be based on a doctrine that fails to consider how trade actually operates in the real world, fails to reflect the real economic costs and benefits of trade agreements and other policies and as a result policies fail to generate the benefits that they promise'.[7] It highlighted that, in 2010, the Productivity Commission had found 'little evidence from business to indicate that bilateral agreements to date have provided substantial commercial benefits' and that the 'increase in national income from preferential agreements is likely to be modest'.[8]

---

4 *Submission 55*, p. 3.

5 *Submission 29*, p. 3.

6 *Submission 41*, p. 5.

7 *Submission 63*, p. 2.

8 *Submission 63*, p. 6.

Value of trade outcomes

3.8 Tariff reductions for Australian products (particularly agribusiness products) exported to Korea were highlighted as key outcomes of KAFTA during the inquiry. Currently 68 per cent of Australia's exports (by value) enter Korea duty free.[9] Following the entry into force of KAFTA, 84 per cent of Australia's exports to Korea will enter duty free, rising to 99.8 per cent on full implementation. The Department of Foreign Affairs and Trade (DFAT) *Outcomes At A Glance* document states:

> For agriculture, Korea will eliminate tariffs immediately on entry into force for raw sugar, wheat, wine, and some horticulture. Tariffs of up to 550 per cent on most other agricultural products will be eliminated within short time frames. Other key outcomes on agriculture include:
>
> - beef: Korea will eliminate its 40 per cent tariff on beef progressively over 15 years, which will help to level the playing field for Australian beef exporters.
> - dairy: duty free quotas for cheese, butter and infant formula and high tariffs will be eliminated on many dairy products between three and 20 years.[10]

3.9 Further, 88 per cent of Australia's manufactures, resources and energy exports will enter Korea duty free on entry into force of KAFTA, with all remaining tariffs phased out within ten years.[11] For the Australian services sector 'KAFTA will provide Australian services exporters with the best treatment Korea has agreed with any trading partner'. This includes:

> - Australian law firms will be able to: establish representative offices in Korea and advise on Australian and public international law; within two years, enter into cooperative agreements with local firms; and, within five years, establish joint ventures and hire local lawyers.
> - Australian accountants will be able to: establish offices in Korea to provide consultancy services on international and Australian accounting laws; and within five years will be able to work in, and invest in, Korean accounting firms.
> - Telecommunications providers, within two years, will be able to own up to 100 per cent of the voting shares of a facilities-based telecommunications service supplier in Korea.
> - Australian financial services providers will be able to supply specified financial services on a "cross-border" basis, including investment advice

9 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 67.

10 Department of Foreign Affairs and Trade, 'Outcomes At A Glance', available at: http://www.dfat.gov.au/fta/kafta/downloads/outcomes-at-a-glance.pdf.

11 Department of Foreign Affairs and Trade, 'Outcomes At A Glance', available at: http://www.dfat.gov.au/fta/kafta/downloads/outcomes-at-a-glance.pdf.

> and portfolio management services for investment funds, as well as a range of insurance and insurance-related services.
>
> - Education, Engineering and Other Professional Services will benefit from Korea's commitments to guarantee existing market access for Australian providers and work towards improving mutual recognition of qualifications.[12]

3.10 Australia will also remove its remaining tariffs on Korean goods on entry into force or over several years. DFAT's *Key Outcomes* document for KAFTA acknowledges that some sectors of the Australian economy 'may face increased competition from imports of Korean products and services, such as motor vehicles, automotive parts, steel products and textiles, clothing and footwear'. It characterises these outcomes as 'in line with the progressive liberalisation already underway in the Australian economy'.[13]

3.11 The Regulation Impact Statement (RIS) for KAFTA includes the results of independent economic modelling undertaken by the Centre for International Economics (CIE) which predicted that liberalisation of the bilateral goods trade would have benefits for the Australian economy. In particular, the CIE modelling predicted that:

> KAFTA goods liberalisation would contribute $226 million in additional GDP in the first year of its implementation. After 15 years of operation, Australian GDP would be $653 million higher than would be the case without KAFTA…
>
> KAFTA goods liberalisation is estimated to lead to the creation of 1,719 new jobs in its first year and 1,062 new jobs after 15 years.
>
> KAFTA will have significant benefits to trade. Economic modelling predicts that Australian exports to Korea would be 25 per cent higher after 15 years of KAFTA's entry into force than a scenario in which Australia does not enter a FTA with Korea.[14]

3.12 During the inquiry, a number of submissions were received from businesses and commercial organisations which would be affected by the trade outcomes of KAFTA. For example, the National Farmers' Federation strongly supported the agreement. Its view was that 'the agreement will provide millions of dollars in export value to Australian farmers, including those in the red meat, grains, dairy, sugar, pork and horticulture sectors'.[15] Similarly, the Winemaker's Federation of Australia noted

---

12 Department of Foreign Affairs and Trade, 'Outcomes At A Glance', available at: http://www.dfat.gov.au/fta/kafta/downloads/outcomes-at-a-glance.pdf.

13 Department of Foreign Affairs and Trade, 'Korea-Australia Free Trade Agreement - Key Outcomes' available at: http://dfat.gov.au/fta/kafta/fact-sheet-key-outcomes.pdf.

14 RIS, p. 10.

15 *Submission 29*, p. 3.

that the fall in the retail price of wine due to the elimination of tariffs was expected to stimulate stronger demand for Australian wine in Korea.[16]

3.13 However, it was also noted that tariff reductions under KAFTA would not affect the substantial government subsidies to Korean farmers which also make Korea a difficult market for Australian agri-food exporters.[17] Other products were not included in the agreement. For example, Apple & Pear Australia stated that both 'apples and pears were specifically excluded from [KAFTA]'. It stated the tariff rates on imported pome fruit from Australia to Korea will remain at the base rate of 45 per cent. Watermelons and strawberries were also excluded from the agreement, along with a number of fresh vegetables.[18]

3.14 The Australian Food and Grocery Council (AFGC) stated that for processed and packaged food KAFTA would eliminate a wide range of tariffs of up to 63 per cent over different timeframes. It observed:

> The outcome will benefit a wide range of processed and packaged food products and enable Australian exporters to more effectively compete with other major exporters including the United States, the European Union and Canada. While the long timeframes for tariff elimination on particular products and the exclusions from liberalisation are disappointing, taken in context, KAFTA will create a framework for Australian exporters to develop in the Korean market to 2050.[19]

3.15 Blackmores also indicated its support for the agreement, stating that successful implementation would 'help improve [its] competitive position as an Australian Vitamins and Dietary Supplement exporter'. It noted that 'Australian Vitamins and Dietary Supplements products exported to Korea are currently subject to tariff rates of around 8 [per cent] whereas products from the United States and the E.U. are enjoying preferential access due to more competitive trading terms'.[20] Mr Peter Osborne from Blackmores told the committee that the tariff reductions in KAFTA would help the company increase 'sales by at least 10 and maybe 20 per cent a year', potentially creating additional employment opportunities in Sydney and Melbourne.[21]

3.16 The Minerals Council of Australia stated that 'big ticket items – iron ore and coal' enter Korea largely duty free, but noted that there were a number of Australian mineral ores and related products which are affected by nuisance tariffs. By removing

16 *Submission 11*, p. 6.

17 For example, ACCI, *Submission 65*, p.2

18 *Submission 39*, p. 1,.

19 *Submission 30*, p. 5.

20 *Submission 13*, p. 1.

21 Mr Peter Osborne, Blackmores, *Committee Hansard*, 8 September 2014, p. 35.

these tariffs, the Council considered that KAFTA would also make 'a modest, but valuable contribution to Australia's minerals and energy exports'.[22]

3.17 However, others questioned the value of the trade outcomes achieved by KAFTA. The Australian Fair Trade & Investment Network (AFTINET) considered that KAFTA was not in Australia's national interest. It argued that the 'National Interest Assessment does not weigh the estimated very small gain of 0.04% in GDP after 15 years against any of the losses which will be experienced as a result of the agreement, either in employment losses or in other losses'. In particular, it pointed to a reduction in public revenue through the collection of tariffs and the impact on employment in Australia.

3.18 AFTINET also criticised the economic modelling undertaken by CIE, noting that it uses 'general equilibrium models which are based on assumptions which the Productivity Commission has concluded generally overestimate the economic gains from trade liberalisation and underestimate the losses, including unemployment'. It charactered the overall predicted increase in GDP ($650 million or 0.04 per cent in 2030) as 'extremely small'.[23]

3.19 The modelling of the economic benefits of KAFTA undertaken by the CIE was also questioned by the Australian Council of Trade Unions (ACTU):

> It would be incorrect to rely on the original modelling. First, such modelling adopts assumptions of full liberalisation rather than the negotiated outcome. This assumes outer-envelope liberalisation which does not reflect the final agreement. Second, this type of modelling adopts analysis which fails to incorporate real world assumptions into the model. If the assumptions are inaccurate, the outcomes of the analysis will be inaccurate. Third, the modelling does not capture the impact of non-tariff commitments in the concluded agreement.[24]

3.20 The Australian Manufacturing Workers Union (AMWU) viewed KAFTA 'as an agreement that favours natural resource endowment sources of comparative advantage at the expense of more sophisticated, advanced and value adding industries'.[25] It argued that the dismantling of tariffs through trade agreements at the same time support for industries such as car manufacturing is in decline 'represents a double blow for the diversity, sophistication, complexity and therefore long term growth prospects of the economy'. The AWMU considered that it 'creates the real risk that Australia's future prosperity will solely rely on agricultural and mining industries,

22 *Submission 61*, p. 2.

23 *Submission 50*, p. 5.

24 *Submission 9*, p. 2.

25 *Submission 63*, pp 1-2.

which are neither value added intensive, labour intensive nor high technology intensive'.[26]

Implementation issues

Timing of ratification

3.21 The text of the agreement provides that phased tariff reductions will be implemented from entry into force of the agreement and on 1 January of every year that follows. DFAT stated:

> The Korean and Australian Governments share the goal of entry into force of KAFTA before the end of 2014. This is subject to the completion of domestic processes in both countries including the passage of implementing legislation through both Parliaments…
>
> Entry into force in 2014 will provide for two tariff cuts in quick succession (i.e. on entry into force and again on 1 January 2015); entry into force in 2015 would mean that the second tariff cut would not occur until 1 January 2016. This would impact negatively on the competitive position of Australian merchandise exports in Korea against exports from countries that are already enjoying the benefits of phased tariff reductions in the Korean market.[27]

3.22 The importance of swift implementation of KAFTA was stressed in a number of industry submissions. For example, the NFF stated:

> [T]o ensure Australian agriculture does not fall behind our competitors in the Korean market, it is vital that the agreement is implemented before the end of 2014. If implementation occurs this year (even if late in 2014) Australian agriculture in particular dairy and red meat sectors will begin to take advantage of the tariff reduction timeline, and will move to 2nd year reductions as from the 1st of January 2015. If, however, implementation does not occur until 2015, Australia will fall another year behind in terms of commercial disadvantage to competitor countries such as the European Union and the United States.[28]

3.23 This urgency was reflected in the evidence of Teys Australia, a large beef exporter to Korea which emphasised the importance of Australia's trade agreements for the company to access high-value markets. Mr Tom McGuire from Teys Australia told the committee:

> Most importantly, from our perspective, is that it is concluded this year. [I]f we do that this calendar year then we get the first tariff cut and we then enjoy a second tariff cut in January of next year. That is important for

26 *Submission 63*, p. 6.

27 DFAT, response to written questions on notice – implementation progress in Korea, p. 2.

28 *Submission 29*, p. 4.

> relativity with the United States. It keeps us 5.3 per cent back…rather than 8 per cent.[29]

3.24 While the AFGC acknowledged that implementation of KAFTA in 2014 would require tight timeframes, it considered this objective was possible with a 'concerned effort of the Australian and Korean Governments':

> At a time when all Australian exporters are under pressure from a high cost economy and finding it difficult to compete in overseas markets, immediate tariff reductions will provide greater scope for products to compete. Immediate tariff reductions will benefit all companies but will have a particular benefit for SME exporters who don't have the scale and financial resources of larger companies to maintain export markets under duress.[30]

3.25 However, the AMWU submitted that the implementation of KAFTA could contribute to the early closure of the car manufacturing industry in Australia. It stated:

> The announced closure of Ford, Holden and Toyota manufacturing in 2016-17 does not guarantee any company will continue operating till 2016-17. The timing of closure will largely depend on volumes up to 2016-17, with a significant drop off in volumes potentially causing an early departure of one or all three manufacturing operations…
>
> [T]he implementation of the Korean [bilateral trade agreement] and the possible concluding of [bilateral trade agreements] with Japan and China will certainly impact on the competitiveness of Australian made cars prior to 2016-17 and will contribute to a decrease in volumes that may result in an early closure of the industry.[31]

3.26 Dr Tom Skladzien from the AMWU indicated that while the tariff reductions on cars entering Australia were relatively small, the AMWU was concerned about the marginal effect:

> As soon as it enters into force, the tariff goes to three point something…and then it goes down to 1.7, I believe, and then down to zero. So it is rather a steep tariff…We do not know how close the firms are to that decision to leave early. Any additional pressure that makes it more likely to leave early we are very concerned about.[32]

3.27 However, at the hearing, DFAT rejected the suggestion that KAFTA could contribute to the early closure of the Australian car industry:

> [T]he decisions the domestic manufacturers took to cease production in Australia at certain points in the future had, according to their own statements, very many reasons. It is true that in some statements

29 Mr Tom McGuire, Teys Australia, *Committee Hansard*, 8 September 2014, p. 15.

30 *Submission 30*, p. 7.

31 *Submission 63*, p. 8.

32 Dr Tom Skladzien, AMWU, *Committee Hansard*, 8 September 2014, p. 51.

> competitive pressure from tariff reductions was mentioned amongst many others—certainly not at the forefront but mentioned as factors contributing to a competitive environment which made manufacturing unviable in the future.[33]

Reform following ratification

3.28 Several submitters and witnesses raised issues following the expected ratification of KAFTA. For example, the Financial Services Council (FSC) saw significant potential benefits arising from KAFTA provided complimentary reforms were undertaken in Australia. It noted that 'KAFTA promotes open markets in that it makes services and investment more contestable between the parties, covers both services and investment activities and adopts an approach that supports market opening'. However, FSC considered that other barriers to access would continue to exist:

> The KAFTA formally allows access for Australian fund managers to provide services in Korea without having to establish there (ie: deliver on a cross border basis), but access is qualified. It doesn't provide relief for Australian collective investment business entities intending to sell foreign collective investment securities within Korea from registration or qualification requirements (and likewise in Australia). Korea can continue to require registration/ authorisation of financial service suppliers…[34]

3.29 The FSC noted there was a commitment in KAFTA to make administrative decisions, such as those on licensing applications, within a specified time period, which may ease registration requirements. However, it highlighted that members of the FSC have reported that licensing and regulatory approval processes have been long and difficult. The FSC argued 'arrangements should be scrutinized in the review procedures built into the agreement to ensure they are as streamlined as possible and adhering to the principle of non-discrimination'.[35]

3.30 In particular, the FSC argued there was a need to implement reforms proposed by the Australian Financial Centre Forum's report on *Australia as a Financial Centre* (the Johnson Report). Mr James Bond, Chief Economist at the FSC stated:

> [I]is great that we have got the Korea free trade agreement; what we are saying is that we need to get domestic regulation and tax right if we are going to take advantage of the free trade agreement. What we are saying is: you need both aspects working. You need the free trade agreement and you need domestic policy working, and there needs to be some coordination…[36]

---

33 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 50.

34 *Submission 67*, p. 8.

35 *Submission 67*, p. 9.

36 Mr James Bond, Financial Services Council, *Committee Hansard*, 8 September 2014, p. 4.

Awareness, utilisation and support of FTAs

3.31 Several witnesses and submitters referred to a recent survey conducted by the Economist Intelligence Unit on business views of trade agreements in Asia.[37] This survey report found that usage rates are low, particularly in Australia. While the average usage rate of 50 FTAs signed by the eight countries surveyed was 26 per cent, in Australia it was 19 per cent.[38] While there appeared to be better understanding of FTAs in Australia than in other countries in the region, a large portion of survey respondents ranked more support from government in terms of education and advice on existing FTAs as important.[39]

3.32 For example, ACCI recommended that the Australian Government should 'publish information about the utilisation rate for each of Australia's PTAs on an annual basis and or in other regular trade performance reporting to ensure that the nation is maximising the opportunities available through each agreement'. Mr Bryan Clark from ACCI also highlighted the need for further government support for exporters to take advantage of trade agreements:

> Every time you do an agreement, there needs to be a support package. There needs to be an office set up, either a dedicated office for each agreement or a general office that can support the agreement so that, firstly, companies understand what is available to them. As you would appreciate, they may not be doing that trade this year, but next year or in three years time…That support network has broken down and we need to rebuild it. One of the things which we have suggested in our budget submissions is that Australia needs to be ramping up its support for exporters and to be outwardly focused in its trade. It is a package which is needed and it is not there at the moment.[40]

3.33 At the public hearing, Mr Hudson from Export Council of Australia pointed the committee to the outcomes of the recent B20 Australia meetings on trade which highlighted the low utilisation rates of bilateral free trade agreements. The B20 recommended that governments 'ensure preferential trade agreements (PTAs) realise better business outcomes by consulting with business, improving transparency and consistency and addressing emerging trade issues' and included an action item for G20 countries to 'survey domestic exporting and importing businesses to identify drivers of PTAs utilisation and impact; make results publicly available'.[41]

---

37 For example, Mr Bryan Clark, ACCI, *Committee Hansard*, 8 September 2014, p. 10.

38 The Economist Intelligence Unit, 'FTAs: fantastic, fine or futile: Business views on trade agreements in Asia', 2014, p. 4.

39 The Economist Intelligence Unit, 'FTAs: fantastic, fine or futile: Business views on trade agreements in Asia', 2014, pp 8-9.

40 Mr Bryan Clark, ACCI, *Committee Hansard*, 8 September 2014, p. 12.

41 *B20 Trade Taskforce Policy Summary*, July 2014, p. 15.

3.34 In relation to awareness of KAFTA, Ms Adams from DFAT commented that while few people would read the full treaty text, those 'people who are actually doing the trade at the paperwork level, at the trade level and at the customs broker level know what tariff line they are working under'.[42] She stated:

> [T]here is a body of work to be done by government as well as peak bodies, industry associations and the whole industry—that consists of freight forwarders, Customs, brokers, the people who do the trade facilitation and the actual trading work—to get more information out about the preferences that are available under some of our agreements. From my experience of the last five years or so on the North Asia FTAs, we know that there are many industries, not just the agriculture industries, that are acutely aware of the tariffs they currently pay and the opportunities that they are going to have when this agreement comes into force. Once it is in force, we are very confident that a lot of our exporters will be ready to utilise those as soon as they are available…We do have more outreach and education and tools that we are going to develop and make available for people to use when the agreements are in force.[43]

3.35 In a response to a question on notice, DFAT noted that 'Austrade plays a significant role in assisting businesses to enter overseas markets and use the opportunities made available by Australia's FTAs'. It indicated that Austrade and DFAT were working closely 'on a program of activities to encourage utilisation of KAFTA by businesses once the agreement has entered into force'. Further:

> Businesses and their representative organisations also have a role in ensuring that they are aware of the opportunities offered by FTAs and are able to take advantage of them in a way that best suits their particular operations, or the operations of their members, in the relevant foreign market.[44]

3.36 In relation to monitoring of utilisation of trade agreements, DFAT noted that it 'regularly publishes detailed trade statistics and investment flows for each of our trading partners, including those where an FTA is in place'. It also highlighted a number of the challenges in collecting accurate data on this subject. These reasons included that 'the availability of this data across FTA trading partners varies'. It did not intend to publish information about the utilisation rate for each of Australia's FTAs on an annual basis as it would be 'a complex and resource-intensive exercise of limited practical value'.[45]

---

42 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 38.

43 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 39.

44 DFAT, response to questions on notice, p. 13.

45 DFAT, response to questions on notice, pp 11-12.

Joint treaty committees

3.37 Chapter 21 of KAFTA outlines institutional provisions of the agreement and establishes a system of joint committees to oversee implementation and operation of agreement. At the hearing, DFAT commented:

> [T]here will be a period of time where both sides seek to give effect to the agreement. They see whether it is operating as effectively as possible. There will be what we call a joint committee meeting sometime probably in the first year. In preparation for that DFAT plus all of the different areas of the FTA will look at where improvements could be made, whether the existing provisions are working as both sides had expected, and will begin this process of seeking to build on the good outcomes that we have already secured to go further where possible. In doing so, of course, we will look at both what the market is telling us, key stakeholders like FSC.[46]

3.38 Some witnesses and submitters had views of the operation of these joint committees. For example, Dr Rebecca LaForgia considered that the agreement should be interpreted by Australia to promote openness and access to information regarding the proceedings of these joint committee. In particular, she argued that the reports of the joint committees established by the agreement should be made public and urged Australia to make an interpretive declaration in order to clarify its practice in this respect. She considered that such an interpretative declaration was urgently required 'because presently it appears that there is an intention of not allowing the committee reports to automatically be open to the public'.[47] At the public hearing, Dr La Forgia highlighted the importance of having these committee reports released in order to promote transparency and public understanding of the policy developments made under the trade agreement.

3.39 Article 4.12 establishes a committee of officials from Australia and Korea to consider and resolve any matter arising in relation to rules of origin and origin procedures. The ACCI recommended that this committee should also include industry representation. Mr Bryan Clark from ACCI explained that the committees established under trade agreements can operate slowly to resolve issues:

> The problem with the committee at the present time is that it is done at the discretion of the parties, so they do not meet on any frequency basis necessarily. They meet on an annual basis or on an as-needs basis, if we refer to other agreements of how this works.[48]

3.40 At the hearing, DFAT noted that committees established by treaties operate 'in the normal government to government way' but stated that, in general, the Australian government was 'very open to having a high degree of transparency on the

---

46 Mr Simon Farbenbloom, DFAT, *Committee Hansard*, 9 September 2014, p. 53.

47 *Submission 66*, p. 2.

48 Mr Bryan Clark, ACCI, *Committee Hansard*, 8 September 2014, p. 13.

implementation going forward'.[49] However, in relation to ACCI's proposal, it commented:

> KAFTA is an international agreement between governments. As such, the implementation of the Agreement is the responsibility of the Australian and Korean governments through the committee structure established under KAFTA. The Australian Government will continue to consult with interested stakeholders, including business representative groups, to ensure the Agreement delivers as intended.[50]

Negotiation, assessment and approval of trade agreements

3.41 KAFTA was seen by some to illustrate problems with the current processes to negotiate, assess and approve trade agreements in Australia. For example, Dr Matthew Rimmer considered that KAFTA 'highlights long-standing problems in respect of treaty-making in Australia – particularly in respect of the secrecy of the negotiations; the lack of independent analysis of the agreement; the limited role afforded to the Australian Parliament; and the lack of public consultation and participation in the negotiations'.[51]

3.42 The AMWU argued there was a disconnection between Australia's trade and industry policy which it considered was a result of a flawed process for approving trade agreements. It noted it was not consulted as stakeholder through the process of negotiating KAFTA.[52] It stated:

> In short, this process involves secretive negotiations between governments on the treaty text, which is followed by a parliamentary rubber stamp process in which parliament can either approve the draft treaty in its entirety or reject it in its entirety. Unlike the USA and other countries, our parliament has no option to amend the text of the treaty prior to approval. This process dilutes community and stakeholder engagement in consultation processes such as the current inquiry, as the agreement is presented as a fait accompli and no possibility of adjustment is possible. In addition, it robs both MPs and the Senate of their rightful role in approving and where necessary amending legislation.[53]

3.43 Mr Bryan Clark from the ACCI noted that the Productivity Commission undertook an investigation of Australia's performance in bilateral and regional trade agreements in 2010:

---

49 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 54.

50 DFAT, response to question on notice, p. 10.

51 *Submission 60*, p. 6.

52 Dr Tom Skladzien, AMWU, *Committee Hansard*, 8 September 2014, p. 48

53 *Submission 63*, p. 12.

> They were relatively scathing at the time and made a number of recommendations that they thought would improve negotiated outcomes. Largely, they have been ignored.[54]

3.44 The ACCI argued that the trade agreements made by Australia 'must be subjected to independent assessment' before ratification and after implementation 'in order to allow for appropriate economic assessment to occur to ensure maximum economic benefit is being achieved'.[55] Further, the ACCI recommended:

> Australian stakeholders to trade agreements should be consulted in the development of National Interest Analysis (NIA) (including for KAFTA). The analysis in the NIA should be conducted by an independent body such as the Productivity Commission, rather than by DFAT. When consulted, Australian stakeholders should be also given a fair opportunity to examine substantive aspects of the treaty text affecting their role in the pending treaty, well before an NIA is published. In this way, future NIA on trade treaties will be independent from negotiations, well-researched and relevant to tangible business activities on the ground, and contain empirical information in the national interest, rather than being developed behind closed doors resulting in inaccuracies and omissions.[56]

3.45 In response to this proposal, DFAT stated:

> The National Interest Analysis (NIA) tabled in Parliament with its accompanying agreement, is an official Government document advising the Parliament among other things of the essential elements of the agreement, any costs and impacts, and why the Government believes it is in Australia's national interests for binding treaty action to be taken. For trade agreements the NIA is drafted by DFAT on a whole-of-government basis in consultation with other agencies that have taken part in the negotiations. Given the in-depth detailed knowledge required of various negotiating positions and options, it would not be appropriate for the NIA to be drafted by entities outside Government.
>
> Through existing review processes JSCOT and other Parliamentary committees have the opportunity to consider and test the statements made in the NIA, as do external stakeholders in submissions and testimony to JSCOT and other committees.[57]

3.46 Another of the ACCI's recommendations was that Australia should develop a model Preferential Trade Agreement (PTA) based on international standards. This would be transparent to Australian industry and to international Governments 'so that all stakeholders are aware of what Australia sees as the ideal outcome from a PTA'. The ACCI considered a 'model' agreement would 'drive a level of consistency and

---

54 Mr Bryan Clark, ACCI, *Committee Hansard*, 8 September 2014, p. 14.

55 *Submission 65*, p. 37.

56 *Submission 65*, p. 6.

57 DFAT, response to questions on notice from hearing, p. 12.

improved confidence as to what is included in the negotiations'.[58] However, DFAT also disagreed with this proposal:

> A one-size-fits-all approach does not work in trade negotiations, and therefore it would not be possible or useful to develop a 'model' preferential trade agreement template.
>
> A negotiating strategy is developed specifically for each trade partner or partners involved in preferential trade agreement negotiations. Each strategy takes a range of factors into account and involves reaching a different balance between respective interests, including market access interests and trading conditions which can vary considerably between markets. The strategy is revised regularly as negotiations progress.[59]

58 *Submission 65*, p. 13.

59 DFAT, responses to questions on notice from hearing, p. 3.

Chapter 4

Key issues

Introduction

4.1 This chapter will consider four specific issues with KAFTA which were raised during the inquiry:

- the investor state dispute settlement provisions;
- the intellectual property provisions;
- the certificate of origin processes; and
- labour issues.

Investor state dispute settlement provisions

4.2 Investor state dispute settlement (ISDS) provisions grant foreign investors the right to access an international arbitration tribunal if they believe actions taken by a host government are in breach of certain investment related commitments made in a trade agreement or an investment treaty.[1] For example, in KAFTA, the investment chapter (Article 11.7) includes that neither party 'shall expropriate or nationalise a covered investment' except for a public purpose, in a non-discriminatory manner and on payment of prompt adequate and effective compensation.

4.3 Most ISDS mechanisms refer to arbitration rules developed by the UN Commission on International Trade Law (UNCITRAL) and the International Centre for the Settlement of Investment Disputes (ICSID). Under KAFTA, Chapter 11, Section B outlines the agreed ISDS arbitration tribunal processes and selection of applicable rules.

4.4 Currently, Australia has agreed to ISDS provisions in four of its seven free trade agreements, being FTAs with Chile, Singapore, Thailand and ASEAN-New Zealand. It has also agreed to ISDS provisions in 21 bilateral investment treaties with Argentina, China, Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam.[2] Notably, an ISDS mechanism was not included in the US-Australia Free Trade Agreement 'in recognition of the Parties' open economic environments and shared legal traditions, and the confidence

---

1 Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)', https://www.dfat.gov.au/fta/isds-faq.html.

2 Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)', https://www.dfat.gov.au/fta/isds-faq.html.

of investors in the fairness and integrity of their respective legal systems'.[3] Similarly, the recently concluded Japan-Australia Economic Partnership Agreement also does not include ISDS provisions.

4.5 While the policy of the previous Labor Government was not to include ISDS provisions in trade agreements, the Coalition government's position is that it will consider ISDS mechanisms in trade agreements on a 'case-by-case' basis. In relation to KAFTA, Ms Adams from DFAT stated:

> The inclusion of an ISDS mechanism in KAFTA was essential for the conclusion of negotiations with Korea, and we negotiated a modern, balanced mechanism that includes a range of explicit ISDS safeguards which protect the government's ability to regulate in the public interest, including for public health and the environment.[4]

4.6 The submission from Dr Jeffrey Wilson provided a useful summary of common positions in relation to the inclusion of ISDS mechanisms in trade agreements:

> Advocates of ISDS provisions argue they augment the strength of investment policy commitments made in FTAs. By providing investors an independent legal route to seek redress against expropriation by host governments, they increase certainty that investment protections will be adhered to. This is argued to increase investor confidence, and ultimately flows of foreign direct investment, resulting from FTAs containing ISDS.
>
> Critics of ISDS provisions contend they impose unnecessary and asymmetric restrictions on the regulatory capacity of governments. Some argue that ISDS protections, which are only extended to investors from a partner country, asymmetrically create legal rights for foreign (but not local) companies. Others go further to suggest that as ISDS tribunals are not subject to the laws created by a democratically-elected legislature they are inherently illegitimate. Others have also contended that ISDS restricts the ability to enact various public welfare provisions – including environmental, cultural, and public health policies – and will produce a 'chilling-effect' on governments' willingness to regulate in these areas in future.[5]

4.7 At the public hearing, Dr Wilson stressed that 'these agreements do not prohibit Australian governments engaging in regulations even that are found to be adverse by ISDS':

> What the ISDS process would do is enforce the payment of compensation for indirect expropriation as a result of these regulations. So it does not say

---

3 Department of Foreign Affairs and Trade, *Government response to the report of the Senate Foreign Affairs, Defence and Trade References–Voting on trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement*, p. 12.

4 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 34.

5 *Submission 59*, p. 2.

> that you cannot regulate in protection of the environment; it simply says that if you do and that results in indirect expropriation you have to compensate affected companies in timely and fair manner.[6]

4.8 A large number of submissions to the inquiry from individuals opposed the inclusion of ISDS processes within KAFTA and other Australian trade agreements. These submissions pointed to a number cases in which investors have taken action against overseas governments under ISDS provisions for enacting health, environmental or other public interest legislation. In particular, Dr Matthew Rimmer, highlighted United Nations Conference on Trade and Development research which indicated a 'staggering' increase in ISDS cases being brought against national governments in recent years.[7] Repeatedly mentioned cases included:

- the Eli Lilly pharmaceutical company suing the Canadian national government over a court decision to refuse a medicine patent;
- the US Lone Pine mining company suing the Québec provincial government of Canada over environmental regulation of shale gas mining; and
- the Swedish energy company, Vattenfall, suing the German government over its decision to phase out nuclear energy.

4.9 Many also argued that the ISDS system privileges foreign investors, usually large multinational corporations over Australian investors and pointed to the lack of evidence that ISDS mechanisms have any effect on levels of direct foreign investment.[8] Several submissions also emphasised that, in 2010, the Productivity Commission had recommended that Australian Governments should seek to avoid including ISDS provisions in subsequent international agreements 'that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system'.

4.10 Those opposed to ISDS processes argued that the cost of litigation and compensation awarded to foreign investors can also act to discourage governments from proceeding with legitimate domestic legislation in the national interest.[9] Dr Kyla Tienhaara described this as 'regulatory chill':

> The concept of regulatory chill reflects the fact that policy makers will be wary of introducing measures that could be challenged in arbitration because of the immense costs associated with the arbitration system and the uncertainty surrounding how investment provisions will be interpreted in any given case.[10]

---

6 Dr Jeffrey Wilson, *Committee Hansard*, 8 September 2014, p. 24.

7 *Submission 60*, p. 17.

8 Dr Kyla Tienhaara, *Committee Hansard*, 9 September 2014, p. 8.

9 For example, Mr Graeme Batterbury, *Submission 7*, pp 1-2.

10 *Submission 3*, p. 21.

4.11 Serious concerns with the procedural aspects of ISDS arbitration were also raised during the inquiry. For example, Dr Tienhaara stated:

> Arbitrators lack the independence of judges because they are chosen by the parties to the dispute and are paid by the hour. Additionally, individuals may act as an arbitrator in one case and as a legal representative for a claimant in another, which creates serious issues of conflict of interest. Arbitrators are also generally experts in the field of commercial arbitration and may have little knowledge of domestic environmental and health legislation.
>
> There is also no system of precedents or any process for appeals, which makes the outcomes of ISDS cases difficult to predict, creating uncertainty for regulators. ISDS is also very expensive. Governments can spend millions of dollars defending themselves in arbitration and may not recoup these costs even if they eventually win a case. The committee should consider whether it believes that panels of international arbitrators who have no accountability to the Australian public should be put in the position of reviewing the decisions of the state and federal governments as well as those made by our domestic courts.[11]

4.12 A frequently mentioned illustrative example was the action taken by Philip Morris Asia against Australia for the *Tobacco Plain Packaging Act 2001* under the 1993 Australia-Hong Kong bilateral investment treaty.[12] Philip Morris claimed that Australia's plain packaging tobacco policy constitutes an 'indirect expropriation' of its Australian investments (in particular in relation to the use of trademarks) and was an 'unreasonable and discriminatory' measure.[13]

4.13 One aspect of this case identified by Dr Wilson was the potential for 'forum shopping' by companies in order to mount claims under ISDS mechanisms:

> There have been a complex set of changes in the ownership of Philip Morris Australia and Asia within the group of companies that were made by the company around the time that this legislation was being enacted, and some have suggested that these were a form of forum shopping—in effect, an attempt to get Philip Morris's Australian operations owned in Hong Kong so then a case could be brought under the Hong Kong BIT, effectively a forum-shopping exercise in restructuring ownership to allow a case under the most favourable BIT that they could find.[14]

4.14 The plain packaging arbitration is one of the first ISDS cases to be brought against Australia. However, several witnesses and submitters pointed to an increased use of ISDS mechanisms against other national governments.

---

11 Dr Kyla Tienhaara, *Committee Hansard*, 9 September 2014, p. 8.

12 For example, The Music Trust, *Submission 48*, p. 2.

13 For example, Dr Jeffrey Wilson, *Submission 59*, pp 2-3.

14 Dr Jeffrey Wilson, *Committee Hansard*, 8 September 2014, p. 24.

4.15 Several witnesses and submitters highlighted that there appeared to be a growing international trend against the inclusion of ISDS mechanisms in trade treaties.[15] For example, AFTINET stated that '[g]overnments in significant economies in Europe, South America, Africa, the Indian sub-continent and Asia have reviewed and/or renounced ISDS on the grounds that it undermines legitimate democratic legislation'.[16] Dr Jeffrey Wilson told the committee:

> The German government has expressed deep reservations about ISDS provisions being included in the TTIP agreement that the EU is currently negotiating with the United States, which is very similar to a kind of European version of the Trans-Pacific Partnership, for those familiar with that agreement. We have also seen the Indonesian government effectively repudiate all, from my understanding, of its bilateral investment treaties, which include these ISDS provisions, in effect, because they have decided they no longer want to be bound by this legal remedy.[17]

4.16 A controversial aspect of the ISDS provisions in KAFTA, and ISDS provisions in other trade agreements, was the broad coverage of potential liability for 'indirect expropriation…where an action or a series of actions by a Party has an effect equivalent to direct expropriation…'. Dr Jeffrey Wilson commented:

> On one hand, indirect expropriation is a real and genuine concern for investors, and has a legitimate place in ISDS clauses. However, because an extremely broad set of regulatory behaviour might potentially qualify as indirect expropriation, concerns exist that it widens the scope of expropriation to be dangerously broad.[18]

4.17 The suggestion was made during the inquiry that the definition of 'expropriation' in KAFTA is broader than in other FTAs. For example, Dr Tienhaara pointed to the narrower definition of expropriation in the Canada Korea free trade agreement.

> [T]he Canada Korea treaty has slightly stricter wording, because it requires a complete, or almost complete, destruction of the investment. So the investment has to be completely destroyed in order for it to be considered potentially an indirect expropriation.[19]

4.18 Associate Professor Weatherall also argued that 'expropriation should only be treated as arising in cases where the interference with a tangible or intangible property right in an investment eliminates all or nearly all of its value and/or substantially deprives the investor of the fundamental attributes of property in its investment,

---

15 For example, Dr Patricia Ranald, AFTINET, *Committee Hansard*, 9 September 2014, p. 1.

16 *Submission 50*, p 3.

17 Dr Jeffrey Wilson, *Committee Hansard*, 8 September 2014, p. 21.

18 *Submission 59*, p. 3.

19 Dr Kyla Tienhaara, *Committee Hansard*, 9 September 2014, p. 15.

including the right to use, enjoy and dispose of its investment'.[20] She suggested this matter could be resolved through a side letter with Korea

Table 1. Comparison of expropriation definitions[21]

Korea-Australia Annex 11-B Expropriation	Korea-Canada Annex 8-B Expropriation
The Parties confirm their shared understanding that: 1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.	The Parties confirm their shared understanding that:… (b) an action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment and eliminates all or nearly all of its value.

4.19 Recent commentary regarding ISDS mechanisms made by Chief Justice French was also highlighted during the inquiry. This commentary noted that ISDS arbitral tribunal decisions could effectively override decisions made by senior Australian courts and noted the lack of consultation with the Australian judiciary about the 'possible effects upon the authority and finality of decisions of Australian domestic courts'.[22] In his commentary, Chief Justice French recommended that the issues be promptly and fully considered, potentially by referral to the Council of Chief Justices, and suggested the following requirements in ISDS provisions be considered:

- prior exhaustion of remedies in domestic courts of the Contracting State;
- preclusion of any challenge to the decision of a domestic court as constituting a breach of the relevant BIT or FTA provisions; and
- preclusion of any arbitral decision based upon a rejection of a decision on a question of law of a domestic appellate court binding on lower courts.[23]

4.20 Requested by the committee to consider these suggestions, DFAT responded:

> Requiring investors to exhaust remedies before resorting to ISDS has been identified as an option by various commentators, including in academic literature and intergovernmental organisations such as UNCTAD. In

20 Associate Professor Kim Weatherall, response to questions on notice, p. 4.

21 Extracted from Associate Professor Kim Weatherall, response to questions on notice, p. 3.

22 Dr Patricia Ranald, AFTINET, *Committee Hansard*, 9 September 2014, p. 6; Chief Justice French, 'Investor-State Dispute Settlement – A Cut Above the Court?', Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014, p. 15.

23 Chief Justice French, 'Investor-State Dispute Settlement – A Cut Above the Court?', Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014, p. 15.

> practice, such a requirement has not been adopted in the majority of treaties. One concern is that a requirement to exhaust domestic remedies could frustrate an investor's ability to seek recourse for an alleged breach, in particular when the resort to domestic remedies would be futile. In some jurisdictions there can be significant delays in the conduct of judicial proceedings and requiring investors to exhaust domestic remedies before submitting a claim to ISDS is likely to prolong a dispute. An alternative approach, adopted in KAFTA, does not require an investor to exhaust domestic remedies but does require that an investor waives its right to initiate or continue proceedings before a domestic court or other dispute settlement procedures before submitting a claim to ISDS. This ensures that the Government could not face multiple simultaneous claims in different fora…
>
> Under KAFTA an award would not be based on a rejection of a decision on a question of law of a domestic court. It must be based on a breach of an investment commitment. It is possible that an ISDS tribunal could examine the same facts and circumstances as a domestic court, however this does not mean that the ISDS tribunal is accepting or rejecting a domestic court's decision on a question of domestic law.[24]

4.21 The lack of transparency and public accountability of tribunal arbitrations, in comparison to normal legal processes, was also emphasised by those opposed to ISDS mechanisms. For example, AFTINET stated:

> The proceedings are not public, and even the results of proceedings can remain secret. Until the time of writing, there has been little public information about UNICITRAL disputes…If it is instructive to note that a side letter to KAFTA refers to the forthcoming UNCITRAL transparency arrangements. However, the side letter states that both parties will **not** be bound by requirements for increased transparency. This may be an indicator of the extent to which not only governments, but future investor parties in disputes may be unwilling to agree to the transparency provisions.[25]

4.22 On this issue, DFAT stated:

> The ISDS mechanism in KAFTA contains a very high degree of transparency which in broad terms is similar to that provided under the UNCITRAL Transparency Rules. The time period for consultations will give the Parties the opportunity to consider how the recently concluded UNCITRAL Transparency Rules could interact with the existing KAFTA ISDS procedures, including the detailed transparency provisions. By this time there may have been some practical application of the Rules which could inform the Parties' consideration.
>
> Australia was actively involved in the development of the UNCITRAL Transparency Rules. Australia supports a transparent approach in ISDS disputes, including through application of the UNCITRAL Transparency

24 DFAT, response to written questions on notice – ISDS provisions, pp 3-4.

25 *Submission 50*, p. 8 [emphasis in original].

> Rules where appropriate. Australia's policy approach and representation in these consultations will be determined after considering the interaction of the UNCITRAL Transparency Rules with the existing KAFTA ISDS provisions.[26]

4.23 A range of other issues were raised in relation to ISDS provisions. For example, the ACTU noted that ISDS mechanisms could provide foreign corporations with legal avenues which were not accessible to domestic corporations, putting domestic corporations at a competitive legal disadvantage.[27] AFTINET considered that the ISDS provisions highlighted a double standard in KAFTA whereby 'foreign investors [have] additional rights to sue governments', but the treaty contains 'no provisions to enforce environmental laws based on agreed UN multilateral agreements through a government-to-government dispute process'.[28]

4.24 An absence of evidence for the benefits of ISDS mechanisms was stressed during the inquiry. For example, Dr Tienhaara argued there was 'no evidence to suggest that including ISDS in KAFTA will lead to an increase in Korean investment in Australia'.[29] AFTINET provided the committee with a recent September 2014 report by the United Nations Conference on Trade and Development. The report concluded that 'policymakers should not assume that signing up to [bilateral investment treaties] will boost FDI…[i]ndeed, they should remain cautious about any kind of recommendation to actively pursue [bilateral investment treaties]'.[30]

4.25 Another specific concern regarding ISDS mechanisms was that the provisions in KAFTA could serve as a precedent for further ISDS mechanisms in a number of other upcoming trade agreements including the Trans-Pacific Partnership Agreement or a bilateral agreement with China.[31]

4.26 However, some submissions indicated broad support for the inclusion of an ISDS mechanism in KAFTA. The ACCI highlighted that the ISDS provisions were an important component in reaching a trade agreement with Korea. It noted that negotiations had stalled until 'the incoming Abbott Government signalled that it was willing to contemplate inclusion of such provisions to accommodate the political requirements of the Korean Government who had a mandate for inclusion of such provisions'.[32]

---

26 DFAT, response to written questions on notice - ISDS provisions, p. 2.

27 *Submission 9*, p. 4.

28 *Submission 50*, p. 16.

29 *Submission 3*, p. 1.

30 UNCTAD, 'Do bilateral investment treaties attract FDI flows to developing countries', *Trade and Development Report*, 2014, p. 159.

31 For example, Dr Kyla Tienhaara, *Committee Hansard*, 9 September 2014, p. 9.

32 *Submission 65*, p. 36.

4.27 The AFGC considered that the inclusion of ISDS provisions in KAFTA 'provides a high level of confidence for investors in both parties, and the inclusion of such provisions promotes the good-faith objectives of the trade agreement'.[33] Similarly, the Export Council of Australia believed that the adoption of the limited ISDS in the KAFTA was warranted. It considered it was 'in the interests of all exporters that they have access to an independent body to mediate and if needs be, resolve disputes in overseas markets'.[34] The Winemaker's Federation of Australia also considered that the 'inclusion of investor state provisions in FTAs give some protection against sovereign risk due to the introduction of social engineering policies and legislation'.[35]

4.28 The ACCI supported the inclusion of ISDS provisions in Australia's bilateral and regional trade investment agreements on a 'case by case' basis. It noted that 'Australia has included such provisions in almost 30 agreements over the past 30 years' and that this 'long history has not resulted in any significant deleterious effects on the Australian economy, but has provided a large amount of security for Australian investors internationally'.[36] Mr Bryan Clark from ACCI commented:

> We are relaxed in developed markets about whether [ISDS provisions are] included or excluded...There are much higher priority countries where you would want it, such as China, India and a lot of developing countries.[37]

Exceptions and safeguards

4.29 In response to some of the criticisms of ISDS provisions in trade agreements, some of the supporters of the treaty highlighted the exceptions and safeguards in relation to these processes. For example, the AFGC argued the 'carve outs for public interest matters…should adequately address some of the concerns around the recent use of ISDS provisions'.[38] The Winemaker's Federation of Australia stated:

> A significant number of investor-state cases taken under NAFTA have involved environmental regulation. However, tighter drafting of provisions in more recent FTAs have largely overcome the issues that concern our government, and we have no concerns with these provisions.[39]

4.30 Dr Jeffrey Wilson outlined that:

> [T]he KAFTA ISDS safeguards: (a) define a set of public welfare measures explicitly protected from expropriation claims by investors; and (b) set

33 *Submission 30*, p. 7.

34 *Submission 55*, p. 3.

35 *Submission 11*, p. 6.

36 *Submission 65*, p. 36.

37 Mr Bryan Clark, ACCI, *Committee Hansard*, 8 September 2014, p. 11.

38 *Submission 30*, p. 7.

39 *Submission 11*, p. 6.

> guidelines for how all other indirect expropriation claims shall be assessed by the tribunal. These provisions broadly conform to – and in some cases directly reproduce text from – the ISDS safeguards included in the United States' *Model Bilateral Investment Treaty* (2012).[40]

4.31 However, a large number of submissions questioned the effectiveness of the 'safeguard' provisions as part of their criticisms of ISDS processes. For example, Dr Tienhaara characterised them as 'untested and likely insufficient'.[41] Similarly, Dr Rimmer stated that the 'framework for exceptions, defences, and safeguards seems partial, limited, and rickety'.[42] He noted that the Productivity Commission's assessment of trade agreements in 2010 included that 'although some of the risks and problems associated with ISDS can be ameliorated through the design of relevant provisions, significant risks would remain'.[43] The Australian Services Union also stated:

> The supposed 'safeguards' included in the KAFTA are not sufficiently adequate to prevent foreign investors from suing governments over health, environment or other public interest policy and legislation. These same 'safeguards' have proved to be ineffective in other agreements with potentially devastating impacts on the capacity of governments to work in the interests of its own people.[44]

4.32 In particular, one safeguard of the ISDS provisions of KAFTA was the 'shared understanding' of the meaning of expropriation in Annex 11-B of the agreement. This included:

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

4.33 The phrase 'except in rare circumstances' was perceived by some submitters as opening 'a very big loophole' to this safeguard provision.[45] Dr Tienhaara noted that it had been suggested 'that the use of the ambiguous terminology "rare circumstances" will only encourage lawyers to develop creative arguments to test the boundaries of the exception'.[46] In relation to this part of KAFTA, Mr Richard Braddock from DFAT commented:

---

40 Dr Jeffrey Wilson, *Submission 59*, p. 5.

41 *Submission 3*, p. 1.

42 *Submission 60*, p. 39.

43 *Submission 60*, p. 33.

44 *Submission 52*, p. 2.

45 For example, Mr Darryl Nelson, *Submission 5*, p. 1.

46 *Submission 3*, p. 24.

> The policy basis is that there could be exceptional circumstances where this may be appropriate…One example could be where a government has made specific written commitments to a particular investor to refrain from taking a certain action and the investor makes an investment based on that commitment, and then the state proceeds to break their commitment in a way which amounts to an expropriation.[47]

4.34 Another problem with this safeguard identified by Dr Wilson was that the KAFTA text fails to precisely define the concept of 'legitimate public welfare objectives'. He argued that this 'leaves the scope of the safeguards up to the interpretation of international arbitral tribunals and therefore poses uncertainty about precisely what qualifies as a public welfare regulation in the first place'.[48] He suggested that an explicit definition of 'legitimate public welfare objectives' could be resolved by an exchange of side letters between Australia and Korea. Dr Wilson commented:

> One of the big difficulties here of course is the lack of binding precedent in international trade law means the risk that different tribunals will rule differently...Were this a matter of domestic law where you could look to past precedent as interpretation it might be less of an issue, but the lack of binding precedents in these tribunals really compounds the definitional problem because things can be redefined from case to case.[49]

4.35 In terms of drafting the safeguards provisions of the ISDS mechanism in KAFTA, Ms Adams from DFAT commented:

> One of the dilemmas, as many would know, of legal drafting is that contrary to what you might first think, sometimes the more that you define something the narrower you make it because saying what is in it can raise more questions. If it is not explicitly mentioned, is it therefore excluded? So there were a lot of debates in the negotiation of this text about whether more definition of particular terms was going to be productive or counterproductive towards the objective. In this case, our considered view was that more explicitly defining legitimate welfare objectives raised a very high risk of being counterproductive and effectively narrowing the definition, whereas we thought we were better to let the words speak for themselves.[50]

Intellectual property

4.36 Chapter 13, the intellectual property (IP) chapter of the agreement, was the focus of some submitters and witnesses, in particular where they considered that KAFTA introduced further obligations to extend IP protection in Australia and Korea.

---

47 Mr Richard Braddock, DFAT, *Committee Hansard*, 9 September 2014, p. 57.

48 Dr Jeffrey Wilson, *Committee Hansard*, 8 September 2014, p. 20.

49 Dr Jeffrey Wilson, *Committee Hansard*, 8 September 2014, p. 23.

50 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 58.

4.37 For example, Associate Professor Kim Weatherall highlighted a number of areas where 'chapter 13 imposes new international IP obligations in Australia: obligations not found in any other multilateral or bilateral agreement, including AUSFTA'. She argued that KAFTA 'locks in' existing Australia IP law which will constrain domestic flexibility to make IP and innovation policy. She noted that Chapter 13 included 'provisions which reflect bad policy and are contrary to the trends in IP law reform internationally', provisions which were 'extremely difficult to interpret…of uncertain scope' and lacked any 'balancing provisions to protect the rights of the public, users, and defendants in enforcement actions'.[51]

4.38 Associate Professor Weatherall also criticised the approach of DFAT to negotiating the IP sections of trade agreements:

> The basic problem is that Australian trade negotiators seem to think that good domestic policy is the same as good trade policy in IP. That is simply incorrect. What works well in local legislation is not always great in a treaty, especially in an area like intellectual property, which is all about innovation and the latest technologies and where we amend the law all the time. We might want to change our IP laws in the future. It is much harder to change things once you have written them in detail into a trade agreement.[52]

4.39 She highlighted that the Productivity Commission had concluded that 'the Australian Government should not seek to include intellectual property provisions in Australia's [bilateral and regional trade agreements] as an ordinary matter of course, and should only include such provisions after an economic assessment of the impacts, including on consumers, in Australia and partner countries'. She highlighted that such an assessment had not be undertaken and that the proposed changes are 'unsupported by any economic or other evidence suggesting a need for extensive or new IP provisions in this particular trade agreement'.[53]

4.40 Dr Matthew Rimmer also described the intellectual property chapter of KAFTA as controversial, 'onesided and unbalanced':

> The intellectual property chapter is focused upon providing longer and stronger intellectual property rights for intellectual property owners. There is a failure to properly consider other public interest objectives – such as access to knowledge, the progress of science and the useful arts, and the promotion of innovation and competition.[54]

4.41 The Electronic Frontiers Australia (EFA) pointed to several extensions of intellectual property protection in KAFTA in relation to trademarks, patents and

---

51 *Submission 46*, p. 2.

52 Associate Professor Kim Weatherall, *Committee Hansard*, 9 September 2014, p. 9.

53 *Submission 46*, pp 2, 4-5.

54 *Submission 60*, p. 56.

copyright and related rights. The EFA was concerned that KAFTA contained requirements substantially at odds with Australian legislation and case law and that the intellectual property rights of consumers have not been addressed. A particularly 'problematic' change 'may require recognition of software patents'. It highlighted that software patents 'pose significant problems for the IT industry and if they are to be recognised in Australia this should be a carefully considered process'.[55]

4.42 The Australian Digital Alliance noted that previously parliamentary committees, the Productivity Commission, a report commissioned by IP Australia and others have made recommendations about the importance of evidence and cost/benefit analysis if Intellectual Property chapters are to be included in trade deals. It highlighted there was 'no evidence of economic analysis, or indeed any analysis of the impact of the IP Chapter in KAFTA'.[56]

4.43 DFAT noted that the international IP system was defined by a large number of multilateral treaties such as the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Australian IP policy is bound by these multilateral treaties and also 'a small number of obligations contained in bilateral trade agreements that are not covered by the multilateral system, most notably in AUSFTA'.[57] However, DFAT pointed out that parties to these treaties are 'largely free as to how they meet these obligations within their own legal systems and practices'.

4.44 As part of its responses, DFAT noted that bilateral trade agreements 'such as KAFTA often reaffirm commitments to the multilateral agreements [on IP], but in particular circumstances, may differ from those commitments as part of a negotiated outcome'. However it stated:

> [A]ny extension of obligations (e.g. to provide an additional term of protection for a particular right) is examined during the negotiation process and considered against Australia's overall interests. The result reflects a negotiated outcome considered by Government to be in Australia's interests, weighing up all factors across the entire agreement, not just on copyright.

4.45 During the hearing, Ms Adams from DFAT commented:

> The basic reason that we have international agreements covering intellectual property issues or laws is that it is part of international trade, so we have all sorts of international agreements on IP, including in trade agreements. That has been the case since the Uruguay Round because of the importance of IP protection as part of the modern trading system. So it is not really just a question of binding domestic law in international agreements; it is a question of striking international agreements that are

55 *Submission 64*, p. 5.

56 *Submission 62*, p. 5.

57 DFAT, responses to questions on notices - intellectual property questions, pp 16-17.

> going to facilitate trade and protection of intellectual property and making sure domestic legislation implements those international commitments.[58]

4.46 DFAT acknowledged in responses to questions on notice that some of the IP provisions in KAFTA 'do have a different scope to previously agreed international obligations, or deal with the subject matter in a different way'. However, it considered that '[o]n balance the text represents a negotiated outcome that is consistent with current Australian law, and outcomes negotiated in other FTAs'.[59]

4.47 However, Associate Professor Weatherall commented:

> The Department has acknowledged that some aspects of KAFTA 'have a different scope' from previously agreed obligations. In reality, where there is a difference, and with a couple of notable exceptions, most of the provisions of KAFTA expand Australia's international obligations.
>
> The Department offers no justification for the expansion of Australia's international obligations, other than to say that the obligations are consistent with current Australian law.[60]

4.48 In particular, DFAT asserted that the obligations in KAFTA 'do not limit the ability of the Government to consider appropriate domestic copyright reform'. It characterised the KAFTA obligations as 'high level and flexible', and stated they 'would not prevent Australia from modernising and updating the *Copyright Act 1968* where required'. However, Associate Professor Weatherall disputed this description of the copyright obligations under KAFTA which she argued were 'detailed and prescriptive'. She noted 'KAFTA precludes change to many aspects of our current copyright system: the lack of formalities, the length of rights, who gets rights, many aspects relating to how litigation occurs (including presumptions that must be applied), and others'.[61]

4.49 Ms Adams defended the qualifications of the personnel involved in treaty negotiations in relation to intellectual property:

> DFAT works with not only the Attorney-General's on some parts of the IP agenda but also with IP Australia. When we were negotiating this text, there were a large number of extremely expert people from those three agencies involved in that process. The DFAT trade lawyers have particular areas with responsibility for trade law in the department. They include qualified legal people. Those people come to work in the public sector with a variety of backgrounds including often a private sector background—not always—with academic qualifications and often with commercial private sector experience. In all cases they are very well versed in the interlocking sets of international obligations be they in the trade sphere or in the broader IP

58 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 41.

59 DFAT, responses to questions on notice – intellectual property, p. 1.

60 Associate Professor Kim Weatherall, response to question on notice, p. 6.

61 Associate Professor Kim Weatherall, response to question on notice, p. 6.

> sphere so they are completely experienced and qualified to do the work that they are entrusted to do.[62]

4.50 However, DFAT did concede that the intellectual property chapter, except for 'a few outstanding issues', was negotiated 'a few years ago' and that the personnel involved had since left those positions.[63]

Online copyright liability

4.51 Article 13.9.28 Enforcement of Intellectual Property Rights, provides that each country will 'provide measures to curtail repeated copyright and related right infringement on the internet'. Further, Article 13.9.29, includes that each country will provide 'legal incentives for online service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials'.

4.52 The National Interest Analysis (NIA) for KAFTA states that, consistent with Australia's existing obligations under the FTA's with the US and Singapore, to fully implement the obligations under KAFTA, 'the *Copyright Act 1968* will require amendment in due course to provide a legal incentive for online service providers to cooperate with copyright owners in preventing infringement due to the High Court's decision in *Roadshow Films Pty Ltd v iiNet Ltd*, which found that ISPs are not liable for authorising the infringements of subscribers'.[64]

4.53 At the public hearing, Mr Andrew Walter, an officer from the Attorney-General's Department, characterised the need for legislative reform in this area as 'a risk assessment':

> In our view, the difficulty that arises with the iiNet decision is that the decision is likely to be applied in almost any case that came before a court in relation to these authorisation liability provisions…[I]f we were relying on section 101 [of the *Copyright Act 1968*] to be an incentive provision—and the [iiNet] decision means that section 101 does not operate in the way we thought it would—then we find ourselves in a situation where we are applying in good faith our obligations at international law, we think there is a risk that we would not be compliant.[65]

---

62 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 46.

63 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 40.

64 NIA, p. 6.

65 Mr Andrew Walter, Attorney-General's Department, *Committee Hansard*, 9 September 2014, p. 47.

4.54 However, Mr Walter conceded that no formal approaches from Australia's trading partners have been made on this matter.[66] He also noted that the government was currently considering submissions from a public consultation process regarding reforms to address online copyright infringement.[67]

4.55 Several submissions and witnesses objected to this statement in the NIA. The Electronic Frontiers Australia (EFA) characterised the description of the iiNet case in the NIA as 'overly broad and misleading arguing that the High Court found that 'iiNet did not authorise copyright infringement'. The EFA was 'concerned that the government may have misinterpreted our obligations under the KAFTA and will seek unnecessarily significant changes to Australian law as a result'. Also in relation to this issue, the Australian Digital Alliance suggested that KAFTA was being used as a justification for contentious domestic policy proposals. It described proposals to extend authorisation liability raised by the Attorney-General's Department as 'likely to cause unforeseen consequences for other intermediaries, such as libraries, schools and universities'.[68]

4.56 Associate Professor Weatherall described the NIA as 'plain wrong in its assertions about online copyright infringement' and stated that 'nothing in our current trade agreements requires legislative change'.[69] Similarly, Dr Matthew Rimmer characterised the statement in the NIA as 'inaccurate and misleading, both in terms of domestic and international law' and argued that '[t]here is no pretext for overturning the ruling of the High Court of Australia under the guise of international law'.[70] In relation to this issue, AFTINET stated:

> The introduction of legislation to nullify a High Court decision which would have the effect of greatly strengthening copyright law in favour of copyright holders is an issue of great public interest, not only to Internet service providers as an industry sector, but also to consumers. Such a proposal should be fully debated and rigorously scrutinised by the democratic parliamentary process, not presented as a done deal in legislation to implement a trade agreement.[71]

4.57 However, other submissions supported the proposed changes in relation to online infringement. News Corp Australia expressed its support for the inclusion of paragraphs 28 and 29 of Article 13.9 of the KAFTA regarding the enforcement of intellectual property rights. It considered these parts of the agreement 'acknowledge

66 Mr Andrew Walter, Attorney-General's Department, *Committee Hansard*, 9 September 2014, p. 48.

67 Mr Andrew Walter, Attorney-General's Department, *Committee Hansard*, 9 September 2014, p. 48.

68 *Submission 62*, p. 4.

69 Associate Professor Kim Weatherall, *Committee Hansard*, 9 September 2014, p. 9.

70 *Submission 60*, p. 49.

71 *Submission 50*, p. 4.

the importance of creators and rights holders having workable and technology-neutral provisions to protect their rights online'.[72] It noted:

> [W]e are concerned that the amendments made to the *Copyright Act 1968* (the Act) in 2004 regarding secondary liability of ISPs do not operate as intended. Specifically, the provisions of the Act – although intended to do so – do not provide rights holders with means to protect rights online as the provisions are technology specific and ineffective in dealing with online copyright infringement as it manifests today, nor as it may manifest in the future.[73]

4.58 Similarly, Music Rights Australia also expressed support for sections 28 and 29 in Article 13(9). It argued that online services offered by 'the Australian music industry must compete with persistent and unchecked use of unlicensed music online and the damaging impact which illegal streaming and downloading services have on it'. It argued:

> There are currently no legal incentives in place to encourage online service providers to cooperate with copyright owners to address infringement on their networks. The section of the Act, which was intended to put in place the mechanisms which would facilitate this, does not function as it was intended to function. The section needs to be amended to address these inadequacies so that the relationship between section 101 and the 'safe harbour scheme' is realigned.[74]

4.59 Commenting on the general nature of the copyright provisions in KAFTA, DFAT stated that the 'KAFTA obligations are high-level and flexible, and do not prevent Australia from modernising and updating the *Copyright Act 1968* where required'. In particular, it noted that KAFTA provides a more flexible provision on ISP liability compared to the AUSFTA'.[75]

Certificates of origin

4.60 Several technical issues with the provisions of KAFTA were raised during the inquiry, particularly in relation to certificates of origin. Certificates of origin are documents which contain a certification by a government authority, or another body, that exported goods originated in a specific country. Ms Adams from DFAT told the committee:

> KAFTA establishes transparent and effective rules of origin and clear origin procedures that promote compliance without creating red tape or unnecessary obstacles to trade. Exporters have the choice to certify the

72 *Submission 56*, p. 2.

73 *Submission 56*, p. 1 [emphasis in original].

74 *Submission 53*, p. 2.

75 DFAT, response to questions on notice – intellectual property questions, p. 18.

> origin of their own products or pay a service provider to certify on their behalf.[76]

4.61 The ACCI identified a large number of specific technical issues and potential problems with KAFTA, particularly in relation to the practicalities of the rules of origin procedures. It stated:

> Preferential trade agreements are specifically designed to benefit the signature parties and exclude all others. They do this through establishing barriers to trade known as the Rules of Origin. That is, only goods that meet the origin conferring criteria of an agreement are eligible to be offered the preferential treatment of the agreement…
>
> The administrative processes described in KAFTA fail in some aspects to provide for the requisite levels of 'trust' needed by importing Customs to have confidence to grant tariff concessions.[77]

4.62 The recommendations of the ACCI focused on the importance of developing clear and consistent rules of origin procedures and the availability of commercially responsive dispute resolution procedures for exporters and importers. Mr Bryan Clark from the ACCI told the committee:

> The origin of goods is the single most important aspect of any preferential trade agreement. It is the process by which goods from the party countries are differentiated from non-party goods and hence to which the preferential terms are applied. If the system lacks integrity than the entire agreement is jeopardised. If the documentary protocols are too hard then commercial use will be limited….[78]
>
> The integrity of these systems has been undermined in the outcomes for origin determination contained in the KAFTA text. If the system of determining the origin of goods lacks integrity then the entire preferential agreement is jeopardised. If traders experience any levels of delay or difficulties in acceptance of their documents in the destination market then they will avoid the agreement and utilisation will be low.[79]
>
> [W]e continue to highlight the poorly drafted and constantly variable approaches and that the rules of origin and the documentary protocols that continue to ignore international norms will lead to continued low utilisation of our agreements, which in turn will reduce the net benefits being captured.[80]

4.63 In particular, the ACCI urged that government negotiators embed the established system of third party certification into Australia's trade agreements:

---

76 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 34.

77 *Submission 65*, pp 13-14.

78 Mr Bryan Clark, ACCI, *Committee Hansard*, 8 September 2014, p. 7.

79 Mr Bryan Clark, ACCI, *Committee Hansard*, 8 September 2014, p. 8.

80 Mr Bryan Clark, ACCI, *Committee Hansard*, 8 September 2014, p. 8.

> If they do not then they continue the current path of novel approaches in each agreement, which reduces our ability to deliver timely and efficient services to exporters and increases the risk of rejection of the claim for preference in the counterparty market.[81]

4.64 While it supported the outcomes of KAFTA, the AFGC observed that each new trade agreement 'invariably produces a new set of arrangements given the nature of a negotiated outcome between two parties'. It stated:

> A number of exporters have highlighted the time consumed or wasted in meeting the different and specific requirements of individual trade agreements in order to receive the preferential treatment under particular agreements. KAFTA will add to this task and while food and beverage exporters will welcome the implementation of KAFTA, there is a growing concern about the administrative burden across agreements.[82]

4.65 AFGC stressed the need for the Australian Government to take approaches in negotiating trade agreements to encourage 'more opportunity for commonality among agreements'.

4.66 The Export Council of Australia considered that the KAFTA 'should not be seen as a static or "settled" FTA' and noted that 'its terms and benefits will continue to develop over time through the Committees established pursuant to KAFTA'. It had the view that 'further work will be necessary on a number of fronts, including advancing the agenda for our exporters, assisting with trade facilitation and assisting with work to further streamline the Rules of Origin (ROO) under KAFTA' and encouraged the Australian Government 'to appoint members of relevant agencies to immediately establish full engagement with industry to further improve those ROO'.[83]

4.67 DFAT stated that the Australian Government's preferred approach to origin is self-declaration undertaken by the exporter or producer, rather than a certificate of origin issued by a government body or other authorised bodies such as the ACCI:

> However, KAFTA does provide two origin documentation options for Australian exporters. A claim for preferential tariff treatment for Australian goods exported to Korea can be made on the basis of either: a certificate of origin completed by the exporter or the producer; or a certificate of origin issued by an authorised body. This approach provides flexibility for traders, particularly small and medium-sized enterprises.[84]

4.68 Mr Karl Brennan from the Department of Industry noted most of Australia's FTAs facilitated industry flexibility in terms of rules of origin by including both third-party certification and self-declaration. He noted that certain exporters, particularly

---

81 Mr Bryan Clark, ACCI, *Committee Hansard*, 8 September 2014, p. 8.

82 *Submission 30*, p. 8.

83 *Submission 55*, pp 2-3.

84 DFAT, responses to questions on notice from hearing, p. 6.

agricultural industries, prefer to use self-declaration.[85] The preference of some industries for self-declaration could exist for a number of reasons, including avoiding the cost and time involved in third party certification.[86]

4.69 As part of its responses to the ACCI recommendations, DFAT also commented:

> The Government places a high priority on the reduction of red tape and it is envisaged that a simple, business-friendly system of declarations by the exporter or producer continues to be our strongly preferred model in preferential trade agreements.
>
> There are a variety of documentation requirements in Australia's FTAs. It is the Government's intention to achieve greater consistency in these arrangements over time, as this will reduce the burden for business and advance the Government's agenda to reduce red tape. But the focus for these efforts must be on convincing trading partners that still have bureaucratic systems, with a focus on documentary controls, to move to a more business friendly risk management system. Declaration systems, which clearly put the onus on the individual companies to ensure their compliance with FTA requirements, are the origin documentation system most consistent with risk management.[87]

4.70 Ms Adams from DFAT described the differing views within the exporting industry on this issue as 'a bit of a domestic issue'. She stated that '[f]rom a Korean point of view, they have confidence that Australia will have a proper process for certifying, be that through certifying bodies, or through proper self-certification'.[88]

Labour rights and labour market testing

4.71 Chapter 17 of KAFTA concerns labour issues. In particular, Article 17.1 General Principles provides 'Each Party shall endeavour to adopt or maintain in its laws, regulations, policies and practices the following fundamental principles and rights as stated in the ILO Declaration'. Several submissions argued that labour rights areas were insufficiently protected within KAFTA. For example, the ACTU noted that 'the labour chapter in KAFTA does not require Australia or South Korea to meet the ILO standards'. The Committee to Protect Vietnamese Workers (CPVW) argued that the use of the phrase 'shall endeavour to' in Article 17.1 'implies it is best-effort only, that is, not enforceable'.[89] Similarly, AFTINET stated that the KAFTA labour chapter had relatively low standards and weak commitments, and noted it was not enforceable

85 Mr Karl Brennan, Department of Industry, *Committee Hansard*, 9 September 2014, p. 35.

86 Mr Ken Gordon, DFAT, *Committee Hansard*, 9 September 2014, p. 37.

87 DFAT, responses to questions on notice, p. 4.

88 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 36.

89 *Submission 57*, p. 2.

through the government-to-government dispute process which applies to some other chapters in the agreement.[90]

4.72 In Australia, employers seeking to access the Subclass 457 visa program to engage workers from outside of Australia, in prescribed occupations, must first test the local labour market to ensure that there is no suitably qualified and experienced Australian citizen or permanent resident to fill the position. As at 31 August 2014, there were 2495 primary 457 visa holders and 2575 secondary (dependent) visa holders from Korea in Australia out of approximately 109,000 in total.[91]

4.73 The RIS notes that:

> Australia has made a commitment [under KAFTA] not to apply labour market testing. The *Migration Act 1958* provides that labour market testing may only be applied if not inconsistent with Australia's international trade obligations. In order to implement Australia's undertaking not to impose labour market testing on Korean nationals, a determination needs to be made by the Immigration Minister under regulatory arrangements. As this chapter locks in existing arrangements, no significant change is expected in the number of skilled workers entering Australia.[92]

4.74 In response to a question on notice, the Department of Immigration and Border Protection commented:

> The subclass 457 visa programme is demand driven so it is not possible to predict how many contractual service suppliers will come to Australia under the KAFTA. There are no numerical limitations placed on the programme or identified in KAFTA commitments; a South Korean visa applicant will only be able to be granted a 457 visa if there is however an eligible employer sponsor nominating them for a skilled position and all other criteria are met.[93]

4.75 Korea has retained the right to apply labour market testing to the category of Australian contractual service suppliers.[94] AFTINET outlined its concerns in relation to labour market testing:

> The Australian government has not required in KAFTA that there will be labour market testing for any categories of temporary workers from Korea in Australia. This means that Korean temporary contractors will be able to work in Australia without local labour market testing to see if there are available local employees. This could contribute to local unemployment. In

90 *Submission 50*, p. 4. Also see Australia Services Union, *Submission 52*, p. 2.

91 DFAT, responses to questions on notice from hearing, provided by the Department of Immigration and Border Protection, p. 26.

92 RIS, p. 18.

93 DFAT, responses to questions on notice from hearing, provided by the Department of Immigration and Border Protection, p. 22.

94 Ms Jan Adams, DFAT, *Committee Hansard*, 9 September 2014, p. 61.

> contrast, Korea's commitments on temporary movement of people retain the right for labour market testing for entry of some categories of temporary workers.[95]

4.76 Similarly, the CPVW argued:

> Because Australia's part of Annex 10-A, which stipulates conditions for allowing such entry and temporary stay, does not require labour market testing, Korean enterprises may freely bring in Korean workers without first giving Australian workers the chance to apply for jobs. This denies employment opportunities for Australian workers. And, even if Korean companies employ some local Australians, the workers' bargaining position is weakened because Korean employers can readily replace them with Korean workers. Further, the Agreement is silent on wages, working conditions, and individual contracts, thus leaving open the possibility of Australians working in Australia but on Korean pay and conditions.[96]

4.77 At the hearing, Mr Greg McLean from the Australian Services Union also raised general concerns related to ensuring workers coming to Australia have appropriate recognised qualifications and occupational health and safety training and equipment. However, he also acknowledged that there can be 'a need for skills to be brought to [Australia] for specific targets'.[97]

4.78 In contrast, the ACCI indicated its support for all efforts to improve and streamline the movement of people for economic purposes. It considered this was a particularly important issue for increasing services trade and allowing people with skills and a commercial need to travel between economies.[98]

95 *Submission 50*, p. 5.

96 *Submission 57*, p. 3.

97 Mr Greg McLean, ASU, *Committee Hansard*, 8 September 2014, p. 44.

98 *Submission 65*, p. 37

Chapter 5

Conclusion and recommendations

5.1 While the committee's inquiry focused on Australia's trade agreement with Korea, a number of broader issues regarding Australia's trade agreements have also been highlighted through the inquiry process. In particular, these relate to ISDS mechanisms, intellectual property provisions in trade agreements, utilisation by Australian exporters of the opportunities created by trade agreements, labour market testing, certificates of origin processes and the treaty making process.

ISDS mechanisms

5.2 Despite the 'safeguards' and exceptions contained in the provisions, the committee remains concerned about the potentially broad scope of application of the ISDS provisions in KAFTA as well as the broader procedural issues regarding the arbitral tribunal processes used to determine ISDS claims. In some 'rare' circumstances it appears that any regulatory action undertaken for legitimate public welfare objectives by the Australian Government could potentially be considered to constitute an indirect expropriation of an investment which would fall within the ISDS mechanism of KAFTA.

5.3 The committee recognises that the ISDS mechanism within KAFTA appears to have been a requirement of the Korean government for the agreement to be concluded. In this case, the Australian Government has made the decision to include an ISDS mechanism within the agreement. In order to take full advantage of tariff reductions achieved by KAFTA it would be preferable for the treaty to be ratified this year. Any major renegotiation of KAFTA is not consistent with meeting this deadline.

5.4 Delaying the implementation of KAFTA in order to negotiate amendments to the ISDS mechanism would not be productive. The committee recognises that Australia is already a party to many other trade agreements which include ISDS provisions. In this context, the risk of investors 'forum shopping' in order to bring a case against Australia (which was articulated by witnesses in relation to the Philip Morris case) will not be substantially increased by ratifying KAFTA at this point in time.

5.5 However, subsequent negotiations to limit the scope of the KAFTA ISDS mechanism as well as the prompt establishment of an appellant body are in Australia's interest. For example, the negotiation of a subsequent side letter with Korea could be undertaken after the commencement of the agreement. In the view of the committee, such a side letter should be negotiated with the Korean government as soon as possible with the objective of narrowing the scope of application and strengthening the safeguards. Obviously, such a side letter would depend on the agreement of the Korean government. However, the committee notes that the Korean government

would also benefit from any additional safeguards or changes agreed to the ISDS mechanism in KAFTA.

5.6 A key objective of such a negotiation should be a clarification of the shared understanding of the term 'expropriation'. The committee notes that other free trade agreements, such as the Canada Korea FTA, have used narrower definitions of where the term expropriation applies. In the view of the committee, a narrower definition of 'expropriation' which limits the scope of potential liability would provide additional predictability and certainty for investors and governments.

5.7 Additionally, the committee does not agree with the argument that it is preferable to have an ill-defined phrase 'legitimate public welfare objectives' within one of the key safeguard provisions. Australian interests could be more effectively protected through a definition of 'legitimate public welfare objectives' which included a non-exhaustive list of public policy areas covered by this term. This definition would clarify some of the uncertainty about potential liability and decrease the chance that the ISDS mechanism in KAFTA will have a 'chilling effect' on the Australian Government's willingness to institute appropriate reforms in the national interest. The important issues raised by Chief Justice French regarding the possible effects of ISDS mechanisms on the authority and finality of decisions of Australian domestic courts should also be addressed as part of any negotiation.

Recommendation 1

5.8 The committee recommends that the Australia Government initiate discussions with Korea to omit or, in the absence of agreement, narrow the scope of the investor state dispute settlement provisions within the treaty, to be formalised by a subsequent side letter. Discussions on narrowing the provisions should include consideration of:

- **a narrower definition of 'expropriation';**
- **a non-exhaustive list of public policy areas covered by the term 'legitimate public welfare objective';**
- **limitations as suggested by French CJ, or as subsequently formally recommended by the Council of Chief Justices; and**
- **that the parties promptly establish a bilateral appealant mechanism as envisaged in Annex 11-E of the agreement.**

5.9 The evidence for the benefits of ISDS mechanisms in terms of increasing foreign investment appears questionable. This reflects the finding of the Productivity Commission in 2010:

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

> evidence does not suggest that ISDS provisions have a significant impact on investment flows.[1]

5.10 Further, the committee notes that investors often have alternative means of protecting their investments in foreign jurisdictions including legal proceedings and insurance risk products. Reputational incentives also exist to discourage national governments from inappropriately taking action which may result in the expropriation of an investment.

5.11 Despite the history of ISDS mechanisms in trade agreements, the broader community has only recently become aware of the full implications for Australia. The committee acknowledges the community concerns about the potentially negative influence of ISDS mechanisms on Australia's public policy. This strong sentiment has been consistently reflected in submissions to this inquiry, to the JSCOT inquiry and to the recent inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014.

5.12 The committee notes that Australia's international trade negotiations are entering an important period with a bilateral trade agreement with China expected to be concluded before the end of the year and the discussions for the Trans-Pacific Partnership continuing. It is important that future trade agreements, such as these, are concluded on terms which are in Australia's long term national interest.

5.13 In this context, it is worthwhile restating the recommendation of the Productivity Commission on ISDS that the Australian Government should seek to avoid the inclusion of investor-state dispute settlement provisions in [bilateral and regional trade agreements] that grant investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors'. Broadly, this position reflects the view of the committee. In particular, unless the fundamental procedural flaws in ISDS mechanisms identified by Dr Kyla Tienhaara and the potential impacts on Australia's justice system highlighted by Chief Justice French are resolved, the Australian Government should not agree to include an ISDS mechanism in future trade agreements.

5.14 However the committee recognises that the Australian Government has indicated that it will consider including ISDS mechanisms in future trade agreements on a 'case by case' basis. In light of this position, the committee considers it is vital the Australian Government ensure there are sufficient safeguards within these future ISDS mechanisms to protect the ability of future Australian Governments to conduct its ordinary processes without the apprehension that investors may instigate compensation claims if their investments are negatively affected.

---

1 Productivity Commission, *Bilateral and Regional Trade Agreements*, November 2010, p. 271.

Recommendation 2

5.15 The committee recommends that the Australian Government should not agree to include investor state dispute settlement mechanisms in future trade agreements.

Copyright and other intellectual property

5.16 The intellectual property (IP) chapter in KAFTA was negotiated 'a few years ago' and does not appear to have been substantially reconsidered since. It does not appear that this chapter was checked or updated close to the time of finalisation of the entire agreement. This is a matter of concern, given the apparent lack of consultation on IP issues and the relatively fast moving pace of technology in this area.

5.17 The justifications made during the inquiry that the IP obligations of the treaty text merely replicate existing domestic Australian law or existing treaty obligations raise the question of the rationale for their inclusion. It is not clear on the evidence available to the committee why the IP provisions were considered a necessary part of KAFTA.

5.18 IP protection provides an incentive for creativity, but can also operate to hamper innovation and cause economic harm. KAFTA includes IP provisions which DFAT has acknowledged, in many cases, are 'differently worded' but maintains these IP provisions are 'consistent with current Australian law, and outcomes negotiated in other FTAs'.[2] This position was disputed during the inquiry. The view of the committee is that the provisions in KAFTA appear to have incrementally expanded some of Australia's treaty obligations in relation to IP protection.

5.19 The Productivity Commission has discussed the complexity of IP rights and interactions with domestic and international law. In relation to global frameworks, the Productivity Commission has noted:

> There has been a progressive increase in the coordination and harmonisation of IP law and its application through global frameworks, as well as bilateral and regional agreements. Frameworks influencing Australian IP law, and trade and commerce in IP both within Australia and internationally, include:
>
> - the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS);
> - treaties administered by the World Intellectual Property Organization (WIPO);
> - other dedicated IP agreements falling outside of the WIPO framework; and IP provisions included as part of bilateral and regional trade agreements.

2 DFAT, responses to questions on notice – intellectual property questions, p. 1.

- Other international treaties and agreements, such as the United Nations Framework Convention on Climate Change and the Kyoto Protocol contain provisions relating to the transfer.[3]

5.20 The interaction between the plurality of international IP agreements with existing domestic law is complex and changing, both with new agreements and with new technologies. The committee believes that this complexity should not be amplified by detailed intellectual property chapters in bilateral trade agreements. References to complying with existing international commitments (as is done in the labour and environmental chapters in KAFTA) would in most cases be sufficient. The community and Parliament should be fully engaged in robust and transparent debate on any proposed changes to the domestic balance of rights in intellectual property. The committee notes that the Productivity Commission and others have recommended a full independent economic assessment as part of the consideration of any such changes.[4]

5.21 The committee broadly agrees with the Productivity Commission's assessment that Australia should not generally include IP provisions in bilateral or regional trade agreements and such provisions should only be considered after a robust economic assessment of the impacts, including on consumers, in Australia and partner countries.[5] An assessment of the potential impact of the IP provisions in KAFTA does not appear to have been undertaken.

5.22 The committee is also concerned that a disputed interpretation of Australia's treaty obligations in relation to online copyright infringement was included in the National Interest Analysis for KAFTA. While some industry submissions supported this aspect of KAFTA, it appears to the committee to be a domestic issue rather than a matter that should be pursued through a bilateral trade agreement. The committee notes that, while assurances were given during the inquiry that Australia's bilateral IP treaty obligations are 'flexible and high-level', the NIA's statement that the *Copyright Act 1968* required amendment due to a court decision was detailed and specific.

Recommendation 3

5.23 The committee recommends that the Australian Government:

- **provide clarity on proposed changes to copyright and assurance that any proposed changes as a result of the Korea-Australia Free Trade Agreement will not create adverse impacts for intellectual property owners or users;**

3 Productivity Commission, *Trade and Assistance Review 2011-12*, 2013, p. 78; also see Competition Policy Review, *Draft Report*, September 2014, p. 87.

4 Productivity Commission, *Bilateral and Regional Trade Agreements*, November 2010, p. 285; Competition Policy Review, *Draft Report*, September 2014, p. 88.

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

- **retain harmony in future trade agreements by limiting intellectual property provisions to Australia's obligations under specific intellectual property related multilateral agreements only and retain policy space to make changes to Australia's domestic intellectual property laws in the future; and**
- **ensures that the potential impact of intellectual property provisions in trade agreements is properly assessed and, in particular, give consideration to the recommendations of the Productivity Commission.**

Labour market testing and labour standards

5.24 The committee acknowledges the concerns raised by various community and industry groups and unions relating to the removal of the right to use labour market testing and the lack of enforceability of the labour chapter.

5.25 Labour market testing underpins a rationale that citizens should have the primary right to jobs in their country. If there are genuine labour shortages, then temporary migration can play, and has played, an important role in Australia's economic growth. Supply and demand of labour in different sectors changes over time and with different projects. The committee is concerned that KAFTA appears to have traded away Australia's policy space to apply labour market testing over time. It is also concerned that this is an asymmetrical position, with Korea retaining such policy space.

Recommendation 4

5.26 The committee recommends the Australian Government:

- **seeks to renegotiate with Korea to preserve the right to labour market testing, noting that Korea retains this right;**
- **put in place measures to more accurately track visa entrants based on free trade agreement provisions, including to monitor and record the levels of contractual service providers granted 457 visas without labour market testing;**
- **reserves policy space in future free trade agreements to regulate labour market entry and better promote labour standards;**
- **actively monitors Korea's adherence to the general principles and labour standards outlined in Chapter 17 of the KAFTA, particularly with reference to goods exported from the special processing zones on the Korean Peninsula pursuant to Annex 3-B of Chapter 3; and actively upholds these standards in various committees and consultation with Korea under the agreement.**

Certificates of origin

5.27 For trade agreements to be beneficial and effective, there must be clear, consistent and readily available rules or origin procedures as well as quick

commercially responsive dispute resolution procedures for exporters and importers. The committee acknowledges the concerns raised by the ACCI regarding ensuring the integrity of the certificate of origin processes for transactions which will be affected by KAFTA. The committee also acknowledges the responses of DFAT and other agencies which outlined a commercially-focused approach in allowing businesses a flexible choice of a certificate of origin completed by the exporter or producer or a certificate of origin issued by an authorised body. However, this aspect of the agreement should not be seen as 'settled' and work should continue in consultation with Australian industry to streamline and improve certificate of origin processes.

Recommendation 5

5.28 The committee recommends that the Australian Government addresses business concerns regarding complex rule of origin processes in KAFTA, and the lack of harmonisation with other preferential trade agreements.

Utilisation of FTAs

5.29 Evidence of low levels of utilisation by exporters of the opportunities available under Australia's trade agreements concerned the committee. The benefits of FTAs are wasted if Australian exporters are unaware of opportunities or find them too difficult to access. In the view of the committee, there is a clear role for the Australian Government to do more in this area, in partnership with peak export and trade facilitation organisations.

Recommendation 6

5.30 The committee recommends that the Australian Government provide additional resources to Austrade and peak export organisations to monitor and improve the awareness within the Australian export industry of the opportunities provided under trade agreements, as well as assistance to new exporters on how to efficiently navigate Australia's complex network of free trade agreements.

Transparency

5.31 The committee notes DFAT's statement that, in general, the Australian government was 'very open to having a high degree of transparency on the implementation going forward'. In order to assist to remove a perception of secrecy surrounding FTAs and to advance the understanding and accessibility of FTAs for industries, businesses and the community, the committee supports the procedural recommendation made by Dr Rebecca LaForgia to make an interpretive declaration relating to the public nature of KAFTA committee proceedings and documents.

Recommendation 7

5.32 The committee recommends that the Australian Government makes an interpretive declaration along the following lines in order to clarify its practice under article 21.4(4) and elsewhere in KAFTA:

This declaration is made to clarify Australia's interpretation that Committee reports will be made public under article 21.4(4). This is made also as an undertaking to the Australian public of Australia's interpretation of KAFTA as an open agreement. As a general approach at points of ambiguity in the text or where the text is silent on the matter, as in article 21.4(4), Australia will favour an interpretation that supports open and public provision of information.

Treaty making processes

5.33 In Australia, responsibility for negotiating trade agreements rests with the executive government. Following the Senate Legal and Constitutional Affairs References Committee's report *Trick or Treaty?* in 1995, the Joint Standing Committee on Treaties (JSCOT) was established as part of reforms to improve the openness and transparency of the treaty making process.[6] This process includes that all treaty actions proposed are tabled in Parliament for a period of at least 15 (or in some cases, 20) sitting days before action is taken that will bind Australia. The JSCOT report on the Anti-Counterfeiting Trade Agreement, in 2011, highlighted the important accountability role it plays in reviewing Australia's trade agreements. However, despite these reforms, there continues to be a level of dissatisfaction with the treaty making process.

5.34 A further component of the treaty making process is that major treaty actions are accompanied by a National Interest Analysis (NIA) prepared by DFAT which provides an explanation of why the Australian Government considers it appropriate to enter into the treaty.[7] It is important that the NIA contains a comprehensive analysis of the costs and benefits of any proposed treaty to allow appropriate parliamentary consideration. In the view of the committee, there is room for improvement in this area. In particular, there is merit in the ACCI's proposal that there should be greater stakeholder input and consultation in the preparation of the NIA. Further, there may be benefit in the NIA, or parts of the NIA, being prepared by an independent body such as the Productivity Commission rather than DFAT. Reforms in relation to this issue should be examined by the Australian Government.

Recommendation 8

5.35 The committee recommends that the Australian Government examine reforms to increase stakeholder consultation in the preparation of National Interest Analysis documents and that the viability of National Interest Analysis documents, or parts of these documents, being prepared by an independent body.

---

6 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 1995, Recommendation 9.

7 JSCOT, 'Role of the Committee', available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee (accessed 19 September 2014).

Conclusion

5.36 The committee recognises that bilateral trade and investment treaties are negotiated outcomes. Every trade agreement is likely to involve both benefits and some costs for Australia. The key question for the committee during the inquiry, having regard to the JSCOT report, was whether the balance of measures agreed under KAFTA was in Australia's national interest.

5.37 It is clear that some specific sectors of the Australian economy will benefit from increased access to the Korean market through reduced tariffs. However, as JSCOT found, the predicted benefits to the Australian economy 'appear minimal in statistical terms'.[8] The economic modelling of KAFTA contained in the RIS is limited to the production and flow of goods between Australia and Korea arising from changes in tariff rates and quota arrangements. The modelling undertaken did not consider the impact of services or investment liberalisation. Further, KAFTA includes an ISDS mechanism with a broad scope of potential liability for the Australian Government. This state of ambiguity in relation to the merits of a major trade agreement with an important strategic partner at such a late stage in the treaty making process is of concern.

5.38 Despite misgivings regarding several aspects of KAFTA, in particular the drafting of the ISDS provisions, the committee judges that, on balance, KAFTA should be ratified. A number of industry bodies and individual companies, such as Teys Australia and Blackmores, have highlighted the benefits of the agreement for them. The ABARES analysis in relation to beef and cheese suggests there will be significant export opportunities under KAFTA for those sectors.[9] There is evidence these specific export opportunities will have positive flow-on benefits for the Australian economy.

5.39 In making this decision, the committee takes into account the external factors surrounding KAFTA, in particular the trade agreements signed (or likely to be signed) by our major export competitors. The committee hopes that KAFTA will be an important step in Australia's trade relationship with Korea with a view to developing further opportunities in the future.

8 JSCOT, *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, Report 142, 2014, p. 45.

9 ABARES, *Agricultural commodities*, Vol. 4, No. 2, June 2014, pp 33-36.

Recommendation 9

5.40 The committee recommends that prompt binding treaty action be taken in relation to the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*.

Senator Alex Gallacher
Chair

Additional comments of Coalition senators

1.1 The Korea-Australia Free Trade Agreement (KAFTA) represents a positive outcome for Australia. The evidence received from Australian companies and peak business organisations during the inquiry highlighted the benefits that will accrue for the Australian economy. While the reduction in tariffs will place some additional competitive pressure on certain sectors, it will also result in more competitive pricing of items which Australians consume. In particular, KAFTA restores Australia's competitive position as an exporting nation in relation to the United States, Canada and other countries which have reached, or are about to conclude, trade agreements with Korea. Timely ratification of KAFTA will potentially provide two initial tariff reductions, one on ratification and another at 1 January 2015, expanding the opportunities for Australian businesses in this important high-value marketplace.

1.2 Coalition senators do not accept most of the majority report's findings, particularly on the merits of KAFTA for the Australian economy. However, Coalition senators endorse the committee's final recommendation that KAFTA should be implemented without further delay.

1.3 In particular, Coalition senators disagree with two of the majority report's recommendations – the recommendation to initiate discussions with Korea for a side letter to limit the scope of the investor state dispute settlement (ISDS) provisions and the recommendation for the Australian Government not to agree to ISDS provisions in future trade agreements.

Recommendation

1.4 Coalition senators recommend that prompt binding treaty action be taken in relation to the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*.

Senator Chris Back
Deputy Chair

Senator David Fawcett

Dissenting report by the Australian Greens

1.1 The Australian Greens are not opposed to trade agreements that open up markets for our agricultural producers and other sectors. However we have concerns about a number of issues in the Korea Australia Free Trade Agreement (KAFTA) and on balance we do not believe the agreement is in Australia's national interest.

1.2 The Australian Greens provided a dissenting report on the Joint Standing Committee on Treaties' (JSCOT) report into KAFTA.[1] None of the evidence presented before this committee has given us pause to reconsider this position. If anything it has provided further evidence in support of our position.

Investor-State Dispute Settlement

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

1.4 The majority report provides a comprehensive summary of the issues arising from the inclusion of ISDS clauses in KAFTA.

1.5 The government and the Department of Foreign Affairs and Trade (DFAT) continue to maintain that there are appropriate safeguards which exempt certain areas from being exposed to ISDS litigation such as legislation relating to health and the environment. A number of submissions and witnesses to this inquiry have indicated that this is not the case. In fact in comparison to the Canada-Korea Free Trade Agreement, Australia's ISDS provisions are weaker and more susceptible to successful litigation.

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

1.7 To put the dangers of including ISDS clauses in perspective, evidence has been provided by DFAT that the reason the KAFTA deal was finally completed after four years of negotiation was because, unlike the previous government, this government was willing to include ISDS in the agreement.[2]

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

---

1 Joint Standing Committee on Treaties, *Report 142 – Treaty tabled on 13 May 2014*, September 2014, p. 63.

2 Mr Richard Braddock, DFAT, Senate Foreign Affairs, Defence and Trade Legislation Committee, *Committee Hansard*, 6 August 2014, p.46.

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

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

> Substantive carve-outs and safeguards have been included for key public policy concerns including public welfare, health, culture and the environment.[3]

1.11 The committee has accepted this evidence from the RIS without question despite the advice of experts in submissions and during the hearings of various committees. For example, Dr Kyla Tienhaara stated:

> The government has tried to calm concerns about ISDS and KAFTA by pointing to the existence of so-called safeguards or exemptions, as they have been referred to this morning, in the agreement. I would like to stress to this committee the point that dangerous loopholes in the text of KAFTA remain despite the government's efforts to preserve the right to regulate under the agreement.[4]

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

1.13 Following the signing of KAFTA, the minister stated regarding ISDS:

> In the Korean Free Trade Agreement that I've just concluded, we did insist on explicit safeguards to ensure that regulation or law that's passed in public interest areas, such as health and the environment, cannot be covered by this ISDS… you could not have the plain packaging exercise repeated there because it has been essentially carved out those areas of public policy interests, especially to do with health and the environment.[5]

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

---

3 RIS, para 76.

4 Dr Kyla Tienhaara, Joint Committee on Treaties, *Committee Hansard*, 14 July 2014, p. 8.

5 Andrew Robb, Interview with Linda Mottram, 702 ABC Sydney, 19 February 2014, available: http://www.andrewrobb.com.au/Goldstein/LocalIssues/tabid/123/articleType/ArticleView/articleId/1602/INTERVIEW-WITH-LINDA-MOTTRAM--702-ABC-SYDNEY.aspx.

> The answer is no under the current wording. If that sort of claim by tobacco companies is a particular concern, the obvious way to preclude it completely is to have a carve-out for measures in relation to tobacco.[6]

1.15 As outlined in the majority report there are a number of risks inherent in including ISDS clauses. The Australian Greens believe these risks are too great to allow ISDS to be included in KAFTA or future trade deals. Recently the Greens introduced a bill into the Senate to have such clauses banned from all future trade deals. Unfortunately the government and Labor members of the FADT Legislation Committee recommended that parliament vote down this legislation.[7]

Intellectual property

1.16 The majority report provides a summary of the opposition to the intellectual property provisions in KAFTA. However it is disappointing that instead of recommending the government remove or renegotiate the intellectual property section in this agreement the committee has chosen to among other suggestions call for future intellectual property provisions to be subject to cost-benefit analysis. While this is a sensible recommendation the committee and the public should be aware that over the past five years parliamentary committees, the Productivity Commission, IP Australia and the ongoing Competition Policy Review have all asserted the importance of cost-benefit analysis for trade agreements and IP with no shift in government policy under Labor or Liberal-National governments.

1.17 The majority report fails to recognise or even comment on these previous reports. Examples from previous reports include:

> The Government should ensure that future trade negotiations are based on a sound and strategic economic understanding of the costs and benefits to Australia and the world and of the impacts of current and proposed IP provisions, both for Australia and other parties to the negotiations.[8]

> IP provisions should only be included in cases where a rigorous economic analysis shows that the provisions would likely generate overall net benefits for the agreement partners.[9]

1.18 In the last few weeks the Competition Policy Review draft report has been released adding its voice to the concern about intellectual property in trade agreements. It recommends that:

---

6 Professor Luke Nottage, Sydney Law School, University of Sydney, Senate Foreign Affairs Defence and Trade Legislation Committee, *Committee Hansard*, 6 August 2014, p. 22.

7 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, p. 17.

8 Harris, T., Nicol, D., Gruen, N., *Pharmaceutical Patents Review Report*, 2013, Recommendation 3.2, p. 58, available at: http://www.ipaustralia.gov.au/pdfs/2013-05-27_PPR_Final_Report.pdf

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

> Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions. Such an analysis should be undertaken and published before negotiations are concluded.[10]

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

Automotive industry

1.20 The majority report fails to acknowledge the controversy about the impact of KAFTA on the automotive industry. In February 2014 Toyota announced that from the end of 2017 the company would stop producing cars in Australia. It stated that amongst other factors:

> with one of the most open and fragmented automotive markets in the world and increased competitiveness due to current and future Free Trade Agreements, it is not viable to continue building cars in Australia.[11]

1.21 In relation to the complete closure of Australia's automotive industry, public commentary was suggesting that the Korean trade deal would be a game changer before it was signed by this government.[12] It appears from evidence presented to the committee that DFAT and the government ignored, or were discounting, the role played by trade agreements in the decline of the car industry.

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

1.23 It is not clear which modelling was used to assess the impact of KAFTA on the automotive industry or which modelling was used in the RIS or NIA. The assessment process should not be allowed to be repeated in this way.

---

10 Competition Policy Review, *Draft Report*, September 2014 Draft Recommendation 7, p. 31.

11 Toyota Australia Announces Future Plan For Local Manufacturing, February 2014, available at: http://m.toyota.com.au/toyota-news/article?articleId=18gd89tfh.

12 Alan Kohler, 'Time to decide if we really need a car industry', *The Australian*, 17 October 2013. http://www.theaustralian.com.au/business/opinion/time-to-decide-if-we-really-need-a-car-industry/story-fng7vg0p-1226741274219

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

Previous parliamentary inquiries

1.25 It is disappointing that just like the JSCOT majority report into the KAFTA, the FADT Committee has missed an opportunity to take a strong position on this trade agreement by opposing it.

1.26 Successive JSCOT and FADT reports have made recommendations for improved cost-benefit analysis and a better process for assessing trade agreements both before the agreements have been signed by the government and once the agreements have begun operation. Unfortunately successive governments have not heeded these recommendations and they remain unacted upon. A selection of strong recommendations from various parliamentary committees is provided below.

> **Foreign Affairs, Defence and Trade References Committee - Voting on trade - The General Agreement on Trade in Services and an Australia-US Free Trade Agreement Treaties and the parliamentary process - 27 November 2003**
>
> **Recommendation 2**
>
> The Committee recommends that the government introduce legislation to implement the following process for parliamentary scrutiny and endorsement of proposed trade treaties:
>
> a) Prior to making offers for further market liberalisation under any WTO Agreements, or commencing negotiations for bilateral or regional free trade agreements, the government shall table in both Houses of Parliament a document setting out its priorities and objectives, including comprehensive information about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.
>
> b) These documents shall be referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for examination by public hearing and report to the Parliament within 90 days.
>
> c) Both Houses of Parliament will then consider the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, and then vote on whether to endorse the government's proposal or not.
>
> d) Once parliament has endorsed the proposal, negotiations may begin.
>
> e) Once the negotiation process is complete, the government shall then table in parliament a package including the proposed treaty together with any legislation required to implement the treaty domestically

f) The treaty and the implementing legislation are then voted on as a package, in an up or down vote, i.e. i.e. on the basis that the package is either accepted or rejected in its entirety.

Joint Standing Committee on Treaties Inquiry into the Australia – United States Free Trade Agreement - Tabled 8 March 2004

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.

Recommendation 22

The Committee recommends that the Government undertake a review of the environmental impact of the Agreement and that legislation be introduced which will ensure that all future free trade agreements contain results of an environmental impact assessment prior to final agreement.

Joint Standing Committee on Treaties Inquiry into the Chile – Australia Free Trade Agreement – Treaty Tabled 17 June 2008

Recommendation 3

The Committee recommends that, prior to commencing negotiations for bilateral or regional trade agreements, the Government table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the costs and benefits. Such assessments should consider the economic regional, social, cultural, regulatory and environmental impacts which are expected to arise.

Recommendation 4

The Committee recommends that the Department of Foreign Affairs and Trade undertake and publish a review of the operation of the Australia – Chile Free Trade Agreement no later than two years after its commencement in order to assess the ongoing relevance of concerns expressed about the Agreement, such as the maintenance of sanitary and phytosanitary measures, impact on the horticulture industries, intellectual property, 457 visas, and labour and environmental standards.

Joint Standing Committee on Treaties Inquiry into the Agreement Establishing the Association of Southeast Asian Nations-Australia-New Zealand Free Trade – Treaty Tabled 16 March 2009

Recommendation 4

The Committee recommends that the Department of Foreign Affairs and Trade prepare a report for the Committee examining mechanisms to allow negotiators to directly consult with industry representatives during the negotiation process.

Recommendation 5

The Committee recommends that the Australian Government include consideration of environment protection, protection of human rights and labour standards in all future negotiation mandates for free trade agreements.

Joint Standing Committee on Treaties Inquiry into the Malaysia-Australia Free Trade Agreement – Treaty Tabled on 14 August 2012

Recommendation 1

That prior to commencing negotiations for a new agreement, the Government table in Parliament a document setting out its priorities and objectives including independent analysis of the anticipated costs and benefits of the agreement. Such analysis should be reflected in the National Interest Analysis accompanying the treaty text.

Recommendation 2

That after 24 months of the treaty coming into effect, an independent review of MAFTA be conducted to assess actual outcomes of the treaty against the claimed benefits and potential negative consequences noted in this report. The review should consider the economic, regional, social, cultural, regulatory, labour and environmental impacts. Such a review should serve as a model for future free trade agreements.

1.27 It is clear from the above examples that parliamentary committees providing sensible recommendations to government is an ongoing pursuit. However successive governments have failed to act on these. Therefore the Australian Greens believe that as KAFTA is not in the national interest it should be voted down by parliament to send a strong message that the trade negotiation and review arrangements require urgent reform by the government.

Conclusion

1.28 KAFTA is not in the national interest. The inclusion of Investor-State Dispute Resolution clauses, intellectual property sections without proper analysis and an ongoing flawed trade negotiation and analysis process has led the Australian Greens to the decision to vote against the trade agreement.

Recommendation 1

1.29 That the Senate refuse to pass KAFTA enabling legislation until Investor-State Dispute Resolution clauses are removed from the agreement.

Recommendation 2

1.30 That the Parliament refuses to pass KAFTA enabling legislation until an independent cost-benefit analysis of the intellectual property provisions in KAFTA has been carried out and has been appropriately assessed by Parliament.

Senator Peter Whish-Wilson

Appendix 1

Public submissions

1. Mr Ray Bricknell
2. Dr Romaine Rutnam
3. Dr Kyla Tienhaara
4. Ms Anne Byrne and Mr Bill Byrne
5. Mr Darryl Nelson
6. Ms Evelyn Roberts
7. Mr Graeme Batterbury
8. Sutherland Shire Environment Centre
9. ACTU
10. Mr James Wright
11. Winemakers Federation of Australia
12. Confidential
13. Blackmores Limited
14. Mr William Davis
15. Australian Sugar Industry Alliance
16. Australian Sugar Milling Council
17. Ms Joy Ringrose
18. Mr Peter Green
19. Mr Charles Sowerwine
20. CANEGROWERS
21. Dr Bill Genat
22. Ms Lyndal Sullivan

23. Ms Paula Martin
24. Mr David Poole
25. Mr Charles S. Mollison, The Foundation for National Renewal
26. Ms Gae Mulvogue
27. Jonathan W. Peter & Josephine L. Prowse
28. Ms Kelly O'Reilly
29. National Farmers' Federation
30. Australian Food and Grocery Council
31. Ms Karla Muir
32. Mr Darcey Woodward
33. Mr Peter Murphy
34. Mr Scott Nickels
35. Sheepmeat Council of Australia
36. Conference of Leaders of Religious Institutes NSW
37. Mr Roger Jowett
38. Australian Pork Limited
39. Apple & Pear Australia Limited
40. NSW Farmers Association
41. Dr Chris Baumann, Macquarie University
42. Australian Chamber of Commerce in Korea
43. AgForce Queensland
44. Confidential
45. Cattle Council of Australia
46. Associate Professor Kimberlee Weatherall
47. Media, Entertainment & Arts Alliance

48. The Music Trust
49. Herbert Smith Freehills
50. Australian Fair Trade & Investment Network (AFTINET)
51. Mr Dominic Scutella
52. Australian Services Union
53. Music Rights Australia Pty Limited
54. Australian Lot Feeders' Association
55. Export Council of Australia
56. News Corp Australia
57. Committee to Protect Vietnamese Workers
58. Pirate Party Australia
59. Dr Jeffrey D Wilson
60. Dr Matthew Rimmer
61. Minerals Council of Australia
62. Australian Digital Alliance
63. Australian Manufacturing Workers' Union
64. Electronic Fontiers Australia, Inc.
65. Australian Chamber of Commerce and Industry
66. Dr Rebecca LaForgia
67. Financial Services Council
68. Teys Australia

Appendix 2

Tabled documents, answers to questions on notice and additional information

Additional information and tabled documents

1 Additional information provided by AFTINET - Mr George Kahale, Keynote Speech, Eighth Annual Juris Investment Treaty Arbitration Conference, Washington DC, 28 March 2014

2 Additional information provided by AFTINET - Chief Justice French, 'Investor-State Dispute Settlement — A Cut Above the Courts?', Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014

3 Additional information provided by AFTINET - Schepel, H., et al., (2014) Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)

4 Additional information provided by the Department of Foreign Affairs and Trade - Extract from ABARES, 'Agricultural commodities', Vol. 4, No. 2, June 2014, pp 27-37

5 Additional information provided by AFTINET - UNCTAD, Trade and Development Report, 2014

Answers to questions on notice

1 AFTINET response to questions on notice from public hearing on 9 September 2014

2 Department of Foreign Affairs and Trade responses to questions on notice from public hearing on 9 September 2014

3 Department of Foreign Affairs and Trade responses to questions on notice from public hearing on 9 September 2014 - Intellectual Property

4 Department of Foreign Affairs and Trade responses to written questions on notice - Implementation progress in Korea

5 Department of Foreign Affairs and Trade responses to written questions on notice - Investor state dispute settlement provisions

6 National Farmers' Federation response to questions on notice on 9 September 2014

7 Associate Professor Kim Weatherall response to questions on notice on 9 September 2014

Appendix 3

Public hearing witnesses

Monday, 8 September 2014—Canberra

BOND, Mr James, Chief Economist, Financial Services Council

BRAGG, Mr Andrew, Director, Policy and Global Markets, Financial Services Council

CLARK, Mr Bryan Tarrant, Director, Trade and International Affairs, Australian Chamber of Commerce and Industry

HUDSON, Mr Jock, General Manager Sales, Teys Australia

McGUIRE, Mr Tom, General Manager Corporate Services, Teys Australia

WILSON, Dr Jeffrey David, Private capacity

BARDEN, Ms Tanya, Director, Sustainability, Trade and Innovation, Australian Food and Grocery Council

ROGERS, Mr Michael, Manager, Agribusiness Forum, Australian Food and Grocery Council

OSBORNE, Mr Peter, Managing Director Asia, Blackmores Limited

MCLEAN, Mr Greg, OAM, Head of Public Services and Assistant National Secretary, Australian Services Union

SKLADZIEN, Dr Tom, National Economic and Industry Adviser, Australian Manufacturing Workers' Union

LAFORGIA, Dr Rebecca, Private capacity

Tuesday, 9 September 2014—Canberra

ADAMS, Ms Jan, PSM, Deputy Secretary, Department of Foreign Affairs and Trade

BRADDOCK, Mr Richard John, Director, Office of Trade Negotiations, Department of Foreign Affairs and Trade

BRENNAN, Mr Karl, Manager, Trade Policy Section, Department of Industry

CHENG, Ms Joy, Acting Senior Legal Officer, Commercial and Administrative Law Branch, Civil Law Division, Attorney-General’s Department

FARBENBLOOM, Mr Simon, Assistant Secretary, North Asia Investment and Services Branch, Free Trade Agreement Division, Department of Foreign Affairs and Trade

GAILEY, Ms Lynn Elizabeth, Member, Advisory Council, The Music Trust

GORDON, Mr Kenneth Robert, Free Trade Division, Department of Foreign Affairs and Trade

HUDSON, Mr Andrew Thomas, Chair, Trade Policy Committee; and Director, Chair of Trade Policy Committee, Export Council of Australia

LISSON, Ms Frances, Assistant Secretary, North Asia Goods Branch, Department of Foreign Affairs and Trade

MAHAR, Mr Tony, Acting Chief Executive Officer, National Farmers' Federation

MURNANE, Mr Simon, Assistant Secretary, Bilateral Engagement and Regional Trade Negotiations Branch, Trade and Market Access Division, Department of Agriculture

RANALD, Dr Patricia Marie, Convenor, Australian Fair Trade and Investment Network

TIENHAARA, Dr Kyla, Private capacity

WALTER, Mr Andrew, Assistant Secretary, Commercial and Administrative Law Branch, Civil Law Division, Attorney-General’s Department

WILDEN, Mr David, Assistant Secretary, Skilled Migration Policy Branch, Department of Immigration and Border Protection

WEATHERALL, Associate Professor Kimberlee Gai, Private capacity