

The Senate

Foreign Affairs, Defence and Trade
References Committee

Proposed Comprehensive and Progressive
Agreement for Trans-Pacific Partnership

September 2018

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Recommendations

Recommendation 1

5.13 The committee recommends that the Department of Foreign Affairs and Trade conduct an evaluation of the consultation mechanisms used by the department.

Recommendation 2

5.15 The committee recommends that the Australian Government: provide public updates on each round of trade negotiations; release draft texts during negotiations where feasible and with appropriate safeguards; and table the text of proposed agreements in Parliament before they are signed.

Recommendation 3

5.17 The committee recommends the creation by legislation of an Accredited Trade Advisors program where industry, union and civil society groups would provide real time feedback on draft trade agreements during negotiations.

Recommendation 4

5.18 The committee recommends that the Department of Foreign Affairs and Trade review the stakeholder consultation mechanisms used internationally and assess their appropriateness for an Australian context and provide recommendations to government.

Recommendation 5

5.21 The committee recommends that before new free trade agreements are signed, the Australian Government commission the Productivity Commission to undertake independent economic modelling and that this modelling be released publicly.

Recommendation 6

5.25 The committee recommends that the Australian Government make a reference to the Productivity Commission to conduct a review of Australia's bilateral and regional trade agreements.

Recommendation 7

5.31 The committee recommends the Australian Government remove ISDS provisions from existing free trade agreements and legislate so that a future Australian government cannot sign an agreement with such provisions.

Recommendation 8

5.36 The committee recommends that the Department of Foreign Affairs and Trade include the provision of further information on labour market testing in its outreach strategy and seminars.

Recommendation 9

5.37 The committee recommends that the Australian Government reinstates labour market testing for contractual service suppliers where it has been waived and legislate so that a future Australian Government cannot waive labour market testing for contractual service suppliers in new agreements.

Recommendation 10

5.41 The committee recommends that the Department of Foreign Affairs and Trade develop and publish an outreach strategy which includes a schedule of information sessions in a wide variety of locations and considers the most appropriate mechanism for publishing key outcomes from the information sessions on the Department's website.

Recommendation 11

5.44 The committee recommends that the Department of Foreign Affairs and Trade and Austrade consider options, including possible partnerships with the private sector, for providing additional information about the TPP-11 to businesses.

Recommendation 12

5.48 The committee recommends that the Department of Foreign Affairs provide regular public updates about matters discussed at the TPP-11 Commission.

Recommendation 13

5.55 The committee recommends that the Joint Standing Committee on Treaties consider a resolution to enable participating membership for inquiries and, if agreed, put the necessary changes to both chambers.

Recommendation 14

5.56 The committee recommends the Australian Government provide the Government's Statement of Objectives for Negotiation to the Joint Standing Committee on Treaties for consideration and feedback; and to provide the Joint Standing Committee on Treaties with a briefing at the end of each round of negotiations.

Chapter 1

Referral

1.1 On 28 March 2018 the Senate referred the following to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report by 18 September 2018:

The proposed Comprehensive and Progressive Agreement for Trans-Pacific Partnership, with particular reference to:

- a. Australia's economy and trade;
- b. Australia's domestic labour market testing obligations and laws regarding wages, conditions and entitlements of Australian workers and temporary work visa holders;
- c. Australian investment;
- d. the effect of Investor-State Dispute Settlement provisions;
- e. Australia's health, environmental, social and cultural policies, including regulation of essential services;
- f. rights for consumers; and
- g. any other related matters.¹

Conduct of the inquiry

1.2 Details of the inquiry were placed on the committee's website at: http://www.aph.gov.au/senate_fadt. The committee also contacted a number of relevant individuals and organisations to notify them of the inquiry and invite submissions by 31 May 2018. The committee continued to receive submissions after the closing date. Submissions received are listed at Appendix 1.

1.3 The committee held two public hearings, one in Melbourne on 30 July 2018 and one in Canberra on 20 August 2018. A list of the witnesses who gave evidence is available at Appendix 3.

1.4 Submissions and the Hansard transcripts of evidence may be accessed through the committee website.

Note on terminology

1.5 The full treaty name 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership' will be referred to as TPP-11 throughout the report. Quotations from submissions and Hansard transcripts that use other variations (such as the acronym, CPTPP) have been left in their original form.

1 *Journals of the Senate*, No. 94—28 March 2018, p. 2980.

Acknowledgement

1.6 The committee thanks the organisations and individuals who participated in the public hearings as well as those who made written submissions.

Other inquiries

1.7 The Joint Standing Committee on Treaties (JSCOT) conducted an inquiry into the TPP which reported on 30 November 2016.² The Senate FADT committee also conducted an inquiry into the TPP which reported on 7 February 2017.³

1.8 The JSCOT conducted an inquiry into the TPP-11 and reported on 22 August 2018. The JSCOT inquiry held four public hearings, two in Canberra, and Melbourne and Sydney.

Reference to other inquiries

1.9 Much of the evidence received for the committee's current inquiry highlighted similar issues to those raised for both this committee's previous inquiry and for the two JSCOT inquiries. While the focus of this report is the evidence provided to the current inquiry, where it can assist to provide context or clarity, reference will be made to the evidence from the other inquiries.

Structure

1.10 This report is not an examination of all aspects of the Agreement but focusses instead on the issues of most interest to the participants in the inquiry. The report is structured as follows:

- Chapter 1 provides background information about the inquiry;
- Chapter 2 provides an overview of the TPP-11, including a summary of the anticipated benefits of the Agreement;
- Chapter 3 summarises the evidence received about the treaty making process and consultation undertaken during the development of the TPP-11, as well as economic modelling and broader assessment of trade agreements;
- Chapter 4 will summarise some of the key issues raised by submitters in relation to the terms of reference of the inquiry; and
- Chapter 5 presents the committee's conclusions and recommendations.

2 See Joint Standing Committee on Treaties, Report 165, *Trans-Pacific Partnership Agreement*, 30 November 2016.

3 Senate Foreign Affairs, Defence and Trade References Committee, *Proposed Trans-Pacific Partnership Agreement*, 7 February 2017.

Chapter 2

Background and Overview

Introduction

2.1 The first section of this chapter will provide a brief background to the development of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), including an overview of the Agreement, suspended provisions and the anticipated outcomes and benefits.

Background to the TPP-11

2.2 Negotiations between the 12 signatories for the original Trans-Pacific Partnership (TPP) commenced in 2008 and concluded in October 2015. The original signatories were: Australia; Brunei Darussalam; Canada; Chile; Japan; Malaysia; Mexico; New Zealand; Peru; Singapore; the United States of America; and Vietnam.

2.3 In January 2017 the acting United States Trade Representative wrote to the representatives of other TPP signatories advising that the United States did not intend to become a Party to the TPP. On 21 May 2017, ministers from the remaining 11 TPP signatory countries issued a joint statement reaffirming the significance of the TPP and agreeing to launch a process of consultations to assess options to bring the TPP into force.¹

2.4 This process culminated in agreement by TPP-11 ministers to the core elements which were announced on 11 November 2017 in Vietnam. A subsequent meeting of senior officials in January 2018 settled the outstanding issues and reached agreement on a final deal.²

2.5 On 21 February 2018 the text of the TPP-11 was released publicly and subsequently signed on 8 March 2018 in Santiago, Chile. The text, the side letters and accompanying National Interest Analysis (NIA) were tabled in parliament on 26 March 2018.³

2.6 The Agreement has been designed so that it is open to other parties to join over time, with a number of other countries already expressing an interest. The TPP-11 will enter into force 60 days after at least 50 per cent of the original signatories to the Agreement have notified each other that their domestic legal treaty-making procedures are complete.⁴

1 National Interest Analysis (NIA), p. 3.

2 NIA, p. 3.

3 Department of Foreign Affairs and Trade, *About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)*, <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx> (accessed 11 April 2018).

4 Joint Standing Committee on Treaties (JSCOT), Inquiry into the TPP-11, *Submission 67, Attachment 1*, p. 3.

Overview of the Agreement

2.7 The TPP-11 incorporates the provisions of the TPP Agreement by reference, with the exception of a limited set of provisions which are suspended.⁵ The TPP-11 Agreement is a separate legal instrument from the TPP and as outlined by the Department of Foreign Affairs and Trade (DFAT):

Importantly for Australia, the TPP-11 ensures that the substantial market access package secured in the original TPP is maintained (i.e. covering goods and services market openings and commitments on regulations on foreign investment). This market access package will be implemented among the TPP-11 Parties, delivering major new opportunities for Australian exporters, investors and firms engaged in international business. The outcome maintains the ambitious scope and high quality standards and rules of the original TPP.⁶

2.8 The original TPP included a number of bilateral side letters which will be retained in TPP-11; seven of these side letters are of treaty-level status and four are of less-than-treaty status. A number of new side letters have been agreed by TPP-11 parties. Of the ten new side letters, six are of treaty-level status and are legally binding while the other four are of 'less-than-treaty status' and not legally binding.⁷ The TPP-11 Agreement's entry into force will terminate or alter a number of Australia's existing treaties or treaty obligations.⁸

2.9 A number of legislative amendments will be required to implement Australia's obligations in the Agreement:

- *Customs Act 1901, Custom Tariffs Act 1995* and relevant customs regulations to incorporate preferential tariff rates. New customs regulations will need to be enacted for the rules of origin requirements;
- *Foreign Acquisitions and Takeovers Regulations 2015* to incorporate the new thresholds for screening investment proposals by investors from Brunei Darussalam, Canada, Malaysia, Mexico, Peru, Singapore and Vietnam;
- passing the Government Procurement (Judicial Review) Bill 2017;
- legislative instrument under the *Public Governance Performance and Accountability Act 2013*; and
- Ministerial determination under section 140GBA of the *Migration Act 1958*.⁹

5 DFAT, Analysis of Regulatory Impact on Australia (ARIA), p. 1.

6 *About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)*.

7 NIA, p. 4.

8 NIA, p. 3.

9 NIA, pp. 18-19.

Ratifying the Agreement

2.10 Once the TPP-11 has been ratified by six of the 11 signatories, it will enter into force 60 days later for those six countries. In May 2018, Mr George Mina, First Assistant Secretary, Office of Trade Negotiations, DFAT noted the importance for Australia to be part of the first group of TPP-11 parties to ratify the agreement:

It is important that Australia be able to participate in TPP-11 as soon as it enters into force, otherwise we will be at a significant competitive disadvantage as our competitors obtain more-favourable access into TPP-11 markets than we would enjoy.¹⁰

2.11 At the Joint Standing Committee on Treaties (JSCOT) hearing in June 2018, Mr Mina advised that other TPP-11 signatories have already commenced their domestic treaty approval processes:

Japan, Australia's second-largest trading partner, and Mexico, a new FTA [free trade agreement] partner for Australia under this agreement, are close to finalising their ratification requirements. Canada is committed to expeditious ratification, introducing implementing legislation in the House of Commons just this month. Brunei, Chile, New Zealand, Peru and Singapore have expressed their desire to ratify in 2018.¹¹

2.12 At this committee's July public hearing, DFAT confirmed that three countries have ratified the TPP-11: Japan, Mexico, and Singapore with further countries indicating their intention to ratify in the coming months. Mr Mina advised the committee that:

[I]t's quite possible that Australia will not be one of the first six signatories to ratify the agreement and therefore may not be, if we don't accelerate our domestic ratification efforts, one of the first group to have the agreement enter into force.¹²

2.13 In an opening statement tabled at the hearing on 30 July 2018, Mr Mina explained the impact if Australia were not to be in the first group of countries to ratify the Agreement:

It is also vital that Australia reaps the benefits of the TPP-11 as soon as it enters into force. Prompt ratification is essential to ensure our competitors do not obtain more favourable access into TPP-11 markets than that of our own businesses. To illustrate this, if Australia were not one of these first six countries and the Agreement entered into force in 2018, Australian agricultural businesses would miss out on real opportunities, losing out on an immediate round of initial tariff cuts, and a second round of cuts in the first half of 2019. The New Zealand wine industry could gain an edge over Australia with access to phased out tariffs in markets such as Canada, Malaysia, Mexico and Vietnam, jeopardising Australia's current wine

10 *Proof Committee Hansard*, 7 May 2018, p. 3.

11 *Proof Committee Hansard*, 25 June 2018, p. 11.

12 *Proof Committee Hansard*, 30 July 2018, p. 63.

exports to TPP-11 countries which are valued at around \$454 million annually. Dairy businesses, without preferential tariff reductions when exporting to Japan, Canada and Mexico, would face heightened competition with exports from New Zealand.¹³

2.14 At a subsequent hearing on 20 August 2018, Mr Mina again emphasised the potential impact should Australia's ratification be delayed. This would mean that Australia would not be able to take advantage of the increased market access in the TPP-11 (until the time that Australia ratified) and it may also affect Australia's position to influence institutional questions (such as dispute settlement) as well as discussions about expanding the parties in the Agreement. On the expansion issue, Mr Mina noted:

As you know, we've set out our view that this is a very important open platform for the future of regional architecture, which countries join that platform and the terms on which they join. These are big questions that shape the future of the initiative, and we would have, again, a diminished role in those discussions as long as we weren't a full party.¹⁴

2.15 Submissions also highlighted the costs to Australia should it not ratify the Agreement. The Export Council of Australia explained:

If Parliament chose to not ratify a bilateral FTA, the agreement would not go ahead and the status quo would remain. That is not the case with the TPP-11.

If the Parliament chooses not to ratify the TPP-11, it would still likely go ahead with ten members that account for around 14% of world trade. Australian businesses would lose out to competitors in the countries that were still party to the Agreement.¹⁵

2.16 The committee notes that the JSCOT tabled its *Report 181, Comprehensive and Progressive Agreement for Trans-Pacific Partnership* which recommended that binding treaty action be taken.¹⁶

Impact of the withdrawal of the US from the Agreement

2.17 In January 2017, Mr Donald Trump, President of the United States, signed an executive order withdrawing the United States from the original TPP. The impact of the withdrawal of the US from the Agreement was also discussed by DFAT during a JSCOT hearing:

In respect of what the impact is of the withdrawal of the US, the US was one of the most important—certainly the most important—economy in the TPP-12 project. In our views, US participation in the region's economic architecture is vital to the region's future in articulating and pursuing high

13 Mr George Mina, *Opening statement*, 30 July 2018, p. 2 (tabled 30 July 2018).

14 *Proof Committee Hansard*, 20 August 2018, p. 2.

15 *Submission 50*, p. 4.

16 JSCOT, *Report 181, Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 22 August 2018.

standards and norms for global trade in our region. So, we do hope that the United States looks to come back to this agreement.¹⁷

2.18 While it was noted that the Government's 'overwhelming interest' is that the US re-join the Agreement, it was also recognised that 'there are additional preferential market access benefits to Australian suppliers in the interim'.¹⁸

We know that...the Australian beef, dairy and wine sectors of all made improvements in their market access. I might just reference for you some of those gains, if I may. Some of those benefits include the very significant benefits we have in agriculture. For instance, Australian beef will have a significant [advantage] over non-TPP beef producers into the Japanese market. Australian beef tariffs into Japan will be reduced down to nine per cent.¹⁹

2.19 Submissions to this inquiry also discussed the impact of the US withdrawing from the Agreement. GrainGrowers explained that the US is a major exporter of grains and oilseeds and competes directly with Australia in a number of TPP-11 nations. Under TPP-11 Australia will continue to have preferential access (over the US) into the TPP region.²⁰ Australian Pork Limited noted that the exclusion of the US from the Agreement delivers additional benefits for the Australian pork industry given that Australian suppliers compete with US suppliers to access key pork markets, such as Japan.²¹

2.20 The Winemakers Federation of Australia also submitted:

The US withdrawing from the agreement is not necessarily considered a negative for Australian wine as US tariffs on Australian wine (specific rates of 6.3 to 16.9 cents/l) have already been eliminated under Australia's existing FTA with US since 2015. There are also currently minimal technical barriers trade for wine sold between Australia and the US.

Furthermore as a competitor in these markets, the US will not receive the benefits that will flow to the wine producing countries, particularly Chile, Canada, New Zealand and Australia. The TPP11 also means we will restore parity with the US in the Mexican market, where the US has the benefit of North American Free Trade Agreement.²²

TPP provisions suspended in TPP-11

2.21 TPP-11 parties have agreed by consensus to suspend the application of 22 provisions contained in the original TPP. As noted in the NIA:

17 Mr George Mina, First Assistant Secretary, Office of Trade Negotiations, DFAT, *Proof Committee Hansard*, 7 May 2018, p. 3.

18 Mr George Mina, DFAT, *Proof Committee Hansard*, 7 May 2018, pp. 3–4.

19 Mr George Mina, DFAT, *Proof Committee Hansard*, 7 May 2018, p. 4.

20 *Submission 6*, p. 3.

21 *Submission 51*, p. 1.

22 *Submission 28*, p. 4.

These provisions will, therefore, have no effect as a matter of international law until the Parties agree to end the suspension, which would also be by consensus. The limited number of suspensions reflect a shared desire by TPP-11 countries to strike a balance between maintaining the overall high standards of the deal, while ensuring that only Parties to the TPP-11 Agreement benefit. Australia's position throughout the TPP-11 process was to preserve the deal's market access package, which represents major economic opportunities for Australia.²³

2.22 The 22 suspended provisions cover a range of issues and are listed in the Annex to the TPP-11 Agreement. Many suspensions relate to intellectual property and the NIA notes:

None of the suspended intellectual property provisions would have required changes to Australia's intellectual property legislation. Provisions governing the protection of satellite and cable signals (Article 18.79) would have required minor regulatory amendments.²⁴

2.23 A number of other non-intellectual property articles have also been suspended including:

- commitment to commence further negotiations on government procurement;
- narrowing the scope of claims that can be made under the Investor-State Dispute Settlement (ISDS) mechanism, specifically precluding ISDS claims for a breach of a private investment contract or for a violation of an investment authorisation granted by the government. In addition, foreign investors in financial institutions can no longer bring an ISDS claim for a breach of the minimum standard of treatment related to those investments.²⁵

2.24 At a JSCOT public hearing, DFAT officials discussed the process for further scrutiny should TPP-11 parties agree to reinstate the suspended provisions:

The suspensions will remain in place until the parties agree to end them by consensus. All the parties will have to agree to begin with. You'll note that the suspension is specified in the treaty itself. As I understand it, if we were to agree to make a treaty amendment, that would be a treaty action... If it is a treaty amendment, we'll have to come back to the Joint Standing Committee on Treaties for scrutiny of that particular action.²⁶

2.25 Some submissions questioned the merit of suspending the provisions rather than completely removing them from the TPP-11. Open Source Industry Australia (OSIA) suggested that '[t]he failure to remove these only casts doubts upon the future of the agreement and creates uncertainty for investment by Australian businesses'.²⁷

23 NIA, p. 4.

24 NIA, p. 5.

25 NIA, p. 5.

26 Ms Juliana Nam, Director, Investment Policy & TPP Section, DFAT, *Proof Committee Hansard*, 7 May 2018, p. 10.

27 *Submission 47*, p. 3.

The Public Health Association of Australia (PHAA) submitted that suspending the provisions is 'a step in the right direction' but remains concerned that they could be reinstated at a later stage by agreement of the Parties.²⁸

Outcomes and anticipated benefits of the TPP-11

2.26 DFAT has described the TPP-11 as 'one of the most ambitious global trade deals concluded since 1994'.²⁹ At the JSCOT hearing on 7 May 2018, DFAT summarised a range of anticipated benefits:

In its revised form, the legal undertakings framed in the TPP-11 will break down some of the most persistent barriers to deliver opportunities for our businesses to enter new markets, shape new standards for TPP-11 governments to facilitate trade and investment and address commercial challenges in the digital era and provide shared rules for the TPP-11 community on transparency, environment, labour, state-owned enterprises and anticorruption, encouraging SMEs to participate more actively in trade and investment in our region...

With the elimination of 98 per cent of tariffs, the TPP-11 tariff cuts will have a cost-saving impact on imported goods for Australian households and businesses, and deliver material gains for our exports. The TPP-11 will provide preferential access for more than \$5½ billion of Australia's dutiable agricultural exports into existing markets as well as new markets, such as Canada and Mexico, working to expand opportunities for industries such as beef, dairy, sugar, rice, grains, seafood, horticulture and wine. The deal will afford new levels of market access for iron and steel products, ships, pharmaceuticals, machinery, paper and auto parts, to name but a few products.³⁰

2.27 The Business Council of Australia (Business Council) identified the strategic benefits for Australia in ratifying the Agreement as the TPP-11:

...can make an important contribution to the diversification and robustness of Australian exports and thus help to insulate Australia against potential disruption in our key markets.³¹

2.28 Furthermore the Business Council was of the view that the TPP-11 will provide an important benchmark in the negotiations for a Regional Comprehensive Economic Partnership with ASEAN and other neighbouring countries. It was also noted that the Agreement 'will also contribute to Australia's engagement in Asia, and increase Australia's weight and influence in trade and strategic dialogue in the region'.³²

28 *Submission 20*, p. 5. See also, ActionAid International, *Submission 46*, p. 6, AFTINET, *Submission 14*, p. 1.

29 NIA, p. 5.

30 Mr George Mina, DFAT, *Proof Committee Hansard*, 7 May 2018, p. 2.

31 *Submission 35*, p. 8.

32 *Submission 35*, p. 8.

2.29 The Minerals Council of Australia (MCA) also highlighted the strategic benefits of the TPP-11:

In addition to the direct economic benefits, the TPP will deliver Australia's commitment to economic engagement with Asian countries critical to our ability to weather the global financial crisis when other advanced economies fell into recession. The TPP 11 will confirm the Asia-Pacific as a region committed to trade liberalisation at a time when protectionist sentiment is rising in parts of the Northern Hemisphere. As a trading nation, as the current trade tensions play out in the global system, Australia has a strategic interest in high-quality trade agreements like the TPP-11 that will drive trade liberalisation and strengthen the rules based international trading system.³³

Identified benefits for particular sectors

2.30 Submissions and evidence from industry associations and peak bodies identified benefits for particular sectors that would result from Australia's ratification of the Agreement.

2.31 The MCA submitted that the TPP-11 will open up new markets for Australian manufacturing, agriculture, mining and energy resources and services exports to major export markets such as Japan and Canada, and to some of the fastest growing emerging markets in the Asia-Pacific.³⁴ MCA also stated that the TPP-11 will assist the mining and mining services sectors to expand resources commodity exports to a range of countries. In addition, as the TPP-11 includes Latin American economies, where the resources trade with Australia is currently small, there will be opportunities for Australian mining companies and mining services firms to partner with local businesses to invest in and develop those countries' resources sectors.³⁵ A report released in September 2018 estimated mining sector exports and imports would each increase by US\$1 billion (A\$1.3 billion) under the TPP-11.³⁶

2.32 GrainGrowers explained that the elimination of 98 per cent of all tariffs will deliver benefits to a broad range of agricultural products including beef, dairy, sheep meat, cotton, wool and grains. Mr Luke Mathews, Trade and Economics Manager explained further:

Improved market access resulting from TPP-11 for the grain sector is most apparent in the Japanese market. In 2016-17 Australian grain exports to Japan were valued at over \$750 million, led by barley at \$325 million, wheat at just over \$300 million and canola at roughly \$84 million. For Japan TPP-11 results in reduced mark-ups or tariffs in addition to improved quota access for wheat, barley and malt.

33 Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia, *Proof Committee Hansard*, 30 July 2018, p. 55.

34 *Submission 37*, pp. 13–14.

35 *Submission 37*, p. 15.

36 Peter A. Petri and Michael G. Plummer, *Australia will gain from continued Asia-Pacific trade integration*, modelling report, September 2018, p. 14.

In addition to these market access outcomes, TPP-11 is probably Australia's most sophisticated agreement in dealing with non-tariff barriers to trade. As a regional agreement, TPP-11 will help encourage mutual recognition of standards and systems and it will improve processes for rules of origin, self-certification and improved and increased transparency for import licensing. Finally, TPP-11 includes a technical barriers to trade committee which it is hoped will assist in the management of these important challenges.³⁷

2.33 In its submission, the red meat and livestock industry noted that the TPP-11 will deliver a range of benefits for their industry and 'will add significant value to the Australian red meat and livestock industry and complement the gains derived from the other free trade agreements Australia has concluded to date'.³⁸ In addition, it is noted that the implementation of the Agreement will 'help to ensure that the Australian red meat supply chain remains internationally competitive'.³⁹

2.34 Australian Pork Limited (APL) explained that, in terms of market access, the TPP-11 is a 'mixed bag' for the pork industry as it will provide greater access opportunities for some markets (such as Mexico) but the advantage Australia currently experiences in the Japanese market will gradually disappear.⁴⁰ Ms Deb Kerr, General Manager, Policy, APL welcomed the non-tariff measures under the TPP-11 as well as the labour market testing waiver for some TPP-11 countries.⁴¹

2.35 The Australian Sugar Industry Alliance (ASA) advised:

With 100 per cent of the value of Australian sugar cane directly linked to the value of Australian world sugar exports, we actively work to improve conditions for world sugar exports, and we see TPP-11 as a really important step in the right direction.

Around a third of our exports, with a value of more than \$500 million annually, are sold to TPP-11 member countries. In this context, securing the improved access opportunities for sugar has been a significant achievement and an important step forward. It builds on some of the gains that had been made in other agreements...In terms of our access to Japan, once TPP-11 is entered into force it will deliver a benefit of further reductions in the levy of around \$18 to \$25 per tonne. This will mean Australia will be the most competitive supplier into the Japanese market and deliver a significant value to that trade.⁴²

37 *Proof Committee Hansard*, 30 July 2018, p. 25.

38 *Submission 36*, p. 2.

39 *Submission 36*, p. 2.

40 Ms Deb Kerr, General Manager, Policy, Australian Pork Limited, *Proof Committee Hansard*, 30 July 2018, p. 24.

41 *Proof Committee Hansard*, 30 July 2018, pp. 24–25.

42 Mr Warren Males, Chairman, Sugarcane Gene Technology Group, Australian Sugar Industry Alliance, *Proof Committee Hansard*, 30 July 2018, pp. 26–27.

2.36 Wine Australia described the TPP-11 as a 'landmark treaty that will support growth in Australian wine exports'.⁴³ It was noted that Australia will gain a competitive advantage, beyond that obtained through bilateral agreements, in four markets: Canada, Malaysia, Mexico and Peru. Wine Australia submitted they are 'particularly excited by the opportunity presented in Mexico' as the removal of the 20 per cent tariff will open the Mexican imported wine market of 72 million litres to Australia, 'thus levelling the playing field with wines from Chile and the USA'.⁴⁴

Implementing and reviewing the TPP-11

Outreach strategy

2.37 The Analysis of the Regulatory Impact on Australia (ARIA) states that:

Once the TPP-11 enters into force, it is intended that DFAT and Austrade will implement an outreach strategy to ensure all Australians are able to take advantage of the Agreement. This will include information sessions held throughout Australia.⁴⁵

2.38 The committee notes that DFAT and Austrade are currently running a series of FTAs seminars across all states and territory with over 100 seminars being delivered since March 2015. For example, a seminar was recently held in Maroochydore, Queensland to assist local businesses to better understand a range of FTAs, including the TPP-11.⁴⁶

2.39 In its submission, the Export Council of Australia (ECA) noted the value of the DFAT and Austrade 'roadshows' although the seminars are 'necessarily high level, and leave the attendees without the detailed knowledge about how to utilise FTAs'.⁴⁷

2.40 The ECA advocated for the Australian Government to commit sufficient resources for the provision of a training program to assist businesses understand 'what they are entitled to and how to access their entitlements'.⁴⁸ In particular, it was noted that businesses will require information about how to determine which FTA to use when their trading partners have multiple FTAs with Australia, rules of origin, services provisions processes, customs classifications and compliance and dispute resolution mechanisms under the TPP-11.⁴⁹

2.41 The ECA submission explained further:

43 *Submission 34*, p. 3.

44 *Submission 34*, p. 3.

45 ARIA, p. 40.

46 The Hon Mark Coulton MP, Assistant Minister for Trade, Tourism and Investment, 'Seminar to help Sunshine Coast businesses come to grips with Australia's FTAs', *Media Release*, 7 August 2018.

47 *Submission 50*, p. 6.

48 *Submission 50*, p. 6.

49 *Submission 50*, p. 6.

While agencies have deep subject matter expertise, they are usually not adequately staffed to roll out a sustained training program. (It is necessary for the training to be available over a long period because there will be many businesses not ready to take advantage of the Agreement until well after it enters into force.) In addition, agencies have little expertise in providing training and often find it difficult to talk in ways that SMEs can understand.

There would be significant value in government partnering with private sector providers to develop an online training program that was freely available to businesses. This training program could reinforce the content of the FTA roadshow seminars, as well as providing much more detail on the technical questions about using an FTA...⁵⁰

TPP-11 Commission

2.42 A TPP-11 Commission will be established under the Agreement which will be responsible for the operation of the TPP-11. The ARIA states that the Commission will review the operation of the Agreement three years after entry into force and at least every five years after that.⁵¹

2.43 The Commission is established under Article 27.1 and is required to meet within one year of the TPP-11 commencing and the frequency of meetings thereafter will be decided by the TPP-11 parties. Meetings of the Commission shall be chaired successively by each Party.⁵² The Commission will comprise representatives for each of the TPP-11 countries at the level of Ministers or senior officials and its purpose is to oversee the implementation of the Agreement and to review its operations as actions under the Agreement are rolled out. The Commission will consider ways to further enhance trade and investment between the Parties and supervise the work of all committees and working groups established under the Agreement.

Evaluating Free Trade Agreements

2.44 Witnesses referred to the 2010 research report published by the Productivity Commission: *Bilateral and Regional Trade Agreements*. This report examined the effects of bilateral and regional trade agreements on a range of matters, including trade and investment barriers, prospects for multilateral reform, regional integration and Australia's economy generally.⁵³

2.45 Mr Bryan Clark, Director, Trade and International Affairs, Australian Chamber of Commerce and Industry (ACCI) explained the importance of a review of existing FTAs particularly as there have been a number of new agreements since 2010:

50 *Submission 50*, p. 6.

51 ARIA, p. 41.

52 Chapter 27: Administrative and Institutional Provisions.

53 Productivity Commission, *Bilateral and Regional Trade Agreements*, Research Report, November 2010.

The Productivity Commission in 2010 did a study of Australia's bilateral and regional agreements that existed at the time, and they thought that there are, perhaps, better ways to do some aspects of them. We'd like to see a revisitation now, because at the time there were fewer and we've now had some more agreements, including the ASEAN-Australia-New Zealand trade agreement, the North Asia free trade agreements plus these ones we're considering now, and a few on the table. So we think that perhaps times have changed, but they're the right type of body to do that sort of work. The fundamental question we would start with is: what happened last time? How do we analyse what happened then to know that continuing the same approach is going to result in different outcomes?⁵⁴

2.46 MCA expressed support for an evaluation of the TPP-11 to occur 'at some stage in the future'. In this context, MCA noted the importance of evaluating FTAs but that the timing of evaluation 'is a matter for government'.⁵⁵

54 *Proof Committee Hansard*, 30 July 2018, pp. 50-51.

55 Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia, *Proof Committee Hansard*, 30 July 2018, pp. 60-61.

Chapter 3

Treaty making process

Introduction

3.1 Submissions to the inquiry highlighted a series of concerns about the treaty making process, with particular reference to the consultation undertaken during the negotiation of the TPP-11 and consultation about free trade agreements (FTAs) more broadly. Another area of concern highlighted in evidence related to the availability of independent modelling of the impact of the Agreement. This chapter will summarise the issues raised on these matters.

Consultation on the TPP-11

3.2 The National Interest Analysis (NIA) noted:

The process for engaging stakeholders in relation to the Agreement was an extension of the Government's efforts to bring the original TPP into force. Stakeholders' views were actively encouraged and considered during consultations undertaken in relation to the original TPP, which commenced in 2008. This consultation process culminated in two parliamentary enquiries. The Government continued to consult stakeholders, State and Territory Governments, interested members of the public throughout the TPP-11 negotiation process from February 2017.¹

3.3 Part 7 of the Analysis of Regulatory Impact on Australia (ARIA) notes that 'stakeholder views were actively encouraged and considered throughout negotiations on the original TPP and the TPP-11'.² It also noted that the original TPP process was followed by two parliamentary inquiries, one by the Joint Standing Committee on Treaties (JSCOT) and the second by this committee.³

3.4 The ARIA details the consultation undertaken specifically in relation to TPP-11 and advised that DFAT continued to consult stakeholders and to make information publically available on its website and responded to emails. In addition:

In relation to the TPP-11, it is estimated that there were 50 meetings, consultations and contacts undertaken over the period February 2017 - January 2018.⁴

3.5 At the public hearing on 30 July 2018, DFAT outlined the consultation undertaken during the development of the TPP-11:

I also recall the extraordinary efforts made to consult stakeholders and seek the views of interested individuals and organisations, both in relation to the

1 National Interest Analysis (NIA), p. 21.

2 Analysis of Regulatory Impact on Australia (ARIA), p. 39.

3 ARIA, p. 38.

4 ARIA, p. 40.

original TPP and the revised TPP-11 Agreement. During the negotiating process for the original TPP alone, we engaged in over 1000 briefings with 485 stakeholders, consulting a wide range of groups including peak industry bodies, companies, academics, unions, and consumer and civil society groups. Including today's proceedings, the TPP process as a whole has been the subject of four separate parliamentary inquiries, which have received over 450 public submissions.⁵

3.6 The committee sought information on what evaluation DFAT had conducted about its consultation process. DFAT stated that:

Individuals and organisations consulted throughout the TPP negotiations were able to provide feedback on the adequacy of the process either to officials in person or through correspondence. The Department of Foreign Affairs and Trade did not implement any additional formal feedback or evaluation mechanisms in respect of TPP stakeholder consultations.⁶

3.7 DFAT provided information about its engagement with parliamentarians, including an initiative towards the end of negotiations 'whereby parliamentarians were invited to view the text upon signing of a confidentiality letter'.⁷ DFAT also provided private briefings to the JSCOT and the Joint Standing Committee on Foreign Affairs, Defence and Trade to 'facilitate their better understanding of the negotiations and the text'.⁸

Stakeholder perspectives on consultation

3.8 The committee received evidence from stakeholders detailing different experiences with DFAT consultation processes. Industry bodies including Australian Pork Limited, GrainGrowers, Meat & Livestock Australia, Red Meat Advisory Council and Australian Sugar Industry Alliance told the committee about their experience with the consultation process. Each organisation was able to make representations at the National Farmers' Federation trade committee as well as bringing particular concerns from their industry directly to the attention of the negotiating team in DFAT.⁹

3.9 Mr Andrew McCallum, Global Manager, Trade and Market Access, Meat & Livestock Australia explained their participation during the negotiation stages:

The negotiations, particularly on the TPP, we felt were very valuable, because they involved a number of broader stakeholder forums. A number of us travelled there and participated in the margins of the negotiating rounds. We had access to the negotiators, to our counterparts in the other TPP member countries and to the trade minister, and that's all invaluable in

5 Mr George Mina, *Opening statement*, 30 July 2018, p. 2 (tabled 30 July 2018).

6 DFAT, answer to question on notice, 20 August 2018 (received 10 September 2018), [p. 4].

7 Mr Mina, *Proof Committee Hansard*, 30 July 2018, p. 65.

8 Mr Mina, *Proof Committee Hansard*, 30 July 2018, p. 65.

9 *Proof Committee Hansard*, 30 July 2018, pp. 29–30.

understanding the process and understanding what the pitfalls might be and in trying to help overcome any roadblocks.¹⁰

3.10 Other witnesses expressed concern about the lack of opportunities to participate in the process. For example, a representative from the Australian Council of Trade Unions (ACTU) explained her experience in the following way:

I'd like to note that it is with some interest that I listened to the answers from our colleagues from the National Farmers' Federation about their access to government and DFAT when it comes to trade deals, because I can tell you that we do not have the resources to follow them around the world when they are negotiating the agreements. My experience has been that, the one time that I actually asked a DFAT TPP negotiator to come and meet with the affiliates of the ACTU working on trade, I was told that that was not possible.¹¹

3.11 In its submission, GetUp expressed their concerns about the negotiation process:

Beyond the text of the deal itself, we also hold deep concerns about the process of negotiation for the Trans-Pacific Partnership -- a process which we saw to have far more accessibility for large corporations than everyday people, and minimal transparency around process. We are troubled by the text of the agreement not being made public until after our Trade Minister had signed the deal, and given in-principle agreement on behalf of the country.¹²

3.12 Dr Patricia Ranald, Convenor, Australian Fair Trade and Investment Network (AFTINET) explained:

DFAT is right to say that they held meetings with business and civil society groups and talked about the agreement. But because we were never able to see the text—business groups have complained about this too—we didn't have sufficiently detailed information for us to actually discuss what was in the text. There were many of these consultations, but the form that they generally took were us presenting our views to DFAT and then asking questions and DFAT saying, 'Well, at a certain point we can't answer that question, because the negotiations are commercial-in-confidence. We can't go into that level of detail.'¹³

Concerns about transparency

3.13 Many of the concerns raised about the consultation suggested a lack of transparency. Several submissions suggested that the Government conducted the

10 *Proof Committee Hansard*, 30 July 2018, pp. 29–30.

11 Ms Andrea Maksimovic, Associate Director International, Australian Council of Trade Unions, *Proof Committee Hansard*, 30 July 2018, p. 36.

12 *Submission 60*, p. 2.

13 *Proof Committee Hansard*, 30 July 2018, p. 15.

negotiations in secret and that the Agreement has been entered into without genuine public input.¹⁴

3.14 AFTINET submitted that the current Australian trade agreement process is:

...secretive and undemocratic, with the text not made public until after the decision to sign it. The decision to sign agreements is made by Cabinet before they are tabled in Parliament and only then examined by the Joint Standing Committee on Treaties.¹⁵

3.15 AFTINET also highlighted that '[p]arliament has no ability to change the agreement and can only vote on the implementing legislation'.¹⁶

Suggested changes to the consultation process

3.16 In light of the concerns raised about the consultation process, several submissions and witnesses advocated for change.

3.17 Instead of the current process, AFTINET indicated that they support:

...publication of negotiating texts, and publication and independent evaluation of the economic, health and environmental impacts of agreements before the decision is made to sign them. Parliament should vote on the whole text of the agreement.¹⁷

3.18 The committee received evidence suggesting there may be a role for industry associations and other bodies to play during treaty negotiations. In its submission, the Australian Chamber of Commerce and Industry (ACCI) noted that they 'have consistently raised concerns about aspects of Australia's treaty making processes and have monitored the response of government to recommendations from recent treaty inquiries'.¹⁸ These concerns include: permitting security cleared representatives from business and civil society to see the government position being put forward as part of treaty negotiations and the provision of independent modelling and analysis of proposed trade agreements by the Productivity Commission, or equivalent organisation, and provided to the relevant parliamentary committee alongside NIA.¹⁹ ACCI stated that processes are yet to be reformed in a way that meets concerns from the business community.²⁰

3.19 When highlighting concerns with the drafting of particular clauses, Open Source Industry Australia (OSIA) suggested that if the TPP-11 parties had involved

14 See for example, AFTINET, *Submission 14*, p. 3; AMWU, *Submission 12*, p. 2; Public Services International, *Submission 5*, p. 2; Open Source Industry Australia, *Submission 47*, pp. 3, 14.

15 *Submission 14*, p. 3.

16 *Submission 14*, p. 3.

17 *Submission 14*, p. 3.

18 *Submission 53*, p. 7.

19 *Submission 53*, pp. 8–10.

20 *Submission 53*, p. 7.

industry bodies throughout the negotiating and drafting process, issues would have been raised earlier and alternate drafting options offered.²¹

3.20 The ACCI advocated for a:

...national think tank to assist to provide thought leadership and analysis to our negotiators in order to ensure the best deal is in fact the outcome from the negotiations...

[The think tank would] recognise that there is expertise in academia, industry and society...that can be brought together and harnessed so that we are all pointed in the same direction.²²

3.21 As outlined in the prospectus, the Australian Trade Centre (ATC) would be established as a public-private partnership and supported by national and international networks to employ a multidisciplinary approach:

The ATC will employ a multidisciplinary approach. Trade practitioners, policy-makers and regulators will collaborate across areas such as international law, political science, criminology, economics and business management. These teams will be located at research hubs positioned across Australia and organised according to four specific work programs: goods, services, investment and society. The work programs will be hosted by partner universities in major cities including Brisbane, Melbourne, Adelaide and Perth. They will be directed by the ATC Executive based at ANU in Canberra, with oversight by a high-level Board.²³

Consultation used in other jurisdictions

3.22 Witnesses drew attention to the consultation processes used by other jurisdictions. Ms Andrea Maksimovic provided some detail about some processes in the European Union (EU) whereby the European Commission publishes all proposals for new negotiating mandates. Ms Maksimovic continued:

They have an advisory group on EU trade agreements, which includes trade unions and other civil society groups, particularly consumer groups. They publish all the EU proposals in the negotiations as soon as those negotiations have happened, so every round they publish everything. They make sure that the negotiated agreement is published as quickly as possible so the public have access to it.²⁴

3.23 Ms Maksimovic argued that Australia should be working towards implementing a model similar to that in the EU. It was further noted that the United Kingdom has an advisory group which involves trade unions.²⁵

21 *Submission 47*, p. 11.

22 Mr Bryan Clark, Director, Trade and Investment Affairs, ACCI, *Proof Committee Hansard*, 30 July 2018, pp. 49, 54.

23 ACCI, answer to question on notice, 30 July 2018 (received 2 August 2018), p. iii.

24 *Proof Committee Hansard*, 30 July 2018, p. 38.

25 *Proof Committee Hansard*, 30 July 2018, pp. 38–39.

3.24 When discussing consultation, ACCI reminded the committee that they have previously suggested an improved process 'might be modelled on the US model for approved accredited advisers to be able to get closer to the text as it is being negotiated'.²⁶

3.25 Dr Ranald also provided some detail about the US system:

The US has a system of committees based on industry or interest groups. Selected people can be on those committees. I don't know that they're actually allowed to take copies of the text away. They can sometimes view bits of the text or discuss bits of the text, but it's still very limited because they're not allowed to tell anyone else what's in it. It's a kind of behind closed doors process with selected people.²⁷

3.26 The committee discussed with DFAT the feasibility of DFAT adopting some of the consultation mechanisms used in other jurisdictions, with particular reference to whether other TPP-11 parties have a system of accredited and/or declared advisers who participate in consultation during the negotiation process. Mr Mina noted that he was 'not aware of current TPP-11 member states' using such a process although Mr Mina confirmed that the United States does accredit advisers in that way.²⁸

3.27 When asked whether DFAT could facilitate a mechanism whereby advisers are cleared and accredited, Mr Mina advised:

All I'll say on this is what I was about to say earlier, which is that we have had elements of that practice in our experience, even in respect of the TPP-11, where we shared the text of the agreement with members and senators in Canberra on a confidential basis. That was part of our practice. To that extent, we have already got practice that gives effect to your request.²⁹

3.28 DFAT further noted that it:

...has an extensive program of outreach on its free trade agreement (FTA) agenda, including broad and regular consultation with all interested stakeholders. The US' system of cleared advisers is long-standing and reflects the particular circumstances of the US. This process provides some stakeholders a greater level of access than other stakeholders. Australia's practice has been to maintain an open, inclusive and flexible approach to consultation, to ensure all stakeholders who want to contribute views can do so.³⁰

Recommendations from previous inquiries about the treaty negotiation process

3.29 The committee notes that previous parliamentary inquiries have recommended changes to the treaty negotiation process with particular reference to consultation

26 Mr Bryan Clark, *Proof Committee Hansard*, 30 July 2018, p. 52.

27 *Proof Committee Hansard*, 30 July 2018, p. 15.

28 *Proof Committee Hansard*, 20 August 2018, p. 9.

29 *Proof Committee Hansard*, 20 August 2018, p. 9.

30 DFAT, answer to question on notice, 20 August 2018 (received 10 September 2018), [p. 7].

mechanisms and facilitating stakeholder contribution during the negotiation stages.³¹ Many of these recommendations have not been supported by government.³²

Assessment of trade agreements

3.30 The need for comprehensive assessment and evaluation of FTAs was of high importance to many of the contributors to this inquiry. Several witnesses and submissions advocated for independent economic modelling to be conducted early in the process as well as broader evaluation of FTAs during the implementation stage.

Economic modelling on the TPP-11

3.31 The modelling included in the NIA pointed to updated modelling by the Peterson Institute for International Economics (PIIE) which found that TPP-11 would increase Australia's income by 0.5 per cent by 2030 (compared to 0.6 per cent under the original TPP).³³ The NIA also highlighted modelling by the Canada West Foundation which found that Australia's exports to other TPP-11 parties would grow by 0.12 per cent, compared with a reduction of 0.14 per cent in Australian exports to other TPP parties under the TPP.³⁴

3.32 The NIA concluded:

The economic benefits to Australia can be expected to increase in the event that other significant economies join the TPP-11. The PIIE's modelling showed that in a TPP-16 scenario (TPP-11 plus Indonesia, the Republic of Korea, Philippines, Taiwan and Thailand), Australia's income would increase by 0.7 per cent by 2030. Some of these economies, such as Indonesia, the Republic of Korea and the Philippines, have publicly shown interest in the TPP in the past.³⁵

3.33 In its submission, the Australian Manufacturing Workers' Union (AMWU) referred to research undertaken by Tufts University which shows that 'Australia is likely to lose some 39,000 jobs in the energy products, primary commodities, manufacturing and services industries'.³⁶ The AMWU also pointed to World Bank modelling of the former TPP-12 which showed that 'it will increase Australia's GDP by just 0.7% by 2030 – less than one tenth of 1 per cent each year over the next 15

31 Senate Foreign Affairs, Defence and Trade References Committee, *Blind agreement: reforming Australia's treaty-making process*, June 2015, pp. xiii-xiv; Joint Standing Committee on Treaties, *Report 165*, 30 November 2016. See Chapter 5.

32 Senate Foreign Affairs, Defence and Trade References Committee, *Blind agreement: reforming Australia's treaty-making process*, Government response, presented February 2016; Government response to Joint Standing Committee on Treaties, *Report 165*, 8 August 2017, p. 2.

33 NIA, pp. 6-7.

34 NIA, p. 7.

35 NIA, p. 7.

36 *Submission 12*, p. 1.

years'.³⁷ The AMWU also noted that the PIIIE 'forecast a total boost to Australia's GDP of a mere 0.5% over the next decade to 2025-26'.³⁸ The AMWU concluded that the 'low growth rates for TPP-11 are likely to be similar to the TPP-12 modelling and potentially less'.³⁹

3.34 Other submissions also provided detail about other economic modelling that has been conducted on the TPP-11. The Minerals Council of Australia submitted:

Several modelling studies have estimated the economic benefits which the TPP-11 and/or the original TPP (including the United States) would deliver for Australia and other countries. The most detailed modelling has been carried out by Professor Peter Petri of Brandeis University and Michael Plummer of Johns Hopkins University. Their most recent study finds that by 2030 the TPP-11 will boost Australia's:

- Real national income by US\$12 billion (A\$15.4 billion) or 0.5 per cent
- Real GDP by US\$14 billion (A\$18 billion) or 0.5 per cent
- Exports by US\$23 billion (A\$29.6 billion) or 4 per cent (in real terms).

A review of 10 modelling studies shows the average finding for Australia is an increase of 0.54 per cent in real GDP, in line with Petri and Plummer's most recent study. A Tufts University modelling study finding job losses under TPP suffers from serious methodological flaws, has been widely criticised by economists and uses inaccurate data and unrealistic assumptions for Australia. Its results lack credibility and contradict Australia's real-world experience.⁴⁰

3.35 The Victorian Government provided a submission to the JSCOT inquiry which contained a report they had commissioned to 'provide detailed analysis of the commercial opportunities that TPP-11 will provide'.⁴¹ The executive summary included the following summary of the Agreement:

The TPP-11 offers some modest gains for exports of Australian goods in the immediate term, with greater gains likely as implementation proceeds. However, some gains are likely to be negated to some extent by heightened competition in the TPP-11 area, with a number of member countries undertaking an FTA with each other for the first time.

In the longer term, as the various aspects of economic integration bear fruit (mutual recognition of professional qualifications, technical standards

37 *Submission 12*, p. 1. World Bank modelling also referred to by Mr Harry Creamer, *Submission 13*, p. 1.

38 *Submission 12*, pp. 1–2.

39 *Submission 12*, p. 2.

40 *Submission 37*, p. 1. For further information, see Peter A. Petri and Michael G. Plummer, *Australia will gain from continued Asia-Pacific trade integration*, modelling report, September 2018, pp. 10–13.

41 The Hon Philip Dalidakis MLC, 'Victoria backs TPP and benefits of free trade', *Media Release*, 26 June 2018.

conformity, streamlined processes supporting cross-border trade and so on), further and wider reaching benefits are likely to be realised.⁴²

3.36 In a response to a question taken on notice at a JSCOT hearing, DFAT advised that multiple economic studies have found that 'the TPP would have positive economic benefits for all TPP Parties'. It was also noted by DFAT that an often quoted study undertaken by Tufts University did not use the mainstream GTAP [Global Trade Analysis Project] model to examine the effects of trade liberalisation arising from the TPP and 'is an outlier in finding negative impacts from the TPP'.⁴³

3.37 At the hearing on 30 July 2018, Mr Mina pointed out that 'this agreement has been extensively evaluated, through economic evaluation'.⁴⁴ Mr Mina went on to note:

There has been no shortage—happily—of such interest by the economic modelling community globally. So we have a good sense of the economic impacts. Of course, with trade reform and the consistent messages and lessons from the economics discipline about the allocative and other efficiency gains that arise from trade reform, successive Australian governments have a view—and this government certainly has a view—about the economic benefits of trade reform.⁴⁵

Criticisms of the economic modelling

3.38 Submissions argued the need for independent modelling and suggested that such modelling is necessary to enable a comprehensive understanding of the proposed benefits to the Australian economy. In particular, several submissions were critical of the lack of independent modelling for an Australian context.

3.39 AFTINET argued that the NIA presented is 'not independent but is conducted by the same department which negotiated the agreement'.⁴⁶

3.40 Several submissions called for broad analysis of the TPP-11 to be undertaken. Friends of the Earth Australia called for an independent economic, social and environmental impact assessment.⁴⁷ The Public Health Association of Australia advocated for a comprehensive Health Impact Assessment (HIA) to be undertaken on the final text of the TPP-11.⁴⁸ ActionAid Australia expressed the view that the Australian Government should commission 'independent analysis of potential

42 *Submission 67, Attachment 1*, p. 5.

43 DFAT, *Submission 65*, p. 2.

44 *Proof Committee Hansard*, 30 July 2018, p. 66.

45 *Proof Committee Hansard*, 30 July 2018, p. 66.

46 *Submission 14*, p. 3.

47 *Submission 15*, p. 1.

48 *Submission 20*, p. 14.

economic, health, environmental and gender impacts' and this analysis should be 'publicly available for debate and discussion'.⁴⁹

3.41 The AMWU indicated that 'all finalised trade agreements should be subject to independent assessment of their costs and benefits before parliament is asked to ratify them'.⁵⁰

3.42 In a number of forums, DFAT has not accepted the criticism that there has not been sufficient economic modelling undertaken of the TPP-11. DFAT responded to these criticisms in its *Myth Busters* document published on its website and referred to the modelling undertaken by the PIIE. DFAT also noted that modelling:

...including of the kind done by the PIIE, understates the potential benefits of the TPP-11 because it is mainly focussed on tariff reductions. Modelling the impacts of other aspects of the TPP-11, such as services market access, improved customs procedures, enhanced investment conditions and rules on transparency, are very difficult.

Similarly, modelling is not currently able to quantify the benefits from a regional deal, such as the TPP-11, which provides a framework in which value chains can function more efficiently and at lower cost among the countries in the Agreement.

Ultimately, free trade agreements (FTAs) like the TPP-11 help to break down trade barriers. The fewer trade barriers Australian businesses face, the easier it is to trade, which in turn brings productivity improvements and higher competitiveness levels across our economy.⁵¹

Recommendations from previous inquiries about independent modelling

3.43 Several previous inquiries have made recommendations that the Australian Government consider implementing a process to ensure that independent modelling and analysis of proposed FTAs is undertaken by a body such as the Productivity Commission and provided alongside the NIA.⁵² The government has not accepted such a recommendation.⁵³ The recent JSCOT report, tabled on 22 August 2018 again recommended that independent modelling and analysis be undertaken by the Productivity Commission or equivalent organisation and be provided at the same time as the NIA.⁵⁴

49 Ms Michelle Higelin, Executive Director, ActionAid Australia, *Proof Committee Hansard*, 30 July 2018, p. 20.

50 AMWU, *Submission 12*, p. 2; Open Source Industry Australia, *Submission 47*, p. 5.

51 <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Pages/tpp-11-myth-busters.aspx> (accessed 1 May 2018).

52 Joint Standing Committee on Treaties, *Report 165*, 30 November 2016, p. 47.

53 Joint Standing Committee on Treaties, *Report 165, Trans-Pacific Partnership Agreement*, Government response, 8 August 2017, p. 23.

54 Joint Standing Committee on Treaties, *Report 181, Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, August 2018, p. 73.

Chapter 4

Issues raised with the committee

Introduction

4.1 This chapter is not an examination of all aspects of the Agreement but rather details the main issues raised with the committee. As noted in chapter 1, the focus of the report is the evidence from the current inquiry although evidence from other inquiries may also be referred to for clarity and context.

4.2 The issues discussed in this chapter focus on the areas outlined in the inquiry's terms of reference including: the Investor-State Dispute Settlement (ISDS) provisions, impact on Australian workers, intellectual property (IP), environmental standards, and government procurement.

Investor–State Dispute Settlement

4.3 Investor–State Dispute Settlement (ISDS) is a mechanism in a free trade agreement or investment treaty that provides foreign investors, including Australian investors overseas, with the right to access an international tribunal to resolve investment disputes. In a fact sheet the Department of Foreign Affairs and Trade (DFAT) provided the following information about ISDS provisions:

Australia has negotiated ISDS provisions over the past three decades to provide protection for Australian companies investing abroad. ISDS promotes investor confidence and can protect against sovereign or political risk. If a country does not uphold its investment obligations, an investor can have their claim determined by an independent arbitral tribunal, usually comprising three arbitrators.¹

4.4 Australia has ISDS provisions in six free trade agreements (FTA) as well as in the TPP-11 and the Peru-Australia FTA which are not yet in force.²

4.5 For a detailed background to the ISDS, please refer to Chapter 6 of *Report 165* from the Joint Standing Committee on Treaties (JSCOT) on the Trans-Pacific Partnership Agreement tabled in November 2016.

4.6 The ISDS provisions are in the Investment Chapter of TPP-11. As noted in chapter 2 of the committee's report, as part of the suspended provisions there has been some narrowing of the scope of claims that can be made under the ISDS provisions.

1 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) FAQs, Investor–State Dispute Settlement*, 23 February 2018, p. 1, <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Documents/tpp-11-faqs-isds.pdf> (accessed on 27 June 2018).

2 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) FAQs, Investor–State Dispute Settlement*, 23 February 2018, p. 1. The current FTAs with ISDS are: China–Australia, Korea–Australia, Australia–Chile, Singapore–Australia, Thailand–Australia and ASEAN–Australia–New Zealand.

4.7 In response to a question taken on notice, DFAT stated that the TPP-11 'contains a set of high-quality, modern rules governing the treatment of investors and their investments. It also contains robust safeguards'.³ The response detailed the 'robust safeguards' which include recognition that TPP-11 parties have 'an inherent right to regulate to protect public welfare, including in the areas of health and the environment' and includes a list of policy areas in Australia that cannot be challenged. Furthermore, the TPP-11 also includes procedural safeguards 'to enhance the arbitration process'.⁴

Concerns about ISDS provisions

4.8 Similar to the concerns with ISDS provisions raised in previous inquiries into the original TPP, the inclusion of ISDS provisions in the TPP-11 was a point of particular concern for many individuals who did not support the signing of the TPP-11.⁵ For example, Mr Harry Creamer argued that ISDS provisions are not in the national interest, arguing that 'many of our laws and policies, achieved through decades of public advocacy and measured government responses, will be threatened by trans-national corporations pursuing their own interests, backed by these provisions'.⁶

4.9 The Australian Fair Trade and Investment Network (AFTINET) argued that the ISDS process is:

...an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors.⁷

4.10 Submitters including AFTINET argued that serious flaws in the ISDS system have been identified and recommended that the TPP-11 should not contain ISDS.⁸

4.11 The Australian Manufacturing Workers' Union (AMWU) submitted:

Judicial, social and commercial concerns about ISDS are notorious, with no less a person than former Australian High Court Chief Justice Robert French expressing grave concerns about the procedures and practices of ISDS. The TPP-11 gives special rights to foreign investors to bypass national courts and sue governments for millions of dollars in these unfair tribunals over changes to domestic laws, even if those laws are in the public interest. Global companies have recently sued governments over medicine prices, protection of the environment, protection of Indigenous land rights and even a rise in the minimum wage. Notoriously Phillip Morris sued the

3 DFAT, answers to questions on notice, 30 July 2018 (received 20 August 2018), [p. 7].

4 DFAT, answers to questions on notice, 30 July 2018 (received 20 August 2018), [p. 7].

5 See for example: Mr Duncan Marshall, *Submission 3*, p. 3; Ms Linda Link, *Submission 10*, p. 1.

6 Mr Harry Creamer, *Submission 13*, p. 2.

7 *Submission 14*, p. 3.

8 *Submission 14*, p. 3

Australian government over cigarette plain packaging laws; whilst the Government was successful the cost was excessive. The Canadian Government has been sued by 35 companies utilising ISDS over a range of issues.⁹

4.12 Several submissions referred to growing opposition to ISDS in the European Union and noted the decision by the European Court of Justice 'ruling that ISDS undermines national legal autonomy and is incompatible with the law of the European Union'.¹⁰ AFTINET explained further:

In the case of the EU, there's been growing popular opposition to ISDS, but there have been, more importantly, two court decisions by the European Court of Justice that ISDS provisions violate national sovereignty and can't be negotiated by the EU Commission on behalf of EU member states. If an agreement contains ISDS, it must now be voted on by each European parliament. The result of that is that the European Commission fears that national parliaments will reject FTAs that contain ISDS and it has developed a fast-track process for agreements without ISDS to enable them to be approved by the European Commission alone.¹¹

ISDS implications for public health initiatives

4.13 The Public Health Association of Australia (PHAA) submitted its strong opposition to ISDS in trade agreements arguing that including such provisions have an adverse impact of public health. It was noted that the 'threat of legal action, or even the existence of an ISDS mechanism, can deter governments from implementing public health policies and laws'.¹² In this context, the PHAA was particularly concerned that the Australian Government may be inhibited from introducing health warning labels on alcohol containers in the future due to ambiguities in the supplementary labelling rules in Annex 8A of the Agreement. These provisions relate to the information provided on a supplementary label on alcohol containers and PHAA was concerned that these provisions may pose a barrier for the implementation of health warning labels on alcohol containers.¹³

4.14 The PHAA and others advocated for the provision of health information to be excluded from the supplementary labelling rules.¹⁴ This could be achieved by amending paragraph 5 of the existing text of Annex 8A, adding a paragraph to the Annex or 'at the very least, the text should be amended to affirm that a state may

9 *Submission 12*, p. 2.

10 See for example, Vintage Reds of the Canberra Region, *Submission 2*, p. 5; Public Services International, *Submission 5*, p. 5; New South Wales Retired Teachers' Association, *Submission 7*, p. 1; Ms Linda Link, *Submission 10*, p. 1.

11 Dr Patricia Ranald, Convenor, AFTINET, *Proof Committee Hansard*, 30 July 2018, p. 10.

12 *Submission 20*, p. 8.

13 The concern about Annex 8A was also raised by the Foundation for Alcohol Research and Education (FARE), *Submission 18*, [p. 2] and Dr Deborah Gleeson, *Submission 4*, p. 13.

14 *Submission 20*, pp. 13–14; *Submission 18*, [p. 13]; *Submission 4*, pp. 2–3.

prescribe the presentation and placement features for information it requires to be included on wine and spirits containers, including on supplementary labels'.¹⁵

Alternate views on ISDS

4.15 In contrast to the evidence outlined above, some evidence to the inquiry provided a different perspective to the ISDS provisions. Mr Mark Davis, Director, Trade and Investment, Minerals Council of Australia (MCA), responding at the committee's hearing on 30 July 2018 stated:

ISDS doesn't create a wide-ranging ability of a foreign company to take action against the Australian government for a policy it doesn't like because the policy hurts its profits, which is sometimes asserted. ISDS disputes must involve the commitments that are made between the countries under the investment chapter. You can't just raise a dispute about anything. It has to relate to whether the state is observing the commitments it has entered into under the investment chapter.¹⁶

4.16 In its submission, the MCA noted that the ISDS provisions contain 'extensive substantive and procedural safeguards':

The substantive safeguards mean the TPP-11 ISDS provisions cannot be used to challenge public policies in environmental protection, healthcare, education, social services, welfare policy, government service delivery, cultural and heritage protection and conservation policies. The procedural safeguards ensure that any claims, disputes or arbitrations under the TPP-11 ISDS provisions will be conducted in an open and transparent manner and will be subject to clear procedural rules and legal standards.¹⁷

4.17 In his submission, Dr Luke Nottage supported ratification of the TPP-11 and noted there have been minimal changes to the Investment chapter from the original TPP. Dr Nottage explained the merits of ISDS:

...•even qualified procedural rights for investors to bring direct action against host states for expropriation or other violation of substantive treaty commitments, in addition to the option of inter-state arbitration, has led historically to increased FDI on a world-wide basis;

•Australian investors now make good use of ISDS protections to recoup losses incurred by alleged treaty violations, notably by developing states;

•the risk of successful claims against Australia and hence supposed "regulatory chill" should be minimal – as shown by the outcome of the Philip Morris claim (and the merits decision in its claim against Uruguay over tobacco regulation) even under old treaties without TPP-like elaborations, as well as the ambit claims recently by some US investors.¹⁸

15 FARE, *Submission 18*, [p. 3].

16 *Proof Committee Hansard*, 30 July 2018, p. 57.

17 *Submission 37*, p. 4.

18 *Submission 8*, pp. 4–5.

4.18 In addition, Dr Nottage recognised the public concern about ISDS and suggested that Australia 'take leadership (preferably with New Zealand)' to commence formal negotiations with other TPP-11 parties 'about superimposing an appellate review mechanism after ratification' and develop guidance or a code of ethics for ISDS arbitrators.¹⁹ Dr Nottage noted that these actions may assist to remedy some of the public concerns about ISDS provisions.²⁰

4.19 According to the Business Council, 'treaty-backed ISDS provisions provide an important avenue for Australian investors to seek remedy in the event of arbitrary, opaque or unfair decisions by foreign governments'.²¹ The Business Council also pointed out:

Agreement to allowing foreign investors to access ISDS in Australian must be seen in terms of the reciprocal access that Australian investors will gain to ISDS abroad, rather than narrowly in terms of the often-heard argument that domestic investors cannot access ISDS. All Australians investing overseas in TPP-11 jurisdictions will be able to access ISDS on an equal basis with all investors from other TPP-11 countries outside their home jurisdictions.²²

4.20 In response to a question on notice, DFAT provided a list of stakeholders who have expressed support for the ISDS mechanism in the TPP and TPP-11 including: Minerals Council of Australia, Business Council of Australia, Law Council of Australia, Australian Chamber of Commerce and Industry, Export Council of Australia, Australian Industry Group, ANZ Banking Group, Financial Services Council, Australian Petroleum Production and Exploration Association, Rio Tinto, BHP Billiton, Centre for Independent Studies and Chatto Creek Advisory.²³

DFAT response to stakeholder concerns

4.21 DFAT addressed concerns about ISDS in its *Myth Busters* document. The 'myth' in the document is 'Investor-State Dispute Settlement (ISDS) provisions allow foreign companies to sue the Australian Government for loss of expected profits'. The document says this is wrong and notes:

- TPP-11 investment rules help protect Australian investments and ensure Australian businesses are given a fair go – for example, by being given due process in local courts overseas.
- Investors cannot sue under ISDS for a mere loss of profits where a government has decided to change its policies or regulations. Instead, investors need to show that the government has broken a TPP-11 investment rule – for example, by nationalising an investment without compensation, or by denying the investor due process in a local court.

19 *Submission 8*, p. 3.

20 *Submission 8*, p. 4.

21 *Submission 35*, p. 6.

22 *Submission 35*, p. 6.

23 DFAT, answers to questions on notice, 30 July 2018 (received 20 August 2018), [p. 10].

•TPP-11 investment rules mean that the Australian Government can continue to make laws that are in the public interest, including regarding health and the environment. There are also rules that will deter frivolous claims and ensure that the Government is free to determine laws and policies without the threat of legal action.²⁴

ISDS Safeguards

4.22 The National Interest Analysis (NIA) explains that there are safeguards built into the rules guiding ISDS, 'making this one of the most protective treaties in existence in terms of its protections for legitimate regulation'.²⁵ In addition:

Procedural safeguards in the Agreement provide enhanced levels of transparency in the management of ISDS claims. In addition, specific Australian policy areas are carved-out from certain ISDS claims including: social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities; measures with respect to creative arts, Indigenous traditional cultural expressions and other cultural heritage; and Australia's foreign investment policy, including decisions of the FIRB [Foreign Investment Review Board]. Australia's tobacco control measures as defined under the Agreement will not be able to be challenged.²⁶

4.23 When providing evidence at a JSCOT hearing, DFAT emphasised that there are appropriate safeguards which will mean that the Australian Government 'will be able to continue to regulate in the public interest under the ISDS provisions' and also advised:

This set of provisions for the first time introduced new safeguards, procedural and substantive, to allow the government to protect legitimate public policy objectives. I think its article 9.16 of the agreement which sets out concerns for the public interest and legitimate public policy objectives in areas such as health and the environment. That is explicitly referenced. We have an explicit carveout for tobacco measures as a result of Australia taking advantage of a reservation in that area. There are a range of procedural benefits as well, including greater transparency in the application of arbitration and other procedural safeguards, that are built into this text. As a result of those improvements in the safeguards elements of the ISDS, we've taken the opportunity to update a few of our bilateral investor state dispute settlement provisions through our bilateral investment agreements. We've laid some of those to rest and said that we'll supersede those agreements with this new, improved ISDS mechanism with the safeguards that it includes.²⁷

24 <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Pages/tpp-11-myth-busters.aspx> (accessed 1 May 2018).

25 NIA, p. 12.

26 NIA, p. 12.

27 Mr Mina, DFAT, *Proof Committee Hansard*, 1 June 2018, p. 9.

4.24 DFAT explained that in article 9.16 of the Agreement, there is 'specific reference to our ability to legislate in pursuit of legitimate public policy objectives in health, environment and other areas'. With respect to the example of providing health warnings on alcohol containers, Mr George Mina said that there are 'substantial and procedural safeguards' under article 9.16 which will ensure that the Australian Government will be 'able to do what we want to do with respect to public policy on health, including alcohol control'.²⁸

4.25 DFAT further advised:

Annex 8-A to the TPP-11 does not prevent the Australian Government from regulating labelling requirements for wine and distilled spirits. The TPP-11 also incorporates specific safeguards that recognise Australia's right to adopt measures for legitimate public policy purposes, including the protection of public health. The TPP-11 provides for the establishment of a Committee on Technical Barriers to Trade (TBT), comprising representatives from TPP-11 Parties. This Committee can monitor the implementation of the commitments in the TBT Chapter, such as those in Annex 8-A, and provide a conduit for cooperation and technical discussions. Australia's ability to influence these discussions could be diminished if we are not in the first group of signatories to ratify the TPP-11.²⁹

4.26 In its submission, the MCA pointed out that the safeguards mean that the ISDS provisions cannot be used to challenge public policies in a range of areas and 'will also ensure that any claims under the TPP-11 ISDS provisions will be conducted in an open and transparent manner and will be subject to clear procedural rules and legal standards'.³⁰

4.27 Several submissions argued that the ISDS safeguards in the TPP-11 are insufficient.³¹ Public Services International argued that:

...assurances that safeguards exist within the TPP-11 allowing regulation in the interests of health and the environment lack merit. These same safeguards have not prevented companies commencing actions against democratically elected governments in these areas.³²

4.28 Public Services International also argued that 'assurances that Australia has ISDS provisions in multiple FTAs and has not faced a barrage of cases also lacks merit'.³³

28 Mr Mina, *Proof Committee Hansard*, 30 July 2018, p. 69.

29 DFAT, answer to question on notice, 20 August 2018 (received 10 September 2018), [pp. 1–2].

30 *Submission 37*, pp. 3, 24–25.

31 PHAA, *Submission 20*, pp. 6–7; Communist Party of Australia, *Submission 29*, p. 2; ACTU, *Submission 39*, p. 25.

32 Public Services International, *Submission 5*, p. 5.

33 Public Services International, *Submission 5*, p. 5.

4.29 Dr Patricia Randal, Convenor, AFTINET questioned the robustness of the ISDS safeguards:

As has been mentioned, the claimed general safeguards for ISDS in the TPP-11 have loopholes identified by legal experts. They won't prevent cases from being brought against Australia. The only cases which will be prevented from being brought will be on tobacco regulation, because that is the only total exemption in the agreement. I would argue that the fact that that total exemption was thought necessary by governments to actually exclude tobacco decisively shows that the other general safeguards are not going to be effective in preventing cases from being launched.³⁴

ISDS framework

4.30 Mr Paul Schofield, Director, Investment and Services Law Section, Trade and Investment Law branch, Office of Trade Negotiations, DFAT provided some detail to the committee about reform processes underway in relation to the ISDS framework which Australia is actively involved in:

The first one is UNCITRAL, which is the UN Commission on International Trade Law. They've set up a working group that's looking at procedural reform of ISDS...Obviously it's a UN body and a multilateral process. We're engaging with quite a few other countries in relation to that process, looking at things like developing a code of conduct for arbitrators to address some of the concerns regarding independence and impartiality. If you look at the TPP and the treaty, it actually provides for the parties to agree on a code of conduct...Separately we're also involved in ICSID, the International Centre for Settlement of Investment Disputes process.³⁵

4.31 Mr Schofield explained that the reforms considered through the ICSID process relate to technical, procedural rules, such as the number of days for lodging a submission. It was noted that some of those procedural changes would not require a change to the treaty text.³⁶ Furthermore, DFAT confirmed:

Should any discussions in UNICTRAL or ICSID lead to an amendment of an existing treaty or consideration of a new treaty, Australia's normal treaty making processes would be triggered. This would include consideration by the Australian Parliament through, for example, the Joint Standing Committee on Treaties.³⁷

Labour issues

4.32 Evidence to the inquiry highlighted concerns about how the TPP-11 may impact on Australian workers, including temporary entry of business persons and labour market testing.

34 *Proof Committee Hansard*, 30 July 2018, pp. 10–11. See AFTINET, *Submission 14*, pp. 13–15 for its more detailed comments about ISDS safeguards.

35 *Proof Committee Hansard*, 30 July 2018, pp. 70–71.

36 *Proof Committee Hansard*, 30 July 2018, pp. 70–71.

37 DFAT, answers to questions on notice, 30 July 2018 (received 20 August 2018), [pp. 12–13].

Temporary entry for business purposes

4.33 Chapter 12 of the TPP-11 deals with the temporary entry of business persons and includes exemptions from labour market testing. This chapter facilitates the entry and temporary stay of nationals and permanent residents to 'facilitate the pursuit of business or investment opportunities'.³⁸

4.34 As outlined in information published by DFAT, Australia's temporary entry commitments are 'limited to business persons from those TPP-11 countries that provide similar access for Australian business persons in equivalent categories'.³⁹

4.35 In accordance with the Agreement, Australia will provide temporary entry to workers from TPP-11 in five generic categories: intra-corporate transferees, contractual service suppliers, including professionals and technicians, investors and independent executives, installers and servicers of machinery and equipment, and short-term business visitors.

4.36 Australia's commitments for intra-corporate transferees, contractual service suppliers and independent executives will be implemented through the Temporary Skill Shortage (TSS) visa programme and installers and servicers and short-term business visitors will be implemented through the subclass 400 and 600 visas respectively.⁴⁰

4.37 The Australian Nursing and Midwifery Federation expressed concerns that the 'temporary labour provisions open the door to further exploitation of temporary migrant workers and are not subject to labour market testing to establish whether there are Australian workers available'.⁴¹

4.38 In its submission, the MCA noted there have been 'concerns about the impact on Australia's labour market of such movement of natural persons provisions in recent trade agreements' and the concern that waiving labour market testing requirements under Australia's temporary skilled migration program 'would lead to an influx of migrant workers at the expense of employment opportunities for Australian residents'.⁴² Drawing on data following the implementation of the China-Australia Free Trade Agreement (ChAFTA) and the Korea and Japan FTAs, the MCA noted there has not been an increase in the number of 457 visas granted to workers from these countries since the FTAs have been in effect.⁴³

38 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), Temporary entry of business persons*, 23 February 2018, p. 1.

39 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), Temporary entry of business persons*, 23 February 2018, p. 1.

40 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), Temporary entry of business persons*, 23 February 2018, p. 1.

41 *Submission 11*, p. 2.

42 *Submission 37*, p. 26.

43 *Submission 37*, pp. 27–29.

4.39 Some witnesses indicated that avoiding labour market testing can benefit employers by reducing the regulatory burden on businesses and allowing them to be more competitive.⁴⁴ For example, Australian Pork Limited suggested farmers could save four weeks by not undertaking labour market testing.⁴⁵

Labour market testing

4.40 DFAT indicated that 'the commitments that Australia made on the movement of natural persons including the waiving of labour market testing for certain categories are unchanged between TPP-11 and TPP-12'.⁴⁶ DFAT further explained:

As was the case with TPP-12, the TPP-11 commitments, including the labour market testing waivers, will apply to certain categories of service suppliers, including contractual service suppliers, for six TPP countries: Brunei, Canada, Malaysia, Mexico, Peru and Vietnam.⁴⁷

4.41 AMWU suggested that the expansion of the existing labour market testing exemptions (in existing FTAs with China, South Korea, Thailand, New Zealand and Singapore) will 'add more exploitable workers to the pool of 1.4 million people who currently possess temporary work visa rights in Australia'.⁴⁸

4.42 The Australian Council of Trade Unions (ACTU) pointed out that other TPP-11 countries such as New Zealand and Brunei have specified that an economic needs test could or will be applied to the entry of overseas workers into their respective countries. Further to this, it is noted that Peru has reserved the right to impose labour market testing if another country is doing so.⁴⁹

4.43 Mr Damian Kyloh, Associate Director for Economic and Social Policy, ACTU provided additional detail at the public hearing:

We're particularly concerned with the provisions on contractual service providers because this includes all 430-odd occupations under TSS visa system, previously the 457 visas. Australian and overseas companies will be able to employ unlimited numbers of workers from at least six TPP member countries in hundreds of occupations, across nursing, engineering and the trades, without any obligation to provide evidence of genuine efforts to recruit Australian workers. This includes occupations such as nurses, engineers, electricians, plumbers, carpenters, bricklayers, tilers, mechanics and chefs. These occupations will be open to bring in unlimited numbers of temporary migrant workers from Vietnam, Malaysia, Japan, Canada, Mexico and Chile. Unions cannot support an agreement that

44 Australian Meat Industry Council, answer to questions on notice, 30 July 2018 (received 17 August 2018), [p. 2].

45 Australian Pork Limited, answer to questions on notice, 30 July 2018 (received 13 August 2018), [p. 1].

46 Mr Justin Brown, Deputy Secretary, DFAT, *Estimates Hansard*, 1 March 2018, p. 166.

47 Mr Brown, DFAT, *Estimates Hansard*, 1 March 2018, p. 166.

48 *Submission 12*, p. 1.

49 *Submission 39*, p. 11.

removes this basic protection and support of Australian jobs and puts thousands of temporary overseas workers at risk of exploitation. As we've seen under ChAFTA, some workers have been paid as low as \$10 dollars an hour.⁵⁰

4.44 Several submissions expressed concern about the waiving of labour market testing. The New South Wales Retired Teachers' Association suggested that the TPP-11 will provide for more vulnerable temporary migrant workers, and AFTINET submitted that because these temporary workers 'are tied to one employer and face deportation if they lose the job means that these workers are vulnerable to exploitation'.⁵¹

4.45 The NIA notes that:

A Ministerial determination will need to be made under section 140GBA of the *Migration Act 1958* to exempt from labour market testing the intra-corporate transferees, independent executives and/or contractual service suppliers of those TPP-11 Parties to which Australia extended temporary entry commitments.⁵²

4.46 DFAT officials provided further detail about labour market testing at JSCOT hearings. It was noted that Australia will extend the commitment to waive labour market testing in the contractual service supplier category to six TPP-11 countries: Brunei, Canada, Malaysia, Mexico, Peru and Vietnam. DFAT emphasised that Australia has obtained 'very significant equivalent reciprocal commitments' from each of the six countries.⁵³

4.47 At Additional Estimates in March 2018, DFAT explained that Australia's commitments under the TPP-11 with respect to contractual service suppliers will be implemented through the skilled occupations list administered by the Department of Jobs and Small Business:

Contractual service suppliers can apply for a temporary work visa under any of the occupations that are on the list at the time of application. As I mentioned, this occupation list is regularly updated to reflect labour market conditions and requirements, feedback from stakeholders, employment trends and a number of other things...⁵⁴

4.48 DFAT explained that the skilled occupations list is updated and modified frequently and as at March 2018, there were more than 400 specific occupations listed. In order to meet Australia's commitments under this category, contractual service suppliers need to meet certain requirements:

50 *Proof Committee Hansard*, 30 July 2018, p. 4.

51 New South Wales Retired Teachers' Association, *Submission 7*, [p. 1]; AFTINET, *Submission 14*, p. 4.

52 NIA, p. 19; DFAT, *Submission 48*, p. 30.

53 Mr Mina, DFAT, *Proof Committee Hansard*, 25 June 2018, p. 15.

54 Mr Justin Brown, *Estimates Hansard*, 1 March 2018, p. 170.

They have to meet certain trade, technical and professional skills and expertise. They have to have the necessary qualifications, skills and work experience to meet our domestic standards. And, importantly, these individuals need to have a contract to supply a service in Australia...Contractual service suppliers can apply for a temporary work visa under any of the occupations that are on the list at the time of application.⁵⁵

4.49 It was also noted that Australia has made commitments in the TPP-11 for the inclusion of contractual service suppliers and the waiving of labour market testing, but the skilled occupations list administered by the Department of Jobs and Small Business is not bound in the TPP-11 and is not legally guaranteed.⁵⁶

4.50 In response to a question taken on notice from the JSCOT hearing on 7 May 2018, DFAT advised that Australian service providers operate in a variety of sectors in the six countries and 'are particularly prominent in the mining, infrastructure, energy, professional services, finance and healthcare sectors'.⁵⁷

4.51 On the issue of skills testing, Mr Justin Brown, Deputy Secretary, DFAT explained during an Estimates hearing:

There's nothing in this agreement which makes commitments on behalf of the Australian government in relation to our skills testing and various other certification procedures. The Australian government maintains complete policy flexibility to impose whatever visa conditions on temporary skilled personnel entering Australia for certain periods, including in relation to skills certification and licensing.⁵⁸

Intellectual Property

4.52 As outlined by DFAT, the Intellectual Property (IP) provisions in chapter 18 of the TPP-11 affirm and build on the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), covering: copyright, trademarks, geographical indications, patents, industrial designs, confidential information, plant variety protection, and civil, border and criminal enforcement. The TPP-11 also includes provisions covering pharmaceutical products, cybersquatting of domain names and trade secrets theft.⁵⁹

4.53 The IP chapter was an area of criticism in submissions received in the committee's 2017 inquiry and was also raised in submissions for the current inquiry.⁶⁰

55 Mr Brown, *Estimates Hansard*, 1 March 2018, p. 170.

56 Mr Brown, *Estimates Hansard*, 1 March 2018, p. 171.

57 DFAT, *Submission 65* (to JSCOT), p. 3.

58 *Estimates Hansard*, 1 March 2018, p. 116.

59 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) FAQs—Intellectual Property*, 23 February 2018, p. 1.

60 Senate Foreign Affairs, Defence and Trade Reference Committee, *Proposed Trans-Pacific Partnership (TPP) Agreement*, February 2017, pp. 23–24.

4.54 As outlined in chapter 2, a number of IP provisions from the original TPP were suspended, including provisions relating to pharmaceutical products (including biologics), copyright and patents.⁶¹ Although acknowledging the suspended provisions, several submissions remained concerned about these sections with a number noting that the provisions could be re-introduced (at any stage) unless they are removed.⁶²

4.55 In a response to a question taken on notice at a JSCOT hearing, DFAT confirmed that the TPP-11 will not require any changes to Australia's policy, legal and regulatory settings on IP:

None of the pharmaceutical provisions in either the original Trans-Pacific Partnership (TPP) or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) would require changes to Australia's intellectual property laws or policies, including on the Pharmaceutical Benefits Scheme. As such, neither Agreement would result in any increase in the cost of medicines to Australians.⁶³

Copyright

4.56 A number of the TPP-11 provisions relating to copyright have been suspended.⁶⁴ The NIA states that 'the Agreement does not require an increase in the term of copyright protection in Australia, nor any other changes to Australia's copyright regime'.⁶⁵

4.57 Open Source Industry Australia (OSIA) expressed concern about the IP chapter. Although some of the concerns raised by OSIA in relation to copyright have been temporarily addressed with the suspended provisions, OSIA remains concerned that the application of Article 18.80(2) may prohibit the government from continuing to use public domain software.⁶⁶ OSIA suggested that the possibly ambiguity is a 'drafting error rather than a deliberate intention to do so' but they remain concerned.⁶⁷

Medicines

4.58 A number of the suspensions relate to the IP rules for pharmaceuticals that were requested by the United States. In particular, the provision to extend the data protection monopolies on biologic medicines has been suspended.⁶⁸

61 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) FAQs—Intellectual Property*, 23 February 2018, p. 1.

62 See for example, Mr Peter Murphy, *Submission 21*, [p. 3]; PHAA, *Submission 20*, p. 5.

63 DFAT, *Submission 65* (to JSCOT), p. 20.

64 *Submission 44*, p. 4.

65 NIA, p. 15.

66 *Submission 47*, p. 11.

67 Mr Jack Burton, Director and Company Secretary, Open Source Industry Australia, *Proof Committee Hansard*, 30 July 2018, p. 43.

68 AFTINET, *Submission 14*, p. 29.

4.59 Noting that many of the provisions have been suspended, the PHAA emphasised that they still have concerns about the public health implications of the IP chapter.⁶⁹ One section that has not been suspended which is of particular concern to the PHAA is patent linkage. With reference to academic research, Dr Deborah Gleeson advised that:

A study that I did with colleagues a couple of years ago found that some of the countries are likely to need to make changes to their legislation to implement the patent linkage provision and only have short transition periods to do that. There's evidence to suggest that patent linkage in the United States has been a very successful strategy for the pharmaceutical industry to delay the introduction of generics. Patent linkage originated from the United States, and it's worth noting that the United States is the only country that seeks to introduce patent linkage through trade agreements. The United States, of course, is no longer party to the TPP, so it doesn't make sense for other countries to be agreeing to this provision in the TPP. The TPP also includes a number of enforcement provisions which haven't been studied closely in their final form but which could also have an effect on the developing countries.⁷⁰

4.60 Another area of concern for the PHAA is that the TPP 'also includes a number of enforcement provisions which haven't been studied closely in their final form but which could also have an effect on the developing countries'.⁷¹

4.61 In his submission, Mr Peter Murphy (with reference to material from AFTINET), noted that although some of the provisions of concern have been suspended, the IP chapter, 'still reinforces existing monopolies on medicines and restricts the ability of governments to change such regulation in future, for example to reduce monopolies on medicines'.⁷²

Environmental standards

4.62 Chapter 20 of the TPP-11 deals with the environment. In its Analysis of Regulatory Impact on Australia (ARIA), DFAT noted that the TPP-11 will address contemporary trade challenges including by:

...promoting high levels of environmental protection, including by liberalising trade in environmental goods and services, and ensuring TPP-11 Parties effectively enforce their domestic environmental laws. TPP-11 Parties must also take measures in relation to a number of important environmental challenges, such as protecting the ozone layer, protecting the marine environment from ship pollution, combatting illegal wildlife trade and combatting over-fishing and illegal fishing. In a breakthrough in the fight against overfishing, subsidies for fishing that negatively affect

69 *Submission 20*, pp. 8–12.

70 *Proof Committee Hansard*, 30 July 2018, p. 3.

71 *Proof Committee Hansard*, 30 July 2018, p. 3.

72 *Submission 21*, [p. 3].

overfished stocks and subsidies for vessels engaged in illegal fishing will be prohibited...⁷³

4.63 As with the committee's previous inquiry, submitters were concerned that the Environment chapter does not mention climate change or the United Nations Framework Convention on Climate Change (UNFCCC) and does not require TPP-11 countries to adhere to their UNFCCC commitments.⁷⁴

4.64 The PHAA also noted its concern about the 'potential use of the ISDS mechanism to limit or subvert government action to protect the natural and built environments', and detailed the range of government action from which corporations and companies have sought damages.⁷⁵

4.65 Friends of the Earth (FoE) submitted that the TPP-11 'will have detrimental effects on the ability of Australia to effectively protect its environment'.⁷⁶ FoE noted that the Environment chapter does not ensure a standard of commitment for the countries involved as each nation is allowed to establish its own level of domestic environmental protection. Furthermore, FoE explained that of the four multilateral environmental agreements (MEAs) included in the text, only one is enforceable—Trade in Endangered Species.⁷⁷

4.66 At the public hearing on 30 July, Ms Samantha Castro, Trades Spokesperson and Operations Coordinator, FoE stated:

It's inadequate. There are no obligations for countries to adhere to environmental protocols and compliance. In fact, they are unenforceable. They are wishful thinking. The environmental chapter neglects to ensure a standard of commitment from countries. Instead, it states that each nation can establish its own level of domestic environmental protection. At a time when we should be joining together to fight climate change, it seems these regional agreements are attempting to pull us apart.⁷⁸

4.67 In its submission, the City of Darebin (Darebin Council) also expressed concern about the Environment chapter:

The City of Darebin has two major concerns with this chapter. One, that the TPP-11 doesn't go far enough in urging international corporations to cut their emissions and two, that it opens the door for international corporations either operating in Darebin or planning to establish themselves her[e] to argue that they should be treated differently and not work with the rest of the community towards a zero emissions target. Either outcome is a poor

73 DFAT, *Analysis of Regulatory Impact on Australia*, p. 25.

74 PHAA, *Submission 20*, 13; Friends of the Earth, *Submission 15*, [p. 2]; Public Services International, *Submission 5*, p. 8.

75 PHAA, *Submission 20*, p. 12.

76 *Submission 15*, [p. 2].

77 *Submission 15*, [p. 3].

78 *Proof Committee Hansard*, 30 July 2018, pp. 44–45.

one not only for Darebin's but Australia's sustainability goals and public health.⁷⁹

Government procurement

4.68 The Government Procurement Chapter of TPP-11 seeks to ensure that governments do not discriminate against foreign suppliers when assessing tenders and awarding contracts. In accordance with the requirements of the TPP-11, governments cannot create specifications or procedures that create obstacles for foreign suppliers to compete for the contract and the contract must be awarded to the supplier offering the best value for money solely on the basis of the stated evaluation criteria.⁸⁰

4.69 The NIA provides some additional detail about procurement, explaining that TPP-11 will provide new opportunities for Australian businesses to bid for government procurement services contracts for a range of services, including accounting, auditing and taxation, management consulting, environmental protection, and health and social services. The NIA also notes that, for the first time, Australian METS (Mining, Equipment, Technology and Services) and oilfield service suppliers will be eligible to bid for government procurement opportunities with Mexico and Peru for services to their respective state-owned petroleum companies.⁸¹

4.70 As noted in the NIA, a legislative instrument under the *Public Governance Performance and Accountability Act 2013* (PGPA Act) will need to be made to replace the Commonwealth Procurement Rules (January 2018) (CPRs) to make the changes required to meet the Agreement's obligations.⁸²

4.71 In its submission, AFTINET expressed concerns with this process noting that the CPRs will be rewritten by the Department of Finance (Finance) and tabled in Parliament, but as they are not a disallowable instrument, they cannot be amended or voted against by the Parliament.⁸³

4.72 Finance officials confirmed that as the CPRs are issued under the PGPA Act, there will be 'some minor consequential amendments' required to the PGPA Act and these will be made via a non-disallowable instrument. Mr Nicholas Hunt, First Assistant Secretary, Finance noted that such an instrument is tabled periodically and is 'generally a relatively uncontroversial instrument'.⁸⁴

4.73 The committee inquired about whether the implementation of the TPP-11 would require any changes to the CPRs, in particular changes to paragraphs 10.31,

79 *Submission 61*, [p. 6].

80 Australian Government, *Trans-Pacific Partnership Agreement, Chapter Summary: Government Procurement*, 6 July 2018, p. 1.

81 NIA, pp. 10–11.

82 NIA, p. 19.

83 *Submission 14*, p. 27.

84 *Proof Committee Hansard*, 20 August 2018, p. 5.

10.32 and 10.10. Finance officials confirmed 'there is no impact from TPP-11' on these paragraphs.⁸⁵

85 Mr Hunt, *Proof Committee Hansard*, 20 August 2018, p. 4.

Chapter 5

Committee conclusions and recommendations

Introduction

5.1 The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) is an important multi-lateral free trade agreement (FTA) which is expected to deliver benefits to the 11 participating countries. The Department of Foreign Affairs and Trade (DFAT) has described the TPP-11 as 'one of the most ambitious global trade deals concluded since 1994'.¹

5.2 The implementation of the TPP-11 is expected to see an increase in trade opportunities for Australian businesses with the elimination of 98 per cent of tariffs. A number of sectors identified particular benefits for their industry including agriculture, resources and mining. The TPP-11 will provide preferential access for a range of Australian exports into existing and new markets.

5.3 While the committee accepts the importance and potential value of this multi-lateral agreement, this inquiry has highlighted some areas of concern. As the vast majority of the text of the TPP-11 remains unchanged from the original Trans-Pacific Partnership (TPP), the committee was not surprised to receive evidence highlighting many of the same issues raised during its inquiry into the original TPP, including: the availability of independent economic modelling, concerns about the Investor-State Dispute Settlement (ISDS) provisions and the risks to Australia's sovereignty and ability to legislate in key areas, concerns about the labour chapter with particular reference to mobility and labour market testing, and concerns about the consultation process during the treaty negotiation.

5.4 This inquiry has provided another opportunity for stakeholders and the broader community to voice its concerns with the TPP-11. In this context, the committee has made a number of recommendations. The committee notes the Joint Standing Committee on Treaties (JSCOT) has made five recommendations in its report on the TPP-11 tabled on 22 August 2018 where it has again recommended that consideration be given to independent modelling and analysis being undertaken and provided alongside the National Interest Analysis (NIA).

Reform to the treaty making process

5.5 Much of the evidence received for this inquiry highlighted concerns about the treaty making process. Many of these concerns applied not just to the process undertaken to negotiate the TPP-11, but to the treaty making processes more broadly. The committee is familiar with these matters following its 2015 inquiry report *Blind Agreement: reforming Australia's treaty-making process*, its previous inquiry into the original Trans-Pacific Partnership (TPP-12) as well as the parliamentary inquiries undertaken by JSCOT.

1 National Interest Analysis, p. 5.

5.6 In this committee's inquiry into the TPP-12, the committee welcomed and supported the recommendations of the 2016 JSCOT majority report on the TPP-12 which related to broader treaty making processes. In addition, the JSCOT concluded that 'with growing isolationist sentiment internationally, the Australian Government needs to focus on how it engages with the public on free trade agreements if it wishes to maintain support for these agreements'.

5.7 Despite the recommendations made during previous parliamentary inquiries, evidence to this inquiry indicates there is still a high level of ongoing concern on these matters. The committee is of the view that further work is still required to facilitate consultation and participation in the treaty making process as well as increasing transparency. These issues are discussed in more detail below.

Increased transparency

5.8 Evidence emphasised that organisations and the general public are seeking more information to be made publicly available during the treaty negotiation process. Several submissions and witnesses expressed the view that negotiations had been conducted in secret, with details only being published once the treaty negotiations were finalised.

5.9 The committee is cognisant of the range of issues that must be taken into account when negotiating trade agreements including ensuring appropriate safeguards to ensure that draft treaty text is kept confidential. The committee notes evidence from DFAT explaining that parliamentarians were invited to view the text upon signing a confidentiality letter. The committee views this as a positive initiative and one which could be extended to other stakeholders provided that appropriate safeguards were in place to maintain confidentiality.

5.10 It was clear to the committee that organisations and the community are seeking additional opportunities to participate. The committee agrees there is a need to increase the openness and transparency of the trade negotiation process. As noted during the inquiry, consulting with a range of stakeholders early in the process may assist the Australian Government in its negotiations as they can highlight issues and suggest possible remedies early in the process.

Consultation

5.11 The committee received evidence describing different perspectives on DFAT's consultation process. While some witnesses from industry were positive about their level of engagement with DAFT, witnesses from unions and civil society groups noted that information was difficult to obtain and that requests for meetings with departmental officials were not accepted.

5.12 The committee notes evidence from DFAT where they described the extensive consultation process undertaken for TPP-11 (and TPP-12) as unprecedented and detailed the range of stakeholders consulted. It is difficult for the committee to determine exactly what factors are contributing to the range of views from witnesses about the consultation experience.

Recommendation 1

5.13 The committee recommends that the Department of Foreign Affairs and Trade conduct an evaluation of the consultation mechanisms used by the department.

5.14 The committee notes that this committee and the JSCOT have both previously made recommendations suggesting changes to the consultation undertaken during treaty negotiations. While the committee notes that DFAT has undertaken consultation and engaged with a range of stakeholders during the negotiation stages for the TPP-11, the committee is concerned about the range of individuals and organisations who have identified that they have not been engaged in the process. In light of this, the committee is of the view that further consideration should be given to making changes to the treaty consultation process.

Recommendation 2

5.15 The committee recommends that the Australian Government: provide public updates on each round of trade negotiations; release draft texts during negotiations where feasible and with appropriate safeguards; and table the text of proposed agreements in Parliament before they are signed.

5.16 As highlighted in previous reports, the committee is aware of the treaty making processes undertaken in other countries. The model used in the United States was again raised in the current inquiry as a model which allows some flexibility for identified stakeholders to participate in the consultation process and view draft treaty text on a confidential basis. Given the high level of interest from stakeholders and the potential benefits that can be gained from early identification of issues, the committee is of the view that alternate models for consultation should be explored. Furthermore, the committee notes the proposal from the Australian Chamber of Commerce and Industry for an Australian Trade Centre.

Recommendation 3

5.17 The committee recommends the creation by legislation of an Accredited Trade Advisors program where industry, union and civil society groups would provide real time feedback on draft trade agreements during negotiations.

Recommendation 4

5.18 The committee recommends that the Department of Foreign Affairs and Trade review the stakeholder consultation mechanisms used internationally and assess their appropriateness for an Australian context and provide recommendations to government.

Modelling and review of free trade agreements

Independent modelling

5.19 Several submissions and witnesses expressed concern that the TPP-11 has not been subjected to independent economic modelling to assess the impact of the TPP-11 in an Australian context. The objectivity of the NIA was questioned given that this analysis was produced by DFAT, the lead department conducting the treaty

negotiations. It was acknowledged that several international economic studies have been undertaken but that none of these have assessed the impact of the TPP-11 in an Australian context.

5.20 The committee restates its support of the 2016 recommendation of the JSCOT that to increase transparency of the benefits and costs there should be an independent assessment of free trade agreements before the agreements are signed to provide an accurate picture of the impact on jobs and the economy. The committee notes with interest that JSCOT's *Report 181* on the TPP-11, tabled on 22 August 2018, again includes a recommendation that the Australian Government 'consider implementing a process through which independent modelling and analysis of a proposed trade agreement is undertaken by the Productivity Commission, or equivalent organisation, and provided to the Committee alongside the National Interest Assessment (NIA) to improve assessment of the agreement'. It continues to be the view of the committee that the Productivity Commission is best placed to undertake such an assessment.

Recommendation 5

5.21 The committee recommends that before new free trade agreements are signed, the Australian Government commission the Productivity Commission to undertake independent economic modelling and that this modelling be released publicly.

5.22 On a related matter, the committee received evidence suggesting that the TPP-11 should be assessed for its impact on a range of issues, with particular reference to assessing the health and gender impacts of such agreements. It is the view of the committee that undertaking assessments in these specific areas may be beneficial and that these matters could be considered as part of any economic modelling taken on free trade agreements.

Review of existing FTAs

5.23 Some witnesses referred to the 2010 research report published by the Productivity Commission: *Bilateral and Regional Trade Agreements*. This report examined the effects of bilateral and regional trade agreements on a range of matters, including trade and investment barriers, prospects for multilateral reform, regional integration and Australia's economy generally.

5.24 Given that almost a decade has passed since the Productivity Commission conducted its research for the *Bilateral and Regional Trade Agreements* report, and Australia has signed a number of new agreements since that time, the committee agrees it may be beneficial for a follow up review to be undertaken. The committee suggests that consideration be given to expand this review to assess impacts on health, gender and the environment.

Recommendation 6

5.25 The committee recommends that the Australian Government make a reference to the Productivity Commission to conduct a review of Australia's bilateral and regional trade agreements.

Investor-State Dispute Settlement

5.26 As with the committee's inquiry into the TPP-12, the committee received much evidence expressing concerns about ISDS provisions. Many contributors to the inquiry shared the view that ISDS provisions grant legal rights to global corporations that are unavailable to domestic investors and these provisions may affect the Australian Government's ability to legislate in a range of areas because of the threat of legal action.

5.27 Evidence from DFAT emphasised the inclusion of safeguards in the Agreement which will protect the Australian Government from ISDS cases and will ensure that Australia can continue to develop legislation and deliver services in a range of areas without being concerned about being the subject of ISDS cases.

5.28 The committee notes that several witnesses and submissions were not reassured by the current safeguards and continued to have concerns about the ISDS process with particular reference to the regulatory framework and the institutions that facilitate and adjudicate the ISDS process. It was noted that an international conversation is underway about this framework which has included discussions about possible reforms to the key ISDS processes and institutions that may be required.

5.29 On this matter, the committee notes advice from DFAT that Australia is actively involved in the two processes currently looking into possible reforms to the ISDS; one involving the UN Commission on International Trade Law (UNCITRAL) and the other with the International Centre for Settlement of Investment Disputes (ICSID). It was noted that changes of a technical or procedural nature would be unlikely to require a change to the treaty text, however any reform that would require a change to treaty text would require additional consideration by JSCOT.

5.30 Given the current international conversation about ISDS and the actions taken by some countries to no longer include ISDS provisions in their FTAs, the committee is of the view that Australia must continue to take an active role in discussions about reforming the ISDS processes or institutions. As these discussions continue, it will be important that DFAT provide regular public updates and advise the implications for Australia's existing FTAs and any that are under development.

Recommendation 7

5.31 The committee recommends the Australian Government remove ISDS provisions from existing free trade agreements and legislate so that a future Australian government cannot sign an agreement with such provisions.

5.32 The committee recognises that ISDS clauses are in place in existing trade and investment arrangements and that there has been limited ISDS cases taken against Australia to date. Although Australia was ultimately successful in the tobacco plain packaging case, this case was resource intensive, time consuming and potentially damaging to Australian public health and sovereignty. Despite the successful outcome, this does demonstrate the potential impact on Australia, particularly from a sovereignty perspective, should ISDS clauses be invoked. The potential financial impact on the Australian Government is also significant.

5.33 Due to the high level of community concern with ISDS clauses and the potential impact should a case be brought against Australia, the committee is of the view that careful consideration should be given to whether ISDS clauses should be included in future trade agreements. The committee was encouraged to hear evidence from DFAT that the inclusion of ISDS provisions in trade agreements is considered on a case by case basis.

Labour market testing

5.34 Under the TPP-11, Australia will extend the commitment to waive labour market testing in the contractual service supplier category to six TPP-11 countries: Brunei, Canada, Malaysia, Mexico, Peru and Vietnam. Australia has obtained equivalent reciprocal commitments from each of the six countries which DFAT has suggested will result in benefits both for Australian businesses and Australians seeking employment overseas. DFAT emphasised that under the TPP-11, Australia has made commitments to waive labour market testing but there will be sufficient flexibility in the operationalising of this commitment due to the fact that the skilled occupations list administered by the Department of Jobs and Small Business is not bound in the TPP-11.

5.35 Despite the reassurances from DFAT, evidence to the inquiry indicated that concerns remain about the negative impact the commitment to waive labour market testing may have on Australian workers. There was a sense that under the Agreement, Australian workers would be disproportionately affected. Concern was also raised about the high number of professions that could currently be covered by the term 'contractual service supplier'.

Recommendation 8

5.36 The committee recommends that the Department of Foreign Affairs and Trade include the provision of further information on labour market testing in its outreach strategy and seminars.

Recommendation 9

5.37 The committee recommends that the Australian Government reinstates labour market testing for contractual service suppliers where it has been waived and legislate so that a future Australian Government cannot waive labour market testing for contractual service suppliers in new agreements.

Implementing the Agreement

5.38 As stated in the Analysis of Regulatory Impact on Australia (ARIA), once the TPP-11 enters into force, it is intended that DFAT and Austrade will implement an outreach strategy which will include information sessions held throughout Australia. The committee notes that, separate to the TPP-11 process, DFAT and Austrade are already hosting information sessions in states and territories to provide information to businesses about FTAs broadly and the potential opportunities for their business.

5.39 Given the level of community interest in the TPP-11 and the range of sectors that may have an interest in its implementation, it is important that DFAT and Austrade build on the existing information sessions to provide targeted information

about specific matters related to the implementation of the TPP-11. In order for Australian businesses to take advantage of the opportunities that the Agreement is intended to deliver, it is vital that the outreach strategy and a program of TPP-11 information sessions are developed and published in a timely fashion.

5.40 Furthermore, in order to assist a range of stakeholders, it is important that the sessions are promoted widely, held in a variety of locations and targeted to a range of affected sectors. It would be beneficial if information was made available in a range of formats including webinars for people in remote areas. Businesses may also find it useful if a summary of outcomes from information sessions was published on the DFAT website.

Recommendation 10

5.41 The committee recommends that the Department of Foreign Affairs and Trade develop and publish an outreach strategy which includes a schedule of information sessions in a wide variety of locations and considers the most appropriate mechanism for publishing key outcomes from the information sessions on the Department's website.

5.42 In addition to the DFAT and Austrade information sessions, evidence to the inquiry emphasised the value of an education program to ensure that businesses are aware of the opportunities that may be available to them under FTAs. In particular, it was noted that small and medium enterprises (SMEs) may benefit from a targeted training program to assist them to navigate the potential opportunities. It was suggested that such a training program could be developed by government in partnership with the private sector and delivered online.

5.43 The committee supports initiatives that will assist Australian businesses to understand and take advantage of opportunities from the TPP-11 and encourages DFAT and Austrade to develop a range of programs to assist business. In light of the concerns raised with the committee about labour market testing, it is particularly important that the education program provides up to date advice to businesses on those issues.

Recommendation 11

5.44 The committee recommends that the Department of Foreign Affairs and Trade and Austrade consider options, including possible partnerships with the private sector, for providing additional information about the TPP-11 to businesses.

TPP-11 Commission

5.45 The committee notes that a TPP-11 Commission will be established under the Agreement which will be responsible for the operation of the Agreement. As outlined in the ARIA, this Commission will review the operation of the TPP-11 three years after entry into force and at least every five years thereafter.

5.46 The committee is aware that this Commission will comprise representatives from each of the TPP-11 parties at the level of Ministers or senior officials and its purpose is to oversee the implementation of the Agreement and to review its operation

as actions under the Agreement are rolled out. The Commission will consider ways to further enhance trade and investment between the Parties and supervise the work of all committees and working groups established under the Agreement. The Commission is required to meet within one year of the TPP-11 commencing and thereafter as the TPP-11 parties decide.

5.47 As already discussed, evidence to the inquiry highlighted the potential value of ongoing review and evaluation of the TPP-11 as this can provide insight into the implementation of the TPP-11. The work undertaken by the TPP-11 Commission to review the operation of the Agreement could be a valuable contribution to the broader discussion about the implementation and the committee encourages DFAT to consider ways to provide regular updates about the work of the Commission.

Recommendation 12

5.48 The committee recommends that the Department of Foreign Affairs provide regular public updates about matters discussed at the TPP-11 Commission.

Suspended provisions

5.49 The committee notes that 22 provisions included in the original TPP-12 have been suspended for the TPP-11 and these provisions can only be reinstated with the agreement of all TPP-11 parties. Evidence to the committee highlighted that although the suspension of the provisions was welcomed, concern remains about the implications should they be reinstated. The committee notes the reassurance from DFAT to the JSCOT committee that should all TPP-11 parties agree to reinstate the suspended clauses, that would trigger a treaty review process to be undertaken by JSCOT. In effect, the suspended clauses would not be reinstated until they had been considered in further detail by the JSCOT.

5.50 The committee recognises the importance of ongoing parliamentary oversight and scrutiny of free trade agreements and the need to ensure that stakeholders are kept informed throughout the committee inquiry process. In the event that TPP-11 parties do agree to reinstate the suspended provisions, it is important that the Government consider the issues raised through the parliamentary inquiry process about the suspended provisions.

5.51 In this context, the committee supports the recommendation from JSCOT's report into the TPP-11 that in the event that the TPP-11 parties agree to reinstate the suspended provisions, the reinstatement be treated as an amendment to the treaty and be subject to an inquiry by the JSCOT.

Other inquiries

5.52 The committee has conducted this inquiry at the same time as the JSCOT has conducted its inquiry into the TPP-11. Concurrent inquiries were also conducted when the committees inquired into the original Trans-Pacific Partnership.

5.53 In this context, the committee is concerned that in conducting this inquiry it has largely replicated the work of the JSCOT which is established to look into such agreements. Two different committees looking into the same agreement was also

confusing for submitters and witnesses. To the committee this does not appear to be the best use of limited committee resources.

5.54 The committee understands that the resolution of appointment establishing the JSCOT does not include provision for participating membership. The committee notes that the Joint Committee on Electoral Matters has resolved to include participating members for inquiries and that this should also be considered for the JSCOT. Allowing participating members on such committees would enable the Parliament to perform vital review functions while alleviating the need to duplicate inquiries.

Recommendation 13

5.55 The committee recommends that the Joint Standing Committee on Treaties consider a resolution to enable participating membership for inquiries and, if agreed, put the necessary changes to both chambers.

Recommendation 14

5.56 The committee recommends the Australian Government provide the Government's Statement of Objectives for Negotiation to the Joint Standing Committee on Treaties for consideration and feedback; and to provide the Joint Standing Committee on Treaties with a briefing at the end of each round of negotiations.

Senator Alex Gallacher

Chair

Dissenting Report from Coalition Senators

Introduction

Coalition Senators welcome the Federal Government's strong commitment to creating more jobs through free trade agreements. Since 2013, trade agreements with China, Japan and Korea have been delivered, while negotiations have been completed for agreements with Peru and Indonesia. As a result, Australia's exports increased to \$401 billion in 2017-18, up from \$307 billion in 2012-13.¹ In 2017-18 Australia had a trade surplus of \$6.4 billion (compared to a deficit of around \$20 billion in 2012-13).

Free trade is vital to the economic success of both Australia as a whole and to individual Australian workers and households with trade contributing one quarter of Australia's economic growth over the past five years and one in five jobs being trade related.

The TPP-11 Agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam is a ground-breaking agreement by dramatically expanding market access for Australian farmers, producers, services firms and exporters. Indeed, modelling undertaken by economists from Brandeis International Business School and Johns Hopkins University shows Australia is forecast to see \$15.6 billion in net annual benefits to national income by 2030 as a result of this Agreement.²

This kind of expansion in our nation's income will mean more jobs, higher wages and greater investment right around Australia and help to build a stronger more diverse economy.

Coalition Senators strongly support the urgent passage of this agreement.

Background

A Trans-Pacific Partnership has long been envisaged with initial talks commencing in 2008 with the United States agreeing to enter into discussions around the potential liberalisation of trade. By 2016, these initial and early discussions had turned into a much larger bi-lateral agreement that was signed on 4 February 2016 by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States.

Despite this earlier agreement, during the 2016 Presidential election campaign both the then Republican nominee Donald J. Trump and the Democratic nominee Hillary Clinton³ indicated that if they were successful they would withdraw from the TPP. On

1 International Trade in Goods and Services, Australia, Australian Bureau of Statistics.

2 *Australia will gain from Asia-Pacific Trade Integration Modelling Report* produced by Peter A. Petri and Michael G Plummer.

3 <https://www.detroitnews.com/story/opinion/2016/09/23/clinton-will-regret-withdrawing-support-tpp/90989824/>

23 January 2017, President Trump signed a Presidential Memorandum to withdraw from the TPP.⁴

Despite these statements, then Prime Minister, the Hon. Malcolm Turnbull MP, worked with Japanese President Shinzo Abe to secure a continuation of the deal without the United States. Coalition Senators firmly agree with Mr Turnbull's assessment⁵ that this shows how the Federal Government was fully prepared to stand up and fight for Australian jobs.

Despite Mr Shorten's earlier declaration⁶ that the TPP was not worth pursuing following the decision from President Trump to withdraw from the TPP, we nonetheless note the Labor Party's announced support⁷ for the TPP-11 agreement and the passage of legislation through the Parliament.

On reaching agreement on the Australian-led TPP-11, it was noted that it will eliminate more than 98 per cent of tariffs in a trade zone with a combined GDP of \$13.8 trillion.⁸ For Australia that means new trade agreements with Canada and Mexico and greater market access to Japan, Chile, Singapore, Malaysia, Vietnam and Brunei.

It is also noted that Britain has reportedly indicated an openness to join the TPP-11 following its withdrawal from the European Union.⁹ Coalition Senators strongly welcome the possibility of a post-Brexit Britain joining the TPP-11 noting that this would effectively achieve the aspirations of many for a CANZUK (Canada, Australia, New Zealand and United Kingdom) trade deal.

The TPP-11 Agreement

Coalition Senators accept the evidence that has been presented by the Department of Foreign Affairs and Trade that this agreement will significantly increase market access for our exporters of goods and services and deliver gains across the board.

Modelling undertaken by economists from Brandeis International Business School and Johns Hopkins University shows Australia is forecast to see \$15.6 billion in net annual benefits to national income by 2030 and increases in exports of \$29.9 billion.¹⁰ The analysis also forecasts significant boosts to investment by 2030, with investment into Australia projected to increase \$7.8 billion and additional overseas investment by

4 <http://www.abc.net.au/news/2017-01-24/trump-withdraws-from-tpp/8206356>

5 <https://www.malcolmturnbull.com.au/media/press-conference-with-the-minister-for-finance-senator-the-hon-mathias-corm>

6 <https://www.sbs.com.au/news/tpp-dead-in-the-water-shorten>

7 <https://www.theaustralian.com.au/national-affairs/foreign-affairs/bill-shorten-warns-labor-left-on-trade-deal-dissent/news-story/543804ac3b447dcc4e6933e2562e318c>

8 <https://www.theaustralian.com.au/national-affairs/foreign-affairs/137-trillion-tpp-pact-to-deliver-boost-in-gdp/news-story/a245fdd6b2f42192e49139acdfd129d>

9 <https://www.ft.com/content/73943036-efa9-11e7-b220-857e26d1aca4>

10 Ibid

Australian businesses increasing by \$26 billion. This directly translates into jobs for Australians, in particular, for regional areas.

This modelling reinforces the benefits identified in earlier modelling by the respected Peterson Institute for International Economics that found that the TPP-11 would boost Australia's national income by 0.5% and boost exports by 4%.

This means that this agreement will further enhance the trade surplus, create jobs, support families and build a stronger and more diversified economy.

Specifically, this agreement will provide:

- better access for farm exporters, including beef and sheep meat producers, dairy producers, cane growers and sugar millers, as well as cereal and grains exporters, rice growers, cotton and wool growers, horticultural producers and wine exporters;
- the elimination of all remaining tariffs on Australian raw wool exports to TPP-11 countries from entry into force of the Agreement;
- the elimination of tariffs on sheep meat, cotton, seafood, horticulture, wine and manufactured goods;
- guaranteed levels of access for services and improved regulatory regimes for investment, notably in mining and resources, telecommunications and financial services;
- improved access to markets where Australia already has FTAs, such as Japan (for example, building on our existing bilateral FTA, accelerated reductions in Japan's tariffs on beef and elimination of a range of Japan's cheese tariffs); and
- the creation of Australia's first free trade agreement with Canada and Mexico – which gives Australian exporters preferential access to two of the world's top 20 economies for the first time, including new high-quality goods and services market access commitments by Canada and Mexico for our exporters.

Additionally, the TPP-11 will enhance the level of transparency and predictability for Australian services exporters across the board, reducing the regulatory risks these enterprises confront internationally, for example:

- Recent reforms in the professional services sector in TPP-11 countries, for example in legal, architectural, engineering and surveying services, will be legally guaranteed and enforceable; and
- mining equipment services and technologies and oilfield service providers will benefit from energy sector reforms in Mexico and Vietnam, and new rules on large State-Owned Enterprises, which will help Australian providers compete on an equal footing.

This agreement will be the first regional trade agreement to contain a dedicated SME chapter, which encourages small and medium-sized enterprise participation in government procurement in TPP countries. The agreement also creates common and

transparent trade and investment rules among TPP-11 parties, making it easier for smaller companies to navigate the region. This will be of particular benefit to small businesses around Australia.

This agreement has been strongly supported by numerous stakeholders that have noted the important benefits across the economy. For example, the National Farmers Federation said:

TPP-11 is a regional free trade agreement of unprecedented scope and ambition. It has great potential to drive job creating growth across the Australian economy. TPP-11 promises far greater access to some of the world's largest and fastest growing markets, including three G20 nations. The agreement opens new opportunities in these markets, over and above Australia's existing bilateral trade arrangements.¹¹

And, importantly:

New opportunities for our farmers, manufacturers and exporters underpin job creation and economic growth right across our economy. The NFF considers that there is no doubt [emphasis added] TPP-11 will improve trading conditions for Australia's farm sector.¹²

The Export Council of Australia similarly notes benefits to the Australian economy:

The ECA strongly supports the TPP-11 because it is a very beneficial agreement for Australia. It opens up new markets for Australian businesses and gives better access to existing free trade agreement (FTA) partner markets. It facilitates business across TPP-11 parties by making it easier to move goods and people, and manage services, data and investment. It gives Australia a major role in driving the next generation of trade rules.

By contrast, there are costs to not ratifying the TPP-11. The choice Parliament faces is not whether or not the TPP-11 should go ahead, it is whether the Agreement should include Australia or not. If it goes ahead without Australia, Australia's competitors would gain advantages from the Agreement and Australia would be worse off as a result. With a history of bipartisan support, not ratifying the TPP-11 would also damage Australia's reputation and its credibility as a negotiating partner.¹³

Coalition Senators found these submissions highly persuasive.

11 *Submission 40*, p. 1.

12 *Submission 40*, p. 1. Emphasis added.

13 *Submission 50*, p. 1.

Skills Testing and Labour Market Testing

A number of submissions to the Committee raised concerns about skills testing and experience requirements, some of which are relied upon in the Committee report. Coalition Senators were unconvinced by the submissions made to this effect.

The TPP-11 does not change the skills and experience requirements that need to be met by electricians or any other foreign workers applying for a temporary skilled visa to work in Australia.¹⁴ That means workers from TPP-11 signatory countries (including electrical workers) remain subject to, and must satisfy, any skills assessment required by the visa process (which, for electricians and other trades, is administered by Trades Recognition Australia).

All of Australia's trade agreements with provisions on the temporary movement of professionals also include waivers of labour market testing.

It is important to note that similar concerns have been made in relation to previous Free Trade Agreements negotiated by both Liberal and Labor Governments that have not resulted in the feared influx of workers from those countries. Indeed, following the negotiation of the Korea, Japan and China Free Trade Agreements, there has been a 10% reduction in the number of 457 visas granted.

Investor-State Dispute Settlement

It is noted that some submissions to the Committee have restated their organisation's long-standing opposition to Investor-State Dispute (ISDS) Resolution provisions being included in Free Trade Agreements. Coalition Senators see the value of ISDS mechanisms to provide protections to Australian investors overseas whilst safeguarding the Australian Government's ability to regulate in the public interest and pursue legitimate public welfare objectives.

Contrary to the claims often made by unions, ISDS mechanisms do not in any way protect an investor from a mere loss of profits following a change in government policy nor do they prevent Australia or any other sovereign nation from making decisions in their public interest.

It is noted that ISDS mechanisms have been included in many Australian Free Trade Agreements, including those negotiated under both Liberal and Labor Governments.

Economic Modelling

Despite the extensive publicly available economic modelling, Coalition Senators note that a number of submissions raised concern that there wasn't even further modelling conducted. It is clear that no amount of evidence will convince some submitters who refuse to accept the lived experience of previously highly successful agreements.

14 Department of Foreign Affairs and Trade (DFAT) *Submission 48*.

It is noted that the former Minister for Foreign Affairs provided the National Interest Analysis, which includes the foreseeable economic effects of the treaty action and any direct financial costs to Australia, as well as a Regulatory Impact Statement.

That said, Coalition Senators remain open minded about the prospect of an economic review of the benefits to the Australian economy of the free trade agreements with China, Korea and Japan. Successful as they have been, any review to help ensure future agreements can be even more successful is encouraged.

Ratification

Coalition Senators firmly agree with the submissions made by both the National Farmers Federation and the Export Council of Australia that Australia should be one of the first six nations to ratify the agreement, preferably by the end of 2018.

Submissions

It is noted that the City of Darebin and Yarra City Councils have troubled themselves with making submissions to the Committee.

Coalition Senators are concerned that the rate-payers of Darebin and Yarra are unwittingly funding local councils which instead of focusing on their business of roads, rates and rubbish are spending their time and money on trying to change national and international policy, matters well beyond their expertise.

Further, Coalition Senators are astounded by the undeserved weight given to the unqualified left-wing activist group GetUp submissions in the Labor Majority's report particularly given the hyper-partisan nature of the group.

Coalition Senators observe that the confected concerns raised by GetUp both in their written submission and in their evidence to the Committee mirror the concerns raised in the Communist Party of Australia's submission to the Committee.

Recommendations

Coalition Senators are pleased to recommend – that:

1. The Trans Pacific Partnership Agreement be fully embraced by the Parliament noting the benefits to job opportunities for Australians, the economy, as well as to individual workers and families;
2. The *Customs Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Bill 2018* and the *Customs Tariff Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Bill 2018* be passed as a matter of urgency;
3. The Australian Government fully support the addition of the United Kingdom to the TPP should they wish to join;

4. The Hon. Malcolm Turnbull be congratulated on his personal stewardship of the TPP and ensuring that an agreement could be reached between the 11 nations; and
5. The City of Darebin and the Yarra City Councils refocus their use of ratepayer resources to their core business of roads, rates and rubbish instead of dabbling in areas where they have neither experience nor mandate.

Eric Abetz

Deputy Chair

Liberal Senator for Tasmania

James McGrath

LNP Senator for Queensland

Additional Comments by Senator Rex Patrick

TTP-11, even less beneficial than TTP-12

but with all the same faults

The Work of the Committee

1.1 I thank the committee for the work it has done in relation to this inquiry. I also thank the secretariat for their behind the scenes efforts.

1.2 I support the general findings in this report and the recommendations that flow from them, but they do not go far enough.

Economic Benefit

1.3 During the 2017 Senate inquiry into the TPP-12 Agreement, the National Interest Analysis (NIA) pointed out that *modelling by the World Bank 'suggests that Australia is set to benefit from the TPP-12 through GDP growth of around 0.7 per cent by 2030'. It also notes that 'similar findings were made in modelling by the Peterson Institute for International Economics and the Research Institute of Economy Trade and Industry, which found increases of 0.6 per cent and 1.9 per cent respectively to Australia's GDP, over similar time periods'*.¹

1.4 For TTP-11, a modelling study conducted by Professor Peter Petri of Brandeis University and Michael Plummer of Johns Hopkins University modelling shows that GDP will only improve by or 0.5 per cent of GDP.

1.5 It is keenly apparent that the economic benefits of the TPP-11 have deteriorated even from the questionable levels of TPP-12. To further illustrate the downside of it, it must be appreciated that the Productivity Commission² has found that predictions for growth and jobs from free trade agreements have rarely been delivered, because the economic models employed exaggerate the benefits, ignore many of the costs and assume away unemployment benefits.

1.6 There is questionable benefit in the TPP-11, but clear downsides. Signing up to this deal without removing the downsides makes little sense.

Lack of Transparency

1.7 I agree with the lack of negotiation transparency discussed at length in this report. A neat summary of the situation is found in Professor Clinton Fernandes new book, *Island Off the Coast of Australia*, where he states:

...small number of DFAT officials and their counterparts overseas, along with a few hundred corporate lawyers and lobbyists, negotiate free trade agreements in secret.

¹ Senate Report into the TPP-12 Agreement, 07 February 2017.

² Productivity Commissioners Trade and Assurances Review 2014-15.

Once the insiders have agreed to the terms, they are presented to the Parliament in a “take it or leave it” deal.”

1.8 ‘Take it or leave it’ will remain a strategy of the bureaucracy until such time as the Parliament rejects this approach by Government.

Recommendation 1

Noting Ministers seem unwilling to challenge the trade orthodoxies within the Foreign Affairs and Trade bureaucracy, the Parliament must draw a line in the sand before any change will occur. The Parliament must reject the enabling legislation and state a clear objection to the closed manner in which these treaties are negotiated.

ISDS Provisions

1.9 Investor-state dispute settlement (ISDS) provisions in the TPP-11 (as is the case for other free trade agreements) allow foreign corporations to sue the Australian Government if they believe they have been affected by changes in public policy. The sole aim of the provisions is to protect foreign investment, shifting sovereign risk from the investor to the taxpayer.

1.10 ISDS provisions are also discriminatory in that they grant a right to foreign companies that is not available to local companies. They are also an attack on Australian legal sovereignty.

1.11 In 2012 the High Court determined that legislation relating to plain packaging of tobacco products was constitutional. That did not deter Philip Morris from shifting some assets to Hong Kong, claiming to be a Hong Kong company, and using the ISDS provisions in an obscure 'Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments' to try to usurp the High Court's decision.

1.12 The case was heard by a tribunal of investment lawyers meeting in Singapore. Thankfully, Australia won the case on jurisdictional grounds, but only after 4 years and \$39 million in legal costs to the Australian taxpayer.

1.13 In 2014, Chief Justice French laid out his views on ISDS provisions when he said:

*The possible inclusion of an ISDS provision in the TPP has become an issue of intense debate with some critics seeing it as a Trojan horse for the enhancement of the power of international corporations at the expense of national sovereignty and interests.*³

1.14 ISDS provisions must go before the Parliament passes the TPP-11 enabling legislation.

Recommendation 2

ISDS is a discriminatory regime that seeks to transfer sovereign risk from foreign corporations to the Australian taxpayer. ISDS provisions are also an attack on our legal sovereignty. The Parliament must reject the enabling

³ Investor State Dispute Settlement – A Cut Above the Courts, Chief Justice RS French AC, 9 July 2014, Darwin.

legislation and state a clear objection to ISDS provisions being in any future trade agreements.

Labour Market Testing

1.15 While concerns of underemployment and low wages are at an all-time high in Australia, the TPP-11 in its current format would see labour market testing waived for ‘contractual service suppliers’ for six signatory countries. This would mean workers from Canada, Peru, Brunei, Mexico, Malaysia and Vietnam would be able to fill jobs in Australia without these jobs being offered to Australians first.

1.16 Under the current arrangement, more than 450 professions could currently be covered by the term ‘contractual service supplier’ - this includes electricians, plumbers, carpenters and nurses – yet no other country has provided Australia with these generous reciprocal visa rights and it remains unknown why these concessions were given by this Government. It must be stated that foreign workers play a role in contributing to the Australian economy, but it is fundamental that Australians are offered employment first, with foreign workers only being brought into the country only once there is a proven need for these workers. Australia’s temporary migration system is designed to supplement the skills of Australians, not replace the ability of Australians to get jobs. Under the TPP-11, the integrity of the temporary migration system would be severely compromised.

Recommendation 3

The waiving of labour market testing is an unnecessary assault on Australian workers and is therefore an unacceptable proposition. The Parliament must reject the enabling legislation and state a clear objection to the waiving of labour market testing in any future trade agreements.

Rex Patrick

Senator for South Australia

Appendix 1

Submissions

- 1 Mr Daniel Frydrych
- 2 Vintage Reds of the Canberra Region
- 3 Mr Duncan Marshall
- 4 Dr Deborah Gleeson
- 5 Public Services International
- 6 GrainGrowers Limited
- 7 N.S.W. Retired Teachers' Association
- 8 Dr Luke Nottage
- 9 Mr Tom Marwick
- 10 Ms Linda Link
- 11 Australian Nursing and Midwifery Federation
- 12 Australian Manufacturing Workers' Union (AMWU)
- 13 Mr Harry Creamer
- 14 Australian Fair Trade and Investment Network (AFTINET)
- 14.1 Supplementary to submission 14
- 15 Friends of the Earth Australia
- 16 Australian Sugar Industry Alliance (ASA)
- 17 CANEGROWERS
- 18 Foundation for Alcohol Research and Education
- 19 Australian Council of Wool Exporters and Processors
- 20 Public Health Association of Australia
- 21 Mr Peter Murphy
- 22 Mr Peter Sainsbury

- 23 Catholics in Coalition for Justice and Peace
- 24 Ms Carolyn Allen
- 25 Mr Sam Altman
- 26 Mr Joseph Castley
- 27 Federation of Australian Wool Organisations Inc
- 28 Winemakers' Federation of Australia
- 29 Communist Party of Australia
- 30 Mr Victor von der Heyde
- 31 Professor Joo-Cheong Tham and Professor K D Ewing
- 32 Professor Joo-Cheong Tham
- 33 Dr Kyla Tienhaara
- 34 Wine Australia
- 35 Business Council of Australia
- 36 Australian red meat and livestock industry
- 37 Minerals Council of Australia
- 37.1 Supplementary to submission 37
- 38 Australia Japan Business Co-operation Committee
- 39 Australian Council of Trade Unions (ACTU)
- 40 National Farmers' Federation
- 41 Northern Territory Government
- 42 Mr Richard Rolls
- 43 Asialink Business
- 44 Dr Matthew Rimmer
- 45 Community and Public Sector Union (CPSU)
- 46 ActionAid Australia
- 46.1 Supplementary to submission 46.1

- 47 Open Source Industry Australia Ltd
- 48 Department of Foreign Affairs and Trade
- 49 Emeritus Professor William Plain
- 50 Export Council of Australia
- 51 Australian Pork Limited
- 52 Humane Society International
- 53 Australian Chamber of Commerce and Industry
- 54 Ms Anna George
- 55 Tyswan Slater
- 56 Dr Elizabeth Thurbon
- 57 Ms Helen Ducker
- 58 Name Withheld
- 59 Australian Dental Industry Association
- 60 GetUp
- 61 City of Darebin
- 62 Yarra City Council
- 63 Australian Small Business and Family Enterprise Ombudsman

Appendix 2

Tabled documents and Answers to questions on notice

Tabled Documents

- 1 Newspaper article tabled by Dr Patricia Randal, AFTINET at a public hearing in Melbourne on 30 July 2018.
- 2 'Japan: Beef Import Tariffs' tabled on behalf of the Australian red meat and livestock industry at a public hearing in Melbourne on 30 July 2018.
- 3 Media releases tabled by Mr Jack Burton, Open Source Industry Australia at a public hearing in Melbourne on 30 July 2018.
- 4 Response to JSCOT question on notice, 'Australian companies using ISDS provisions', tabled by Minerals Council of Australia at a public hearing in Melbourne on 30 July 2018.
- 5 Opening statement tabled by Mr George Mina, Department of Foreign Affairs and Trade at a public hearing in Melbourne on 30 July 2018.

Answers to questions on notice

- 1 Australian Chamber of Commerce and Industry, Answer to question taken on notice at 30 July 2018 hearing in Melbourne, received 2 August 2018.
- 2 Australian Pork Limited, Answer to question taken on notice at 30 July 2018 hearing in Melbourne, received 13 August 2018.
- 3 Australian Manufacturing Workers' Union, Answer to question taken on notice at 30 July 2018 hearing in Melbourne, received 14 August 2018.
- 4 Public Services International, Answer to question taken on notice at 30 July 2018 hearing in Melbourne, received 16 August 2018.
- 5 Minerals Council of Australia, Answers to questions taken on notice at 30 July 2018 hearing in Melbourne, received 16 August 2018.
- 6 DFAT, Answers to questions taken on notice at 30 July 2018 hearing in Melbourne, received 20 August 2018.
- 7 Public Health Association of Australia, Answer to question taken on notice at 30 July 2018 hearing in Melbourne, received 17 August 2018.
- 8 Australian Meat Industry Council, Answer to question taken on notice at 30 July 2018 hearing in Melbourne, received 17 August 2018.

- 9 AFTINET, Answer to question taken on notice at 30 July 2018 hearing in Melbourne, received 17 August 2018.
- 10 Friends of the Earth Australia, Answer to question taken on notice at 30 July 2018 hearing in Melbourne, received 17 August 2018.
- 11 DFAT, Answers to questions taken on notice at 20 August 2018 hearing in Canberra, received 10 September 2018.
- 12 ActionAid Australia, Answer to question taken on notice at 30 July 2018 hearing in Melbourne, received 11 September 2018.

Appendix 3

Public hearings and witnesses

Monday 30 July 2018 Melbourne Victoria

Public Health Association of Australia

Dr Deborah Gleeson, Deputy Convener, Political Economy of Health Special Interest Group

Australian Fair Trade & Investment Network (AFTINET)

Dr Patricia Ranald, Convener

Public Services International

Mr Michael Whaites, Sub-regional Secretary

ActionAid Australia

Ms Michelle Higelin, Executive Director

Australian Pork Limited

Ms Deb Kerr, General Manager Policy

Mr Andrew Robertson, Manager Trade and Workforce

Australian red meat and livestock industry

Mr Lachie Hart, Director Red Meat Advisory Council

Mr Andrew McCallum, Global Manager—Trade and Market Access, Meat and Livestock Australia

Ms Mary Johnson, Assistant Manager—Trade and Market Access, Meat and Livestock Australia

Australian Sugar Industry Alliance

Mr Warren Marles, Head—Economics, CANEGROWERS

Mr David Rynne, Director, Economics and Trade, Australian Sugar Milling Council

GrainGrowers Limited

Mr Luke Mathews, Trade and Economics Manager

Australian Council of Trade Unions

Mr Damian Kylah, Associate Director of Economic and Social Policy

Ms Andrea Maksimovic, Associate Director of International and Civil Society

Australian Manufacturing Workers' Union

Mr Warren Tegg, National Policy Officer

Open Source Industry Australia Ltd

Mr Jack Burton, Company Secretary

Friends of the Earth Australia

Ms Samantha Castro, Operations Coordinator

Australian Chamber of Commerce and Industry

Mr Bryan Clark, Director, Trade and International Affairs

Minerals Council of Australia

Ms Tania Constable, Chief Executive Officer

Mr Mark Davis, Director, Trade and Investment

Mr Daniel Boettcher, Assistant Director, Industry and Trade Policy

Department of Foreign Affairs and Trade

Mr George Mina, First Assistant Secretary, Office of Trade Negotiations

Mr Paul Schofield, Director, Investment and Services Law Section, Office of Trade Negotiations

Ms Juliana Nam, Director, Investment Policy and TPP Section

Department of Home Affairs

Mr Michael Willard, Assistant Secretary

Monday 20 August 2018 Canberra Australian Capital Territory**Department of Foreign Affairs and Trade**

Mr George Mina, First Assistant Secretary, Office of Trade Negotiations

Mr Dominic Trindade, Assistant Secretary, Services Investment and Intellectual Property Branch

Mr David Brightling, Director, Investment Policy and TPP Section, Office of Trade Negotiations

Mr Paul Schofield, Director, Investment and Services Law Section, Office of Trade Negotiations

Ms Kim Debenham, Director, Services and Digital Trade Section, Office of Trade Negotiations

Department of Home Affairs

Mr Michael Willard, Assistant Secretary

Department of Finance

Mr Nicholas Hunt, First Assistant Secretary, Procurement and Insurance Division

Mr Andrew Bourne, Assistant Secretary, Procurement Policy Branch, Commercial and Government Services

Department of Communication and the Arts

Mr Hari Sundaresan, Senior Policy Officer

Ms Kirsti Haipola, Director

Department of Jobs and Small Business

Ms Jane Press, Director Migration and Trade Policy, Migration Policy Branch

Department of Health

Dr Megan Keaney, Medical Advisor, Technology Assessment and Access Division