

The Senate

Foreign Affairs, Defence and Trade
References Committee

Proposed Trans-Pacific Partnership (TPP)
Agreement

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Abbreviations

ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFTINET	Australian Fair Trade and Investment Network
ASEAN	Association of Southeast Asian Nations
AUSFTA	Australia-United States Free Trade Agreement
BCA	Business Council of Australia
CFMEU	Construction, Forestry, Mining and Energy Union
ChAFTA	China-Australia Free Trade Agreement
DFAT	Department of Foreign Affairs and Trade
ETU	Electrical Trades Union
FTA	Free trade agreement
GDP	Gross domestic product
IP	Intellectual property
ISDS	Investor-state dispute settlement
JAIPA	Japan-Australia Economic Partnership Agreement
JSCOT	Joint Standing Committee on Treaties
KAFTA	Korea-Australia Free Trade Agreement
NIA	National Interest Analysis
PHAA	Public Health Association of Australia
PJCHR	Parliamentary Joint Committee on Human Rights
RCEP	Regional Comprehensive Economic Partnership
RIA	Analysis of Regulatory Impact on Australia
TPP	Trans-Pacific Partnership Agreement

UN	United Nations
US	United States of America
WTO	World Trade Organisation

Recommendations

Recommendation 1

5.9 The committee recommends that the Australian Government should defer undertaking binding treaty action until the future of the Trans-Pacific Partnership Agreement is clarified through further negotiations with Australia's major trading partners.

Recommendation 2

5.15 The committee recommends that the Australian Government expedite widely supported reforms to the treaty-making process in order to assist the completion of future trade agreements.

Chapter 1

Introduction

Referral of inquiry

1.1 On 15 September 2016, the Senate referred an inquiry into the Trans-Pacific Partnership (TPP) Agreement to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 7 February 2017.¹ The terms of reference for this inquiry are as follows:

The proposed Trans-Pacific Partnership (TPP) Agreement, with particular reference to the impact of the agreement on:

- 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. Australia's social, cultural and environmental policies;
- e. the effect of Investor-State Dispute Settlement;
- f. rights for copyright holders;
- g. rights for consumers; and
- h. any other related matters.

Conduct of the inquiry

1.2 The committee advertised the inquiry on its website and wrote to individuals and organisations likely to have an interest in the inquiry and invited them to make written submissions. The committee received 100 submissions to the inquiry. A large number of short pieces of correspondence and form letters were also received opposing ratification of the TPP. These included over 165 emails from persons associated with the Australian Fair Trade and Investment Network (AFTINET), over 2,400 emails from GetUp! supporters and over 4,300 emails from the SumOfUs online community.

1.3 Due to the likelihood the TPP will not enter into force, following the withdrawal of the United States of America (United States), the committee has made the decision not to hold a public hearing and to complete the inquiry 'on-the-papers'.

Structure of report

1.4 The report contains five chapters. Chapter 2 will provide a brief background to the TPP and recent events. Chapter 3 will summarise some of the key issues raised by submitters in relation to the terms of reference of the inquiry. Chapter 4 will cover

1 *Journals of the Senate*, 15 September 2016, p. 227.

discussion of Australia's trade agreements and the treaty-making process. Finally, Chapter 5 contains the committee's view and recommendations.

Acknowledgements

1.5 The committee thanks all those who contributed to the inquiry by making submissions, providing additional information or expressing their views through short correspondence and emails. The committee also acknowledges those who offered their time to attend a public hearing and give evidence.

Chapter 2

Background

Introduction

- 2.1 This chapter will provide a brief background to the TPP including:
- the negotiation and agreement of the TPP;
 - a summary of the TPP's chapters;
 - the inquiry by the Joint Standing Committee on Treaties (JSCOT); and
 - other recent events.

Negotiation and agreement

2.2 The TPP is a regional trade agreement between the governments of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

2.3 Negotiations for the TPP were commenced in 2008 and concluded on 5 October 2015. The TPP text was then subject to a process of legal review, translation and verification. The legally-verified English-language version of the TPP text was released on 26 January 2016. On 4 February 2016, the TPP was formally signed in Auckland by representatives of participating countries, including the then Minister for Trade and Investment, the Hon Andrew Robb AO.¹

2.4 The Ministers' statement released following the signing of the TPP included:

After more than five years of intensive negotiations, we have come to an agreement that will support jobs, drive sustainable growth, foster inclusive development, and promote innovation across the Asia-Pacific region. Most importantly, the agreement achieves the goal we set forth of an ambitious, comprehensive, high standard and balanced agreement that will benefit our nation's citizens.

TPP brings higher standards to nearly 40 percent of the global economy. In addition to liberalizing trade and investment between us, the agreement addresses the challenges our stakeholders face in the 21st century, while taking into account the diversity of our levels of development. We expect this historic agreement to promote economic growth, support higher-paying jobs; enhance innovation, productivity and competitiveness; raise living standards; reduce poverty in our countries; and to promote transparency, good governance, and strong labor and environmental protections.²

1 Department of Foreign Affairs and Trade (DFAT), 'Background Document: Implementation Timeline – Trans-Pacific Partnership Agreement', 9 February 2016, p. 1, available at: <http://dfat.gov.au/trade/agreements/tpp/> (accessed 16 January 2017).

2 'Minister's statement' available at <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/ministers-statement.aspx> (accessed 16 January 2017).

Trans-Pacific Partnership Agreement

2.5 The text of the TPP comprises 30 Chapters, with associated Annexes and schedules, and four separate Annexes (including Schedules of Commitments for all TPP parties). The National Interest Analysis (NIA) contains an overview of the chapters of the TPP. This has been extracted below.

2.6 The TPP is a broad and comprehensive agreement that will liberalise and facilitate trade and investment between all TPP Parties. Upon entry into force, or over time, each Party is required to eliminate or reduce specified tariffs and non-tariff barriers or restrictive policies on imports of goods from the other Parties.

2.7 The elimination and reduction of tariffs on goods (Chapter 2) that meet the agreed Rules of Origin criteria (Chapter 3) is in accordance with each Party's Schedule of tariff commitments, and with Tariff Rate Quotas specified. Article 2.4.3 (Elimination of Customs Duties) affords any one or more of the Parties with the ability to request consultations with a view to accelerating tariff elimination as set out in their respective Schedules. Under Chapters 10 and 11 of the TPP, Parties will also be required to eliminate barriers or restrictive policies on foreign services and service suppliers.

2.8 Under the Investment (Chapter 9), Cross-Border Trade in Services (Chapter 10) and Financial Services (Chapter 11) chapters, each Party is required to grant market access and non-discriminatory treatment (known as national treatment and most favoured nation (MFN) treatment) to investments and services from the other Parties. In Australia's case, national and MFN treatment will apply unless otherwise specified in the non-conforming measures annexes to the TPP (Annexes I and II). In the Investment Chapter, each Party is also required not to expropriate or nationalise a covered investment unless in certain circumstances; and to treat a foreign investor or investment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2.9 The TPP also contains the Parties' commitments and disciplines on:

- (a) Textiles and Apparel (Chapter 4);
- (b) Customs Administration and Trade Facilitation (Chapter 5);
- (c) Trade Remedies (Chapter 6);
- (d) Sanitary and Phytosanitary Measures (Chapter 7);
- (e) Technical Barriers to Trade (Chapter 8);
- (f) Temporary Entry of Business Persons (Chapter 12);
- (g) Telecommunications (Chapter 13);
- (h) Electronic Commerce (Chapter 14);
- (i) Government Procurement (Chapter 15);
- (j) Competition Policy (Chapter 16);
- (k) State-Owned Enterprises and Designated Monopolies (Chapter 17);

-
- (l) Intellectual Property (Chapter 18);
 - (m) Labour (Chapter 19);
 - (n) Environment (Chapter 20);
 - (o) Cooperation and Capacity Building (Chapter 21);
 - (p) Competitiveness and Business Facilitation (Chapter 22);
 - (q) Development (Chapter 23);
 - (r) Small and Medium-Sized Enterprises (Chapter 24);
 - (s) Regulatory Coherence (Chapter 25);
 - (t) Transparency and Anti-corruption (Chapter 26); and
 - (u) Administrative and Institutional Provisions (Chapter 27).

2.10 Chapter 28 (Dispute Settlement) of the TPP contains a binding State-to-State dispute settlement mechanism modelled on previous FTAs and the WTO system. Most substantive obligations under the TPP will be subject to this mechanism, except those in the chapters on Competition Policy, Cooperation and Capacity Building, Competitiveness and Business Facilitation, Development, Small and Medium-Sized Enterprises, and Regulatory Coherence, and Annex 26-A (Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices) to the Transparency and Anti-Corruption Chapter. There is also an ISDS Mechanism.

2.11 Chapter 29 (Exceptions and General Provisions) is consistent with the approach taken in other FTAs in setting out several WTO-style general and security exceptions which apply to a number of chapters of the TPP. Such exceptions ensure FTA obligations do not unreasonably restrict government action in key policy areas, including action to protect essential security interests, the environment and health.

2.12 Chapter 30 (Final Provisions) provides for matters such as entry into force, amendments, accession, withdrawal and the Depository of the TPP. In particular, Article 30.5.1 (Entry into Force) provides that the TPP will enter into force 60 days after the date on which all original signatories have notified the Depository in writing of the completion of their applicable legal procedures. If not all original signatories have completed their applicable legal procedures within a period of two years, the TPP will enter into force, if at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product (GDP) of the original signatories in 2013, have notified the Depository in writing of the completion of their applicable procedures within this period.

2.13 A number of side letters entered into with TPP participating countries mean that entry into force of the TPP will alter a number of Australia's existing treaties or treaty obligations. Seventeen of these side letters are of treaty status and are legally binding between the parties. An example is the agreement between Australia and the US suspending provisions in the Australia-United States Free Trade Agreement (AUSFTA) providing tariff rate quotas for beef and dairy and agricultural safeguards, and confirming that the applicable tariff rate quotas are those set out in the TPP. A further ten are of less-than-treaty status. These include a memorandum of

understanding with Vietnam to provide technical assistance regarding distance and blended education, and for a pilot program under which Australian universities will deliver online education into Vietnam.³

Joint Standing Committee on Treaties inquiry

2.14 The TPP was tabled in Parliament on 9 February 2016 and referred to the Joint Standing Committee on Treaties (JSCOT). Following the federal election, the TPP was re-referred to JSCOT at the beginning of the 45th Parliament.

2.15 JSCOT tabled its report on the TPP on 30 November 2016. The majority report made six recommendations including that 'binding treaty action be taken' in relation to the TPP. In particular, the committee noted its concern that 'Australia's long-term commitment to free trade, from which Australia benefits immensely, is currently at risk from a resurgence of nationalism and isolationism internationally'.⁴ Additional comments from Opposition members of JSCOT highlighted a number of 'process and substance concerns' regarding ratifying the TPP. These included:

- the need for independent economic analysis of treaties;
- the weakening of labour market testing and skills assessments; and
- the inclusion of ISDS provisions.

2.16 A dissenting report by the Australian Greens also outlined several concerns with the TPP and recommended 'no measures are taken towards Australia's acceptance or ratification of the TPP'.⁵

Recent events

2.17 On 8 November 2016, Mr Donald Trump was elected as the 45th President of the United States. Prior to his election, President Trump had indicated his administration would withdraw the United States from the TPP as part of several 'actions to protect American workers'.⁶ On 23 January 2017, President Trump signed an executive order withdrawing the United States from the TPP.⁷

2.18 Due to the structure of the entry into force provisions in the TPP, it is unlikely the TPP will enter into force without ratification by the United States. However, the Australian Government has continued to express hope that the TPP will enter into force. On 22 November 2016, the Trade Minister, the Hon Steven Ciobo MP,

3 *Submission 83*, 'National Interest Analysis' (NIA), pp 14-15.

4 JSCOT, *Trans-Pacific Partnership Agreement*, Report 165, November 2016, p. 101.

5 JSCOT, *Trans-Pacific Partnership Agreement*, Report 165, November 2016, p. 139.

6 Donald Trump, 'Donald J Trump Contract with the American voter', available at https://assets.donaldjtrump.com/CONTRACT_FOR_THE_VOTER.pdf (accessed 12 January 2017).

7 Conor Duffy, 'Donald Trump signs executive order withdrawing US from Trans-Pacific Partnership', ABC News, 24 January 2017.

indicated that the Australian Government would 'press ahead with our domestic processes' for ratification of the TPP'. Minister Ciobo stated:

The agreement as it currently stands allows 24 months for countries to ratify. We need the United States to ratify in order for the agreement to come into effect....[W]e need to give the US time. And ultimately as well, obviously the other member countries that agreed to the TPP will continue discussions, will continue discussions around what shape it should take going forward. And we have the option, as I said, of looking to drive the TPP forward without the United States, if that's what came to pass.⁸

2.19 On 14 January 2017, the Prime Minister, the Hon Malcolm Turnbull MP, indicated that Australia and Japan would coordinate toward the early entry into force of the TPP and the prompt conclusion of the RCEP [Regional Comprehensive Economic Partnership].⁹ On 22 January 2017, Minister Ciobo issued a media release on the TPP which noted that while President Trump's decision not to ratify the TPP at this time was disappointing it was 'not unexpected'. The Minister stated that ratification was the strongest message Australia could send on the importance of the TPP. However, he also outlined that other options were being pursued:

This week at the World Economic Forum I met with Japan, Canada, Mexico, Singapore, New Zealand and Malaysia to discuss alternatives. The shape this takes will be the subject of discussion over coming months. A number of options are available to us and there is a strong desire to ensure the benefits of the TPP are not lost.¹⁰

2.20 On 26 January 2017, Prime Minister Turnbull indicated the Australian Government's decision on the legislation to ratify the TPP will depend on discussions with other TPP members and the position of the Senate.¹¹

8 The Hon Steven Ciobo MP, Minister for Trade, Tourism and Investment, *Transcript*, 22 November 2016.

9 'Malcolm Turnbull, Shinzo Abe agree to push for TPP despite Trump scepticism' ABC News,

10 The Hon Steven Ciobo MP, Minister for Trade, Tourism and Investment, 'Trans-Pacific Partnership', *Media Release*, 22 January 2017.

11 AAP, 'Turnbull remains committed to TPP', *Sky News*, 27 January 2017 available at <http://www.skynews.com.au/news/politics/federal/2017/01/27/turnbull-remains-committed-to-ttp.html> (accessed 27 January 2017).

Chapter 3

Key issues

Introduction

3.1 This chapter will outline evidence received in relation to key issues in the terms of reference of the inquiry. These include the impact of the TPP on:

- the economy and trade;
- labour issues;
- investment;
- social, cultural and environmental policies;
- the investor-state dispute settlement provisions;
- copyright and other intellectual property; and
- consumer rights.

Economy and trade

Outcomes

3.2 The economic and trade outcomes of the TPP for Australia are highlighted in the TPP's National Interest Analysis (NIA) which states that '[i]ncreased and more efficient trade and investment in the region will benefit the Australian economy':

Improved market access for Australian goods and services exports and lower import prices will increase capital accumulation, raise productivities and improve utilisation of resources...The TPP market access outcomes build on existing access Australia has with its FTA partners of Japan, the US, Chile, New Zealand, Malaysia, Singapore, Brunei and Vietnam. The TPP also creates valuable new market access opportunities for Australian exporters in the three TPP countries where Australia does not have a FTA, namely Canada, Mexico and Peru...¹

3.3 A number of Australian business and industry organisations emphasised the benefits for their sectors that were likely to accrue from the TPP coming into force.² Areas where the TPP's outcomes improved on existing trade agreements or established arrangements with countries with which Australia did not have an FTA were often highlighted. For example, Wine Australia noted that, assuming political obstacles to ratification are overcome, 'the TPP promises significant benefits for Australian wine exporters'. It was particularly excited by the opportunities in Mexico 'where an imported wine market of 61 million litres will be opened up for Australia through the

1 NIA, p. 4.

2 For example, Grain Growers, *Submission 45*, p. 2, Australian Sugar Industry Alliance, *Submission 13*, p. 1-2; Meat and Livestock Australia, *Submission 30*, p. 2; Minerals Council, *Submission 35*, p. 2.

removal of the 20 per cent tariff, thus levelling the playing field with wines from Chile and the USA'. While it acknowledged that there were also defensive interests for the Australian domestic wine market, it observed that Australia already has FTAs eliminating tariffs with other major wine producing countries participating in the TPP.³

3.4 Others industry groups, while generally supportive of the TPP, had a more balanced view of the outcomes achieved. For example, AUSVEG observed that the Australian vegetable industry's export potential is primarily covered by other FTAs which are already in effect. It stated:

While the benefits delivered to our industry by the TPP in isolation are relatively few at this time, the continued work being performed to enhance Australia's relationships with key trading partners supports Australian growers' expansion of their export capabilities, and we look forward to future export development into the future.⁴

3.5 Significant impediments to market access for Australian exporters which were not addressed in the TPP were also identified. For example, Australian Pork noted:

Other pork-exporting TPP members will share the market access wins available to Australian exporters under the agreement. [Australian Pork] would welcome this competition if it were to be conducted on a level playing field. Unfortunately, a number of TPP members, most notoriously Canada, provide large, trade-distorting subsidies to their domestic industry, undermining the ability of Australian producers to compete in third markets.⁵

Rules of Origin

3.6 The TPP includes a number of commitments intended 'to lower the cost of doing business' between TPP countries.⁶ The Business Council of Australia (BCA) observed that 70 per cent of Australia's exports flow to TPP countries:

Global supply chains underpin the global economy. Reducing barriers and costs across the global value chain will improve the ability of businesses to trade internationally. Businesses face a range of regulatory barriers that slow down processing and delivery. The TPP addresses these through a range of commitments to ensure that over 40 per cent of the global economy is operating under consistent, harmonised rules.⁷

3.7 In particular, the BCA made the point that the TPP will improve the conduct of trade by simplifying regulations and procedures. It considered that a key reason for the low-utilisation of Australia's existing FTAs was the overlapping and sometimes

3 *Submission 1*, p. 2.

4 *Submission 18*, p. 4.

5 *Submission 49*, p. 2.

6 NIA, p. 9.

7 *Submission 9*, p. 2.

confusing Rules of Origin. Rules of Origin are the criteria used to determine whether goods will qualify for preferential treatment under trade agreements (that is, whether a good originates within the territory of a party to trade agreement, such as the TPP).⁸ The TPP will establish a set of regional Rules of Origin and a single set of documentary procedures for products traded under the TPP.⁹ The BCA stated:

These arrangements will support the development of regional supply chains by encouraging global multinationals to establish operations within TPP countries. This will permit inputs used in the production of a good from one TPP country to be treated as the same as inputs from any other TPP country when producing the good...These arrangements will also allow businesses to save on administrative costs and allow them to trade under the one set of rules, rather than under existing multiple bilateral FTAs.¹⁰

3.8 Blackmores also considered this was an important development. It noted that as it entered new export markets, it faced increasingly complex administrative arrangements through multiple Rules of Origin and multiple documentation requirements. It stated that the TPP would set 'a new standard for the harmonisation of administrative processes for international business'.¹¹

3.9 However, the Australian Chamber of Commerce and Investment raised significant concerns regarding the calculated benefits of the Rules of Origin in the TPP. It argued that '[c]reating novel and divergent regulatory requirements for exporters and producers increases red tape' and that the TPP could introduce 'yet another set of rules and compliance for Australian importers and exporters'.¹² It recommended that the Australian Government instruct its negotiators to ensure that new regional agreements 'harmonise the existing practices of the preceding bilateral agreements and Australia ASEAN, New Zealand Free Trade Agreement (ANZFTA), and also embrace the WTO Trade Facilitation Agreement and the provisions of the Revised Kyoto Convention of Simplification and Harmonisation of Customs Procedures – including Annex K – Rules of origin'.¹³

Services sector

3.10 The Australian services sector was perceived as gaining additional opportunities under the TPP. The NIA emphasises that the beneficiaries of the TPP include 'Australian service suppliers across a range of sectors including: education, financial, mining-related, professional, telecommunications and transport and logistics services'. ITS Global highlighted the importance of the TPP's coverage of the services sector, noting that in 'developed economies, 70-90 percent of growth is generated by

8 NIA, p. 16.

9 NIA, p. 10.

10 *Submission 9*, p. 4.

11 *Submission 86*, p. 2.

12 *Submission 16*, p. 25.

13 *Submission 16*, p. 5.

services industries'.¹⁴ ANZ also argued the TPP will provide many opportunities for Australian businesses, particularly in the services sector, at a time when diversification is important to the Australian economy:

Australia already has a relatively open economy in terms of tariffs on goods. Around half the expected gains from the agreement will be from liberalisation of services and investment. This is a boon for Australia's growing services sector; services now represent more than 70 per cent of Australia's GDP and comprise 54 per cent of Australia's total exports.¹⁵

3.11 Similarly, Universities Australia believed the TPP would 'facilitate greater education engagement and expand Australia's education services across the region and into Latin America, further strengthening a vital pillar of the Australian economy, whilst delivering considerable non-economic benefits through research collaboration and public diplomacy'. It was particularly pleased by the Australia–Vietnam Memorandum of Understanding which would 'support a pilot program enabling Australian universities to provide online education to Vietnamese students'.¹⁶

Economic modelling

3.12 The NIA states that modelling by the World Bank 'suggests that Australia is set to benefit from the TPP 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'.¹⁷

3.13 However, the overall economic benefits of the TPP for the Australia economy were questioned. For example, Dr Anis Chowdhury characterised the Peterson Institute studies of the benefits of the TPP as making 'heroic assumptions about growth, mainly by attributing relatively large, but very dubious growth gains from 'non-trade measures''. She noted that the World Bank acknowledges that 'estimating the impact of deep and comprehensive trade agreements is still very much a work in progress' and the TPP's 'ultimate implications, however, remain unclear'.¹⁸

3.14 AFTINET and a number of other submitters highlighted that there has been no independent economic modelling of the specific impacts of the TPP on the Australian economy as a whole measured by GDP.¹⁹ Similarly, the CFMEU considered that 'the overall economic benefits of the TPP have been found to be marginal and no rigorous independent assessment has been undertaken as to the likely costs to the Australian economy'. It noted that:

14 *Submission 7*, p. 1.

15 *Submission 33*, p. 1.

16 *Submission 81*, p. 1.

17 NIA, p. 4.

18 *Submission 21*, p. 2.

19 *Submission 39*, p. 26.

The United States Department of Agriculture released a report that found that even under the most favourable assumptions the TPP would result in zero change in GDP for Australia. Other analysis has all found benefits of less than 1 percent of GDP over a decade or more.²⁰

3.15 AFTINET pointed out that any benefits from the TPP for Australia need to be balanced against 'the loss to government revenue...resulting from tariff reductions'.²¹ If the TPP entered into force in early 2017, the estimated loss of tariff revenue for Australia would be approximately \$25 million in 2016-2017 and \$135 million over the forward estimates period.²²

Labour issues

3.16 Chapter 19 of the TPP deals with Labour issues. The NIA described the TPP as addressing contemporary trade challenges, in part, through 'the recognition and emphasis by TPP parties on the importance of internationally recognised labour rights'. It states:

Each Party is required to adopt and maintain in its legislation and practices the rights contained in the International Labour Organization Declaration, such as elimination of forced labour, abolition of child labour, freedom of association and the right to collective bargaining. The TPP will also enhance cooperation and consultation on labour issues, and effective enforcement of labour laws in TPP Parties.²³

3.17 However, a number of specific criticisms were made of this aspect of the TPP. AFTINET described the inclusion of a chapter on labour rights as welcome but suggested 'the DFAT description paints a rosier picture than is revealed by the details in the text'. It noted:

Labour law experts have criticised the chapter because much of it is aspirational rather than legally binding, even in relation to forced and child labour. The enforcement process for those few provisions which are legally binding is more qualified, lengthy and convoluted than in other chapters of the agreement. These processes have not proved effective in other agreements.²⁴

3.18 Similarly, the CFMEU argued that the TPP in its current form 'fails to protect the rights of workers'. It noted that the 'TPP does not make reference to detailed International Labour Organisation (ILO) Conventions, but only to the shorter and more general principles in the ILO Declaration'.²⁵

20 *Submission 55*, p. 2.

21 *Submission 39*, p. 26.

22 NIA, p. 18.

23 NIA, p. 11.

24 *Submission 39*, p. 7.

25 *Submission 55*, p. 4.

3.19 Chapter 12 of the TPP deals with the temporary entry of business persons and includes exemptions from labour market testing. Labour market testing means that Australian employers seeking to access the subclass 457 visa programme must first test the local labour market to ensure that there is no suitably qualified and experienced Australian citizen or permanent resident or 'eligible temporary visa holder' readily available to fill that position.²⁶ Exemptions from labour market testing have been controversial aspects of previous trade agreements.

3.20 The NIA notes that in order to implement the TPP 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 Parties to which Australia extended temporary entry commitments.²⁷

3.21 The scope of proposed changes were highlighted in the ACTU submission:

In the case of Australia, its commitments to grant temporary entry extend beyond business visitors and high-level independent executives and include the category of 'contractual service suppliers'. This category is defined expansively to include all 'business persons' with trade, technical and professional skills. Essentially, this commitment would appear to cover temporary entry for all skilled occupations under the 457 visa program, such as nurses, engineers, electricians, plumbers, carpenters, bricklayers, tilers, mechanics and chefs. The DFAT explanatory materials confirm these commitments will be implemented though the 457 visa program...

Under the TPP, Australia has signed away labour market testing for an additional six countries: Canada, Mexico, Malaysia, Peru, Brunei and Vietnam.²⁸

3.22 The ACTU argued:

We have no objection to overseas workers from any country being employed in Australia, provided there is genuine, verifiable evidence through labour market testing that the employer has not been able to find a suitable, qualified Australian to do the job, and those workers are treated well and receive their full entitlements. However, we cannot support this fundamental obligation on employers to support Australian jobs first, simply being waived as part of the cost of pushing through free trade agreements.²⁹

3.23 The CFMEU repeated its argument, previously made in relation to the China-Australia Free Trade Agreement (CHAFTA) that 'the removal of adequate labour

26 Department of Immigration and Border Protection, 'What is labour market testing', available at <http://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-is-labour-market-testing-for-subclass-457> (accessed 16 January 2017).

27 NIA, p. 18.

28 *Submission 38*, pp 13, 15.

29 *Submission 38*, pp 10-11.

market testing for engaging temporary overseas workers would undermine local working conditions and safety'.³⁰ Similarly the Electrical Trades Union (ETU) recommended that the TPP should require 'mandatory skills assessment and labour market testing for licenced trades and occupations'. It argued:

Removing the requirement for overseas trades workers to be assessed to see if their skills meet our standards is dangerous for the workers, their colleagues and for the public. To allow foreign companies to bypass the Australian labour market and bring in a workforce comprised of people untrained and unfamiliar in Australian practices (including an electrical wiring standard that differs substantially from most countries), and entirely dependent on their employer for residence in Australia, is unsafe and unfair for all parties and economically unsound.³¹

3.24 Several submissions highlighted recent examples of the exploitation of temporary workers in Australia, including underpayment, long hours and insufficient health and safety training leading to injuries. AFTINET argued that it was 'not acceptable that the TPP expands temporary entry without requiring labour market testing, and without any provisions to prevent such exploitation'.³² It noted:

Academic studies comparing various recent trade agreements have demonstrated that a range of governments are using temporary work visas without local labour market testing as a means of deregulating labour markets. Such arrangements create groups of workers with less bargaining power who are more vulnerable to exploitation because loss of their employment can lead to deportation.³³

3.25 The potential impacts of the TPP on employment and inequality was also raised. Research by the Global Development and Environment Institute at Tufts University was frequently cited as evidence the TPP could have adverse impacts in these areas. This research projected that the TPP could cause employment losses overall with employment in Australia contracting by 39,000 jobs by 2025.³⁴

3.26 The TPP was also projected to increase inequality with a lower labour share of national income both in Australia and overseas. The Tufts University paper expected competitive pressures on labour incomes, combined with employment losses, to push the share of national income for labour further down, redistributing income from labour to capital in all countries. Dr Anis Chowdhry commented:

While production for export may grow production for domestic markets is likely to decline in the face of import competition. But exports may be less

30 *Submission 55*, p. 3.

31 *Submission 5*, p. 4.

32 *Submission 39*, p. 22.

33 *Submission 39*, p. 21.

34 Jeronim Capaldo and Alex Izurieta, 'Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement', Global Development And Environment Institute Working Paper No. 16-01, January 2016.

labour-intensive with adverse consequences for employment while more imported inputs for export-oriented production will reduce national linkages and multiplier effects compared to domestic production. Businesses may seek to become more competitive by cutting labour costs. This will negatively affect income distribution.

Real incomes for employees, especially the less skilled, are likely to be further depressed, as in recent decades, due to greater international competition following trade liberalization. The TPP, thus, will likely lead to higher inequality due to declining labour shares of national incomes. This will in turn weaken domestic demand.³⁵

Investment

3.27 The NIA states that the TPP will 'create new investment opportunities and provide a more predictable and transparent regulatory environment for investment'. It outlines:

The TPP will promote further growth and diversification of Australian outward investment by liberalising investment regimes in key sectors for which the TPP region accounts for a major share of global investment, such as mining and energy, telecommunications and financial services...

The TPP will also promote further growth and diversification of foreign investment in Australia by liberalising the screening threshold at which private foreign investments in non-sensitive sectors are considered by the Foreign Investment Review Board (FIRB), increasing it from \$252 million to \$1,094 million for all TPP Parties.

Under the TPP, Australia has retained the ability to screen investments in sensitive sectors to ensure they do not raise issues contrary to the national interest. All investments by foreign governments will continue to be examined and lower screening thresholds will apply to investments in agricultural land and agribusiness.³⁶

3.28 Comments received were generally supportive of these aspects of the TPP. For example, ITS Global made the point that Australia 'has always depended on foreign investment to build economic growth' and noted that while Australia once was a net recipient of foreign capital, it is now as much an investor offshore and an importer of capital. It made the argument that 'Australia needs more outward investment and more inward investment to secure the benefits on offer in the global economy'.³⁷ Similarly, ANZ considered the TPP would encourage both inward and outward investment:

Inward FDI stocks are projected to increase by around AUD13 billion; an increase of 1 per cent. Australia's outward FDI stocks are likely to increase

35 *Submission 21*, pp 2-3.

36 NIA, p. 9.

37 *Submission 7*, p. 3.

by around \$30 billion (3 per cent). This means that Australian investors and companies will become more engaged with the global economy.³⁸

Social, cultural and environmental policies

3.29 A series of concerns were expressed that Australia's social, cultural and environmental policies would be undermined by provisions in the TPP. In particular the lack of enforcement for environmental measures and the possible impact on health policies in Australia were raised.

Environmental issues

3.30 DFAT's supporting documentation observes that the TPP Environment Chapter 'aims to promote sustainable development through mutually supportive trade and environmental policies, and to achieve higher levels of environmental protection in TPP countries'. It states:

The TPP Environment Chapter promotes the effective enforcement of domestic environmental laws and lays the foundation for TPP Parties to work together to address a range of trade-related 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.³⁹

3.31 Environmental Defenders' Offices of Australia considered that 'Chapter 20 of the TPP outlines a series of obligations which if fully implemented could improve Australia's national environmental laws, in particular the *Environment Protection Biodiversity Act 1999* (EPBC Act), *Fisheries Management Act 1991* (FM Act) and *Illegal Logging Prohibition Act 2012*'. For example, it noted that Article 20.4 requires each Party to affirm its commitment to the multilateral environmental treaties. It argued this was an opportunity to improve the implementation of multilateral environmental treaties under the EPBC Act.⁴⁰

3.32 However, Friends of the Earth considered the TPP would have detrimental effects on the ability of Australia to effectively protect the environment. It stated:

Legally meaningless rhetoric pervades the text with few conservational and environmental issues actually addressed...The environment chapter neglects to ensure a standard of commitment from the countries involved, allowing each nation to 'establish its own level of domestic environmental protection', however, this is in juxtaposition to the fact that enforcement of those laws is dependent on breaches affecting trade and investment.

Of the four multilateral environmental agreements (MEAs) included in the text only one is enforceable – Trade in Endangered Species (Article 20.17.2) ...

38 *Submission 33*, p. 2.

39 DFAT, 'Outcomes: Environment Chapter – Trans-Pacific Partnership', 18 December 2015, p. 1.

40 *Submission 48*, p. 2.

The section in the TPP that deals with climate change never uses the words 'climate change' nor does it mention the global treaty under the United Nations, the [United Nations Framework Convention on Climate Change], which contains binding agreements that every country in the TPP has signed onto.⁴¹

3.33 Many those who provided correspondence to the committee were concerned that the environment standards mentioned in the TPP had weak enforcement measures and did not acknowledge climate change issues. The ETU recommended that 'a full, public study of the environmental impacts of the TPP be carried out urgently, with the findings to inform the inclusion of a new chapter in the agreement that deals with environmental standards that includes commitments by governments to implement agreed international environmental standards which should be enforced by the government-to-government disputes process of the agreement'.⁴²

Health issues

3.34 In relation to health, many submitters and persons who contacted the committee were concerned regarding the impact of the TPP on Australia's health system and particularly the Pharmaceutical Benefits Scheme. For example, the Public Health Association of Australia (PHAA) stated:

Trade agreements are a significant determinant of health. They can affect many aspects of health care and public health...PHAA is particularly concerned about the emerging trend of trade agreements that aim to extend into areas that have previously been matters for domestic policy making.⁴³

3.35 The PHAA, together with other health organisations, had undertaken a health impact assessment (HIA) on the early versions of the TPP text which were available prior to the TPP being agreed. It described a HIA as a 'systematic process that considers the potential health effects of a proposed policy, plan, or project, and offers recommendations to mitigate health harms and improve benefits'. The PHAA outlined:

The HIA identified concerns related to regulation of alcohol control, tobacco control, and food labelling (potential impacts to the cost of medicines have been discussed in other parts of this submission). The HIA found that the technical barriers to trade chapter, the wine and spirits annex, and the intellectual property chapter may make it more difficult for Australia to implement innovative control measures, such as health warning labels on alcohol containers, particularly where the evidence base for the intervention is still developing. Similarly, rules in the technical barriers to trade chapter may limit future legislation for food labelling. The regulatory coherence and transparency chapters could also enable a greater role of the

41 *Submission 47*, p. 5.

42 *Submission 5*, p. 5.

43 *Submission 42*, p. 4.

processed food industry in policymaking, which may influence the food labelling system used in the future.⁴⁴

3.36 In addition to the impact of the ISDS provisions, the PHAA outlined a number of other potential areas of the TPP which could affect Australia health policy. These included ambiguous provisions in relation to biologic products, which are produced through biological processes and account for a significant and growing share of government expenditure on pharmaceuticals. 'Generic' or 'follow-on' versions of biologics are called 'biosimilars'. The PHAA noted that monopolies on just ten biologic drugs listed on Australia's Pharmaceutical Benefits Scheme cost Australian taxpayers over \$205 million in 2013-14.

3.37 DFAT supporting documentation outlines there is a two-track outcome on biologics protection in the TPP:

Parties can choose to provide effective market protection through at least 8 years of data protection. Alternatively, Parties can choose to provide effective market protection through at least 5 years of data protection, along with other measures, including existing measures in the case of Australia, and recognising market circumstances. These measures and circumstances include regulatory settings, patents, and the time it takes for follow-on medicines to become established in the market. Australia will follow the 5 year option, which reflects our current system and requires no changes. This acknowledges that different tracks can deliver comparable outcomes.

Australia is not required to change any part of its current law, including data protection for biologics, or our patent regime. There will be no adverse impact on the Pharmaceutical Benefits Scheme and no price increases for medicines.⁴⁵

3.38 However, the PHAA considered that the final text of the TPP's Intellectual Property (IP) Chapter contained 'problematic language and troubling ambiguities'. It stated:

If the poorly drafted and ambiguous biologics provisions are interpreted in such a way that the Australian Government is not able to bring biosimilars to market in a timely fashion, the TPP could add substantially to the costs of the Pharmaceutical Benefits Scheme. These costs are likely to be passed on to consumers through higher co-payments, resulting in a financial and health burden for already vulnerable people including those on low incomes, older people, and people with chronic illnesses.⁴⁶

3.39 Medicines Australia considered it was 'misleading to suggest that data protection will add costs to patients when accessing prescription medications through the pharmacist'. However, it submitted that the Australian Government needed to provide insight and clarity as to whether and how the TPP articles on data protection for new pharmaceutical products would be domestically implemented. It argued that

44 *Submission 42*, p. 13.

45 DFAT, 'Outcomes: Biologics', 7 July 2016, p. 2.

46 *Submission 42*, p. 8.

this clarity will 'encourage greater consistency and transparency in both the domestic and international business environment within which innovative pharmaceutical companies make their investment decisions'.⁴⁷

Investor-State Dispute Settlement

3.40 ISDS provisions provide foreign investors with the right to access an international arbitration tribunal if they believe actions taken by a host government are in breach of its investment obligations. Australia has signed a series of bilateral investment treaties which include ISDS provisions. ISDS provisions were also part of free trade agreements with Chile, Singapore, Thailand, Korea, Japan and China. Notably, Australia did not agree to ISDS provisions as part of the Australia-United States Free Trade Agreement.

3.41 Sharply opposing views were expressed regarding the ISDS provisions in the Investment Chapter of the TPP. Many of the arguments made in relation to the ISDS provisions in the TPP were familiar to the committee from previous inquiries into major trade agreements. For example, Ms Steffie Baird observed:

In its 2010 report, the Productivity Commission stated that there did not 'appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements'. The report also noted the 'policy and financial risks' for governments posed by ISDS.⁴⁸

3.42 A number of submitters also reminded the committee of then High Court Chief Justice Robert French's commentary in 2014 regarding ISDS provisions. This included:

Arbitral tribunals set up under ISDS provisions are not courts. Nor are they required to act like courts. Yet their decisions may include awards which significantly impact on national economies and on regulatory systems within nation states... 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.⁴⁹

3.43 The inclusion of ISDS provisions in the TPP was a point of particular concern for many individuals who wrote to the committee to urge that the TPP be rejected. For example, Ms Chay Neal wrote:

This system is not about protecting a foreign investor from direct expropriation of assets, and instead has long been a system for foreign investors to block or control regulation by the host government in the public interest. This system is a gross violation of the ordinary concept of national

47 *Submission 51*, p. 2.

48 *Submission 8*, p. 1.

49 Chief Justice Robert French AC, 'Investor-State Dispute Settlement – a cut above the courts?', Supreme and Federal Courts Judges' Conference, 9 July 2014, Darwin, available at: <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf> (accessed 16 January 2017).

sovereignty, because it overrides the constitutional legislative functions of federal, state and local government, and the constitutional functioning of Australia's judicial system.⁵⁰

3.44 The increasing use of ISDS provisions by overseas investors worried many submitters. For example, the Logan and Albert Conservation Association noted:

The Australian government is entering into this risky space at a time when there is an enormous ramping up of ISDS challenges globally. Only 50 ISDS challenges occurred in the 50 years to 2000. Since 2000 more than 600 cases have been launched, the majority of these challenging environmental and resource regulations.⁵¹

3.45 Dr Kyla Tienhaara provided the committee with a paper on possible costs of ISDS provisions for Australia based 'on available global data and a direct comparison with the experience of Canada' under the North American Free Trade Agreement. This paper outlined that:

- American investors initiate a large portion of ISDS cases globally (20 per cent);
- the TPP's carve-out of tobacco is of very limited value given that ISDS claims are initiated by investors from a wide variety of industrial sectors over a wide range of issues;
- ISDS cases can arise over measures brought by any level of government;
- states lose or settle ISDS cases more often than they win them;
- even when states 'win' ISDS cases, they 'lose' because they have unrecoverable legal costs;
- damages awarded by tribunals and compensation settlements vary wildly;
- it is difficult to quantify the cost of 'regulatory chill' but there is mounting evidence that it is an identifiable phenomenon; and
- ISDS provides no discernible public benefits—the only beneficiaries of the system are corporations, and particularly large multinationals.⁵²

3.46 In contrast, the Centre of Independent Studies also provided the committee with papers relevant to the inquiry including those which made the case for investor-state arbitration. It characterised ISDS provisions as strengthening the rule of law, providing legal predictability and equality in the international arena among disputing parties, introducing competition in the delivery of justice by allowing 'international investors to choose whether to pursue their grievances in either domestic courts or ad-

50 Correspondence received 28 October 2016.

51 *Submission 63*, p. 1.

52 *Submission 20*, p. 3.

hoc tribunals' and reducing 'the sovereign risks associated with investments across borders.'⁵³

3.47 Dr Jeffrey Wilson argued the TPP would promote certainty in relation to ISDS provisions. He noted:

Despite featuring in many bilaterals, differing ISDS implementations have resulted in a lack of clarity over precisely what rights and obligations these impose. A particular concern has been around the definition of 'expropriation', to what extent this impacted on governments' ability to engage in public welfare regulation. Providing a single ISDS template via the TPP can help end this regulatory uncertainty for both businesses and governments.⁵⁴

3.48 The TPP NIA stresses the safeguards which had been 'built into the rules guiding ISDS, making this one of the most protective treaties in existence worldwide in terms of its protections for legitimate regulation':

Procedural safeguards in the TPP 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 Foreign Investment Review Board. Australia's tobacco control measures as defined under the TPP will not be able to be challenged.⁵⁵

3.49 The BCA considered that the TPP ISDS provisions had appropriate safeguards and would create investment certainty by allowing Australian investors to protect their investments from discriminatory treatment overseas. It argued:

It is important to note that the TPP's ISDS provisions do not protect an investor from a mere loss of profits following a change in government policy or regulation. ISDS also does not prevent the Australian Government from changing its policies or regulating in the public interest. It also does not freeze existing policy settings. Investors cannot mount a case against the government merely because an investor does not agree with a new policy or that a policy adversely affects its profits....

The ISDS text will not prevent either government from regulating in the public interest. Explicit safeguards are included to re-affirm the right of governments to take decisions in the public interest, including explicit caveats covering areas such as health and the environment.⁵⁶

53 *Submission 23*, p. 4.

54 *Submission 6*, p. 4.

55 NIA, p. 9.

56 *Submission 9*, pp 4-5.

3.50 However, other submitters were not assured by the ISDS safeguards in the TPP. For example AFTINET stated:

Claimed ISDS 'safeguards' for health, environment and other public welfare measures have not prevented ISDS cases. These 'safeguards' do not address the main structural deficiencies of ISDS tribunals, which have no independent judiciary, no precedents and no appeals process. Tribunals have enormous discretion in interpreting the meaning of 'safeguards'...

The claimed 'safeguards' which actually apply to the ISDS section of the investment chapter cannot be described as clear carveouts or exclusions. The only clear carveout or exclusion is that governments have the option of excluding future tobacco control laws from ISDS cases...[T]his begs the question of why other public interest laws are not clearly excluded...⁵⁷

Copyright and other intellectual property

3.51 TPP's Intellectual Property (IP) chapter (Chapter 18) covers patents, trademarks, copyrights, industrial designs, geographical indications, trade secrets, other forms of intellectual property, and enforcement of intellectual property rights.⁵⁸ The NIA states that the chapter is consistent with Australia's existing intellectual property regime and will not require any changes to Australia's legislation. In order to implement the TPP '[m]inor regulatory changes relating to encoded broadcasts will be required in order to extend benefits in Part VAA of the *Copyright Act 1968* that Australia already extends to parties to the Rome Convention and AUSFTA to broadcasts from Malaysia, Singapore, Brunei Darussalam and New Zealand'.⁵⁹

3.52 Despite this assurance, Chapter 18 was a key area of criticism in submissions received. For example, the Intellectual Property Committee (IPC) of the Business Law Section of the Law Council of Australia (Law Council) stated:

The TPP IP Chapter is the latest in a series of recent trade agreements to include detailed commitments regarding the form and substance of domestic IP law. Of all of the agreements concluded in the last decade or so, the TPP is the most complex, in part owing to its plurilateral nature.

A first problem with this complexity is that it is becoming increasingly difficult to ascertain exactly what Australia's international IP obligations are.

A second problem with detailed and complex rules is that they can tend to limit reform options. Australia's IP laws are not perfect and the need for future reform is foreseeable based on the experience of the recent past.

...[C]onsistency in at least basic IP rules – is not being achieved. In fact, it is notable that in the case of the TPP, the IP Chapter does not in fact create a 'common set of rules' (National Interest Analysis, [37]3) for IP law. For

⁵⁷ *Submission 39*, p. 15.

⁵⁸ DFAT, 'Summary of the TPP Agreement', p. 9.

⁵⁹ NIA, p. 18.

example, in relation to online intermediary liability, the chapter provides at least 4 different regimes applicable to different parties to the TPP.⁶⁰

3.53 The Law Council also disputed the NIA's statement that Australia's TPP obligations are consistent with Australia's existing intellectual property regime and require legislation changes. It pointed to a number of areas including online service provider liability and technological protection measures where amendments to Australian law may be required.⁶¹

3.54 Associate Professor Kimberlee Weatherall argued that the key effect of Chapter 18 of the TPP was to 'lock in' existing Australian IP law:

This is not a good thing unless Australia's current IP laws (1) are perfect; and (2) will continue to be perfect in the medium to long term regardless of changes in technology, changes in business models, changes to Australia's areas of comparative advantage, and changes to other countries' IP settings. Obviously this cannot be true. The number of reviews we have had of current Australian IP law, and the number of changes that have been proposed for Australian IP law by those reviews, suggests otherwise.⁶²

3.55 She recommended the committee 'condemn Chapter 18 for locking in existing IP law; hindering or preventing future reform; and creating a breathtaking degree of complexity and legal uncertainty'.⁶³ Dr Matthew Rimmer also considered the TPP was unbalanced and distorted the aims, objectives, and principles of copyright law:

There is a failure to properly represent the traditional objectives of copyright law in promoting learning, access to knowledge, and scientific progress. Moreover, the Trans-Pacific Partnership does not promote copyright goals – such as creativity, innovation, competition, and access to goods and services.⁶⁴

3.56 The broader impacts of the TPP's treatment of IP regulation was also discussed in submissions. For example, Electronic Frontiers Australia considered the 'TPP has failed to internationalise a balanced and modern copyright regime and is instead a reflection of controversial concepts and ideas which negatively impact users and have not been proven to increase innovation and creativity so as to justify this invasion of user rights'.⁶⁵ Dr Aoife O'Donoghue and Dr Ntina Tzouvala argued that increased patent protection in the TPP would disproportionately affect developing states 'who are unable to take advantage of the looser regulation that accompanied fast economic development in the Global North'.⁶⁶

60 *Submission 26*, pp 1-2.

61 *Submission 26*, p. 3.

62 *Submission 82*, p. 3.

63 *Submission 82*, p. 1.

64 *Submission 84*, p. 3.

65 *Submission 79*, p. 3.

66 *Submission 22*, p. 2.

Consumer rights

3.57 Parts of the TPP directed to the benefit of consumers included commitments on personal information protection, enforceable consumer rights, addressing 'spam' and the high costs of international mobile roaming.⁶⁷ However, in submissions for the inquiry, discussion regarding the possible impact of the TPP on consumer rights centred on tariff reductions and the influence of the TPP, particularly the ISDS provisions, on future regulation intended to benefit consumers.

3.58 The NIA characterises Australia's tariff elimination schedule as 'ambitious', with 93 per cent of all tariff lines eliminated or bound at zero tariff rates upon entry into force. Almost all remaining tariffs, covering sectors where tariffs still provide some level of protection against imports, would be eliminated in either three or four years.⁶⁸

3.59 The Business Council of Australia argued that '[o]pen markets deliver material benefits to consumers through greater competition and access to a greater variety of goods and services. It noted that 'eliminating tariffs on goods imported from key import markets' would benefit Australian consumers and businesses using imported input.⁶⁹ Further:

The TPP will enhance transparency, cooperation and promote good practice with regard to establishment and maintenance of technical regulations. A better understanding of each party's regulatory systems will improve public safety and benefit Australian consumers.⁷⁰

3.60 The Financial Services Council argued that lower barriers to trade would allow Australian consumers of financial services 'access to a greater range of products'. It noted that 'while Australia's market for financial services is already one of the most open and well-regulated in the world, free trade agreements provide the opportunity to broaden the range of products available to Australian consumers'.⁷¹

3.61 In contrast, CHOICE focused its submission on the potential effect on consumers of the ISDS provisions of the TPP. It highlighted its concern that the TPP would place 'future reform to benefit Australian consumers at risk':

Specifically, CHOICE is concerned about ISDS action against Australia should the Federal Parliament pass legislation or if the Government implements regulations to:

- Require specific-ingredient labelling on food products, like palm oil;
- Change or strengthen our country of origin labelling system;

67 NIA, p. 11.

68 NIA, p. 13.

69 *Submission 9*, p. 3.

70 *Submission 9*, p. 4.

71 *Submission 41*, p. 2.

- Require the display of 'health stars' or 'traffic lights' on the front of packaged foods;
- Ban the import of products that are dangerous or potentially dangerous;
or
- Improve the Australian Consumer Law to, for example, ban unfair trading or to strengthen consumer guarantees.⁷²

72 *Submission 43*, p. 2.

Chapter 4

Australia's trade agreements and the treaty-making process

Introduction

4.1 While not an explicit part of the terms of reference of the inquiry, many submissions made specific comments on two related subjects—Australia's trade agreements and the treaty-making process.

Australia's trade agreements

4.2 A key argument made in the NIA for Australia's participation in the TPP was that it would 'protect Australia's competitive position in the markets of the TPP Parties'. The NIA notes that '[m]arket access gains under the TPP will be delivered more quickly than any other current multilateral or plurilateral negotiations underway such as in the World Trade Organization (WTO) or in the Regional Comprehensive Economic Partnership (RCEP)'.¹

4.3 The Analysis of Regulatory Impact on Australia (RIA), attached to the NIA, included an assessment of alternative means to achieve similar regional trade outcomes for Australia. It notes there has not been a significant global trade agreement since 1994. In particular, the WTO Doha Round negotiations have stalled and would not address Australia's priority trade and investment interests as extensively, or in as timely a way, as is possible under the TPP. While noting that Australia was working closely with all RCEP countries, the RIA considered 'it does not provide an alternative option for delivering the same outcomes':

First, the scope of the TPP is far broader than RCEP, along with its stated ambition of liberalising trade in goods, services and investment. Second, although there is some overlap in membership, there are important differences that make the two regional FTAs complementary. In particular, the TPP brings in the North American market and gives Australia access to supply chains in that region that would not be addressed by RCEP.²

4.4 The significance of the TPP in relation to Australia's existing trade agreements and possible future trade agreement was often discussed in submissions. For example, Chatto Creek Advisory observed that the 'WTO's inability to conclude the Doha Agreement has left trade-dependent economies, like Australia, with an important need to seek out practical and achievable alternatives'. It considered that 'a failure of the TPP Agreement to come into force would represent a significant setback to trade liberalisation...a lost opportunity for all economies, including Australia, that would not be easily or promptly recovered'.³

1 NIA, p. 3.

2 RIA, p. 7.

3 *Submission 17*, pp 2- 3.

4.5 The capacity of the TPP to add new participating countries was also considered an important feature. For example the Minerals Council noted:

While the agreement first started as a negotiation between four countries, it expanded to 12 members and has purposeful provision to accept new members...[T]he TPP is one of the most compelling frameworks to encourage China – Australia's largest trading partner and mineral resources client – to deepen its market reforms and sign on to more ambitious liberalisation commitments. The TPP has the potential to create the long suggested Free Trade Area of the Asia-Pacific.⁴

4.6 The importance to Australia of regional trade agreements was highlighted by several submitters. For example, Dr Jeffrey Wilson from Murdoch University urged the committee to focus on the systemic effects the TPP could have 'for the trade architecture of our region'. He explained:

The TPP is more than just a set of market access opportunities that need to be balanced against the costs of domestic policy reforms. It also promises wholesale change in the way the Asia-Pacific trade system is structured...

The proliferation of bilateral FTAs in the Asia-Pacific has led to a phenomenon trade economists call the 'noodle bowl problem'. Rather than having a single, integrated set of trade rules that apply equally to all governments, the region is now criss-crossed by over a hundred bilateral deals. Compounding matters, the bilateral FTAs are often wildly inconsistent. Each contains its own rules for tariff reduction, non-tariff trade policy reforms, and standards for administrative procedures...

An important, but often overlooked, feature of the TPP is that it is an explicit attempt to address the noodle bowl problem. By providing a single, overarching set of trade rules with relatively broad regional coverage, it is one of the first steps in returning Asia-Pacific trade architecture to a multilateral model.⁵

4.7 Dr Aoife O'Donoghue and Dr Ntina Tzouvala noted that failure of the Doha Round of the WTO and the move to regional trade agreements, such as the TPP, has significantly reduced the leverage available to developing states within trade negotiations. They urged that Australia take into account of the implications of regional trade deals for developing states who may be poorly resourced to adapt to rapid tariff elimination, increased patent protection or ISDS provisions.⁶

4.8 The ACCI considered that the 'Australian Government should consider alternate pathways for trade and investment liberalisation under the potential scenarios of both entry into force or not for the TPP'. It noted:

In the end Australia has already negotiated to undertake further liberalisation of our own tariffs and investment regimes plus other areas

4 *Submission 35*, p. 3.

5 *Submission 6*, pp 1-3.

6 *Submission 22*, p. 2.

covered by the TPP. Australia is also negotiating a range of other agreements including the Regional Comprehensive Economic Partnership (RCEP) and numerous bilaterals. We imagine that the terms of the TPP will be the basis for "landing zones" for these other negotiations.

4.9 In this context, the ACCI urged the Australian Government to commit to unilaterally removing existing barriers to trade and investment to enable full benefits to flow to the Australian economy.⁷

Australia's treaty-making process

4.10 For Australia, the next key step to ratification of the TPP is for the Parliament to consider and pass any legislation, or amendments to existing legislation, that may be necessary to implement the specifics of the agreement. However, a number of submitters expressed concerns with the manner in which the TPP had been developed and more broadly Australia's treaty-making process. Often these criticisms had been raised during the committee's previous inquiries into trade agreements and were reiterated in relation to the development of the TPP. For example, Dr Matthew Rimmer noted that '[i]n spite of significant criticism of the treaty-making process, there has been a failure to reform the system of treaty-making in Australia'.⁸

Negotiation and consultation

4.11 The NIA outlines the consultations undertaken for the TPP including with the state and territory governments, Commonwealth government departments and agencies, business, industry and civil society. It noted:

Stakeholder views were actively encouraged and considered throughout negotiations on the TPP, including through an initial call for public submissions. In November 2008, the Australian Government publicly announced that Australia would participate in the TPP negotiations. Australia's decision to participate in the TPP negotiations followed extensive consultations involving a wide range of stakeholders and State and Territory Governments. Overall, there was widespread support for Australia's participation in the TPP.

The Department of Foreign Affairs and Trade (DFAT) engaged in over 1000 TPP stakeholder briefings and consultations over the time period of the negotiations with a wide range of domestic stakeholders, including representatives from peak industry bodies, individual companies, academics, unions, consumer groups, special interest groups and other organisations representing civil society. Many stakeholders were consulted on several occasions and provided more than one written submission.

Senior TPP negotiators provided briefings and information on the progress of negotiations to stakeholders on request during the course of the negotiations. In addition, DFAT held public stakeholder consultations in state capitals, for example on 26 March 2014 in Melbourne and 27 March

7 *Submission 16*, p. 32.

8 *Submission 84*, Supplementary submission 4, p. 68.

2014 in Sydney. Such consultations were open to businesses, civil society and interested members of the public, and were advertised on the DFAT website. DFAT provided updates on the TPP negotiations via its website, and consulted stakeholders and interested members of the public via group email address...⁹

4.12 However, the lack of transparency in the consultation and negotiation of the TPP was repeatedly criticised by submitters opposed to the TPP. For example Electronic Frontiers Australia (EFA) believed that 'the secrecy surrounding the negotiations of the Trans-Pacific Partnership (TPP) fundamentally undermines the legitimacy of the agreement'. It considered the approach was 'inherently antidemocratic and has led to an outcome that clearly favours the interests of a select group of corporations and industry sectors, who have had privileged access to and input to the negotiating process, at the expense of consumers and society more generally'.¹⁰ Similarly, the Friends of the Earth commented:

That the TPP text remained secret for so long, that negotiations took place behind closed doors, and that independent bodies, the parliament and the community are still unable to alter or vote on the adoption of the deal, is a testament to the undemocratic nature of Australia's treaty process.¹¹

4.13 Similarly, Dr Hazel Moir stated:

What 'consultation' does take place with DFAT is very much one-way. Because of the secrecy around trade negotiations, DFAT provides only very high-level general information to participants in such consultations. Its 'consultations' involve DFAT listening but rarely responding. This wastes the time of the many groups and individuals who attempted to participate.¹²

4.14 The ACCI considered that Australia's limited domestic consultation during trade negotiations meant that 'treaties often contain provisions that stakeholders, including business, are only aware of after the treaty negotiations are concluded'. This lack of transparency could lead to misunderstanding and alarmist politicisation of treaty provisions.¹³ The ACCI made a number of recommendations to reform the manner in which treaties are negotiated, considered and monitored. It considered these reforms should be implemented even if the TPP does not enter into force.

4.15 These proposed reforms included:

- an independent Government body that is arms-length from negotiations – such as the Productivity Commission – should prepare the trade treaty National Interest Analysis (NIA) and Regulatory Impact Statement (RIS) documents

9 NIA, p. 33.

10 *Submission 79*, p. 2.

11 *Submission 47*, p. 1.

12 *Submission 25*, p. 4.

13 *Submission 16*, p. 3.

that are provided to the Joint Standing Committee on Treaties and tabled in Parliament;

- the Productivity Commission – or similar independent body at arms-length from negotiations – should be tasked with an objective regular review and report on the agreement;
- performance of all in-force Australian trade treaties, comparing the economic objectives cited at their commencement;
- the direct costs to the Australian Government for the conduct of treaty negotiations should be transparently reported to the Parliament through the annual budget process;
- the Australian Government should examine the merits of retaining current bilateral agreements where they have been superseded by larger and more modern agreements covering the same Parties; and
- the Australian Government should introduce an enhanced consultative procedure for the development of improved trade treaties, which would allow representative bodies to register for access to the draft treaty text within the terms of the relevant confidentiality agreements, in order to provide advice to negotiators throughout the negotiation process.¹⁴

4.16 A high level of frustration with the current treaty-making process was expressed in a number of submissions. For example, Gene Ethics were 'extremely disappointed and angry that a section on Trade of Products of Modern Biotechnology appears in the TPP':

DFAT officials and the Minister's office advised us that no aspect of [Genetically Manipulated] (GM) techniques or their products were on the table during TPP negotiations. DFAT officials said our concerns about GM provisions were unfounded when we raised them with DFAT, with the Minister...

Their disinformation was reiterated during three TPP briefings that DFAT officials convened in Melbourne. Now the published TPP text contains provisions that intend to permit the 'low level presence' (LLP) at unspecified levels, of unapproved GM contaminants in traded food commodities and the SPS provisions are also unsatisfactory.¹⁵

4.17 Many submissions argued the current treaty-making process involved insufficient parliamentary oversight, scrutiny and approval. For example, the Friends of the Earth supported 'a transparent, democratic and accountable process, that should include full parliamentary debate and approval before a Minister or Cabinet is able to sign off on a regional or global agreement'.¹⁶ The ETU recommended the 'TPP should

14 *Submission 16*, pp 4-5.

15 *Submission 53*, p. 2.

16 *Submission 47*, p. 7.

be referred to the full Parliament for an open debate, including aspects that do not require implementing legislation'.¹⁷ AFTINET proposals for reform included:

Prior to commencing negotiations, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement.

Such assessments should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise. The Australian Government should release its proposals and discussion papers during trade negotiations. Draft texts should be also released for public discussion, as occurs in the WTO and is now the practice in some EU negotiations. The final text should be released for public and parliamentary debate before it is authorised for signing.¹⁸

Assessments of trade agreements

4.18 The NIA for the TPP was also criticised. For example, Dr Hazel Moir unfavourably compared Australia's NIA of the TPP with that produced by New Zealand:

In regard to DFAT's NIA for the [TPP], it is clear that this is not independent. There is a marked contrast between the Australian and New Zealand documents. The New Zealand analysis is far more even-handed, identifying costs very clearly. It also clearly identifies as a negative feature the loss of domestic policy control in a number of areas.¹⁹

4.19 Several submitters disputed the contents of the NIA for the TPP. For example, Associate Professor Kimberlee Weatherall recommended the committee recognise that 'the National Interest Analysis misrepresents the effect of Chapter 18 by failing to acknowledge the costs imposed by the chapter, and failing to acknowledge that the chapter will not offer tangible benefits to Australian creators or inventors'.²⁰

4.20 A number of alternative and additional methods to assess of the TPP and other future trade agreements were advocated. For example, the New South Wales Nurses and Midwives' Association recommended the development of legislation requiring that all free trade agreements undergo a publically transparent health impact assessment prior to signing:

Healthcare policy should not be subject to 'commercial-in-confidence' style negotiations. Rather, all government policies should be assessed as to their healthcare impact and this assessment process should be transparent, evidenced based and accessible to the public. Healthcare matters should not be a part of any Free Trade Agreement that fails the test of transparency. For the TPP healthcare professionals and academics were denied access to

17 *Submission 5*, p. 4.

18 *Submission 39*, p. 9.

19 *Submission 25*, p. 4.

20 *Submission 82*, p. 1.

the text, were not included in negotiations and had limited access to the trade negotiators and when they were detailed information was not provided. In raising legitimate, evidenced based concerns the Minister for Trades' response was to refer to concerns as being 'shrill'...

[T]he negotiation process and outcomes of the TPP highlight an urgent need to ensure that there is health governance process applied to all free trade agreements and treaties. Such a process must be transparent, independent and involve an 'all-of-government' approach to ensure that agreements in seemingly unrelated areas do not impact on health or healthcare policy.²¹

4.21 Similarly, ActionAid recommended:

To ensure that Australia protects, respects and fulfils human rights in Australia and overseas, the Australian Government must undertake the following with respect to the TPP and other trade agreements:

- Undertake a human rights impact assessment on trade agreements as required under the Universal Declaration of Human Rights and in line with the International Covenants on Civil and Political Rights and the Economic Social and Cultural Rights
- Specifically undertake a gender analysis of the impacts of the TPP Take the lead in ensuring that trade agreements are transparently discussed and shared with the public
- Ensure that civil society in all signatory countries is fully consulted and provided information in a timely manner to ensure that they understand the full implications of trade agreements and can be involved in decisions on the same.²²

4.22 Other transparency reforms were also raised. Under the TPP, a commission will be established which will review the operation of the TPP three years after entry into force of the agreement and at least every five years thereafter.²³ Dr Rebecca LaForgia proposed that Australia adopt an interpretive declaration 'to ensure that in the practice of Australia, all reports by the 'committees, working groups and any other subsidiary bodies' created under the TPP are open and available to the public'. She stated:

The public like, the [TPP] Commission, in order to comprehend the operation of the TPP also requires access to the reports prepared by the 'committees, working groups and any other subsidiary bodies' established under the TPP. Without such access the agreement is secret, non-democratic and cannot be comprehended by the public...It is a mistake to consider that the only and primary time for openness is in the creation and negotiation stage of the TPP. Of equal importance is the open reporting

21 *Submission 40*, pp 3, 8.

22 *Submission 57*, p. 2.

23 *Submission 83*, 'TPP – Analysis of Regulatory Impact of Australia', 27 November 2015, pp 35-36.

over the life of the agreement, in order for public to be able to observe and comprehend the operation of international trade...²⁴

Chapter 5

Committee view and recommendations

Introduction

5.1 The TPP was an ambitious attempt to create a regional trade agreement for the Asia-Pacific. If it had been successfully completed, it would have linked 12 countries, 819 million people and almost 26 per cent of global trade. The TPP would have included significant trade and investment outcomes which would potentially have assisted Australian industry, business and consumers. However, there were also a number of troubling aspects to the final agreement. These included:

- the lack of independent economic modelling which indicated Australia would benefit from the TPP;
- the high risks associated with the ISDS provisions in the TPP;
- provisions undermining labour market testing requirements;
- the lack of enforceable commitments to labour and environmental standards;
- ambiguity regarding data protection for biologic products; and
- provisions which would 'lock-in' Australia's intellectual property regime.

5.2 However, the committee's inquiry into the proposed TPP has been overtaken by events. With the recent withdrawal of the United States, the committee's expectation is that the TPP will now not enter into force in its current form.

5.3 Despite the change of position by the United States, there still appears to be support amongst the remaining TPP participating countries for a regional trade agreement and key officials have indicated that alternative trade arrangements may be pursued. For example, Chile's Minister of Foreign Affairs, Mr Heraldo Muñoz was reported as stating that '[w]hether it be with the United States or without the United States, there's a willingness among the countries that make up the TPP to move forward'.¹

5.4 A revived trade deal may be arranged between the remaining participating countries. Should this occur, a new inquiry will be required. However, in this environment of uncertainty, it would not be useful to extend the committee's inquiry into proposed TPP. The committee will mainly comment on the TPP's ratification by Australia and the treaty-making processes.

Deferral

5.5 Given the clear position of the Trump administration, it is apparent the TPP will not enter into force in its current form. Gaining access to the substantial market of

1 Antonio De la Jara, 'Chile's foreign minister: TPP not dead, despite Trump comments', *Reuters*, 22 November 2016, available at <http://www.reuters.com/article/us-chile-china-trade-idUSKBN13H23B> (accessed 16 January 2017).

the United States (nearly 62 per cent of the GDP of participating countries) was a key component and justification for the negotiation and agreement of the TPP. Japanese Prime Minister Shinzo Abe has previously described the TPP without the United States as 'meaningless'.²

5.6 The Minister for Trade, Tourism and Investment, the Hon Steven Ciobo MP, has indicated that he has 'been speaking at length' with his TPP counterparts on ways 'to lock in the benefits from the TPP, without the United States if need be'.³ The prospects for such a future trade agreement appear reasonable. The process of negotiating the TPP would have enabled participating countries to obtain a better understanding of each other's priorities. This will be an important foundation for future trade agreements.

5.7 However, the Australian Government has indicated that it still may attempt to ratify the TPP through introducing implementing legislation into the Parliament. If the Australian Government has stated it is actively seeking alternative trade arrangements with the remaining countries who participated in the TPP, it is not clear to the committee why ratification should be a legislative priority. A new regional trade agreement could contain significantly different arrangements and commitments.

5.8 Legislation intended to implement Australia's trade agreements usually provides that the relevant provisions will not commence until the treaty enters into force for Australia. Given the present situation, it would be unproductive for the Australian Government to commit resources to passing implementing legislation which will not commence if the TPP does not enter into force. The committee's view is the Australian Government should defer any binding treaty action in relation to the TPP and focus on engaging with its trading partners to negotiate multilateral, regional or bilateral trade agreements which are in Australia's interests and can be agreed and implemented in a timely manner.

Recommendation 1

5.9 The committee recommends that the Australian Government should defer undertaking binding treaty action until the future of the Trans-Pacific Partnership Agreement is clarified through further negotiations with Australia's major trading partners.

Reform to the treaty-making process

5.10 The committee welcomes and supports the recommendations of the JSCOT majority report on the TPP which relate to broader treaty-making processes. These include that the Australian Government:

- consider changing its approach to free trade agreement negotiations to permit security cleared representatives from business and civil society to see the

2 Kiyoshi Takenaka, 'Japan PM says TPP trade pact meaningless without U.S.', *Reuters*, 21 November 2016.

3 Minister for Trade, Tourism and Investment, the Hon Steven Ciobo MP, 'Trans-Pacific Partnership', *Media release*, 22 January 2017.

Australian Government positions being put as part of those negotiations (Recommendation 1); and

- 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 (Recommendation 2).

5.11 The JSCOT recommendations reflect a growing consensus regarding the need for reform of the treaty-making process which was also evident in the submissions received for the committee's current inquiry. The TPP was perceived by some to be emblematic of problems in this area. A broad range of submitters highlighted issues with the transparency of treaty negotiations, the one-sided nature of consultations with stakeholders, the lack of adequate and independent assessment of trade agreements and the challenges the current treaty-making process presents to Australia's democratic values.

5.12 These recommendations also align with the committee's recommendations for reform made in *Blind Agreement: reforming Australia's treaty-making process* in 2015. At that time, the committee's recommendations were not accepted by the Australian Government. The committee considers these proposals for reform should be reassessed.

5.13 The committee notes that the JSCOT report highlighted a concern 'that Australia's long-term commitment to free trade, from which Australia benefits immensely, is currently at risk from a resurgence of nationalism and isolationism internationally'. However, in submissions to the current inquiry there was wide acceptance of Australia's approach to trade as a vehicle for economic growth, job creation and rising living standards. Broad support was expressed for the development of fair trading relationships with all countries and the need to regulate trade through the agreement of international rules.

5.14 Both in Australia and overseas, a key aspect of community opposition to recent trade agreements has evolved from a lack of transparency and consultation in treaty-making processes, the extension of trade agreements into broader policy areas beyond tariffs and customs arrangements and a perceived 'democratic deficit' in the treaty-making process. The committee recommends the Australian Government should prioritise action to respond to the growing bipartisan and community support for reform of the treaty-making process. A reformed treaty-making process will be an important measure to assure continued public support for Australia's future trade agreements.

Recommendation 2

5.15 The committee recommends that the Australian Government expedite widely supported reforms to the treaty-making process in order to assist the completion of future trade agreements.

Senator Alex Gallacher
Chair

Coalition senators' additional comments

1.1 The proposed Trans-Pacific Partnership Agreement (TPP) is an ambitious, comprehensive, high standard and balanced agreement which would promote global trade, provide new export opportunities for Australian businesses, increase economic growth and support the creation of jobs in Australia.

1.2 While it is disappointing that the United States has made a decision to withdraw from the TPP, the five years of negotiation has strengthened the links between the participating countries and highlighted the benefits that can be achieved through a modern regional trade agreement for the Asia-Pacific. The extensive dialogue and the agreement reached between Australia and the other participating countries will be a foundation for future trade agreements.

1.3 It is indisputable that trade delivers more opportunities for business and more jobs. The submissions to the inquiry made clear that Australia benefits when there is a well-regulated, fair and liberalised environment for trade. Submissions from industry and businesses highlighted how tariff reductions would increase economic activity, investment, production and create employment. Australian service providers were eager to access new opportunities to expand into overseas markets. Consumers would also benefit from increased choice and consumer protections. Already the benefits for Australian businesses and employees are evident as a result of Australia signing free trade agreements with Japan, South Korea and China in recent years. This has been underlined by recent record trade results for Australia.¹

1.4 As a middle-ranking open economy, Australia is more dependent on trade than many others. However, Australia is fortunate to be located in a region where an increasing proportion of global trade is occurring. Coalition senators firmly believe that increasing trade and opening the door to new markets will be vital to Australia's future economic prosperity.

1.5 It is important that the Australian Government keeps advocating for free trade and maintains its commitment to make new trade agreements in Australia's national interest. For example, in October last year, Minister Ciobo, with his Singaporean counterpart Minister Lim Hng Kiang, signed an Agreement to Amend the Singapore-Australia Free Trade Agreement.² Further opportunities exist to expand Australia's trade with Mexico, Chile, Peru and Canada in addition to countries in Asia through a regional trade agreement. In this context, Coalition senators encourage the Australian Government to work towards a regional trade agreement for the Asia-Pacific which

1 The Hon Steven Ciobo MP, Minister for Trade, Tourism and Investment, 'Record trade results for Australia', *Media release*, 2 February 2017.

2 The Hon Steven Ciobo MP, Minister for Trade, Tourism and Investment, 'Singapore-Australia Free Trade Agreement', *Media release*, 13 October 2016.

will benefit Australia and support Minister Ciobo's recent efforts to engage with his counterparts to 'lock in the benefits' of the TPP negotiations.³

1.6 Coalition senators note that pursuing a broad regional trade agreement continues to have the support of Australian business and farm groups. For example, National Farmers Federation Chief Executive, Mr Tony Mahar, has said the benefits of the landmark deal were too significant for Australia's farming sector to give up. He stated that the opportunities presented by the TPP had the potential to be 'transformational' for Australia's export sector with gains for commodities across-the-board including red meat, dairy, fruit and vegetables, cotton, wool, sugar, grain and seafood. He noted that while it would be preferable for the United States to be a participating country 'the most significant gains for Australia lie with the deals struck with Japan, Mexico, Argentina and Canada'.⁴

1.7 Similarly, the wine sector has urged that Australia 'must do everything in our power to ensure the agreement comes into force'. Mr Tony Battaglione, Chief Executive of the Winemakers Federation of Australia (WFA), considered that there were potentially 'tremendous' opportunities for the wine sector and 'the promise of wealth creation in regional Australia as well as to the national economy'. He observed that the deal struck was the first agreement to specifically address significant nontariff trade barriers restricting export growth and that it would provide a template for future agreements. He stated:

...WFA has called on all parties to get behind the Free Trade agenda. The worst thing for the prosperity of the Australian people will be to embrace protectionism. We need strong export growth and trade liberalisation through Free Trade Agreements is key to our success.⁵

1.8 The Chief Executive Officer of the Export Council of Australia (ECA), Ms Lisa McAuley, has noted that 'Australia simply cannot afford to go backwards on trade'. The ECA 'stands behind the Australian government's focus to pursue an alternate agreement under the TPP framework'.⁶ She stated:

In the current international environment, the lack of support for agreements such as the [TPP] from the new US administration does not have to mean the end of the agreement. Rather, this can present a new opportunity for Australia and other like-minded nations to take the lead on creating new

3 The Hon Steven Ciobo MP, Minister for Trade, Tourism and Investment, 'Trans-Pacific Partnership Agreement', *Media release*, 22 January 2017.

4 National Farmers' Federation, 'No white flag on TPP as Trump prepares to assume White House', *Media release*, 20 January 2017.

5 Winemakers' Federation of Australia, 'Wine Sector gets behind TPP Agreement', *Media release*, 23 January 2017.

6 Ms Lisa McAuley, Export Council of Australia, 'International trade makes the world go round-Australia cannot afford to go backwards', *Dynamic Export*, 25 January 2017, available at: <http://www.dynamicexport.com.au/export-market/articles-export-markets/International-trade-makes-the-world-go-round-Australia-cannot-afford-to-go-backwards/> (accessed 1 February 2017).

market openings for our companies, and ensure the jobs and prosperity of tomorrow are as secure as possible. Australia must therefore continue to pursue new liberalising trade deals, as well as other international agreements that prioritise the interests of prosperity-creating SMEs.⁷

1.9 The peak sugarcane farming group, Canegrowers has outlined that the withdrawal of the United States from the TPP has meant that an improved framework for selling sugar in the Asia-Pacific has been lost for the foreseeable future. It has urged the Australian Government to continue to work to close a TPP deal with the remaining participating countries. Further, it has commented that there is now more significance to 'the other avenues Australia is negotiating for improved trade access – a stronger deal with China, the Asia-focused Regional Cooperative Economic Partnership and free trade agreements with the European Union and United Kingdom'.⁸

1.10 Coalition senators recognise that it is the responsibility of the Australian Government to take the next steps in relation to strengthening Australia's trade relationships with the participating countries. In the future, this may include the introduction of implementing legislation as a strong signal of support to our major trading partners for a broad regional trade agreement. In this context, it is important that the bipartisan support for trade and open markets which has existed in Australian politics for decades is maintained. It is vital that there continues to be clear statements from all sides of politics that Australia rejects protectionism and encourages open trade within our region.

1.11 Coalition senators support the recommendations made by the Joint Standing Committee on Treaties (JSCOT) in assessing the TPP. In particular, that the Australian Government consider possible reforms to two specific areas of the treaty-making process:

- changing the approach to free trade agreement negotiations to permit security cleared representatives from business and civil society to view the Australian Government positions being put as part of negotiations; and
- the provision of independent modelling and analysis of proposed trade agreements to JSCOT.

If undertaken, these will be significant reforms to the treaty-making process and will require careful assessment.

7 Ms Lisa McAuley, Export Council of Australia, 'International trade makes the world go round-Australia cannot afford to go backwards', Dynamic Export, 25 January 2017, available at: <http://www.dynamicexport.com.au/export-market/articles-export-markets/International-trade-makes-the-world-go-round-Australia-cannot-afford-to-go-backwards/> (accessed 1 February 2017).

8 Canegrowers, 'Trade push continues despite USA TPP setback', *Media release*, 24 January 2017.

Senator Chris Back
Deputy Chair

Senator David Fawcett

Additional comments of the Australian Greens

1.1 The Foreign Affairs, Defence and Trade References Committee Inquiry into the Trans-Pacific Partnership Agreement (the TPP) received submissions from peak bodies and experts in trade. A substantial number of submissions raised concerns regarding the TPP.

1.2 While recognising some of the concerns raised by these experts, the majority committee report has fallen short of calling for a definitive and permanent rejection of the implementation of the TPP. Given that the United States of America have officially withdrawn from the TPP, it is both foolish and wasteful to pretend it can still be implemented in any meaningful way. The Greens contend that there is no point in Australia ratifying this Agreement or passing enacting legislation and that any attempts to resurrect the TPP will result in deeply flawed trade deals that do not advantage regular Australians. The Greens are strongly opposed to the ratification of the TPP, either now or at any time in the future, and recommend that the Government commit to formally and permanently ending Australia's involvement with the Agreement.

1.3 The Greens have serious concerns regarding the secrecy under which the TPP was negotiated over the course of six years and the failure of the government to conduct any independent assessments of the Agreement, despite serious concerns raised by the Productivity Commission. This deal was cobbled together behind closed doors. It was created by big business, for big business, and it is not surprising that such a process has been met with deep scepticism from the Australian public. The Greens believe that the archaic and secretive process of treaty negotiation needs to be overhauled, so that the Australian people can be at the centre of any future deals. The Greens recognise and welcome the comments made in the majority committee report relating to this issue, but feel they do not go far enough. Genuine reform of the process would enable community consultation regarding agreements while they are being negotiated and require Parliamentary confirmation of the full text of future agreements, not just their enabling legislation.

1.4 With regard to the TPP specifically, the Greens are deeply concerned by the stronger monopoly rights this Agreement would have secured for large multi-national pharmaceutical companies. These protected monopolies will delay patient access to cheaper medicines, such as those required to treat cancer, and drive up the cost to Australian consumers.

1.5 The Greens are further concerned that the TPP included rights for foreign companies to sue the Australian government in international tribunals if they can argue that a change in domestic law or policy at a national, state or local level will potentially 'harm' their investment, known as Investor-State Dispute Settlement (ISDS). The Greens note that the Productivity Commission have recommended that the Australian Government avoid the inclusion of ISDS provisions in any trade agreements that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.

1.6 The TPP also contains inadequate protection for labour rights and migrant workers in accordance with recognised international standards and deeply inadequate and enforceable environmental standards.

Conclusion

1.7 The Australian Greens do not support the ratification of the TPP, either now or at any time in the future and, given the United States withdrawal from the TPP, recommend that the Australian Government commit to formally and permanently ending Australia's involvement with the Agreement. The Greens are troubled by the secretive manner in which the TPP was negotiated and are deeply concerned regarding key components of the Agreement. These include the predicted increase in cost to Australians regarding essential pharmaceuticals, the ability for large multi-national corporations to sue Australian governments, poor labour rights protections and a lack of enforceable commitments to key international environmental agreements. This deal was negotiated to afford the greatest possible advantage to major, international corporations and was not designed to help regular Australians. Any moves towards ratifying the TPP would be counter to Australia's interests and should be opposed.

Recommendation 1

1.8 The Australian Greens recommend that no measures are taken towards Australia's acceptance or ratification of the TPP.

Recommendation 2

1.9 The Australian Greens recommend that the Australian Government commit to formally and permanently ending Australia's involvement with the TPP.

Recommendation 3

1.10 The Australian Greens recommend that legislation be passed, barring the Australian Government from signing the country up to international trade agreements that include ISDS clauses in future.

Recommendation 4

1.11 The Australian Greens recommend that the current trade agreement process is amended to allow for greater transparency, including independent assessments of proposed agreements, the opportunity for genuine community consultation during the negotiation phase and a final ratification process whereby Parliament votes on the whole text of agreements, rather than just implementing legislation.

**Senator Hanson-Young
Australian Greens**

Senator Nick Xenophon's additional comments

'TPP: I have studied this dumb deal...'

1.1 I thank the committee and, in particular, the secretariat for the effort they have put into summarising the background to the Trans Pacific Partnership (TPP) agreement, outlining the key issues and examining the treaty-making process.

1.2 The committee has examined various aspect of the agreement and, coupled with the circumstances that have arisen since the inauguration of US President Donald Trump, has made two recommendations, both of which I support but they do not go far enough.

The future of the TPP

1.3 In relation to the future of the TPP the committee has recommended 'the Australian Government should defer undertaking binding treaty action until the future of the Trans-Pacific Partnership Agreement is clarified through further negotiations with Australia's major trading partners'.

1.4 One of the criticisms expressed of the TPP, including by the JSCOT, has been the lack of sufficient analysis of the national benefit of entering into such a deal. Shallow rhetorical statements cannot be used to make the case. Analysis of agreements after their implementation invariably shows that the claims made by Government and free trade spruikers just don't stack up.

1.5 The Productivity Commission has revealed predictions of growth and jobs from Free Trade Agreements (FTAs) have rarely been delivered because the economic models employed exaggerate the benefits, ignore many of the costs and assume away unemployment effects.

1.6 The Australian National University's study of the outcomes of the Australia-US FTA after 10 years showed the preferential agreement diverted trade away from other countries. Australia and the United States have reduced their trade by \$US53 billion (\$71 billion) with the rest of the world and are worse off than they would have been without the agreement. That study concludes that 'deals that are struck in haste for primarily political reasons carry risk of substantial economic damage'.

1.7 Past Governments have claimed that Australia's FTAs with Japan, South Korea and China would lead to tens of thousands of additional jobs. Yet economic modelling, by the Canberra based Centre for International Economics, estimates that by 2035 those three FTAs will have produced a total of only 5400 additional jobs. That's less than 300 jobs a year. The same study indicates that the three North Asia FTAs – with Japan, Korea and China – taken together will boost total Australian exports by only 0.5 per cent. They'll boost imports by 2.5 per cent. These FTAs are more like 'import agreements' than export agreements.

1.8 I am not against the expansion of trade or negotiating free trade agreements. Trade is the lifeblood of our economy. But we need to take a more strategic approach to trade; indeed a much more hard-headed approach that supports a diverse economy including our manufacturing industry.

1.9 Manufacturing is in crisis. Over 200,000 manufacturing jobs have disappeared since 2008, and the rate of job loss has accelerated. Manufacturing employment fell 6 per cent in 2015 alone. There was never anything inevitable about this. What we have been witnessing has to a large extent been driven by the policy decisions of successive governments. The decline in Australian manufacturing output and employment is not typical of other industrial countries. Australia is well behind our counterparts – and now has the smallest share of manufacturing in total employment of any OECD country.

1.10 All successful manufacturing nations, the United States, Japan, Germany, South Korea, and others have negotiated trade agreements that expand trade but still enable them to use government procurement and other active government policies to develop globally competitive manufacturing industries.

1.11 The government has negotiated poorly in the South Korea, Japan and China FTAs, conceding far more than our trading partners. They have struck deals at any cost, going for quantity, not quality.

1.12 The 'success' of this policy is evident in Australia's huge current account deficits. In 2015, Australia exported just under \$100 billion in total value of manufactured products, but imported \$246 billion. The deficit in manufacturing is the biggest single contributor to Australia's ongoing current account deficits which have driven rising international debt, now exceeding \$1 trillion.

1.13 In addition to an inadequate business case there are other significant flaws in the agreement. One of these is the sovereignty sapping ISDS provisions. The committee rightly quoted the powerful and attention demanding extrajudicial statements of none less than the former Chief Justice of High Court, Justice Robert French AC, which is worthy of repeating:

Arbitral tribunals set up under ISDS provisions are not courts. Nor are they required to act like courts. Yet their decisions may include awards which significantly impact on national economies and on regulatory systems within nation states...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.

1.14 Other flaws in the agreement are well articulated in the committee's report.

1.15 The TPP is a dumb deal.

Recommendation 1

1.16 Even if a suitable replacement economy for the United States is found, the TPP or a similarly styled agreement should not be accepted or ratified by the Australian government.

Reform to the treaty-making process

1.17 The committee highlighted bipartisan agreement to reform the treaty-making process and made a recommendation that 'the Australian Government expedite widely supported reforms to the treaty-making process in order to assist the completion of future trade agreements'.

1.18 The Senate committee joined JSCOT in endorsing 'the need to permit security cleared representatives from business and civil society to see the Australian Government positions being put as part of those negotiations' and the need for independent modelling and analysis of a proposed trade agreement to be undertaken by the Productivity Commission, or equivalent organisation.

1.19 I support these reforms but note that the committee's recommendation can be strengthened by ensuring that the text of these agreements be subject to the scrutiny of the Parliament prior to the agreement being signed.

Recommendation 2

1.20 That the Australian Government expedite widely supported reforms to the treaty-making process in order to assist the completion of future trade agreements and for that reform to include the need for the text of these agreements to be subject to the scrutiny of the Parliament prior to the agreement being signed.

**Senator Nick Xenophon
Senator for South Australia**

Appendix 1

Submissions

1. Wine Australia
2. American Chamber of Commerce in Australia
3. Dr Luke Nottage
4. Name Withheld
5. Electrical Trades Union of Australia
6. Dr Jeffrey Wilson
7. ITS Global
8. Ms Steffie Baird
9. Business Council of Australia
10. Dr Liz Elliott
11. Wine Makers Federation of Australia
12. Mr Michael Wood
13. Australian Sugar Industry Alliance
14. Mr Vince Moore
15. Mr Leslie Shirreffs
16. Australian Chamber of Commerce and Industry
17. Chatto Creek Advisory
18. AUSVEG
19. United Voice
20. Dr Kyla Tienhaara
21. Dr Anis Chowdhury
22. Dr Aoife O'Donoghue and Dr Ntina Tzouvala
23. Centre for Independent Studies

24. Unions WA
25. Associate Professor Hazel Moir
26. Law Council of Australia
27. Open Source Industry Australia Ltd
28. Doctors Without Borders / Medicines Sans Frontieres
29. Communist Party of Australia
30. Australian Red Meat and Livestock Australia
31. Sutherland Shire Environment Centre
32. Humane Society International
33. Australia and New Zealand Banking Group
34. Australian Services Union
35. Minerals Council of Australia
36. Australian Dairy Industry Council and Dairy Australia
37. Joint Education Unions
38. Australian Council of Trade Unions (ACTU)
39. Australian Fair Trade & Investment Network (AFTINET)
40. NSW Nurses and Midwives' Association
41. Financial Services Council
42. Public Health Association of Australia
43. CHOICE
44. Public Services International
45. Universities Allied for Essential Medicines
46. Grain Growers Limited
47. Friends of the Earth Australia
48. Environmental Defenders' Offices of Australia
49. Australian Pork Limited

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50. Copyright Advisory Group to the Council of Australian Governments
Education Council
 51. Medicines Australia
 52. North Queensland Conservation Council
 53. Gene Ethics
 54. Adjunct Professor Anna George
 55. CFMEU
 56. Australian Digital Alliance
 57. ActionAid Australia
 58. Dr Elizabeth Thurbon
 59. Dr Deborah Gleeson
 60. Mr Kyle Dickson-Smith
 61. Dr Des Maddalena
 62. Mr Barry Fitzpatrick
 63. Logan & Albert Conservation Association
 64. Mr Richard Rolls
 65. Mr David Meredith
 66. Ms Christine Price
 67. Kendall Lovett and Mannie De Saxe
 68. Nicholas and Rosalind Peterson
 69. Ms Mahalia Mertens-Moussa
 70. Ms Linda Link
 71. Mr Roger Jowett
 72. Mr Harry Creamer
 73. Mr Malcolm Bosworth
 74. Mr Brian Jones

75. Mr Nathan Laurent
76. Name Withheld
77. Mr Kevin Bracken
78. CropLife
79. Electronic Frontiers Australia
80. Dr Rebecca LaForgia
81. Universities Australia
82. Associate Professor Kimberlee Weatherall
83. Department of Foreign Affairs and Trade
84. Dr Matthew Rimmer
85. NSW Government
86. Blackmores
87. Mr Craig Welch and Ms Ruth Lopert
88. Ms Marina Kofman
89. Government of South Australia
90. Mr Tony Mullen
91. Name Withheld
92. Name Withheld
93. Ms Toni Davies
94. Mr Alan Manson
95. Mr Gilbert Holmes
96. Name Withheld
97. Rick and Barbara Godfrey
98. Dr Lyndon DeVantier
99. Mr Warren Whelan
100. Mr Peter West

