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Report 181

Comprehensive and Progressive Agreement for Trans-Pacific Partnership

Joint Standing Committee on Treaties

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Executive Summary

This report contains the Joint Standing Committee on Treaties' review of the following treaty action the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* and associated side letters (Santiago, 8 March 2018) (the TPP 11).

In November 2016, the Joint Standing Committee on Treaties tabled its *Report 165* into the *Trans-Pacific Partnership Agreement* (TPP).

By the time the Report was tabled, it was clear that the chances of the TPP coming into force were slim.

In January 2017, the United States Trade Representative notified the other parties to the TPP that the United States would not be ratifying the Agreement.

The TPP has been revived by the remaining TPP signatories as the TPP 11. The active provisions of the TPP 11 are much the same as those in the TPP, with the exception of a handful of suspensions.

While the Committee has effectively already examined the provisions of the TPP 11 in *Report 165*, the Committee determined to conduct an extensive inquiry because:

- in the absence of the United States, the impact of the TPP will be different;
- in the time since the Committee reported on the TPP, extensive additional research into the impact of the agreement has been undertaken; and
- the suspended provisions change the environment for a number of important Australian industries.

Chapter 2 of the Report examines trade in goods. Support for the tariff reduction measures in TPP 11 is widespread, and the tariff reductions are highly likely to benefit Australian business in general.

The absence of the United States TPP 11 will have some unexpected benefits for Australia, particularly in relation to trade with Japan.

Chapter 3 examines trade in services. The Committee found that there were significant opportunities for Australian service providers in TPP 11 countries, particularly in the Mineral Exploration and Technology Services.

The Committee also found that concerns about limitations on Australia's ability to regulate services like health care and education are mitigated by Australia's listing of non-conforming measures in relation to these sectors.

Investor-State Dispute Settlement (ISDS), which is discussed in Chapter 4, remains a matter of concern to some participants in the inquiry.

The Committee considers that while ISDS provides a degree of certainty to Australian investors overseas, there is a potential pitfall in ISDS for the Australian Government.

Chapter 5 deals with the movement of persons provisions in the TPP 11.

People remain concerned about the need for Australia to use skilled temporary visas to fill job vacancies. Concerns generally focus on the adequacy of training of skilled temporary visa holders and the exploitation of temporary visa holders, regardless of the visa program under which they entered Australia.

In a strict sense, these concerns are about labour market regulation in Australia, rather than about trade agreements, but the two are conflated in public opinion, and so concerns about people on temporary visas working in Australia contributes to concerns about trade liberalisation generally.

Chapter 6 deals with Intellectual Property, where the most significant impact of the suspended provisions of the TPP 11 is being felt. Participants to the inquiry, with some exceptions, supported the suspensions, particularly as the suspensions relate to medicines and copyright.

The biggest concern was the uncertainty surrounding the reintroduction of the suspended provisions. The Committee recommends that, if the suspended provisions are reintroduced, they should be considered to be a treaty action and should be subject to an inquiry by the Committee.

The final Chapter considers matters not related to the specific provisions of the TPP 11.

Participants to the inquiry engaged in debate about the sets of modelling undertaken into the TPP and TPP 11 and the results they predicted for Australia. While the debate was extensive, it was not illuminating.

Modelling trade agreements is an activity constrained by the data used in the model and the specificity of the matters modelled. In other words, models are not predictive, merely illustrative.

Modelling is only useful as one guide to decision making amongst others. Nevertheless, the Committee is of the view that it is better to have some modelling rather than none and better to have modelling by an independent and recognised body. The Committee reiterates its recommendation from *Report 165* that the Australian Government implement independent modelling of proposed trade agreements through an independent and recognised body, preferably the Productivity Commission.

Acceptance of a rules based international trade system and trade liberalisation has only worsened since the Committee tabled its report on TPP in November 2016.

On the international level, the United States and China, amongst others, are targeting each other with increasing levels of protectionism. At a local level, public trust in trade liberalisation is eroding as a result of perceptions about a loss of national sovereignty and employment matters.

The Committee is firmly of the view that maintaining trade liberalisation can only benefit Australia. Australia is a trading nation. If Australia's ability to trade is impaired, Australia will be significantly worse off.

The Committee supports the ratification of the TPP 11.

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Abbreviations

AANZFTA	ASEAN-Australia-New Zealand Free Trade Agreement
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
ADA	Australian Digital Alliance
AFPA	Australian Forest Products Association
AFTINET	Australian Fair Trade and Investment Network
AMWU	Australian Manufacturing Workers' Union
BCA	Business Council of Australia
CFMEU	Construction, Forestry, Maritime, Mining and Energy Union
ChAFTA	China-Australia Free Trade Agreement
DFAT	Department of Foreign Affairs and Trade
ECA	Export Council of Australia
ETU	Electrical Trades Union
FIRB	Foreign Investment Review Board
FOSS	Free and Open Source Software
FTA	Free Trade Agreement
GPL	General Public Licence
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
JSCOT	Joint Standing Committee on Treaties

MCA	Minerals Council of Australia
METS	Mineral Exploration and Technology Services
NAFTA	North American Free Trade Agreement
NFF	National Farmers' Federation
NIA	National Interest Analysis
NTEU	National Tertiary Education Union
OECD	Organisation for Economic Cooperation and Development
OSIA	Open Source Industry Australia Ltd
PHAA	Public health Association of Australia
PSI	Public Services International
RIS	Regulation Impact Statement
SAFTA	Singapore-Australia Free Trade Agreement
SMEs	small business enterprises
TPP 11	<i>Comprehensive and Progressive Agreement for Trans-Pacific Partnership</i>
TPP	Trans-Pacific Partnership
TRIPS	<i>Agreement on Trade-Related Aspects of Intellectual Property</i>
US	United States
WHO	World Health Organisation
WTO	World Trade Organisation

Members

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Deputy Chair

Hon Michael Danby MP

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Senator Slade Brockman

Mr Chris Crewther MP

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Terms of Reference

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - i. either House of the Parliament, or
 - ii. a Minister; and
 - iii. such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

List of Recommendations

Recommendation 1

6.41 The Committee recommends that, in the event that the Parties to the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* agree to reinstate the suspended provisions of the *Trans Pacific Partnership Agreement*, the reinstatement be treated as an amendment to the Treaty and be subject to an inquiry by the Committee.

Recommendation 2

7.23 The Committee recommends that the Australian Government review Australia's bilateral trade agreements with TPP 11 Parties with a view to withdrawing from those which are no longer beneficial to Australian businesses.

Recommendation 3

7.70 The Committee recommends that the Australian Government consider implementing a process through which independent modelling and analysis of a proposed trade agreement is undertaken by the Productivity Commission, or equivalent organisation, and provided to the Committee alongside the NIA to improve assessment of the agreement.

Recommendation 4

7.88 The Committee supports the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the*

Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam and recommends that binding treaty action be taken.

1. Introduction

Purpose of the report

- 1.1 This report contains the Joint Standing Committee on Treaties' review of the following treaty action:
 - *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* and associated side letters (Santiago, 8 March 2018).
- 1.2 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become a signatory, on the treaty being tabled in Parliament.
- 1.3 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australia will not arise.
- 1.4 Prior to tabling, major treaty actions are subject to a *National Interest Analysis* (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.
- 1.5 A *Regulation Impact Statement* (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. This Treaty required an RIS.

- 1.6 The Committee takes account of these documents in its examination of the Treaty text, in addition to other evidence taken during the inquiry program.
- 1.7 Copies of the Treaty considered in this report and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:
 - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11/Treaty_being_considered.

The inquiry

- 1.8 In November 2016, the Joint Standing Committee on Treaties tabled its report into the Trans-Pacific Partnership Agreement (TPP).
- 1.9 By the time the Report was tabled, it was clear that the chances of the TPP coming into force were slim. Both candidates for the President of the United States, the election for which was being held in the same month the Report was tabled, had committed to withdrawing from the TPP.
- 1.10 In January 2017, the United States Trade Representative notified the other parties to the TPP that the United States would not be ratifying the Agreement.¹
- 1.11 The Committee's 2016 Report was lengthy, covering a range of issues raised in relation to a comprehensive trade agreement.
- 1.12 The active provisions of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (referred to as TPP 11) are much the same as those in the TPP.
- 1.13 The Committee generally does not conduct an extensive inquiry when considering treaties that retain similar provisions to treaties already negotiated. However, in this instance, a number of factors warranted a more extensive inquiry. These factors are:
 - since the Committee's initial report into the TPP was tabled, an extensive body of additional research into the provisions of the TPP has emerged, especially in relation to Investor-State Dispute Settlement (ISDS) and modelling;

¹ National Interest Analysis [2018] ATNIA 1 with attachments *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* and associated side letters, [2018] ANTNIIF 1, hereafter referred to as the NIA, para 8.

- the withdrawal of the United States, the largest economy in the TPP, means that the TPP 11 will have a different impact; and
- the TPP 11 has suspended a number of provisions of the original TPP, which attracted debate amongst inquiry participants.

1.14 Another reason for undertaking an extensive inquiry is the ongoing uncertainty amongst the Australian community as to the benefits of free trade and the active implementation of protectionist economic policies in a number of economies.

Background

1.15 Negotiations for the TPP commenced in Melbourne in 2010 and concluded five years later in Atlanta on 5 October 2015.²

1.16 In its scope and ambition, the TPP was the most significant international trade agreement since the completion of the World Trade Organisation (WTO) Uruguay round twenty years ago.³

1.17 The TPP was intended to be a comprehensive agreement. In addition to chapters that are generally regarded as part of trade agreements, including those relating to the removal of tariff barriers, rules of origin and non-tariff barriers, access for business persons, investment, and intellectual property, the TPP included commitments on:

- government procurement;
- electronic commerce;
- labour and environment standards;
- competition with state owned enterprises;
- regulatory coherence;
- transparency and anti-corruption; and
- small and medium enterprises.⁴

1.18 The TPP 11 is an attempt by most of the TPP parties to implement the provisions of the TPP.

1.19 The TPP was abandoned after it became clear that it could not meet one of the requirements necessary for it to enter into force.

² Joint Standing Committee on Treaties (JSCOT), *Report 165: Trans-Pacific Partnership Agreement*, November 2016, Canberra, p. 1.

³ JSCOT, *Report 165*, p. 4.

⁴ JSCOT, *Report 165*, pp. 4–5.

- 1.20 Article 30.5 of the TPP stated that the Agreement could not enter into force unless it had been ratified by six Parties which together account for at least 85 per cent of the combined gross domestic product of the parties.⁵
- 1.21 This requirement could only be met if the United States ratified the TPP.
- 1.22 The TPP 11 has been signed by 11 of the original 12 Parties to the TPP, including: Australia; Brunei Darussalam; Canada; Chile; Japan; Malaysia; Mexico; New Zealand; Peru; Singapore; and Vietnam.⁶
- 1.23 Because the intention of TPP 11 is to retain as much as possible of the original TPP, the TPP 11's architecture is different to that of a conventional trade agreement.
- 1.24 The TPP 11 is a separate legal instrument to the TPP, but it incorporates nearly all of the provisions of the TPP. The exceptions include mechanical provisions such as those relating to entry into force and withdrawal.⁷
- 1.25 In addition, the TPP 11 includes a number of bilateral side letters that incorporate the provisions of the TPP's side letters into the TPP 11 to the extent that these apply to the TPP 11's Parties.⁸
- 1.26 The TPP 11's entry into force will occur when a simple majority of the parties have ratified the Agreement.⁹

Suspended provision

- 1.27 The TPP 11 Parties have agreed to suspend 22 of the incorporated TPP provisions. These will consequently have no effect in international law until the Parties agree to end their suspension.¹⁰
- 1.28 The 22 suspensions include:
- an obligation on Parties to review the threshold below which customs duties are charged on express packages;

⁵ *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America, and Vietnam* and associated side letters [2016] ANTNIIF 2.

⁶ NIA, para 1.

⁷ NIA, para 11.

⁸ NIA, para 57.

⁹ NIA, para 2.

¹⁰ NIA, para 16.

- provisions allowing companies to use Investor-State Dispute Settlement Provisions (ISDS) claims in relation to private investment contracts with a Government;
- an obligation on monopoly postal services to refrain from cross subsidising express postal services;
- an entitlement for foreign investors in financial services to bring ISDS claims in relation to a Government violating the minimum standard of treatment obligation;
- a commitment to international labour rights as part of Government procurement;
- a commitment to negotiate for enhanced Government procurement provisions within two years (this commitment has been extended to five years);
- a requirement that new patents be made available for: new uses of a product; new processes using a known product; and inventions derived from plants;
- the ability for a patent holder to extend their patent if there is a delay in approving a patent, or if the sale of a pharmaceutical product is delayed as a result of marketing approval;
- a provision establishing a five year protection for patent holders on test data supplied to a government as part of the process for approval for pharmaceuticals;
- copyright protection for the life of the author plus 70 years;
- the application of civil and criminal penalties for a number of types of changes to protected copyright works;
- the obligation on on-line service providers to cooperate with rights holders to deter online copyright infringement;
- an obligation on Parties to the Agreement to take measures to combat the trade in endangered flora and fauna traded in another jurisdiction; and
- obligations relating to the timing of entry into force of provisions by specific Parties.¹¹

Conduct of the Committee's review

1.29 The Treaty action reviewed in this report was advertised on the Committee's website from the date of tabling. Submissions for the Treaty were requested by 20 March 2018. The Committee received 69 submissions.

¹¹ NIA, *Attachment III: TPP 11 suspensions explained*.

- 1.30 The Committee held four public hearings into the Treaty, two in Canberra on 7 May 2018 and 25 June 2018 and one each in Melbourne on 1 June 2018 and Sydney on 15 June 2018. The transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website listed above.
- 1.31 A list of submissions received is at Appendix A. A list of exhibits received is at Attachment B. A list of witnesses who appeared at the public hearing is at Appendix C.

2. Trade in Goods

Tariffs

2.1 According to the Department of Foreign Affairs and Trade (DFAT):

With the elimination of 98 per cent of tariffs, the TPP-11 tariff cuts will have a cost-saving impact on imported goods for Australian households and businesses, and deliver material gains for our exports. The TPP-11 will provide preferential access for more than \$5½ billion of Australia's dutiable agricultural exports into existing markets as well as new markets, such as Canada and Mexico, working to expand opportunities for industries such as beef, dairy, sugar, rice, grains, seafood, horticulture and wine. The deal will afford new levels of market access for iron and steel products, ships, pharmaceuticals, machinery, paper and auto parts, to name but a few products.¹

2.2 The tariff arrangements in the TPP 11 are supported by many participants in the inquiry. The Export Council of Australia (ECA) states that the TPP 11:

...allows Australian businesses, for the first time, to access preferential tariffs and some service sectors in Mexico and Canada. It gives better access to some markets with which Australia already has FTAs. This includes lower tariffs for some Australian goods into Japan, and new access to some services sectors, particularly in Malaysia and Vietnam.²

¹ Mr George Mina, First Assistant Secretary, Office of Trade Negotiations, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 7 May 2018, p. 2.

² Export Council of Australia (ECA), *Submission 59*, p. 2.

- 2.3 Benefits from tariff reductions extend beyond the simple provisions of trade agreements. The ECA cited the indirect benefits to Australian businesses that can flow from trade agreements.³
- 2.4 For example, after the Korea—Australia Free Trade Agreement entered into force, a fruit exporter to Korea saw higher volumes because of lower tariffs. The higher volumes allowed the exporter to negotiate lower freight and logistics costs. This meant that not only did the exporter enjoy increased sales, but also increased margins on those sales.⁴
- 2.5 A number of inquiry participants identify specific benefits they expect will flow from the TPP 11, particularly in relation to agriculture and resources.

Agriculture

- 2.6 Australia exports around A\$12 billion worth of agricultural goods to TPP 11 Parties. This represents about 23 per cent of Australia's total agricultural exports.⁵
- 2.7 The TPP 11 will:
- reduce and eliminate tariffs on beef exported to Japan, Mexico and Canada;
 - reduce tariffs and levies on sugar in Japan and Canada;
 - expand the quota for rice exports to Japan, and eliminate tariffs on exports to Mexico;
 - eliminate tariffs on cheese exports to Japan, improve butter and skim milk quotas for exports to Japan, and allow preferential access for all dairy produce in Mexico and Canada;
 - eliminate tariffs on wheat and barley on exports to Mexico and Canada, and reduce tariffs applied in Japan;
 - eliminate tariffs on the export of wine to Mexico, Canada, and Vietnam; and
 - eliminate tariffs on seafood exports to Canada, Vietnam, Mexico and Japan.⁶

³ ECA, *Submission 59*, p. 2.

⁴ ECA, *Submission 59*, p. 2.

⁵ National Interest Analysis [2018] ATNIA 1 with attachments *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* and associated side letters, [2018] ANTNI 1, hereafter referred to as the NIA, para 32.

⁶ NIA, para 32.

- 2.8 The National Farmers' Federation (NFF) states that, based on trade figures for 2016–17, A\$5.5 billion worth of agricultural exports to which tariffs currently apply would have been tariff free under the TPP 11.⁷
- 2.9 The phase out of agricultural tariffs in TPP 11 countries, will, according to the NFF, make Australia more price competitive in the Pacific Rim.⁸
- 2.10 According to Meat and Livestock Australia:
The agreement has ... delivered on our priorities—via securing either a plurilateral reduction or elimination of import tariffs over various implementation timeframes.⁹
- 2.11 Meat and Livestock Australia argues that the gradual removal of tariffs will improve the profitability of Australian cattle, sheep and goat producers, processors and exporters as well as alleviate prices paid for Australian red meat, livestock and associated products currently inflated by tariffs imposed by TPP 11 countries.¹⁰
- 2.12 Although, according to Meat and Livestock Australia, the benefits are limited to a handful of TPP 11 countries:
For the remaining [TPP 11] members, existing bilateral and or regional agreements have, or are already delivering market access improvements.¹¹
- 2.13 Around one-third of Australian sugar exports, valued at more than A\$510 million annually, are sold to TPP 11 countries. The Australian Sugar Industry Alliance believes that securing improved market access for sugar in the TPP 11 is a significant achievement and an important step forward.¹²
- 2.14 The Winemakers' Federation of Australia is also very supportive of the TPP 11 tariff reductions. The TPP 11's specific tariff outcomes for wines are as follows:
- the elimination of 'nuisance' tariffs on exports to Canada;
 - the removal of the 15 per cent tariff on packaged wine exports to Japan by 2021;

⁷ National Farmers' Federation (NFF), *Submission 36*, p. 2.

⁸ NFF, *Submission 36*, p. 2.

⁹ Meat and Livestock Australia, *Submission 37*, p. 1.

¹⁰ Meat and Livestock Australia, *Submission 37*, p. 1.

¹¹ Meat and Livestock Australia, *Submission 37*, p. 2.

¹² Australian Sugar Industry Alliance, *Submission 63*, p. 1.

- the removal of tariffs on wine into Malaysia over 15 years;
- the elimination of the 20 per cent tariffs on premium wines into Mexico in three years; and
- the removal of the 50–59 per cent tariffs on wine exports to Vietnam over 11 years.¹³

Resources

- 2.15 Australian exports of minerals and energy resources to TPP 11 countries were valued at A\$43 billion in 2016–17.¹⁴
- 2.16 Australia’s most significant minerals and energy resources exports were iron ore, coal and LNG. The most significant export markets were Japan, Malaysia and Singapore. Minerals and energy exports to these countries are already tariff free for the most part.¹⁵
- 2.17 The most significant gain for Australia will be the elimination of tariffs on butane, propane, refined petroleum and liquefied natural gas to Vietnam.¹⁶
- 2.18 The outcomes of the TPP 11 in market access gains for mining and energy resources commodities and mining services include:
- Peru eliminating tariffs on iron ore, copper and nickel;
 - Vietnam eliminating tariffs on butane, propane and liquid natural gas; and
 - Vietnam eliminating 20 per cent of tariffs on refined petroleum.¹⁷
- 2.19 The Minerals Council of Australia (MCA) also argues that the TPP 11 will also ‘lock in and preserve existing market access for Australia’s mining commodities in these countries.’¹⁸

Forestry and paper products

- 2.20 While exporters are very supportive of the tariff reductions in the TPP 11, local industries facing tariff reductions have some concerns.

¹³ Winemakers’ Federation of Australia, *Submission 20*, p. 3.

¹⁴ Minerals Council of Australia (MCA), *Submission 38*, p. 14.

¹⁵ MCA, *Submission 38*, p. 16.

¹⁶ NIA, para 36.

¹⁷ MCA, *Submission 38*, p. 1.

¹⁸ MCA, *Submission 38*, p. 1.

- 2.21 The Australian Forest Products Association (AFPA) is one of the few industry groups to discuss the risks to Australian industry from overseas competitors.
- 2.22 The AFPA states that it:
- ... supports the high-level principles of trade liberalisation to support global trade by removing unnecessary trade barriers and promoting greater efficiency, innovation and investment. However, these principles must be applied equitably and with comparable tariff reduction commitments from our major trading partners to deliver positive outcomes.¹⁹
- 2.23 The AFPA is concerned that the changing nature of trade in paper products between Australia and other TPP 11 parties could involve significant risk to Australian producers.²⁰
- 2.24 The Association argues that:
- A detailed analysis of the tariff outcomes overlayed by existing country trade flows, has indicated that TPP-11 will result in some asymmetric tariff outcomes for Australian companies (in both the tariff % concession amount and the differing length of tariff removal transition times) for specific wood and paper products.²¹
- 2.25 The tariff outcomes in the proposed TPP 11 are primarily due to the concessions given to other TPP 11 nations in their tariff removal transition times, which can give other countries immediate advantage to compete in Australian markets, and no immediate collateral benefits or opportunities for exporting Australian businesses.²²
- 2.26 For example, Australia has a five per cent tariff in place for imports of sawn wood, board products, woodchip, and paper and paperboard. Under TPP 11, these tariffs will be removed on entry into force of TPP 11, except for fibreboard which will remain at a tariff of five per cent for three years.
- 2.27 In contrast Malaysia has a range of tariffs (10 per cent to 25 per cent) which will be removed between 3 and 6 years after entry into force. Packaging and

¹⁹ Australian Forest Products Association (AFPA), *Submission 48*, p. 2.

²⁰ AFPA, *Submission 48*, p. 2.

²¹ AFPA, *Submission 48*, p. 3.

²² AFPA, *Submission 48*, p. 3.

industrial paper and paperboard products predominantly have tariffs of 25 per cent in Malaysia, which will be removed over three years.²³

2.28 The Association argues:

Given the fierce nature of competition in paper markets, Australian producers are very susceptible to asymmetric tariff reductions and adverse impacts from non-tariff barriers, including direct subsidies, potentially enjoyed by producers in other countries. Capital subsidies in those countries may be explicit or may be a result of poor financial or other regulation.²⁴

Effect of US withdrawal

2.29 A number of participants in the inquiry advised the Committee that the withdrawal of the United States from the original TPP would benefit Australia. The benefits are primarily a result of the fact that the United States and Japan do not have a bilateral trade agreement. This means that United States exports to Japan are still subject to tariffs that would have been removed under the original TPP.

2.30 GrainGrowers, for example, is ambivalent regarding the possibility of the United States re-joining the TPP 11. While it would send a positive signal regarding trade liberalisation, Australia will retain a competitive edge, particularly with regard to the Japanese market, if the United States remains outside the agreement.²⁵

2.31 Pork producers also expect to benefit from the absence of the United States from the TPP 11:

The new agreement, while not containing any additional market access for Australian pork when compared to the original agreement, has the benefit of excluding the US from receiving equivalent market access in key pork markets where we compete with US suppliers, such as Japan. In that respect, the TPP-11 without the US delivers a relatively superior outcome for Australian pork farmers.²⁶

2.32 The Australian Chamber of Commerce and Industry (ACCI) indicate that the TPP 11 without the United States provides Australian businesses with a

²³ AFPA, *Submission 48*, p. 3.

²⁴ AFPA, *Submission 48*, p. 4.

²⁵ GrainGrowers, *Submission 25*, pp. [3]–[4].

²⁶ Australian Pork Limited, *Submission 29*, p. 1.

significant advantage because the US is not able to take advantage of privileged market access to Japan.²⁷

Non-tariff barriers

2.33 There is no clear definition of non-tariff barriers. The Organisation for Economic Cooperation and Development (OECD) describes non-tariff barriers as:

... all barriers to trade that are not tariffs.²⁸

2.34 The TPP 11 contains chapters dealing with aspects of non-tariff barriers, including:

- customs administration and trade facilitation;
- sanitary and phytosanitary measures;
- technical barriers to trade; and
- transparency and anti-corruption.

2.35 According to AI Group:

Our experience with some FTAs has been that non-tariff barriers have increased post ratification, negating the benefits of tariff reductions and market access. We are pleased to see that negotiators have taken the pragmatic steps to include mechanisms to address non-tariff barriers within the agreement, ensuring that it is a dynamic and practical tool for ongoing trade access.²⁹

2.36 The Australian Dairy Industry Council is a strong supporter of the non-tariff barrier provisions in the TPP 11:

While tariffs and quotas are generally transparent and declining over time, the growing range and diversity of behind the border (non-tariff) measures have a major impact upon the incentive to and profitability of exporting.³⁰

2.37 In relation to dairy products, examples include product labelling, age and testing requirements, certification of dairy products and food safety rules

²⁷ Australian Chamber of Commerce and Industry (ACCI), *Submission 49*, p. 4.

²⁸ Organisation for Economic Cooperation and Development (OECD), *Glossary of Statistical Terms – non-tariff barriers*, <<https://stats.oecd.org/glossary/detail.asp?ID=1837>> viewed 13 November 2016.

²⁹ AI Group, *Submission 33*, p. 8.

³⁰ Australian Dairy Industry Council and Dairy Australia, *Submission 51*, p. 1.

and more broadly, a lack of adherence to sound science principles in the regulatory decision-making process.³¹

- 2.38 The Australian Dairy Industry Council advises that provisions in TPP 11 address these non-tariff barriers, though work needs to be undertaken by respective regulatory agencies post implementation, to put in place measures to systemically resolve them.³²
- 2.39 The Winemakers' Federation of Australia's submission points out that non-tariff barriers are more costly for Australian wine exports than tariffs.³³
- 2.40 The Federation argues that the imposition of technical requirements, particularly in countries where wine is not produced, results in unnecessary costs to wine exporters.³⁴
- 2.41 The significant advantage of the TPP 11 for winemakers is that for the first time it addresses wine related technical barriers to trade through a Wine and Spirits Annex.³⁵
- 2.42 According to the Winemakers' Federation of Australia the Wine and Distilled Spirits Annex (Annex 8-A of Chapter 8 of the TPP 11) clarifies, streamlines and removes technical barriers to wine exports to TPP 11 countries.³⁶
- 2.43 The specific provisions considered most useful by the Federation are:
- streamlining certification requirements;
 - mutual acceptance of winemaking practices;
 - labelling requirements; and
 - traceability and fraud commitments.³⁷
- 2.44 On the other hand, some inquiry participants were concerned that TPP 11 might cause Australia to weaken non-tariff barriers related to dumping (importing products at a price lower than their market value) and product quality.

³¹ Australian Dairy Industry Council and Dairy Australia, *Submission 51*, p. 1.

³² Australian Dairy Industry Council and Dairy Australia, *Submission 51*, p. 1.

³³ Winemakers' Federation of Australia, *Submission 20*, p. 3.

³⁴ Winemakers' Federation of Australia, *Submission 20*, p. 3.

³⁵ Winemakers' Federation of Australia, *Submission 20*, p. 3.

³⁶ Winemakers' Federation of Australia, *Submission 20*, p. 3.

³⁷ Winemakers' Federation of Australia, *Submission 20*, p. 3.

2.45 The Australian Forest Products Association is concerned to maintain strong non-tariff measures to ensure a fair competitive Australian market, including:

... a strong anti-dumping and countervailing measures regime, and maintenance of trade safeguard provisions to ensure a level playing field ...³⁸

2.46 The Construction, Forestry, Maritime, Mining and Energy Union (CFMEU) is also concerned about the maintenance of trade safeguards:

Maintaining the availability of trade defences through a strong trade remedies system, is more vital now than any other time in Australia's history ...³⁹

Technical Barriers to Trade

2.47 The TPP 11's Technical Barriers to Trade Chapter (Chapter 8) attracted interest from participants in the inquiry.

2.48 Chapter 8 builds on the World Trade Organisation's *Agreement on Technical Barriers to Trade*.⁴⁰

2.49 The aim of the *Agreement on Technical Barriers to Trade* is to encourage the development of international standards for technical regulation and to prevent technical regulations from creating unnecessary obstacles to trade.⁴¹

2.50 Under the *Agreement on Technical Barriers to Trade*, a technical regulation is defined as a document which lays down the product characteristics with which compliance is mandatory, including such matters as symbols, packaging, marking or labelling requirements.⁴²

2.51 The objective of the TPP 11 Technical Barriers to Trade Chapter is to:

... facilitate trade, including by eliminating unnecessary technical barriers to trade, enhancing transparency, and promoting greater regulatory cooperation and good regulatory practice.⁴³

³⁸ AFPA, *Submission 48*, p. 5.

³⁹ Construction, Forestry, Maritime, Mining and Energy Union (CFMEU), *Submission 58*, p. 5.

⁴⁰ TPP 11, Article 8.1.

⁴¹ Ms Paula O'Brien, Dr Deborah Gleeson, Dr Robin Room and Ms Claire Wilkinson, *Exhibit 3, Marginalising Health Information: Implications of the Trans-Pacific Partnership Agreement for Alcohol Labelling*, *Melbourne University Law Review*, Vol 41, 2017, p. 368.

⁴² Ms Paula O'Brien et al, *Exhibit 3*, p. 369.

⁴³ TPP 11, Article 8.1.

- 2.52 This may take the TPP 11 in a different direction in relation to technical barriers to trade than the *Agreement on Technical Barriers to Trade*. The *Agreement on Technical Barriers to Trade* is viewed as being directed towards addressing regulatory protectionism, but the TPP 11 is aimed at positive integration and harmonisation between parties.⁴⁴
- 2.53 Chapter 8 requires the establishment of a Technical Barriers to Trade Committee, which will have membership from each TPP 11 Party. The purpose of the Committee is to resolve technical trade issues.
- 2.54 The Australian Fair Trade and Investment Network (AFTINET) is concerned that the Technical Barriers to Trade Committee provisions in Chapter 8 may put pressure on Australian testing authorities to accept overseas testing regimes and mutual recognition arrangements:

Mutual recognition of regulatory standards across countries with different standards raises the question of how to maintain and improve Australia's relatively high standards in areas like food regulation and building product standards. Harmonising standards may not be in the public interest.⁴⁵

- 2.55 According to the CFMEU:

Australia has a poor record when it comes to the issue of technical barriers to trade (TBT). It is a record chequered by failure to erect barriers and implement procedures effective and efficient enough to defend Australia, Australians and our legitimate objectives. Recent spectacular failures have highlighted the threat to two of Australia's most important industries; the agriculture industry (the white spot disease outbreak in the prawns sector) and the construction and building products industry (the widespread prevalence of imported non-conforming building products).⁴⁶

- 2.56 The CFMEU argues that Chapter 8 will not address its concerns in relation to Australia's technical barriers to trade.⁴⁷

- 2.57 According to the CFMEU:

... of grave concern is that the TBT chapter in TPP 11 contains 'WTO plus' obligations around conformity assessment procedures. What this means is that Australian testing authorities will be under pressure to enter Mutual Recognition Arrangements with overseas testing authorities resulting in us

⁴⁴ Ms Paula O'Brien et al, *Exhibit 3*, p. 378.

⁴⁵ Australian Fair Trade and Investment Network (AFTINET), *Submission 45*, pp. 24–25.

⁴⁶ CFMEU, *Submission 58*, p. 6.

⁴⁷ CFMEU, *Submission 58*, p. 6.

being required to accept their test results when determining whether the imported product is allowed entry.⁴⁸

Alcohol labelling

- 2.58 The impact of Chapter 8 on alcohol labelling has been extensively examined in the Committee's 2016 inquiry into the TPP and the current inquiry.
- 2.59 Globally, the burden of alcohol harm is substantial and alcohol health warning labels are an important public health strategy as they promote health messages in ways that other health initiatives do not, at point of sale and at point of consumption.⁴⁹
- 2.60 The foundation for Alcohol Research and Education identifies that alcohol is responsible for nearly 6,000 deaths and 157,000 hospitalisations in Australia each year.⁵⁰
- 2.61 Research evaluating experience with labelling as currently implemented internationally emphasises that the effectiveness of alcohol warning labels is dependent on the content, format, and presentation of the message.⁵¹
- 2.62 According to Paula O'Brien, Senior Lecturer at the Melbourne Law School, the *Agreement on Technical Barriers to Trade* provides scope for the use of well designed, non-discriminatory, evidence based, health warning labelling.⁵²
- 2.63 However, Dr Deborah Gleeson argues that Annex 8-A of Chapter 8 of TPP 11 contains a novel set of provisions for wine and spirits that require parties to allow suppliers to place country specific labelling information on a supplementary label.⁵³
- 2.64 Paragraph 5 of Annex 8-A states that if a party requires a supplier to indicate information on a distilled spirits label, a party shall permit the supplier to indicate that information on a supplementary label that is affixed to the distilled spirits container. Similar provisions are made for supplementary labelling of wine.⁵⁴

⁴⁸ CFMEU, *Submission 58*, p. 7.

⁴⁹ Foundation for Alcohol Research and Education, *Submission 31*, p. 2.

⁵⁰ Foundation for Alcohol Research and Education, *Submission 31*, p. 1.

⁵¹ Ms Paula O'Brien et al, *Exhibit 3*, p. 362.

⁵² Ms Paula O'Brien et al, *Exhibit 3*, p. 369.

⁵³ Dr Deborah Gleeson et al, *Submission 22*, p. 1.

⁵⁴ Ms Paula O'Brien et al, *Exhibit 3*, p. 380.

- 2.65 The rules on supplementary labelling in Annex 8-A of TPP 11 is the first appearance of a supplementary labelling requirement in an international trade treaty.⁵⁵
- 2.66 The functional purpose of the supplementary label is to save suppliers from having to redesign their standard product labels to accommodate different labelling requirements for different countries.⁵⁶
- 2.67 Dr Gleeson’s submission argues that these provisions potentially create challenges for countries wishing to introduce effective health warning schemes and other types of health information on alcohol containers.⁵⁷
- 2.68 Dr Gleeson argues that it is important that a state’s right to introduce evidence based health information on alcohol is preserved.⁵⁸
- 2.69 Paula O’Brien’s analysis of the alcohol labelling provisions in Annex8-A:
... suggests that the new rules negotiated in the TPP potentially create some challenges, though probably not insurmountable ones, for countries wishing to introduce new labelling regimes to display health information on alcohol containers.⁵⁹
- 2.70 There is no definition of ‘supplementary label’ in Annex 8-A. However, Paula O’Brien suggests that the Annex’s requirements may be met if a TPP 11 Party introduced a mandatory alcohol labelling scheme that includes the layout, design and placement of the label, and permits suppliers to use a supplementary label.⁶⁰
- 2.71 This reading of the TPP 11 fits with the purpose of the TPP 11, which is to strengthen the competitiveness of business, develop regional supply chains, and decrease technical barriers to trade.⁶¹
- 2.72 Paula O’Brien suggests that TPP 11 Parties might be able to defend this on the basis that an additional label can be added after manufacture but before sale, enabling manufacturers to access economies of scale in labelling their

⁵⁵ Ms Paula O’Brien et al, *Exhibit 3*, p. 345.

⁵⁶ Ms Paula O’Brien et al, *Exhibit 3*, p. 381.

⁵⁷ Dr Deborah Gleeson et al, *Submission 22*, p. 1.

⁵⁸ Dr Deborah Gleeson et al, *Submission 22*, p. 1.

⁵⁹ Ms Paula O’Brien et al, *Exhibit 3*, p. 389.

⁶⁰ Ms Paula O’Brien et al, *Exhibit 3*, p. 383.

⁶¹ Ms Paula O’Brien et al, *Exhibit 3*, p. 384.

products while retaining the right to oblige the application of a health warning.⁶²

Conclusion

- 2.73 Support for the tariff reduction measures in TPP 11 is widespread, and the tariff reductions are highly likely to benefit Australian business in general.
- 2.74 The potential impact of the United States re-joining the TPP 11 in the future is discussed in Chapter 6. In the meantime, the current position of the United States towards the TPP 11 will have some unexpected benefits for Australia, particularly in relation to trade with Japan.
- 2.75 The quality of Australia's legitimate non-tariff barriers relating to the quality of products imported and Australia's anti-dumping measures are becoming more of a focus for concern in Australia, and concerns remain in relation to the impact of the regulatory harmonisation provisions in Chapter 8 of the TPP 11.
- 2.76 The Committee believes that the Australian Government will need to be vigilant in these policy fields to ensure public support for free trade continues into the future.

⁶² Ms Paula O'Brien et al, *Exhibit 3*, p. 383.

3. Trade in Services

Trade in services provisions

3.1 The key commitments in the TPP 11 relating to trade in services include:

- a national treatment obligation requiring a TPP 11 country to treat local and foreign service suppliers equally where there are like circumstances;
- a Most Favoured Nation treatment obligation requiring a TPP 11 country to treat service suppliers from another TPP 11 country equally to how it treats service suppliers from other countries;
- a market access obligation preventing a Party from imposing restrictions on its own or foreign suppliers in service sectors, including preventing limitations on the number of providers who can supply services in a country or the legal form of enterprise that can provide services, unless otherwise listed in the non-conforming measures schedules; and
- a prohibition from requiring a provider from another TPP 11 country to establish a local office as a condition of supplying services.¹

3.2 Specifically, the TPP 11 will result in the following:

- the liberalisation of Mexico's energy sector;
- changes to Vietnam's and Brunei Darussalam's local content requirements on supplies for mining, oil and gas exploration;
- removing Malaysian restrictions on foreign legal, architectural, engineering and surveying professional services;

¹ *National Interest Analysis* [2016] ATNIA 4, *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam* and associated side letters [2016] ANTNIIF 2, para 24.

- guarantees for cross border access in relation to investment advice, portfolio management, collective investment, maritime insurance, and international commercial aviation and freight brokerage;
- guaranteed access for secondary and tertiary education providers to Brunei Darussalam, Japan, Malaysia, Mexico, and Vietnam;
- changes to integrated logistics and supply chains to support transportation services;
- the phasing out of foreign equity limits on telecommunication services in Vietnam;
- greater access for private health providers to Malaysia, Mexico and Vietnam; and
- guaranteed access for Australian tourism operators to Brunei Darussalam, Canada, Chile, Japan, and Mexico.²

3.3 The Export Council of Australia (ECA) noted the benefits of liberalisation in trade in services:

The TPP-11 makes it easier for people, data and investment to flow between the parties, greatly reducing some major obstacles for Australian businesses operating internationally, particularly in services sectors. The TPP-11 will ensure Australian businesses can provide a better level of services to their clients (either through temporary travel or sending people to establish offices). It will allow businesses to host data from TPP-11 parties on one secure server. It will protect the international offices of Australian businesses from discriminatory treatment and ensure they can return their profits to Australia.³

Mineral Exploration and Technology Services (METS)

- 3.4 As many TPP 11 Parties have already removed tariffs on Australian resources exports, the greatest benefit to Australia's resources sector is likely to be in the export of Mineral Exploration and Technology Services (METS).
- 3.5 The Minerals Council of Australia (MCA) also focussed on the potential benefits to Australia of (METS). The Minerals Council submission identifies the following measures as being particularly attractive for mining equipment, technology and services businesses:

² *National Interest Analysis* [2018] ATNIA 1 with attachments *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* and associated side letters, [2018] ANTNIIF 1, hereafter referred to as the NIA, para 36.

³ Export Council of Australia (ECA), *Submission 59*, p. 3.

- access to legal services markets in Canada, Mexico, Malaysia and Brunei Darussalam;
- access to engineering services markets in Brunei Darussalam, Canada, Chile and Mexico;
- access for exploration, production, processing and refining of oil and gas in Mexico;
- increased transparency for operating conditions for suppliers and investors in Malaysia;
- opening investment in oil, gas, and power development in Vietnam and Brunei Darussalam;
- access for mining and oilfield goods and services in Brunei Darussalam, Mexico and Vietnam;
- access to mining related consulting, research and development, engineering and environmental services in Chile and Mexico; and
- commitments to allow a more level playing field in competition with mining and energy state owned enterprises.⁴

3.6 The Minerals Council also identified the provisions of Chapter 14 of the TPP 11 as being particularly beneficial for Australian METS businesses:

The TPP-11's electronic commerce provisions in Chapter 14 will support Australian exports of mining-related software and the potential for digital delivery of Australian mining services to these markets. Chapter 14 recognises the opportunities of digital trade and the importance of promoting confidence and avoiding unnecessary barriers to the development of electronic commerce. Several specific provisions in this Chapter will support Australian mining software and digital delivery of mining services.⁵

Ratchet mechanism

- 3.7 Public Services International (PSI) is concerned that the TPP 11 goes further than previous agreements in relation to trade in services by only allowing governments to exclude specified services from international competition.⁶
- 3.8 According to PSI, the TPP 11 prevents governments from, for example, resuming control of services even in the case of market failure. PSI argues

⁴ Minerals Council of Australia (MCA), *Submission 38*, p. 19.

⁵ MCA, *Submission 38*, p. 19.

⁶ Public Services International (PSI), *Submission 27*, p. 3.

that some services in Australia such as the childcare industry and vocational training, have suffered market failure recently.⁷

3.9 According to PSI, the TPP 11 will also prevent governments from requiring minimum staffing levels and qualifications in areas such as nursing, childcare and aged care regardless of evidence that supports such minimum ratios.⁸

3.10 The effect is colloquially called the ‘ratchet mechanism,’ which is contained in Chapter 10 of the TPP 11, relating to trade in services.

3.11 Chapter 10 obliges a party to permit services and service suppliers from another party to no less favourable treatment than it accords local services and service suppliers.

3.12 Article 10.5 is the relevant article for the ratchet mechanism. This article prevents a party from imposing limits that do not already exist on:

- the number of service suppliers;
- the value of service transaction or assets;
- the total number of service operations or the quantity of service output; and
- the total number of persons that may be employed in a service.

3.13 PSI argues that the effect of this is to set a limit on government’s ability to wind back access to service provision by entities from other parties.⁹

3.14 The National Tertiary Education Union (NTEU) makes the same point:

Once a ‘public’ social service is opened to competition, regulatory actions undertaken by government will have a cost that is ultimately defrayed onto the taxpayer. Take Australia’s experience of profound market failure in the deregulation of vocational education and training (VET), where State and Federal governments have been forced to intervene and reregulate against the private provision of those services. Ratification of the [TPP 11] means that a for-profit VET provider owned by an overseas company could demand compensation from a State/Territory or Federal government if they changed laws which led to the company being deregistered, losing a licence, or being excluded from access to public subsidies.¹⁰

⁷ PSI, *Submission 27*, p. 3.

⁸ PSI, *Submission 27*, p. 3.

⁹ PSI, *Submission 27*, p. 3.

¹⁰ National Tertiary Education Union (NTEU), *Submission 40*, p 4. See also Australian Manufacturing Workers’ Union (AMWU), *Submission 41*, p. 2.

- 3.15 However, Article 10.7 provides that a Government can list in a Schedule to Annex II of the TPP 11 the types of services to which the provisions in Article 10.5 do not apply.
- 3.16 Australia has listed a number of measures to which the relevant provisions to Chapter 10 do not apply. The range of measures appears to be quite broad.
- 3.17 Australia's Schedule to Annex II states the following:
- Australia reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, including the collection and distribution of blood and blood related products, childcare, public utilities, public transport and public housing.
- 3.18 It is not clear whether the Australian Government is now limited in terms of the matter to which the Chapter 10 provisions apply to those contained in Australia's Schedule to Annex II, or whether it is open to Australia to amend its Schedule using the provisions in Chapter 27. The provisions in Chapter 27 do not limit the matters which can be the subject of amendment.
- 3.19 In addition, the Australian Government would appear to be able to pursue nationalisation in a service sector subject to market failure under Article 9.8 of the TPP 11.

Conclusion

- 3.20 Concerns relating to the Australian Government's capacity to act in Australia's interest in relation to trade in services hinge on the scope and applicability of Australia's Schedule to Annex II of the TPP 11.
- 3.21 In the Committee's view, the Australian Schedule to Annex II is quite broad in scope, and would seem sufficient to address the particular concerns raised by participants in the inquiry. Australia should, according to the TPP 11, be able to regulate the matters listed in Annex II without impediment under the Agreement.
- 3.22 Other mechanisms exist in the TPP 11 in the event that Australia needs to regulate matters outside the scope of the Australian Schedule of Annex II, although these would likely be costly and time consuming to pursue.

4. Investment and ISDS

Introduction

4.1 This Chapter discusses issues relating to investment and Investor State Dispute Settlement (ISDS) in the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (TPP 11).

4.2 ISDS in particular remains a matter of concern to some participants in the inquiry. For example, Mr Jonathan Peter, like many other individuals, states:

The dispute resolution mechanisms (ISDS) of these recently proposed agreements are a serious threat to the sovereignty of member states, as it allows corporate interests to sue national governments in unelected offshore tribunals, without appeal to the domestic justice systems of the countries involved.¹

4.3 Nevertheless, the importance of Australian businesses being able to invest overseas easily, and for Australia to be seen as a safe and reliable location for foreign investment underpins Australia's prosperity. The provisions of Chapter 9 of TPP 11 provide an important reassurance in this regard.

Investment

4.4 According to the National Interest Analysis (NIA), the TPP 11 will 'provide a more predictable and transparent regulatory environment for investment.'²

¹ Mr Jonathan Peter, *Submission 2*, p. 1. See also Mr Charles Mollison, *Submission 6*, p. 1; Mr Peter Sainsbury, *Submission 8*, p. 1; Sam Altman, *Submission 11*, p. 1; Mr Tom Marwick, *Submission 12*, p. 1; Mr Harry Creamer, *Submission 43*, p. 2.

² National Interest Analysis [2018] ATNIA 1 with attachments *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of:*

- 4.5 The TPP 11 is expected to liberalise investment regimes in sectors in which the TPP 11 Parties account for the majority of global investment. This includes energy, mining, telecommunications and financial services.³
- 4.6 The TPP 11 should also encourage growth in foreign investment into Australia by liberalising the screening threshold at which private foreign investment in non-sensitive sectors are considered by the Foreign Investment Review Board (FIRB). The threshold for FIRB review will increase from A\$261 million to A\$1.134 billion.⁴
- 4.7 The NIA notes that under the TPP 11, Australia retains the ability to screen investments in sensitive sectors to ensure they are not contrary to the national interest.⁵
- 4.8 The TPP 11's investment obligations contain, according to the NIA:
 ... high quality, modern rules governing the treatment of investors and their investments, balanced with robust safeguards to preserve the right of the Government to continue regulating in the public interest.⁶
- 4.9 The Minerals Council of Australia (MCA) points out that, with a relatively small population, Australia has always relied on supplementing domestic savings with foreign investment to take advantage of investment opportunities.⁷
- 4.10 TPP 11 investment provisions will, according to the MCA, help both inward and outward investment in Australia.⁸
- 4.11 According to the MCA, there are a number of provisions in the TPP 11 that will support Australian outward investment, including that:
- foreign investors and their investments cannot be treated less favourably than domestic investors and investments;
 - investments can only be expropriated for a public purpose, and must be compensated at the market value; and

Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam and associated side letters, [2018] ANTNIIF 1, hereafter referred to as the NIA, para 42.

³ NIA, para 43.

⁴ NIA, para 44.

⁵ NIA, para 45.

⁶ NIA, para 46.

⁷ Minerals Council of Australia (MCA), *Submission 38*, p. 21.

⁸ MCA, *Submission 38*, p. 2.

- foreign investors will be accorded a set minimum standard of treatment, including providing due process in court proceedings.⁹

4.12 ActionAid is concerned that the investment provisions of the TPP 11 may unfairly discriminate against women, particularly in the less developed TPP 11 parties. ActionAid's concerns are twofold:

- the provisions enable international investors to purchase farming land from smallholders, who are predominantly women; and
- the investment provisions may discourage a TPP 11 party from introducing affirmative action policies to support women in small business.¹⁰

4.13 The Department of Foreign Affairs and Trade (DFAT) identified that there are provisions in the TPP 11 that permit a country to discriminate in certain circumstances. Articles 15.3 and 29.2 provide that in certain circumstances the application of the investment provisions can be circumvented to:

- protect public morals, order or safety;
- protect human, animal or plant life or health (including environmental measures necessary to protect human, animal or plant life or health);
- protect intellectual property; and
- protect goods and services of a person with disabilities, of philanthropic or not-for-profit institutions, or of prison labour.¹¹

4.14 Annex 15A of TPP 11 provides that the investment provisions do not apply to:

- any form of preference to benefit small and medium enterprises;
- measures to protect national treasures of artistic, historic, or archaeological value;
- measures for the health and welfare of indigenous people; and
- measures for the economic and social advancement of indigenous people.¹²

⁹ MCA, *Submission 38*, p. 22.

¹⁰ ActionAid Australia, *Submission 46*, p. 7.

¹¹ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* and associated side letters, [2018] ANT/NIF 1, hereafter referred to as the TPP 11, Articles 15.3 and 29.2.

¹² TPP 11, Annex 15A.

Investor-State Dispute Settlement

Background

- 4.15 Investor-State Dispute Settlement (ISDS) is an international arbitration procedure that is intended to be an impartial, law-based approach to resolving conflicts between countries and foreign investors.¹³
- 4.16 From a country's point of view, an ISDS scheme offers a number of advantages:
- it provides a mechanism to resolve investment conflicts without creating country to country conflict;
 - it protects a country's citizens who invest abroad; and
 - it provides foreign investors in a country with reassurance that the country will respect the rule of law in relation to their investments.¹⁴
- 4.17 From a foreign investor's point of view, ISDS is a more reliable mechanism for resolving disputes than the alternatives:
- taking action in the legal system of the host country, which may not have laws to permit such an action, or may give certain institutions immunity; or
 - seeking the diplomatic assistance of the investor's home country, which relies on the willingness of the home country to provide such assistance.¹⁵
- 4.18 ISDS is now widespread and well established. The world's first ISDS institution, the International Centre for Settlement of Investment Disputes (ICSID) was established in 1966. ICSID was established by an international convention to which Australia is a signatory, and operates under the auspices of the World Bank.¹⁶

¹³ Office of the United States Trade Representative, *Fact Sheet: Investor-State Dispute Settlement*, <<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>> viewed 11 November 2016.

¹⁴ Office of the United States Trade Representative, *Fact Sheet: Investor-State Dispute Settlement*, <<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>> viewed 11 November 2016.

¹⁵ Dr S Luttrell, 'Why ISDS is Good for Australia,' *Law Society of Western Australia, Brief*, vol. 42, no. 11, December 2015, p. 11.

¹⁶ Joint Standing Committee on Treaties (JSCOT), *Report 165: Trans-Pacific Partnership Agreement*, November 2016, Canberra, p. 63.

- 4.19 In terms of the evidence gathered during the inquiry, the time since the completion of the inquiry into the original TPP has enabled the collection of significantly more information on ISDS than was previously available to the Committee.
- 4.20 The TPP 11 retains the ISDS provisions of the original TPP with the exception that their application to investment agreements and investment authorisations has been suspended.¹⁷
- 4.21 This will not significantly change the ISDS provisions from Australia's perspective because these authorisations had already been excluded from application to Australia by Annex 9-H of the original TPP.¹⁸
- 4.22 A further change is the suspension of the minimum standard of treatment protection with respect to investments in the financial services sector.¹⁹
- 4.23 Disputes under ISDS provisions of the TPP 11:
... must involve breaches of the substantive investment commitments governments make under the relevant trade agreement such as the commitments in the TPP-11 not to expropriate property without adequate compensation or not to discriminate against foreign investors compared to domestic businesses.²⁰
- 4.24 ISDS provisions vary across the range of agreements in which they are contained, but there is a constant framework at the core of all ISDS schemes.
- 4.25 To bring an ISDS case, a foreign investor must believe that an arbitrary or capricious action of the host Government has caused them to lose their investment.²¹
- 4.26 ISDS cases are heard by a tribunal of three: one appointed by the investor, one appointed by the country, and a third agreed by both parties.²²
- 4.27 The cases can be either public or private.
- 4.28 The role of the tribunal is to review the host Government's actions to determine if those actions were arbitrary or capricious:

¹⁷ Dr Luke Nottage, *Submission 13*, p. 1.

¹⁸ Dr Luke Nottage, *Submission 13*, p. 1.

¹⁹ Dr Luke Nottage, *Submission 13*, p. 2.

²⁰ MCA, *Submission 38*, p. 2.

²¹ See for example TPP 11, Article 9.19.

²² See for example TPP 11, Article 9.22.

They are essentially conducting what has been described in some ways as global administrative law. They are reviewing the process that led to the law being passed. They are reviewing matters such as whether the reasoning that informed the passage of the law was sufficiently conveyed to the public and the affected investors, whether it was arbitrary, whether it was capricious and whether it was disguised expropriation. Those are the points they are considering.²³

4.29 This is an important point: an ISDS tribunal cannot overturn domestic laws and regulations. The tribunal can only require an investor be compensated for the loss of the investment.²⁴

4.30 In other words, if a Government wishes to pursue regulation it believes is in the national interest, it can do so regardless of the outcome of any related ISDS cases, noting that there may be costs incurred.

4.31 The NIA states:

A number of important safeguards are built into the rules guiding ISDS, making this one of the most protective treaties in terms of its protections for legitimate regulation.²⁵

4.32 Australia will retain the TPP Tobacco Control Notice under Article 29.5 which will prevent ISDS challenges to Australia's tobacco control measures.²⁶

4.33 In addition, Australia has listed a series of non-conforming measures covering a range of existing public policies, legislation and regulations.²⁷

4.34 According to the MCA, the TPP 11's ISDS provisions cannot be used to challenge Australian public policies in such areas as environmental protection, health care, education, social services, welfare policy, government service delivery, cultural and heritage protections and conservation policies.²⁸

²³ Dr Sam Luttrell, *Committee Hansard*, Perth, 5 October 2016, p. 13

²⁴ Office of the United States Trade Representative, *Fact Sheet: Investor-State Dispute Settlement*, <<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>> accessed 11 November 2016.

²⁵ NIA, para 47.

²⁶ NIA, para 47.

²⁷ NIA, para 47.

²⁸ MCA, *Submission 38*, p. 2.

- 4.35 According to Dr Luke Nottage, Professor of Comparative and Transnational Business Law at the University of Sydney, there is good evidence that ISDS, including the new procedural rights contained in the TPP 11 version of ISDS, has contributed to a rise in foreign direct investment worldwide.²⁹
- 4.36 Dr Nottage points out that:
- Encouraging investors to make and maintain investments in reliance on investment treaty protections is also better than leaving them to ‘manage’ them eg through bribery.³⁰
- 4.37 The Australian Council of Trade Unions (ACTU) does not support trade agreements that contain ISDS provisions.³¹
- 4.38 The ACTU submission states:
- These provisions mean that when Australian governments make new laws or policy in the interests of Australian people, foreign investors can sue our government in international tribunals if they consider those laws harm their investments or disadvantage them in some way.³²
- 4.39 The ACTU uses the example of the North American Free Trade Agreement (NAFTA) ISDS experience as a basis for arguing that ISDS provisions result in significant costs to countries that are party to these provisions.³³
- 4.40 The MCA’s submission points out that ISDS’ opponents tend to use examples of ISDS cases undertaken using provisions in older agreements, such as NAFTA, to which Australia is not a party.³⁴
- 4.41 The Mineral Council’s submission also points out that ISDS provisions are already in place between Australia and all TPP 11 countries except Canada.³⁵

ISDS cases

- 4.42 A significant body of evidence was provided to the Committee about the scope and outcomes of ISDS cases. The Committee heard from

²⁹ Dr Luke Nottage, *Submission 13*, p. 4.

³⁰ Dr Luke Nottage, *Submission 13*, p. 5.

³¹ Australian Council of Trade Unions (ACTU), *Submission 57*, p. 22.

³² ACTU, *Submission 57*, p. 23.

³³ ACTU, *Submission 57*, p. 26.

³⁴ Minerals Council of Australia, *Submission 38*, p. 23.

³⁵ Minerals Council of Australia, *Submission 38*, p. 23.

organisations and individuals with specific technical or sectoral expertise in trade agreements.

Scope

- 4.43 Dr Kyla Tienhaara, Visiting Fellow at the School of Regulation and Global Governance, Australian National University, points out Canada and Australia have very similar economies, levels of Government and regulatory frameworks, which makes a useful comparison possible.³⁶
- 4.44 While the ISDS provisions in the TPP 11 and NAFTA are not the same, Dr Tienhaara argues that the ISDS provisions in these agreements are sufficiently alike to permit ISDS claims of the sort brought against Canada under NAFTA to be brought against Australia under the TPP 11.³⁷
- 4.45 Since 2006, 27 ISDS cases have been brought against Canada under NAFTA. In addition, the bulk of cases brought against Canada have concerned regulatory decisions rather than unlawful expropriation.³⁸
- 4.46 Dr Tienhaara points out that ISDS cases can be brought against any level of Government. For example in Canada, ISDS cases have been brought against Provincial and Territorial Governments (equivalent to Australia's State and Territory Governments).³⁹
- 4.47 Dr Tienhaara discusses a number of ISDS cases brought against Canada as a result of regulatory decisions by various levels of Canadian Government:
- In 1997, the Canadian Government prohibited the import and use of Methyl-cyclopentadienyl manganese tricarbonyl, a fuel additive believed to be a neurotoxin. Canada's was one of the first governments to prohibit the additive, adopting regulation based on the precautionary principle. Ethyl Corporation, an importer of the additive, launched an ISDS case which caused the Canadian Government to revoke its prohibition. The additive has since been removed from the market on health grounds;
 - In 2008, an aggregate firm called Bilcon brought an ISDS claim against the Canadian Government and the Government of Nova Scotia after a quarry proposal was rejected following an environmental assessment.

³⁶ Dr Kyla Tienhaara, *Exhibit 2*, p. 9.

³⁷ Dr Kyla Tienhaara, *Exhibit 2*, p. 12.

³⁸ Dr Kyla Tienhaara, *Exhibit 2*, p. 16.

³⁹ Dr Kyla Tienhaara, *Exhibit 2*, p. 16.

The ISDS tribunal found for Bilcon on the basis that a higher standard of environmental review was applied to Bilcon's project than had been applied in the past. The outcome had the perverse effect of allowing a foreign investor a remedy that was not available to Canadian investors. When a similar case was later brought against the Canadian Government, the United States and Mexican Governments intervened to argue that the Bilcon tribunal had made an error in interpreting NAFTA; and

- Lone Pine, a shale gas developer, brought an ISDS case against the Government of Quebec because that Government had revoked fracking rights in the St Lawrence lowlands because a significant number of the gas wells in that region were leaking methane. Lone Pine's argument is that the Quebec Government's closure of the wells was a result of public pressure rather than a scientific assessment of the issues.⁴⁰

4.48 Public Services International (PSI) highlights another Canadian ISDS case, involving health care. Eli Lilly brought a case against the Canadian Government after the Canadian Government declined a patent application for a medicine on the grounds that the company could not adequately demonstrate that the medicine delivered the benefits promised. Eli Lilly challenged not only the facts of the drug's efficacy, but the right of the Canadian Government to make a decision on the basis of the evidence of the drug's efficacy.⁴¹

4.49 The Public Health Association of Australia notes that the tribunal in the Eli Lilly case found in favour of Canada, but that the victory did not extend to closing the possibility of another ISDS case along similar lines in future.⁴²

4.50 Dr Tienhaara states that, as a consequence of the 27 ISDS cases involving Canada, the Canadian Government now has significant experience in dealing with ISDS cases.⁴³

4.51 The Committee believes it would be in Australia's interests to learn from Canada's experience so as to limit future costs of ISDS cases.

Outcomes

⁴⁰ Dr Kyla Tienhaara, *Exhibit 2*, p. 2.

⁴¹ Public Services International (PSI), *Submission 27*, p. 5.

⁴² Public Health Association of Australia (PHAA), *Submission 34*, p. 6.

⁴³ Dr Kyla Tienhaara, *Exhibit 2*, p. 2.

- 4.52 Dr Nottage provided analytical results from a database of 541 ISDS cases, which permits a useful insight into the outcomes of these disputes.
- 4.53 Of the 541 disputes, 147 were won by the claimant (the investor), and of these 132 provided both claimed and awarded amounts.⁴⁴
- 4.54 According to Dr Nottage, a 2012 Organisation for Economic Cooperation and Development (OECD) scoping study on ISDS found that the average cost of ISDS arbitration was US\$8 million.⁴⁵
- 4.55 The OECD study found that costs were high and there were efforts underway to reduce them. The study also found that the rules for allocating the costs were very flexible and a source of uncertainty for claimants and respondents.⁴⁶
- 4.56 The OECD found that the largest cost component is the fees and expenses incurred for legal counsel and experts. These are estimated to be on average 82 per cent of the costs on an ISDS action, with arbitration fees amounting to 16 per cent of the costs.⁴⁷
- 4.57 A more extensive study was conducted by Matthew Hodgson and Alistair Campbell. This study also includes data up to the end of 2017.⁴⁸
- 4.58 This study found the average cost of ISDS was around US\$6 million plus tribunal costs of about US\$1 million.⁴⁹
- 4.59 Average costs can be skewed by a small number of very high costs. The median cost determined in the Hodgson and Campbell study is US\$3–3.6 million.⁵⁰
- 4.60 Dr Nottage also provides advice on the amounts claimed in ISDS cases compared to the amounts awarded. This information reflects only on ISDS cases where an investor has won because these are the only cases in which both a claim and an award are made.⁵¹

⁴⁴ Dr Luke Nottage, *Supplementary Submission 13.1*, p. 5.

⁴⁵ Dr Luke Nottage, *Supplementary Submission 13.1*, p. 1.

⁴⁶ Dr Luke Nottage, *Supplementary Submission 13.1*, p. 1.

⁴⁷ Dr Luke Nottage, *Supplementary Submission 13.1*, p. 1.

⁴⁸ Dr Luke Nottage, *Submission 13.1*, p. 2.

⁴⁹ Dr Luke Nottage, *Submission 13.1*, p. 2.

⁵⁰ Dr Luke Nottage, *Submission 13.1*, p. 2.

⁵¹ Dr Luke Nottage, *Supplementary Submission 13.1*, p. 4.

4.61 Of these cases, the median award was 17 per cent of the median claimed.⁵²

ISDS and public policy

4.62 Dr Elizabeth Thurbon, Associate Professor in International Relations and International Political Economy at the University of New South Wales, notes:

The revised agreement ... does [not] assuage concerns that regulatory carve outs will be sufficiently robust to protect governments seeking to regulate for social or environmental purposes.⁵³

4.63 The Australian Fair Trade and Investment Network (AFTINET) maintains that the claims made by DFAT that 'specific policy areas are carved out or excluded from certain ISDS claims' are inaccurate and misleading:

These exclusions or carveouts are listed in Annex 2 to Chapter 9 on investment, but they only apply to specific articles in the investment chapter. They do not apply to any of the ISDS provisions.⁵⁴

4.64 The National Tertiary Education Union (NTEU) argues that:

...these reservations do not apply to expropriation and compensation and therefore are not a protection against ISDS claims where a company has suffered a loss on investment.⁵⁵

4.65 This is not an entirely accurate reflection of the provisions of the TPP 11.

4.66 Article 9.16 of the TPP 11 states:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

4.67 In relation to Australia, Annex II states:

Australia reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for

⁵² Dr Luke Nottage, *Supplementary Submission 13.1*, p. 5.

⁵³ Dr Elizabeth Thurbon, *Submission 61*, p. 4.

⁵⁴ Australian Fair Trade and Investment Network (AFTINET), *Submission 45*, p. 13.

⁵⁵ National Tertiary Education Union (NTEU), *Submission 40*, p. 4.

a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, child care, public utilities, public transport and public housing.⁵⁶

4.68 The provisions in Annex II apply to all the provisions in Chapter 9A under which an investor might use ISDS provisions (that is, Articles 9.4, 9.5, 9.10 and 9.11) except the provision relating to nationalisation or appropriation of an investment (Article 9.8).

4.69 However, Article 9.8 does not prevent a Government from nationalising or appropriating an investment. The provisions allow nationalisation and appropriation for a public good and with due process of law, provided appropriate compensation is paid to the investor.

4.70 Appropriate compensation is defined in the article as 'equivalent to the fair market value of the expropriated investment immediately before the expropriation'.

4.71 However, the Public Health Association of Australia (PHAA) does point out that the statement 'any measure otherwise consistent with this Chapter' effectively permits ISDS cases to be brought over whether a measure is consistent with the Chapter.⁵⁷

Regulatory Chill

4.72 Analysis of ISDS cases to date has given rise to a theory called 'regulatory chill', which relates to governments deciding not to pursue regulation in the public interest as a result of ISDS.

4.73 The concept of regulatory chill was also subject to discussion amongst inquiry participants.

4.74 Dr Tienhaara believes that the potential regulatory chill has been underestimated by the Australian Government.

4.75 Dr Tienhaara notes that law firms involved in ISDS are actively advertising the use of ISDS as a method of preventing 'wrongful regulatory change.'⁵⁸

⁵⁶ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam and associated side letters*, [2018] ANT/NIF 1, Annex II

⁵⁷ PHAA, *Submission 34*, p. 6.

⁵⁸ Dr Kyla Tienhaara, *Exhibit 2*, p. 19.

- 4.76 Dr Tienhaara identifies a number of factors that might contribute to regulatory chill, pointing out that governments generally have multiple motivations for adopting policy measures. The factors include:
- while governments may have one view of what constitutes bona fide measures, the case law indicates that other actors in the ISDS process often have diverging views about where the line between reasonable and unreasonable regulation should be drawn; and
 - governments often have a distorted view of the likelihood of success should they apply a body of regulation, and may be reluctant to risk a negative outcome because of the potential cost of ISDS cases.⁵⁹
- 4.77 However, Dr Nottage also notes that the risk of regulatory chill in Australia has been seriously negated by the result of the outcome of the Philip Morris ISDS claim against Australia's plain packaging tobacco laws. The claim was dismissed by the ISDS tribunal with costs awarded to Australia.⁶⁰

Transparency

- 4.78 The Committee notes views expressed by many submitters regarding the need for transparency in ISDS cases.
- 4.79 Claims made under the TPP 11 must take place in an open and transparent manner.⁶¹
- 4.80 In relation to the transparency of ISDS cases, Dr Nottage notes that of the 506 known concluded ISDS cases, 62 per cent were public and 38 per cent were confidential.⁶² Around 85 per cent of cases where either the investor or the state have won are fully public, and most of the rest are partly confidential.⁶³
- 4.81 Confidential cases are more likely to involve early settlements, where a final outcome is not reached.⁶⁴
- 4.82 Dr Nottage identified four levels of confidentiality in ISDS cases: strictly confidential, where basic information such as who won the case is not

⁵⁹ Dr Kyla Tienhaara, *Exhibit 2*, p. 19.

⁶⁰ Dr Luke Nottage, *Submission 13*, p. 19.

⁶¹ MCA, *Submission 38*, p. 3.

⁶² Dr Luke Nottage, *Submission 13*, p. 4.

⁶³ Dr Luke Nottage, *Supplementary Submission 13.1*, p. 6.

⁶⁴ Dr Luke Nottage, *Supplementary Submission 13.1*, p. 6.

known; confidential, where the victor in a case is known but the merits and the final award are confidential; partly confidential, where the victor and the level of the award is known; and public, where the case is fully public.⁶⁵

Unequal access to dispute resolution

4.83 During the inquiry, a new theme emerged amongst those opposed to ISDS provisions. The argument states that ISDS favours foreign investors over local investors by permitting a means of relief to foreign investors that is not available to local investors. For example:

... our local corporations and loyal businesses do not get offered the same rights !! These 'trade agreements' and their dispute 'tribunals' actually favour [foreign] corporations over local industry and citizens.⁶⁶

4.84 Dr Elizabeth Thurbon points out that:

... ISDS provisions violate the principle of National Treatment and Non-Discrimination enshrined in Australia's WTO obligations (and indeed in the obligations of its other [trade agreements]). They do so by discriminating against local firms. Specifically, ISDS provisions give foreign investors more rights than local firms by extending the right to sue national governments for 'indirect expropriation' to foreign firms alone.⁶⁷

4.85 Finally, the ACTU submission raises the issue of foreign investors being able to access ISDS remedies, while local investors are not able to.⁶⁸

Potential improvements in ISDS

4.86 Some participants in the inquiry discussed a range of changes to the ISDS process that could be implemented in future agreements. The potential improvements suggested are:

- an appellate mechanism for ISDS tribunal decisions envisaged in TPP 11 Article 9.23.11;
- the code of ethics for ISDS arbitrators envisaged in Article 9.22.6; and
- the use of precedent in ISDS decisions.

⁶⁵ Dr Luke Nottage, *Supplementary Submission 13.1*, p. 6.

⁶⁶ Mr Duncan Marshall, *Submission 15*, p. 3.

⁶⁷ Dr Elizabeth Thurbon, *Submission 61*, p. 4.

⁶⁸ ACTU, *Submission 57*, p. 23.

- 4.87 An appellate review mechanism is being increasingly advocated by those unhappy with the inconsistencies in traditionally structured one tier ISDS tribunals.⁶⁹
- 4.88 At present, ISDS tribunal decisions are final and binding. As discussed above in relation to the Bilcon ISDS case in Canada, final and binding ISDS decisions that are outside the scope envisaged for an ISDS mechanism by the negotiating parties can occur.
- 4.89 Dr Luke Nottage observes that there was no effort to add an appellate review mechanism when the TPP 11 was renegotiated, even though future agreement on this is envisaged in TPP 11 Article 9.23.11.⁷⁰
- 4.90 The TPP 11 also contains an Article (9.22.6) which requires the development of guidance or a code of ethics for ISDS arbitrators before the treaty comes into force.⁷¹
- 4.91 Dr Nottage notes that implementing these provisions:
Would go a long way towards assuaging public concerns about ISDS ...⁷²
- 4.92 Dr Kienhaara points out, however, that the TPP does not make the proposed code binding.⁷³
- 4.93 Finally, Dr Tienhaara criticises the fact that tribunals ruling on ISDS cases do not create precedents. Tribunals consequently do not have a base of previous decisions to guide their consideration of ISDS cases.⁷⁴

Conclusion

- 4.94 Dr Tienhaara points out that ISDS cases involving oil, gas and mining are likely to increase as a result of the Paris Climate Agreement. Meeting the Agreement's commitments globally will require that a third of the planet's oil reserves, 80 per cent of coal reserves and half the gas reserves are not exploited.⁷⁵

⁶⁹ Dr Luke Nottage, *Submission 13*, p. 3. See also Public Service International, *Submission 27*, p. 5.

⁷⁰ Dr Luke Nottage, *Submission 13*, p. 3.

⁷¹ Dr Luke Nottage, *Submission 13*, p. 3.

⁷² Dr Luke Nottage, *Submission 13*, p. 3. See also PHAA, *Submission 34*, p. 7.

⁷³ Dr Kyla Tienhaara, *Exhibit 2*, p. 4.

⁷⁴ Dr Kyla Tienhaara, *Exhibit 2*, p. 4.

⁷⁵ Dr Kyla Tienhaara, *Submission 17*, p. 2.

- 4.95 The use of ISDS as a mechanism for protecting industries that might be impacted by climate change policy is also identified by Friends of the Earth as a concern.⁷⁶
- 4.96 Dr Tienhaara point out that when governments begin curbing fossil fuel investments, a possible result is a company involved in the exploitation of these resources will attempt to recover potential losses using ISDS provisions.⁷⁷
- 4.97 Experts in ISDS who submitted to the Committee, both those in favour and those opposed to ISDS, support an appellate mechanism for ISDS cases.
- 4.98 It might also be worth Australia advocating for the use of precedent in ISDS cases, as this will at least provide a degree of clarity as to what to expect from ISDS tribunal decisions.
- 4.99 The Committee's *Report 165* on the original TPP noted that if Australia entered into a treaty with ISDS provisions in it, Australia should expect to be subject to ISDS cases and should plan accordingly.⁷⁸
- 4.100 Participants in the inquiry have also expressed the concern that Australia will be subject to ISDS claims. For example:
- I expect the number of global corporations that could be involved with us through this TPP-11 could be huge, in view of all of the countries involved in this massive agreement and the fact that covers almost all aspects of trade and services. This complexity increases the risk of the ISDS legal provision being used against us for compensation in the future, in my opinion.⁷⁹
- 4.101 Since the publication of *Report 165*, the Australian Government has indeed been subject to another ISDS claim. The United States based company APR Energy Holdings Ltd has lodged a claim in relation to the alleged expropriation of several power generation turbines.
- 4.102 APR leased the turbines to another company, Forge Group, which used the turbines as security for a loan from the ANZ bank. APR lost ownership of the turbines after the ANZ appointed receivers to Forge Group⁸⁰

⁷⁶ Friends of the Earth, *Submission 23*, p. 2. See also PSI, *Submission 27*, p. 8.

⁷⁷ Dr Kyla Tienhaara, *Submission 17*, p. 2. . See also Ms Linda Link, *Submission 28*, p. 1.

⁷⁸ JSCOT, *Report 165*, p. 64.

⁷⁹ Ms Linda Link, *Submission 28*, p. 1.

⁸⁰ AFTINET, *Supplementary Submission 45.1*, p. 2.

- 4.103 The case has been lodged under the terms of the Australia-US FTA (AUSFTA), even though AUSFTA does not contain an ISDS provision giving it direct rights to arbitration. The company is relying on AUSFTA's most-favoured-nation clause, drawing on Australia's consent to arbitration in the Hong Kong-Australia bilateral investment treaty, to argue that it can launch a case under the Hong Kong treaty.
- 4.104 The potential improvements discussed above: an appellate mechanism; a code of ethics for ISDS arbitrators; and the introduction of precedent, light the way forward for ISDS.

5. Movement of persons

Background

- 5.1 This Chapter examines the evidence the Committee received concerning Chapter 12 of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (TPP 11), covering the movement of persons between TPP 11 countries for business purposes.
- 5.2 The intent of Chapter 12 is to reduce the barriers to persons wishing to conduct business in another TPP 11 country by allowing those persons easier entry to the country and reducing the regulatory barriers limiting their activities within a country.
- 5.3 Chapter 12 of the TTP 11 expands on previous trade agreements to include preferential temporary entry for Australian professional business persons (and their spouses) with a number of TPP 11 Parties on a reciprocal basis.¹
- 5.4 Annex 12-A of the TPP 11 details Australia's commitments in relation to the entry of business persons. The commitments are as follows:
 - business persons and service sellers from all Parties gain temporary entry into Australia for business purposes provided their remuneration is sourced outside Australia;
 - installers or servicers of machinery or equipment who are remunerated from outside Australia gain temporary entry for business purposes from other TPP 11 Parties that have similar commitments in relation to installers or servicers;

¹ Joint Standing Committee on Treaties (JSCOT), *Report 165: Trans-Pacific Partnership Agreement*, November 2016, Canberra, p. 73.

- intra-corporate transferees who are either executives, or technically or professionally employed, in TPP 11 Parties which have made similar commitments, gain temporary entry to Australia for business purposes provided their organisation has an ongoing presence in this country and they meet the necessary Australian skills requirements;
 - independent executives or people seeking to invest or establish a business office in Australia from all TPP 11 Parties gain temporary entry into Australia;
 - contractual service suppliers, including professionals and technical professionals, from other TPP 11 Parties making similar commitments gain entry provided they meet the necessary Australian skills requirements.²
- 5.5 The Business Council of Australia (BCA) points out that Chapter 12 of the TPP 11 applies to Australians wishing to pursue opportunities in other TPP 11 Parties.
- 5.6 The BCA believes that as a strongly services-oriented economy, Australia's best interests will be served by ensuring that removing barriers to the ability of Australian business people and professional service providers to operate in overseas markets will facilitate overseas investment by Australian business.³
- 5.7 The Minerals Council of Australia (MCA) makes the same point in relation to mining services.⁴

Contractual service providers

- 5.8 Provisions permitting the entry of contractual service providers continue to be a concern for a number of inquiry participants.
- 5.9 The commitment by Australia in Annex 12-A of the TPP 11 identifies a contractual service supplier as a person assessed as having the necessary qualifications, skills and work experience to meet the domestic standard in Australia for their nominated occupation.

² *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam and associated side letters, [2018] ANT/NIF 1, hereafter referred to as the TPP 11, Annex 12-A.*

³ Business Council of Australia (BCA), *Submission 55*, p. 5.

⁴ Minerals Council of Australia (MCA), *Submission 38*, p. 3.

5.10 Annex 12-A of the TPP 11 provides the following:

In accordance with, and subject to, Australia's laws and regulations, Australia shall, upon application, grant the right of temporary entry, movement and work to the accompanying spouse or dependants of a business person that is granted temporary entry or an extension of temporary stay under these commitments.

5.11 The arrangement is reciprocal. In other words, it only applies if another TPP 11 Party makes the same commitment. Reciprocal commitments have been made by: Brunei; Canada; Chile; Japan; Malaysia; Mexico; New Zealand; Peru; and Vietnam.⁵

5.12 The types of employment open to the contractual service suppliers from other TTP 11 countries are contained in the List of Eligible Skilled Occupations, administered by the Department of Jobs and Small Business.⁶

5.13 The List is regularly reviewed to ensure that, where there are sufficient people in particular skilled profession to fill available jobs, that profession is not included in the List.⁷

5.14 The combined effect of these provisions is that contractual service suppliers from Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand Peru, and Vietnam are permitted to enter Australia to work temporarily where:

- they are sponsored by an employer;
- they meet the necessary qualifications; and
- their profession is contained in the List of Eligible Skilled Occupations.

5.15 Many submitters argue as a basic principle that:

... a matter of critical importance for Australian workers is the ongoing commitment that they will have first access to Australian jobs, through a labour market testing obligation on employers to provide evidence they have

⁵ JSCOT, *Report 165*, p 75.

⁶ Department of Home Affairs, *List of Skilled Occupations*, <<https://www.homeaffairs.gov.au/trav/work/work/skills-assessment-and-assessing-authorities/skilled-occupations-lists>> viewed 30 July 2017.

⁷ Department of Home Affairs, *List of Skilled Occupations*, <<https://www.homeaffairs.gov.au/trav/work/work/skills-assessment-and-assessing-authorities/skilled-occupations-lists>> viewed 30 July 2017.

made all genuine efforts to find a suitable Australian worker before they employ a temporary overseas worker.⁸

- 5.16 The Australian Council of Trade Unions (ACTU) claims in particular that Australia has provided preferential access to temporary skilled migrants in a broader range of occupations than Australia has been able to secure from other TPP 11 countries.⁹
- 5.17 Australia's commitments in relation to contractual service providers cover all trade, technical and professional occupations, while other countries' commitments are, for example, as follows:
- Chile defines a contractual service provider as a business person engaged in a 'special occupation';
 - Japan defines a contractual service supplier as a person employed by an overseas company or in an advanced research position; and
 - Malaysia confines contractual service providers to professional services, education and financial services.¹⁰
- 5.18 The ACTU believes that, as a basic principle, employers should always have an obligation to employ Australians first, and that this obligation should not be removed through trade agreements.¹¹
- 5.19 The Construction, Forestry, Maritime, Mining and Energy Union (CFMEU) expresses a similar concern, observing:
- The Government's approach ... tends to use labour mobility as a bargaining chip in trade agreements. Their approach would appear to be the result of a combination of a having little left to trade after years of unilateral liberalisation of tariff barriers ...¹²
- 5.20 Alternatively, the ACTU argues that, if it is necessary to continue making such commitments in trade agreements, these commitments should not be extended to contractual service providers.¹³

⁸ Unions WA, *Submission 30*, p. 2. See also Vintage Reds of Canberra, *Submission 18*, p. 3; Australian Manufacturing Workers' Union (AMWU), *Submission 41*, p. 1.

⁹ Australian Council of Trade Unions (ACTU), *Submission 57*, p. 10.

¹⁰ ACTU, *Submission 57*, p. 12.

¹¹ ACTU, *Submission 57*, p. 9.

¹² Construction, Forestry, Maritime, Mining and Energy Union (CFMEU), *Submission 58*, p. 11.

¹³ ACTU, *Submission 57*, p. 9.

Number of temporary visa holders who can work

- 5.21 Inquiry participants engaged in a debate over the number of temporary visa holders eligible for employment in Australia.
- 5.22 While the debate doesn't deal specifically with TPP 11 Parties, it illustrates the degree of disagreement in the public debate about this issue.
- 5.23 The MCA analyses the effects of recent free trade agreements on the number of contractual service suppliers entering Australia.¹⁴
- 5.24 The MCA's analysis shows that after the ratification of the China-Australia Free Trade Agreement (ChAFTA), contractual service suppliers visa entries from China declined by 15 per cent in 2016 and 17 per cent in the first three quarters of 2017.¹⁵
- 5.25 In addition, the Minerals Council notes that the TPP 11 countries covered by the contractual service supplier provisions are not significant sources for temporary skilled migrants into Australia.¹⁶
- 5.26 The ACTU states that it:
- ... would disagree with some of that analysis. You have to look at multiple different visa types to understand the numbers of temporary workers coming in from ChAFTA.¹⁷
- 5.27 According to the Department of Home Affairs, the total number of temporary visa holders with work rights in Australia includes:
- visas for temporary work and activity, graduates, and other temporary residents, which provide work rights; and
 - students, working holiday makers and New Zealand citizens have incidental work rights, and work is not the primary purpose of the visa.¹⁸
- 5.28 In terms of number, the Department advised that as of 31 May 2018, there were 1,485,353 primary temporary visa holders in Australia with work

¹⁴ MCA, *Submission 38*, p. 3.

¹⁵ MCA, *Submission 38*, p. 26.

¹⁶ MCA, *Submission 38*, p. 3.

¹⁷ Mr Damian Kyloh, Associate Director of Economic and Social Policy, Australian Council of Trade Unions (ACTU), *Committee Hansard*, Melbourne, 1 June 2018, p. 24.

¹⁸ Department of Home Affairs, *Submission 69*, p. 1.

rights, and a further 150,498 secondary temporary visa holders with work rights.¹⁹

- 5.29 Statistics on the number of temporary visa holders that are eligible for work are available for a number of countries. In this case, the Committee has included statistics on China, Malaysia and Vietnam.
- 5.30 In 2014/2015, 6,653 temporary visas were issued for skilled workers from China. This is an increase of 38.5 per cent over the number of the same visas granted in 2011/2012.²⁰ It is worth noting that the time period of the statistics available to the Committee are different to those provided by the MCA.
- 5.31 In the same year 65,737 temporary student visas were issued to Chinese students studying in Australia. This is an increase of 32.6 per cent over the number of the same visas granted in 2011/2012.²¹
- 5.32 Both categories of temporary visa holders can work in Australia.²²
- 5.33 For Malaysia, there were 1,152 temporary visas for skilled workers issued in 2014/2015, a decline of 38.6 per cent over the number of the same visas granted in 2011/2012. The number of temporary student visas granted to Malaysians in 2014/2015 was 10,414, an increase of 11.8 per cent over the number of the same visas granted in 2011/2012.²³
- 5.34 For Vietnam, there were 1,021 temporary visas for skilled workers issued in 2014/2015, a 68.5 per cent increase over the number of the same visas granted in 2011/2012. The number of temporary student visas granted to Vietnamese students was 10,283 in 2014/2015, an increase of 26 per cent over the number of the same visas granted in 2011/2012.²⁴

¹⁹ Department of Home Affairs, *Submission 69*, p. 1.

²⁰ Department of Home Affairs, *Country Profile: China*, <<https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/country-profiles/peoples-republic-of-china>> viewed 30 July 2018.

²¹ Department of Home Affairs, *Country Profile: China*, <<https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/country-profiles/peoples-republic-of-china>> viewed 30 July 2018.

²² Department of Home Affairs, *Submission 69*, p. 1.

²³ Department of Home Affairs, *Country Profile: Malaysia*, <<https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/country-profiles/malaysia>> viewed 30 July 2018.

²⁴ Department of Home Affairs, *Country Profile: Vietnam*, <<https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/country-profiles/vietnam>> viewed 30 July 2018.

Temporary visa workers issues

5.35 Issues relating to the skills and working conditions of temporary visa holders in Australia are a concern for a number of participants in the inquiry.

5.36 The Electrical Trades Union (ETU) argues that an independent and transparent process for both skilled and semi-skilled temporary visa holders is necessary to ensure that qualifications gained overseas meet the contemporary requirements of Australian qualifications and licensing arrangements. According to the ETU, this is in the interest of the worker, employers and, in particular, the public and their safety.²⁵

5.37 The ETU's concern is focussed on professional standards in the electrical trades. According to the ETU:

... the TPP represents a likely introduction of significant regulatory challenges at a time when the industry is already grappling with too many challenges, including defunding of the licencing and training institutions which are needed to uphold the quality and value of our well trained Australian electrical workers.²⁶

5.38 According to the ETU, the skills assessment for electrical trades as a result of the entry on temporary visas of skilled workers involves:

... immigration officers ... determining, through an administrative process, whether or not a licensed electrician actually has the skill set necessary to carry out electrical work in this country.²⁷

5.39 In the past:

... what would have occurred is that they would have come to Australia, said that they were an electrician and, before they were granted entry into this country, they would have had to undertake a practical skills assessment. Part of that assessment was a technical skills assessment, so it was a theoretical and technical skills assessment. That was done by a registered training organisation to determine whether or not they had the necessary skill sets,

²⁵ Electrical Trades Union (ETU), *Submission 35*, p. 4.

²⁶ ETU, *Submission 35*, p. 4.

²⁷ Mr Allen Hicks, National Secretary, Electrical Trades Union (ETU), *Committee Hansard*, Sydney, 15 June 2018, p. 39.

work experience and qualifications to undertake electrical work in this country.²⁸

- 5.40 The ETU argues that this is effectively a paperwork assessment that does not guarantee that temporary visa holders will have the same skills levels, occupational health and safety standards and qualifications required for Australian workers in the same jobs.²⁹
- 5.41 The ETU is concerned that this will place pressure on the resources of agencies policing and enforcing licencing checks.³⁰
- 5.42 Using electricians as an example, there are a number of countries from which skilled temporary visa holders have to go through a mandatory skills assessment because of concerns about the training and licencing system in those countries.³¹
- 5.43 The list of countries from which electricians are required to undertake mandatory skills assessment includes Vietnam, one of the countries from which contractual service suppliers can be sourced without market testing under the TPP 11.³²
- 5.44 Mandatory skills recognition is undertaken by a Trades Recognition Service. For electricians, this will include a technical interview and practical assessment.³³
- 5.45 According to the Department of Foreign Affairs and Trade (DFAT):
- Under Australian law, any foreign worker, such as an electrician, would be obligated to undergo the same skills-testing as required by an Australian worker. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership does not change this requirement.³⁴

²⁸ Mr Hicks, ETU, *Committee Hansard*, Sydney, 15 June 2018, p. 39.

²⁹ ETU, *Submission 35*, p. 5.

³⁰ ETU, *Submission 35*, p. 5.

³¹ Mr Hicks, ETU, *Committee Hansard*, Sydney, 15 June 2018, p. 40.

³² Trades Recognition Australia, *TSS Skills Assessment*, <<https://www.tradesrecognitionaustralia.gov.au/programs/tss-skills-assessment>> viewed 30 July 2018.

³³ For the purposes of this report, the example of the College of Electrical Training, a Trade Recognition Service <<https://www.cet.asn.au/Onshore-Trades-Assessment.aspx>> identified by Trades Recognition Australia, was used.

³⁴ Department of Foreign Affairs and Trade (DFAT), *Submission 65*, p. 13.

- 5.46 The vulnerability of temporary migrant workers is also an issue for a number of inquiry participants. For example, Ms Carolyn Allen stated:
- The TPP-11 also has provisions for more vulnerable temporary migrant workers from Vietnam, Malaysia, Japan, Canada, Mexico and Chile without first testing if local workers are available.³⁵
- 5.47 According to the ETU:
- Unfortunately, there are still many employers who seek to exploit overseas workers ...³⁶
- 5.48 The ETU described a particular example of this,³⁷ but there has been other evidence of rogue behaviour that causes concern for the welfare of employed temporary visa workers in general.
- 5.49 It is beyond the scope of this inquiry to look into these cases and the issues associated with them.

³⁵ Ms Carolyn Allen, *Submission 19*, p. 2.

³⁶ ETU, *Submission 35*, p. 8.

³⁷ Mr Hicks, ETU, *Committee Hansard*, Sydney, 15 June 2018, p. 43.

6. Intellectual Property and Copyright

Background

- 6.1 Chapter 18 of the previous Trans-Pacific Partnership Agreement (TPP), relating to Intellectual Property and copyright, is built on the World Trade Organisation's *Agreement on Trade-Related Aspects of Intellectual Property* (TRIPS Agreement).¹
- 6.2 Chapter 18 covered copyright, trademarks, geographical indications, patents, industrial designs, confidential information, plant variety protection, and civil, border and criminal enforcement.²
- 6.3 Chapter 18 included, amongst other matters:
 - five years protection for data about the safety or efficacy of new pharmaceutical products submitted to the regulatory authority for the purposes of obtaining marketing approval;
 - protection of patents for biologics medicines;
 - protecting the exclusive rights of authors, performers and producers with respect to the reproduction, communication, distribution, and broadcasting of their works, performances and phonograms, while providing certain limitations and exceptions;

¹ National Interest Analysis [2016] ATNIA 4, *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam* and associated side letters [2016] ANTNIIF 2, hereafter known as the TPP NIA *Summary of Chapter Outcomes*, para 64.

² TPP NIA, *Summary of Chapter Outcomes*, para 64.

- protections for copyright and related rights through technological protection measures and rights management information; and
 - a framework of legal incentives for internet service providers to cooperate with content owners to deter unauthorised storage and transmission of copyrighted materials.³
- 6.4 The *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (TPP 11) suspends a number of the provisions of Chapter 18, including:
- provisions on the protection of patents for biologics medicines;
 - a requirement that new patents be made available for: new uses of a product and new processes using a known product (called secondary patents); and inventions derived from plants;
 - the ability for a patent holder to extend their patent if there is a delay in approving a patent, or if the sale of a pharmaceutical product is delayed as a result of marketing approval;
 - a provision establishing a five year protection for patent holders on test data supplied to a government as part of the process for approval for pharmaceuticals;
 - copyright protection for the life of the author plus 70 years;
 - the application of civil and criminal penalties for a number of types of changes to protected copyright works; and
 - the obligation on on-line service providers to cooperate with rights holders to deter online copyright infringement.⁴

Intellectual Property

Medicines

- 6.5 The TPP 11 suspended provisions relating to pharmaceuticals are a focus of debate by inquiry participants.
- 6.6 Amongst the suspended provisions are the provisions relating to biologic medicines. Biologic medicines are a rapidly evolving class of medicines that treat difficult to cure diseases and illnesses such as cancer.

³ TPP NIA, *Summary of Chapter Outcomes*, para 64.

⁴ *National Interest Analysis* [2018] ATNIA 1 with attachments *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* and associated side letters, [2018] ANTNIIF 1, hereafter referred to as the NIA, *Attachment III: TPP 11 suspensions explained*.

- 6.7 The Public Health Association of Australia (PHAA) described the original TPP 11 provisions relating to biologics as ‘ambiguous’ in their application.⁵
- 6.8 Biologics are very expensive medicines to develop, and so cost a great deal. The adoption of ‘biosimilar,’ or generic, products from biologic products, would have saved the Australian health system \$A367 million in 2015/16, according to the PHAA.⁶
- 6.9 Another of the suspended provisions that may have increased the cost of health care to Australia is mandating recognition of secondary patents. Secondary patents are patent claims made on a medicine by the original patent owner to cover other uses of a patent medicine.⁷
- 6.10 Secondary patents effectively extend the patent life of a medicine beyond the original patent term and prevent the introduction of cheaper generic versions of the medicine.⁸
- 6.11 In Australia, the top 15 most expensive drugs are subject to a mean of 49 patents per drug, extending the patent life of the drugs for long periods.⁹
- 6.12 Other suspended provisions identified as problematic by the PHAA include:
- Data retention provisions which enable medicine patent holders to withhold data such as trial results necessary to allow the development of generic alternatives; and
 - Patent extensions are granted to patent holders as a mechanism to recoup research and development costs by preventing generic alternatives from entering the market. A number of organisations, such as the Productivity Commission, believe that patent extensions are too easily granted, and should be better targeted.¹⁰
- 6.13 The removal of provisions relating to mandatory recognition of secondary patents, data retention periods and patent extensions are also supported by Mylan, a large supplier of generic medicines in Australia.¹¹

⁵ Public Health Association of Australia (PHAA), *Submission 34*, p. 8.

⁶ PHAA, *Submission 34*, p. 8.

⁷ PHAA, *Submission 34*, p. 10.

⁸ PHAA, *Submission 34*, p. 10.

⁹ PHAA, *Submission 34*, p. 10.

¹⁰ PHAA, *Submission 34*, p. 11.

¹¹ Mylan, *Submission 68*, pp 1-3.

- 6.14 Medicines Australia is in favour of the reinstatement of the suspended Intellectual Property provisions, recommending that any expansion of the Parties to the TPP 11 should revisit this issue.¹²
- 6.15 In particular, Medicines Australia supports:
- extending the data retention provisions on the basis that the protection specified in the now suspended articles of the TPP is insufficient; and
 - ensuring a strong, enforceable patent notification scheme: thereby providing certainty and preventing delay in generic market entry.¹³
- 6.16 Medicines Australia argues that data retention protection should be strengthened from the current 5 years, and suggests that claims that data protection adds significant costs to Australian patients when accessing Pharmaceutical Benefits Scheme medicines are misleading.¹⁴

Copyright and open source software

- 6.17 Open Source Industry Australia (OSIA) discusses the treatment of open source software in the TPP 11.
- 6.18 Open source software is software that can be freely accessed, used, changed, and shared and modified by anyone.¹⁵
- 6.19 Open source software is extensively used in Australia:
- The three main things I can put to you as major issues are the Linux operating system, Android phones and the Drupal website that runs the government websites...
- ... theres an awful lot of infrastructure and things like that in mining and in defence.¹⁶
- 6.20 For commercial purposes, open source software uses a model that removes the proprietary aspects of software licencing. In practice, this means that the software can be used for a commercial purpose, but cannot have proprietary

¹² Medicines Australia, *Submission 56*, p. 1.

¹³ Medicines Australia, *Submission 56*, p. 1.

¹⁴ Medicines Australia, *Submission 56*, p. 3.

¹⁵ Open Source Initiative, *Frequently Asked Questions*, < <https://opensource.org/faq#osd> > viewed 30 July 2018.

¹⁶ Mr Mark Phillips, Chairman, Open Source Industry Australia Ltd (OSIA), *Committee Hansard*, Melbourne, 1 June 2018, p. 13.

restrictions, such as restricting the use of the software by other persons, placed on it.¹⁷

- 6.21 The nature of open source software complicates the application of copyright law. The issue is whether an open source software licence constitutes a copyright licence or a contract.¹⁸
- 6.22 The argument that open source software licences are copyright licences hinges on the assumption that their users don't have any rights in relation to the software other than those provided in the open source software licence.¹⁹
- 6.23 On the other hand, open source software licences may be contracts in the sense that an open source software licence involves an exchange of some sort, referred to as a 'consideration.' This interpretation rests on whether there is an obligation on a person who makes use of open source software to distribute the results as required in the open source software licence. The 'consideration' here is the obligation to distribute.²⁰
- 6.24 The nature of the open source software industry is not conducive to litigation, so no legal precedent has been set to resolve this argument.²¹
- 6.25 According to Open Source Software:
- ...whats defined as a copyright licence; is FOSS [Free and Open Source Software] classed as a commercial copyright licence; and does the Australian government have the ability to override international copyright laws? The suspended clause actually says that you do not need to give the software when you hand over a system. The GPL [General Public Licence] and FOSS licences, in most cases, say, Yes, you do.²²
- 6.26 The problem for the Australian Government is the extent to which open source software is used to run the infrastructure of the electronic environment.

¹⁷ Open Source Initiative, *Frequently Asked Questions*, < <https://opensource.org/faq#osd> > viewed 30 July 2018.

¹⁸ Dr Brian Fitzgerald and Mr Nic Suzor, Legal Issues for the use of Free and Open Source Software in Government, *Melbourne University Law Review*, Vol. 29, 2005, p. 436.

¹⁹ Dr Brian Fitzgerald and Mr Nic Suzor, Legal Issues for the use of Free and Open Source Software in Government, p. 436.

²⁰ Dr Brian Fitzgerald and Mr Nic Suzor, Legal Issues for the use of Free and Open Source Software in Government, p. 436.

²¹ Mr Jack Burton, Company Secretary, OSIA, *Committee Hansard*, Melbourne, 1 June 2018, p. 13.

²² Mr Phillips, OSIA, *Committee Hansard*, Melbourne, 1 June 2018, p. 13.

6.27 If the TPP 11 or any other trade agreement compels this issue to be resolved in the courts, the result could be significantly costly:

...if open-source software licences were no longer enforceable in Australia, the cost the Commonwealth alone would face, just in terms of its web presence, from migrating to closed-source systems would be substantial.²³

Support for suspensions

6.28 OSIA notes that the suspension of Chapter 18 provisions in the TPP 11 is welcomed by the open source software industry. However, OSIA is concerned that these provisions have been suspended rather than excised completely.²⁴

6.29 The Australian Digital Alliance is also happy with the suspensions:

...we note that many of the provisions that we identified in that submission as concerning have been suspended in the TPP-11, including overly strict copyright restrictions with respect to technological protection measures and the intermediary safe harbours. This goes a long way to alleviating the detrimental effect of the overly prescriptive copyright provisions in the previous agreement on Australia's ability to adapt its copyright system in the future in response to changing technologies and social norms.²⁵

Uncertainty

6.30 All inquiry participants discussing the suspensions are unhappy about the uncertainty appending to the concept of 'suspended' provisions that could be brought back to life by the consent of the TPP 11 parties.

6.31 The National Tertiary Education Union (NTEU) points out that:

... the news that US President Trump intends to potentially re-negotiate the [TPP 11]...could mean that Australia would be subject to the reintroduction of currently excluded provisions, such as copyright extensions, longer monopoly rights on medicines and other controversial provisions... Even if the Australian government currently represented the broad interests of the

²³ Mr Jack Burton, OSIA, *Committee Hansard*, Melbourne, 1 June 2018, p. 16.

²⁴ Open Source Industry Australia Ltd (OSIA), *Submission 53*, p. 3.

²⁵ Australian Digital Alliance, *Submission 52*, pp. 1-2. See also PHAA, *Submission 34*, p. 5.

Australian people in signing the [TPP 11], they would not be required to seek a mandate in reaching an agreement if the US sought to renegotiate.²⁶

6.32 OSIA states that the suspension gives rise to an unacceptable degree of uncertainty which will discourage investment in the open source software industry.²⁷

6.33 OSIA states that:

So, what we have here is a trade treaty which has optional clauses in it. We may put these clauses back in; we may not put these clauses back in. We don't know at the moment. Our point of view as a business is, how can we measure the risk that's associated with this treaty? We have a totally undefined set of issues in there which fundamentally could affect our business.²⁸

6.34 For example, an open source software business may be liable to penalties for using information currently in the public domain that will return to private ownership if the suspensions are removed.²⁹

6.35 There is also a degree of concern about the impact on the price of medicines should the suspended provisions be reinstated. If the suspended provisions are reinstated, the introduction of generic medicines will take longer than it currently does.³⁰

6.36 Consequently, the original TPP provisions would have seen prolonged higher costs to government or individuals.³¹

6.37 Dr Elizabeth Thurbon warns:

...if the Australian government did decide to concede these highly contentious aspects of the [TPP 11] to the US for geopolitical reasons, it would risk further eroding public support for international economic agreements, exacerbating the already fractured consensus that is so troubling the government.³²

²⁶ National Tertiary Education Union (NTEU), *Submission 40*, p 3. See also Dr Elizabeth Thurbon, *Submission 61*, p. 5.

²⁷ OSIA, *Submission 53*, p. 3.

²⁸ Mr Phillips, OSIA, *Committee Hansard*, Melbourne, 1 June 2018, p. 11.

²⁹ OSIA, *Submission 53*, p. 8.

³⁰ Public Services International (PSI), *Submission 27*, p. 8.

³¹ PSI, *Submission 27*, p. 9.

³² Dr Elizabeth Thurbon, *Submission 61*, p. 5.

6.38 The Australian Digital Alliance is of the view that, should the suspended provisions be considered for reinstatement, a process of public consultation should take place:

Should any of the suspended provisions from the former TPP be reintroduced ADA would welcome consultation and public disclosure in relation to those provisions. By extension, ADA renews our advocacy for the implementation of a more rigorous and transparent assessment process before Australia commits to future treaties that would impact Australian IP law.³³

6.39 The Committee believes that the reimposition of the suspended provisions will have a significant enough impact on Australian business that the suspended provisions should not be reimposed without a public consultation process.

6.40 The Committee therefore recommends that a proposal to reimpose any of the suspended provisions should be considered a treaty amendment, resulting in an inquiry by the Committee into the proposal.

Recommendation 1

6.41 The Committee recommends that, in the event that the Parties to the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* agree to reinstate the suspended provisions of the *Trans Pacific Partnership Agreement*, the reinstatement be treated as an amendment to the Treaty and be subject to an inquiry by the Committee.

³³ Australian Digital Alliance, *Submission 52*, p. 2.

7. Other matters

- 7.1 This Chapter considers issues that are not related to specific provisions of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* (the TPP 11), and draws together the themes that have emerged during the inquiry.

Regulatory harmonisation

- 7.2 Problems associated with the number of bilateral trade agreements in the Asia-Pacific (commonly called ‘the noodle bowl effect’) have resulted in an effort to multilateralise the region’s trade architecture by negotiating a plurilateral trade agreement that harmonises the rules governing trade between Parties. The *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America, and Vietnam* (TPP) and the TPP 11 are a result of this process.¹
- 7.3 AI Group argues that global trade is no longer characterised by the import or export from one country to another of raw materials and finished manufactured products, but rather webs of trade in intermediate products, across different sectors, and often involving numerous countries, business trips and data exchanges.²
- 7.4 Estimates show that:

¹ Joint Standing Committee on Treaties (JSCOT), *Report 165: Trans-Pacific Partnership Agreement*, November 2016, p. 29.

² AI Group, *Submission 33*, p. 4.

...60% of global commerce involves intermediate products, and 30% of the total is conducted between affiliates of the same multinational corporation.³

7.5 This sort of trade raises the importance of trade transaction costs such as border administration, particularly where products must travel through numerous countries before the final good can be sold.⁴

7.6 One of the principal advantages for business in the TPP 11 is the regulatory harmonisation it will bring to trade amongst the Parties. AI Group states:

The [TPP 11] will provide Australian companies with a guaranteed set of rules in which to operate throughout the region and protect Australian interests. Perhaps we won't see the true benefit until an Australian company needs to rely on those rules to protect their interests.⁵

7.7 The Export Council of Australia (ECA) described the benefits of regulatory harmonisation as:

... particularly important when it comes to trade that occurs within value chains. In value chains, intermediate goods can move across borders multiple times. Tariffs, and documentation and logistics costs compound. Because value is created across multiple countries, value chains often do not meet the 'rules of origin' for eligibility for bilateral FTAs. With 11 parties involved, it is easier for value chains to accumulate enough value added within member countries to satisfy the TPP-11's rules of origin.⁶

7.8 According to AI Group, this demonstrates the true value of multilateral agreements over bilateral agreements. While the multilateral agreements are more complex and take longer to negotiate and implement, the benefits of having a group of economies agree on a single set of rules has a multiplier effect on business.⁷

7.9 For the Australian Chamber of Commerce and Industry (ACCI) the most important benefit of the TPP 11 is the consistency of the rules it will impose across a range of trading partners.⁸

³ AI Group, *Submission 33*, p. 4.

⁴ AI Group, *Submission 33*, p. 3.

⁵ AI Group, *Submission 33*, p. 3.

⁶ Export Council of Australia (ECA), *Submission 59*, p. 3.

⁷ AI Group, *Submission 33*, p. 3.

⁸ Australian Chamber of Commerce and Industry (ACCI), *Submission 49*, p. 4.

- 7.10 The ECA highlighted the benefits of the TPP 11 to small and medium sized businesses in particular:

The TPP-11 ... contains a chapter dedicated to helping SMEs access the benefits of the agreement. This includes provisions to help SMEs utilise the agreement, such as mandating websites to provide user-friendly information on the Agreement. It includes measures to make supplying to governments easier, including the Australian Government.⁹

The noodle bowl

- 7.11 The capacity of Australian business, particularly small and medium enterprises (SMEs) to make use of trade agreements, is a significant issue.

- 7.12 The ECA noted that the number of Australian businesses involved in exporting has declined:

Between 2006-07 and 2014-15, the proportion of Australian businesses exporting fell from 9.1% to 7.1%.¹⁰

- 7.13 Dr Elizabeth Thurbon is concerned that:

Since 2013, the government has pumped vast resources into negotiating trade deals intended to increase foreign market access for Australian firms. Yet at the same time, it has been actively dismantling local industry development initiatives aimed at boosting the innovation and export capacity of Australian firms so that they might actually capitalize on market access wins abroad.¹¹

- 7.14 The ECA considers that the TPP 11 contains novel provisions that will raise problems for many businesses. The ECA argues that it is important that the Australian Government commits sufficient resources to help businesses understand how the Agreement will benefit them.¹²

- 7.15 The ECA identified a number of factors necessary for Australian businesses to make use of trade agreements:

Businesses will need to understand a range of different aspects of the Agreement, including:

⁹ ECA, *Submission 59*, p. 3.

¹⁰ ECA, *Submission 59*, pp. 6-7.

¹¹ Dr Elizabeth Thurbon, *Submission 61*, p. 6.

¹² ECA, *Submission 59*, p. 1.

- how they should determine which FTA to use when their trading partners have multiple FTAs with Australia (e.g. Australia—Singapore trade could occur under SAFTA, AANZFTA or the TPP-11)
- how to calculate ‘rules of origin’ under the TPP-11 and other agreements, and how to complete a declaration of origin
- what the TPP-11 services provisions mean, and the processes required to utilise those provisions
- issues around customs classifications and compliance
- the mechanisms the TPP-11 provides to resolve disputes.¹³

7.16 According to the ECA, Government agencies have deep subject matter expertise, but are usually not adequately staffed to roll out a sustained training program. In addition, agencies have little expertise in providing training and often have difficulty communicating with small and medium enterprises.¹⁴

7.17 ACCI is concerned that the TPP 11 overlays, rather than replaces, existing bilateral agreements, and that this will exacerbate rather than remove the ‘noodle bowl effect’ of having a range of different rules applying to each jurisdiction.

7.18 According to ACCI, the impact on businesses is increased red tape. ACCI advises that:

It is important to understand that each agreement includes compliance terms which need to be satisfied in order to take advantage of the agreement. In the case of goods trade, this is the tariff regime where rules of origin must be satisfied. Zero preferential tariffs are different to the abolition of tariffs. Any tariff, even 0, requires the importers to satisfy the compliance rules and so red tape is retained.

7.19 ACCI argues that the TPP 11 actually increases the prospect of a business making a mistake in relation to rules of origin, because the TPP 11 allows self-certification, rather than using recognised certifiers like Governments or their representative agencies.¹⁵

¹³ ECA, *Submission 59*, p. 6.

¹⁴ ECA, *Submission 59*, p. 6.

¹⁵ ACCI, *Submission 49*, p. 6.

- 7.20 ACCI recommends that the Government withdraw from existing bilateral trade agreements with TPP 11 countries to provide consistency to Australian business.¹⁶
- 7.21 The Committee considers that there might be some advantages to Australian businesses if the trade agreement architecture were simplified by Australia withdrawing from older bilateral trade agreements with TPP 11 Parties. However, such a simplification should only be undertaken if no Australian business would be disadvantaged.
- 7.22 The Committee therefore recommends that the Australian Government review Australia's bilateral trade agreements with TPP 11 Parties with a view to withdrawing from those which are no longer beneficial to Australian businesses.

Recommendation 2

- 7.23 The Committee recommends that the Australian Government review Australia's bilateral trade agreements with TPP 11 Parties with a view to withdrawing from those which are no longer beneficial to Australian businesses.**

Modelling

- 7.24 The accuracy, scope and level of importance attributed to modelling trade agreements is a perennial issue.
- 7.25 During this inquiry, the Committee collected a great deal of evidence on the various sets of modelling applied to the TPP 11.
- 7.26 The claims and disagreements about modelling amongst participants to the inquiry are related to the interpretation of the TPP 11 each participant wishes to apply.
- 7.27 The effect is that participants appear to make a number of contradictory claims about what the modelling reveals.
- 7.28 Examining what each model is intended to demonstrate shows both the limitations of modelling, and the limitations of the interpretations of the modelling outcomes.

Computable general equilibrium model

¹⁶ ACCI, *Submission 49*, p. 6.

- 7.29 The type of modelling generally used to model the outcomes of trade agreements is the computable general equilibrium model. A number of modelling studies that show benefits from the TPP 11 for Australia use this model.¹⁷
- 7.30 The Mineral Council of Australia's (MCA's) submission analyses nine sets of computable general equilibrium modelling that estimate the TPP 11 impact on Australia's GDP by 2030.
- 7.31 The GDP benefits range from a 1.2 per cent increase (modelled by Kenichi Kawasaki at the Institute for Policy Studies, Tokyo), to a negligible increase (modelled by Carlo Dade and Dan Ciurick of the Canada West Foundation).¹⁸
- 7.32 Some computable general equilibrium modelling of the TPP 11 indicates that Australia will do better out of the TPP 11 than under the original TPP. This is because Australia is party to the Australia-United States Free Trade Agreement (AUSFTA), while many other TPP 11 countries do not have free trade agreements with the United States.¹⁹
- 7.33 This means that Australia retains preferential access to the United States market despite the United States withdrawing from the TPP.
- 7.34 The modelling cited by the Australian Government, the Petri and Plummer modelling, is in the middle of the range for GDP outcomes.²⁰
- 7.35 Petri and Plummer's modelling indicates that by 2030, the TPP 11 will improve Australia's economic outcomes to the following extent:
- real national income by A\$15.4 billion, or 0.5 per cent;
 - real GDP by A\$18 billion, or 0.5 per cent; and
 - exports by A\$29.6 billion, or 4 per cent.²¹
- 7.36 Petri and Plummer's modelling indicates that Australia has the least to gain of TPP 11 countries in terms of real national income improvements by 2030.²²

¹⁷ Minerals Council of Australia (MCA), *Submission 38*, p. 6.

¹⁸ MCA, *Submission 38*, p. 8.

¹⁹ MCA, *Submission 38*, p. 5.

²⁰ MCA, *Submission 38*, p. 8.

²¹ MCA, *Submission 38*, p. 1.

²² MCA, *Submission 38*, p. 9.

7.37 Many participants point out that the modelling done on the TPP and TPP 11 using the computable general equilibrium model show no significant benefits to Australia. The NSW Retired Teachers' Association, for example, stated:

There are no definitive economic benefits for Australia. The World Bank analysis found that in 15 years the Agreement would have boosted the economy by 0.7%, or 0.05% per year. The Peterson Institute for International Economics suggests the eventual gain would be 0.5%, or less than half of one tenth of a per cent per year.²³

United Nations Global Policy Model

7.38 Of the ten sets of modelling that has been conducted, only one set did not follow the computational general equilibrium modelling approach, that of Capaldo and Izurieta, of Tufts University. This is the model that the Australian Council of Trade Unions (ACTU) focusses on, which indicated Australia could lose 39,000 jobs as a result of the TPP 11.²⁴

Employment and income

7.39 The debate about modelling employment and income is complicated because of the way the different models treat these issues.

7.40 The MCA points out that one of the core assumptions of the Capaldo and Izurieta model is that trade agreements will cause employers to cut wages, which in turn will reduce expenditure.²⁵

7.41 The ACTU submission in turn argues that most of the computable general equilibrium model assumes full employment and a constant income distribution in all TPP countries.²⁶

7.42 According to the Department of Foreign Affairs and Trade (DFAT):

There were no employment aspects on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) modelled in the 2017 Peterson Institute for International Economics study.²⁷

²³ NSW Retired Teachers' Association, *Submission 21*, p. 2.

²⁴ Australian Council of Trade Unions (ACTU), *Submission 57*, p. 18.

²⁵ MCA, *Submission 38*, p. 10.

²⁶ ACTU, *Submission 57*, p. 20.

²⁷ Department of Foreign Affairs and Trade (DFAT), *Submission 65*, p. 2.

- 7.43 In other words, the computable general equilibrium model is not designed to model employment outcomes at all.
- 7.44 However, the computable general equilibrium model can model real national income.²⁸

Evidence from past trade agreements

- 7.45 Dr Elizabeth Thurbon points out that the outcomes modelled for previous trade agreements have not proven to be accurate:

What the evidence does show is that preferential trade agreements can have welfare-reducing outcomes. The Australia-US Free Trade Agreement stands as a clear example of a welfare-reducing deal. As ANU economist Dr Shiro Armstrong has shown, since its entry into force in 2005, that deal has had a trade-distorting effect, diverting trade away from lower cost sources and leaving both Australia and the US worse off than they would have been without it.²⁹

- 7.46 Real world evidence of the impact of previous trade agreements may be helpful in determining what benefits Australia can expect from the TPP 11. Unfortunately, the evidence of the economic impact of previously negotiated trade agreements is also subject to a range of claims that are not directly comparable.
- 7.47 The MCA points to studies conducted by the Centre for International Economics, which showed that from 1998/99 – 2013/14, trade related employment in Australia increased by 15 per cent.³⁰
- 7.48 The Centre for International Economics study also indicated that trade liberalisation had increased real national income by 5.1 per cent between 1986 and 2016.³¹
- 7.49 Further, the MCA argues that the outcome of the Tufts University modelling conflicts with real world experience, in which Australia has experienced economic growth as a result of tariff reductions and improvements in free trade.³²

²⁸ MCA, *Submission 38*, p. 9.

²⁹ Dr Elizabeth Thurbon, *Submission 61*, p. 3.

³⁰ MCA, *Supplementary Submission 38.1*, p. 3.

³¹ MCA, *Supplementary Submission 38.1*, p. 3.

³² MCA, *Supplementary Submission 38.1*, p. 3.

- 7.50 The Electrical Trades Union (ETU) argues that the levels of job growth in Australia predicted for free trade agreements have not materialised. As an example, the Union cites the predictions of jobs growth in the agricultural sector as a result of China-Australia Free Trade Agreement (ChAFTA), pointing out that between November 2015 and May 2017, agricultural employment in Australia actually shrank by 31,400 jobs.³³
- 7.51 AI Group cite modelling from 2014 which indicate that the advantages of trade facilitation changes are considerably greater in terms of export gains compared to GDP gains. The evidence cited by AI Group points to GDP increases in Australia as a result of trade facilitation changes by 2020 (from 2014) of 1.29 per cent, while export gains amount to 8 per cent.³⁴

Problems with modelling

- 7.52 In summary, the debate about modelling has been heated but has not been very illuminating.
- 7.53 The problem lies in how modelling works. Modellers take a series of assumptions about an economy based on previous evidence, and cast that forward to produce expected outcomes in a limited range of fields. Models that do not predict employment outcomes cannot be made to do so, just as models that make assumptions about wages outcome will not provide useful data on income.
- 7.54 Modelling a complex agreement like the TPP 11 in a real world environment imposes necessary limitations on the accuracy of the predictions.³⁵
- 7.55 The Committee believes that modelling is only useful as a tool, amongst others, to inform decision making.

What modelling misses

- 7.56 To demonstrate the limitations on modelling, there is a range of potential impacts of trade agreements that modelling does not cover. One of these is the health impacts of trade agreements; another is the impact trade agreements have on women.

Health Impact Assessment

³³ Electrical Trades Union (ETU), *Submission 35*, p. 6.

³⁴ AI Group, *Submission 33*, p. 5.

³⁵ ECA, *Submission 59*, p. 5.

- 7.57 The Public Health Association of Australia (PHAA) has recommended that free trade agreements to which Australia is party undergo health impact assessments before signing.
- 7.58 According to the PHAA, a health impact assessment has a number of benefits:
- Health Impact Assessment (HIA) is 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.³⁶
- 7.59 The World Health Organisation (WHO) explicitly calls for the use of Health Impact Assessment to better integrate health into policy decisions, particularly those that impact the social, economic and environmental determinants of health.³⁷

Impact on women

- 7.60 ActionAid Australia points out that trade agreements may impact women in ways that are not measured by basic modelling.³⁸
- 7.61 ActionAid argues that for many women in lower income countries, free trade and integration into global supply chains has exacerbated gender inequalities.³⁹
- 7.62 While organisations like the World Bank and the World Trade Organization (WTO) suggest that free trade can ‘add significant momentum to our efforts to end poverty,’ their failure to recognise the gender-specific impacts of trade liberalisation is a particular concern for ActionAid Australia given its potential to significantly impede progress on women’s empowerment and gender equality globally.⁴⁰
- 7.63 The Organisation for Economic Cooperation and Development (OECD) evidence suggests that the possible differential effects and impacts on men and women resulting from trade openness and related trade agreements might exacerbate existing inequalities.⁴¹

³⁶ Public Health Association of Australia (PHAA), *Submission 34*, p. 14.

³⁷ PHAA, *Submission 34*, p. 14.

³⁸ ActionAid Australia, *Submission 46*, p. 2.

³⁹ ActionAid Australia, *Submission 46*, p. 2.

⁴⁰ ActionAid Australia, *Submission 46*, p. 2.

⁴¹ ActionAid Australia, *Submission 46*, p. 2.

Australian modelling

- 7.64 Noting the limitations on modelling, many participants in the inquiry, such as the ACCI, support the use of independent economic modelling of trade agreements in Australia, arguing that such modelling will show the significant benefits such agreements will produce.⁴²
- 7.65 ACCI recommends that an independent body, such as the Productivity Commission should undertake independent modelling of trade agreements.⁴³
- 7.66 Dr Elizabeth Thurbon argues that in the absence of a comprehensive, independent analysis of the TPP 11 it is impossible for Australians and their elected representatives to weigh the relative merits of the deal and to make an informed decision as to whether to support it.⁴⁴
- 7.67 In its report on the TPP, the Committee recommended that the Australian Government consider implementing a process through which independent modelling and analysis of a proposed trade agreement is undertaken by the Productivity Commission, or equivalent organisation, and provided to the Committee alongside the National Interest Analysis (NIA) to improve assessment of the agreement.⁴⁵
- 7.68 In its Response, the Government did not accept the Recommendation.
- 7.69 The Committee believes that, notwithstanding the accepted limitations on modelling, there are significant benefits, especially in the public perception of the benefits of trade agreements, to be had from the Australian Government commissioning modelling to be included in the NIA for trade agreements.

Recommendation 3

- 7.70 The Committee recommends that the Australian Government consider implementing a process through which independent modelling and analysis of a proposed trade agreement is undertaken by the Productivity Commission, or equivalent organisation, and provided to the Committee alongside the NIA to improve assessment of the agreement.**

⁴² ACCI, *Submission 49*, p. 7.

⁴³ ACCI, *Submission 49*, p. 18.

⁴⁴ Dr Elizabeth Thurbon, *Submission 61*, p. 3.

⁴⁵ JSCOT, *Report 165*, p. 47.

Transparency

7.71 A number of submitters are concerned about the level of transparency in the negotiation process for the TPP 11. Mr Fred Schilling states:

Certain multinational corporations were privy to the TPP during its negotiation but not the voting public; what appalling behaviour. There are far more smarts out here in voter land than the politicians want to know.⁴⁶

7.72 Some participants are concerned about the binding effects extensive international treaties have on future government action, given that they are negotiated without transparency. Unions WA points out:

...while a government might legitimately want to make a long term commitment to certain trade arrangements, it is not legitimate to enter agreements that will 'tie the hands of its opponents' e.g. future elected governments.⁴⁷

7.73 According to the ETU, the complexity of bilateral and regional trade agreements and the potential for provisions to impose net costs on the community presents a compelling case for the negotiated text of an agreement to be comprehensively analysed before signing and again at each and every review.⁴⁸

7.74 The ACTU states that:

The secrecy of the detail of TPP negotiations meant that occasional unauthorised leaking of text documents has been the only way stakeholders have gained access to documents that should have been the subject of open debate in parliament and in the community throughout negotiations.⁴⁹

7.75 The ACTU submission points out that the European Union has recognised community demand for negotiation papers and final texts to be exposed to public debate.⁵⁰

⁴⁶ Mr Fred Schilling, *Submission 4*, p. 1. See also Dr V R Rutnam, *Submission 10*, p. 1; Freedom Publishers Union, *Submission 16*, p. 1; Vintage Reds of Canberra, *Submission 18*, p. 2; Mr Peter Murphy, *Submission 31*, p.2.

⁴⁷ Unions WA, *Submission 30*, p. 2.

⁴⁸ ETU, *Submission 35*, p. 11.

⁴⁹ ACTU, *Submission 57*, p. 14.

⁵⁰ ACTU, *Submission 57*, p. 17.

7.76 On the other hand, a number of organisations expressed satisfaction with the degree of consultation undertaken by the Australian Government. For example, the National Farmers' Federation (NFF) states:

The NFF and its commodity members have had very cooperative engagement with Australian Government officials in the stages of the agreement's negotiations, before and following each negotiating engagement, and after the release of the agreements text and schedules.⁵¹

Trade liberalisation

7.77 Public concerns about the transparency of trade agreement negotiations is an aspect of the most significant problem facing the ongoing acceptance of trade agreements: the belief that protectionism may provide a better outcome for people.

7.78 Dr Elizabeth Thurbon points out that:

In its 2017 Foreign Policy White Paper, the Australian Government identified a key threat to our nation's future prosperity: the fracturing global consensus for a rules-based international economic order.⁵²

7.79 To help repair this fracture and restore faith in international economic rules, Australian policymakers must understand the causes of public opposition to preferential trade deals like the TPP 11.⁵³

7.80 The Business Council of Australia (BCA) highlights the importance of trade agreements in a global environment in which protectionism is on the rise.

7.81 The BCA is concerned by recent developments in the international trading environment, including the potential imposition of punitive tariffs by the US and China on each other's trade.

7.82 The tariff penalties being threatened by the US and China cover more than 50 per cent of their bilateral trade, and could, if imposed, have a significant impact on Australia's exports and consequently employment. A trade war, if it eventuated, could have wide-ranging repercussions for global trade and the economy.⁵⁴

⁵¹ National Farmers' Federation (NFF), *Submission 36*, p. 2.

⁵² Dr Elizabeth Thurbon, *Submission 61*, p. 4.

⁵³ Dr Elizabeth Thurbon, *Submission 61*, p. 4.

⁵⁴ Business Council of Australia (BCA), *Submission 55*, p. 6.

- 7.83 Against these developments, the TPP 11 provides an important, positive example of international cooperation promoting rules-based trade and investment liberalisation.
- 7.84 Ratification would be an important contribution towards stabilising the current environment, reinjecting momentum into cooperative trade liberalisation and rules-based approaches on a global basis.⁵⁵
- 7.85 The ECA also emphasises the importance of trade liberalisation:
The ECA sees multilateral trade liberalisation through the World Trade Organisation (WTO) as the best outcome for Australia.⁵⁶
- 7.86 The Committee agrees with these assessments. A rules based international order and trade liberalisation is worth pursuing and worth promoting.
- 7.87 The Committee supports the TPP 11 and recommends that binding treaty action be taken.

Recommendation 4

- 7.88 The Committee supports the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam* and recommends that binding treaty action be taken.**

Hon. Stuart Robert MP

Chair

20 August 2018

⁵⁵ BCA, Submission 55, p. 6.

⁵⁶ ECA, Submission 59, p. 2.

A. Submissions

- 1 Mr Philippe Dupuy
- 2 Mr Jonathan Peter
- 3 Mr William Winser
- 4 Mr Fred Schilling
- 5 Mr Joseph Castley
- 6 Mr Charles Mollison
- 7 Mr Charles Sowerwine
- 8 Mr Peter Sainsbury
- 9 Ms Anne Byrne
- 10 Dr Verna Romaine Rutnam
- 11 Sam Altman
- 12 Mr Tom Marwick
- 13 Dr Luke Nottage
 - 13.1 Supplementary to submission 13
- 14 *Confidential*
- 15 Mr Duncan Marshall
- 16 Freedom Publishers Union
- 17 Dr Kyla Tienhaara
- 18 The Vintage Reds of the Canberra Region
- 19 Ms Carolyn Allen

- 20 Winemakers' Federation of Australia
- 21 NSW Retired Teacher's Association
- 22 Dr Deborah Gleeson et al
- 23 Friends of the Earth Australia
- 24 Mr John Watkins
- 25 Grain Growers Limited
 - 25.1 Supplementary to submission 25
- 26 Mr Carlos Andrade
- 27 Public Services International
- 28 Ms Linda Link
- 29 Australian Pork Limited
- 30 UnionsWA
- 31 Foundation for Alcohol Research and Education
- 32 Mr Peter Murphy
- 33 Australian Industry Group
 - 33.1 Supplementary to submission 33
- 34 Public Health Association of Australia
- 35 Electrical Trades Union of Australia
- 36 National Farmers' Federation
- 37 Australian red meat industry
- 38 Minerals Council of Australia
 - 38.1 Supplementary to submission 38
 - 38.2 Supplementary to submission 38
 - 38.3 Supplementary to submission 38
- 39 Law Council of Australia
- 40 National Tertiary Education Union
- 41 Australian Manufacturing Workers Union (AMWU)
- 42 Australian Nursing & Midwifery Federation
- 43 Mr Harry Creamer
- 44 CPSU SPSF

-
- 45 Australian Fair Trade and Investment Network (AFTINET)
- 45.1 Supplementary to submission 45
 - 45.2 Supplementary to submission 45
- 46 ActionAid Australia
- 47 Electrical Trades Union (ETU)
- 48 Australian Forest Products Association
- 49 Australian Chamber of Commerce and Industry
- 50 GetUp!
- 51 Australian Dairy Industry Council (ADIC) & Dairy Australia (DA)
- 52 Australian Digital Alliance
- 53 Open Source Industry Australia
- 54 JOINT INDUSTRY ORGANISATIONS
- 55 Business Council of Australia
- 56 Medicines Australia
- 57 Australian Council of Trade Unions
- 58 CFMEU
- 59 Export Council of Australia
- 60 Mr Michael Kiddle
- 61 Dr Elizabeth Thurbon
- 62 Australian Council of Wool Exporters and Processors Inc.
- 63 Australian Sugar Industry Alliance (ASA)
- 64 Canegrowers
- 65 Department of Foreign Affairs and Trade
- 65.1 Supplementary to submission 65
- 66 Dr Matthew Rimmer
- 67 Victoria State Government
- 68 Mylan Australia
- 69 Department of Home Affairs

B. Exhibits

- 1 *Various articles, Dean Baker, (Submission 15)*
- 2 *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement, Kyla Tienhaara, (Submission 17)*
- 3 *Marginalising Health Information: Implications of the Trans-Pacific Partnership Agreement for Alcohol Labelling, Paula O'Brien, Deborah Gleeson, Robin Room and Claire Wilkinson, (Submission 22)*
- 4 *Commentary on 'Communicating Messages About Drinking': Using the 'Big Legal Guns' to Block Alcohol Health Warning Labels, Paula O'Brien, Deborah Gleeson, Robin Room, and Claire Wilkinson, (Submission 22)*
- 5 *ISDS Briefing: The case for banning Investor State Dispute Settlement in Australia, Friends of the Earth Australia, (Submission 23)*
- 6 *Submission to the Joint Standing Committee on Trade, Dr Elizabeth Thurbon, (Submission 61)*
- 7 *Back to the Future: The Digital Millennium Copyright Act and the Trans-Pacific Partnership, Dr Matthew Rimmer, (Submission 66)*
- 8 *The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, the Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership, Dr Matthew Rimmer, (Submission 66)*
- 9 *The Trans-Pacific Partnership: Intellectual Property, Public Health, and Access to Essential Medicines, Dr Matthew Rimmer, (Submission 66)*
- 10 *Greenwashing the Trans-Pacific Partnership: Fossil Fuels, the Environment, and Climate Change, Dr Matthew Rimmer, (Submission 66)*
- 11 *SMH article: It's time to stop giving more rights to global corporations, Dr Patricia Ranald, (Submission 45)*

- 12 *AFTINET membership list*, (Submission 45)
- 13 *Exclusionary Rules of Origin of Mega-RTAs under WTO Law: Mega-RTA 'Fracturing' Its Overlapping RTA*, Jong Bum Kim, (Submission 49)
- 14 *Bilateral and Regional Trade Agreements: Detangling the Noodle/Spaghetti Bowl*, Paul Gretton, (Submission 49)
- 15 *Rules of Origin: can the noodle bowl of trade agreements be untangled?* Productivity Commission, (Submission 49)

C. Witnesses

Monday, 7 May 2018

Canberra

Department of Foreign Affairs and Trade

Department of Home Affairs

Department of Jobs and Small Business

Friday, 1 June 2018

Melbourne

Minerals Council of Australia

Open Source Industry Association

Winemakers' Federation of Australia

ACTU

Friday, 15 June 2018

Sydney

Grain Growers Limited

Australian Fair Trade and Investment Network (AFTINET)

Dr Luke Nottage, private capacity

Export Council of Australia

Dr Elizabeth Thurbon, private capacity

Australian Industry Group

Electrical Trades Union of Australia

Monday, 25 June 2018

Canberra

Medicines Australia

Australian Chamber of Commerce and Industry

Department of Foreign Affairs and Trade

Department of Home Affairs

Department of Health

IP Australia

Department of Education and Training

Additional Comments

*Hon Michael Danby MP, Mr Ross Hart MP, Senator
Hon Kristina Keneally, Senator Jenny McAllister,
Ms Susan Templeman MP*

As has been noted elsewhere in this report, the Joint Standing Committee on Treaties tabled its *Report 165* into the Trans Pacific Partnership Agreement (TPP) in November 2016.

The Labor members of that committee made additional comments at that time, which are worth repeating, given the additional evidence received by the committee in the course of its hearings supports many of the observations made within the comments at that time.

Labor has a long history of support for free trade. The reforms of the Hawke and Keating Governments including the unilateral reduction of tariffs have helped deliver a record 26 years of continuous economic growth and increased the average Australian family's real income by \$8448.¹

When Labor was last in Government, we signed three trade agreements and commenced negotiations on seven others, including the former Trans-Pacific Partnership (TPP). Labor supports high quality free trade agreements because trade encourages greater economic activity and creates jobs. These jobs are often more stable and better paid. Trade and open markets have lifted millions out of

¹ <http://dfat.gov.au/about-us/publications/trade-investment/Documents/cie-report-trade-liberalisation.pdf>

poverty globally and provides consumers with cheaper products. International trade also lifts Australia's rate of economic growth and productivity leading to greater economic opportunities. This provides consumers with cheaper products and offers Australian businesses the ability to invest and operate in overseas markets.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP 11) is a new, different agreement to the TPP signed in New Zealand in February, 2016. The original agreement included 40 per cent of the world's GDP whereas the TPP 11 including only 13 per cent. The TPP 11 also suspends 22 provisions of the original TPP and features additional side letters, including ten new side letters between Australia and other signatories alone.

Independent economic modelling of the finalised TPP 11 has been conducted by Grant Thornton on behalf of the Victorian Government. This independent economic modelling indicates that the TPP 11 will deliver modest initial gains – predominantly for agricultural goods. In particular it provides new preferential access to Mexico and Canada. There is the potential for more significant gains in the longer term if more countries become part of the TPP 11. The analysis concludes that while the TPP 11 does not benefit all sectors equally, no sector or business should be worse off as a result.

The Hawke and Keating Labor Governments were the driving force behind the development of APEC. This has helped to cut tariffs in half across the Asia-Pacific. Simplifying trade rules and building stronger trade ties between all the countries of the Asia-Pacific increases security in our region and helps to bring the countries of our region closer together. Our long term ambition should be a free trade agreement that includes all countries of the Asia Pacific, including China and The United States. The TPP 11 may be the first step in achieving this.

This agreement includes both environmental and labour standards. This is welcome and will help to combat the destruction of the environment and exploitation of workers in countries with lesser domestic standards than that of the agreement. The Committee heard evidence that the enforceability of these provisions may be difficult or slow however this does not mean that their inclusion is insignificant.

There are still clear shortcomings in the process through which Australia's participation in the TPP 11 has been negotiated and determined, in particular with respect to the inadequacy of stakeholder engagement in the negotiation phase, and the absence of independent economic analysis or modelling, including analysis for specific consideration by this Committee which is explored elsewhere in this Report.

Labor members of the Committee support the inclusion in the Report of a recommendation that goes to the question of providing wider, earlier, and more substantial engagement with stakeholders from industry and civil society. We believe, however, that the Report should also include a recommendation with respect to the provision of independent economic analysis and modelling.

There are some provisions of the TPP 11 which Labor members of the Committee have some concerns. In particular Labor is concerned that the TPP 11 waives labour market testing for 'contractual service suppliers' for six signatory countries. This will mean jobs in Australia will be able to be filled by workers from Canada, Peru, Brunei, Mexico, Malaysia and Vietnam without being offered to Australians first. This comes at a time when many in Australia are concerned about under employment and low wages. This concession by the Australian Government also breaks a promise made by the Prime Minister when announcing the new Temporary Skills Shortage visa scheme on 18 April 2017.

More than 450 professions could currently be covered by the term 'contractual service supplier' and includes electricians, plumbers, carpenters and nurses. No other country has provided Australia with such generous reciprocal visa rights and it is unclear why such concessions were given by this government. While Labor acknowledges foreign workers play a role in the success of the Australian economy it is fundamental that Australians are offered employment first and that foreign workers are brought into the country only once there is a demonstrated need. The temporary migration system is supposed to supplement the skills of Australians, not replace the ability of Australians to get jobs.

A Shorten Labor Government will not waive labour market testing as part of any free trade agreement it signs and will seek to reinstate labour market testing in existing agreements as part of their scheduled reviews.

Labor is also concerned about the erosion of skills testing in the TPP 11. Australia has the best-trained tradespeople in the world and this standard must be protected. Labor acknowledges some submissions raised concerns of less qualified and inexperienced tradespeople working in Australia because they may not be subject to the current rigorous testing. The Committee heard evidence of the potential consequences to workers and consumers if Australia's current regime was not fully enforced. A future Shorten Labor Government will retain the right to enforce skills testing in trade agreements.

Labor is also concerned that the ISDS provisions within the TPP 11 leaves Australia vulnerable to lengthy legal disputes with foreign-owned corporations. It was for this reason that ISDS provisions were excluded by the former Labor Government

in early negotiations of the TPP.² The former Howard Government shared Labor's concerns and did not include ISDS in Australia's Free Trade Agreement with the United States.

Labor members of the Committee were deeply critical of the portion of the report addressing ISDS in *Report 165*.

This report provides more balance, but still it is the view of Labor members of the committee that the potential for concern remains, particularly with respect to the potential for a successful ISDS claim to expose a future government to a substantial claim for compensation, notwithstanding that a government legislates in the public interest.

As was stated previously, if Philip Morris had won their case, Australia would have been faced with abandoning the 'plain packaging' public health initiative or paying compensation to Phillip Morris.

The latter outcome would be untenable, and does not fit with any reasonable interpretation of being able to regulate in the public interest.

It is not sufficient to simply note, as has been noted at 4.30 that (if) a government may wish to "pursue regulation it believes is in the national interest, it can do so regardless of the outcome of any related ISDS cases, noting that there may be costs incurred".

It is important to remember that the TPP introduces an ISDS mechanism between Australia and three other countries for the first time, namely: Japan, Canada, and Peru. Under the TPP an ISDS arrangement will be excluded between Australia and New Zealand by a side letter to the agreement.

It is of concern, also, that committee received evidence as to the possibility of a claim by virtue of most-favoured-nation provisions, notwithstanding that there is no ISDS provision within a relevant treaty, as is noted in Paragraphs 4.101-4.103 of this Report.

As was noted in *Report 165* by the Labor Members:

In 2010, the Productivity Commission's Bilateral and Regional Trade Agreements report said the Australian government should "seek to avoid accepting provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system".

It also stated:

² DFAT evidence at JSCOT – 7/11/20162

There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements. Available evidence does not suggest that ISDS provisions have a significant impact on investment flows.

Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions. [p. xxxiv]

Against this background, the Commission considers that Australia should seek to avoid accepting ISDS provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system. Nor, in the Commission's assessment, is it advisable in trade negotiations for Australia to expend bargaining coin to seek such rights over foreign governments, as a means of managing investment risks inherent in investing in foreign countries. Other options are available to investors. [pp 276-277]

In the context of a more recent review of trade agreements, Paul Lindwall of the Productivity Commission said, on 25 July 2016, in relation to ISDS provisions and the Phillip Morris case: "As it was resolved on a technicality, and costs are apparently yet to be recovered, this success should not be taken as an indication that ISDS is essentially harmless."

The relevant evidence before the Committee can therefore be considered in two streams, each of which argues against the unnecessary and risky introduction of ISDS provisions, especially between Australia and other 'low-risk' but frequently litigious nations like the United States. Those streams of evidence are:

- *The fact that there is no demonstrated or reasonably anticipated benefit in terms of investment flow from ISDS between Australia and countries like the US, Japan, and Canada.*
- *The fact that there are well-established risks of ISDS imposing costs on Australian taxpayers (whether for compensation or legal costs or both), and the potential for ISDS to prevent Australian governments from regulating in the public interest.*

What's more, the Productivity Commission's Trade & Assistance Review 2013-14 included the following observations and recommendations:

[...] it is not clear ISDS provisions respond to a demonstrable market failure or have been associated with the fostering of foreign investment flows, particularly between advanced economies with transparent and well-functioning legal systems. [page 61]

The inclusion of investor-state dispute settlement (ISDS) provisions in Australia's preferential trade agreements and bilateral investment treaties has become contentious.

- *The provisions depart from national treatment principles by affording substantive appeal rights to foreigners not available to domestic firms, risk impeding domestic regulatory reform (regulatory chill), include safeguards and carve-outs of uncertain effect, lack transparency and have inadequate parliamentary scrutiny.*
- *ISDS provisions also expose the Australian Government to potentially large unfunded contingent liabilities dependent on decisions by international arbitration tribunals.*
- *Concerns are heightened by increases in the number of ISDS cases internationally. [page 61]*

In its report on Bilateral and Regional Trade Agreements (PC 2010a, p. 271), the Commission concluded there was an absence of an identifiable underlying economic problem on market failure grounds that necessitates the inclusion of ISDS provisions. The apparent lack of evidence regarding the effects of such provisions on Australian foreign investment leads the Commission to emphasise its previous recommendation that:

The Australian Government should not include matters in bilateral and regional trade agreements that would serve to increase barriers to trade, raise costs or alter established social policies without a comprehensive review of the implications and available options for change.

On specific matters, the Australian Government should:

- *seek to avoid the inclusion of investor-state dispute settlement provisions in BRTAs that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors. (PC 2010a, p. xxxviii) [page 80]*

The weight of evidence and expert opinion is clear on two fronts with respect to the introduction of ISDS provisions between countries that are considered low-risk because they have robust governance and judicial systems: (1) the benefits of ISDS are uncertain and minimal with respect to both the flow of investment into Australia, and the protection of Australian investment abroad; and (2) the risks of ISDS in terms of legal costs, compensation, interference with the ability of governments at all levels (local, state, and federal) to regulate in the public interest, and the influence of ‘regulatory chill’.

Even in the case of so-called ‘high-risk’ investment jurisdictions there is a strong argument to be made that the risk of direct or unfairly indirect expropriation can be dealt with by means other than ISDS which are equally effective, but which avoid the capricious nature of the ISDS process/institutions and provide an incentive for developing nations to evolve a mature regulatory and judicial system.

- The view remains, indeed that view is reinforced by evidence received by this committee at its hearings. The fact that the committee view concedes that significant costs might arise by virtue of a claim should be of concern not just to a government seeking to regulate in the best interests of the public, the general public would be concerned to know that costs, legal costs and Tribunal costs would be incurred by virtue of a claim being pursued by an overseas corporation.

The areas in which such claims might be articulated also might be of significant concern for the general public, given interest in public health, environmental issues, Occupational Health & Safety and the like.

The fact that a claim might not be successfully made is irrelevant, the cost will be borne notwithstanding that a claim might be unmeritorious.

- The European Court of Justice determined in 2017 that ISDS provisions violated national sovereignty and that EU member states had to vote separately on ISDS provisions in trade agreements. In March 2018 the European Court of Justice also found that damages awarded to a Dutch private health insurance company against Slovakia by an ISDS Tribunal also breached EU law.

It is possible that public opinion, in Europe, in the US and elsewhere against ISDS is well-informed.

- The United States has put forward a proposal to withdraw from the ISDS provisions in NAFTA because of the risk and costs of US governments being sued by foreign corporations.

Between the signature of the TPP and the TPP 11 there was a change of government in New Zealand. The current New Zealand Labor government does not support the inclusion of ISDS provisions and was able to remove ISDS provisions through four additional side letters with Brunei, Malaysia, Peru and Vietnam. This indicates it is possible to remove ISDS provisions of the TPP 11 which apply to Australia and other signatories through the use of side letters with signatory countries.

A future Labor Government will not agree to Investor-State Dispute Settlement (ISDS) provisions in new trade agreements and will seek to remove these provisions from existing trade agreements as part of their scheduled reviews.

Labor members of the Committee are also disappointed that this agreement was not subject to independent economic modelling commissioned by the Federal Government. This has been recommended by this and other Parliamentary committees as well as the Productivity Commission, the Harper Review, the

Australian Chamber of Commerce and Industry, the Minerals Council of Australia and the Australian Council of Trade Unions.

The absence of independent economic analysis of the benefits and concessions contained within the TPP and also the TPP 11 was noted in numerous submissions, and was identified as a serious shortcoming repeatedly in evidence given at public hearings during this Inquiry.

The Productivity Commission was commonly cited as an appropriate organisation to undertake this independent analysis.

On that basis, Labor members of the Committee sought to have the following recommendation included in *Report 165*, and were grateful this was supported by the Committee as a whole.

The Committee recommends that the Australian government consider implementing a process through which independent modelling and analysis of a proposed trade agreement is undertaken by the Productivity Commission, or equivalent organisation, and provided to the Committee alongside the National Interest Assessment (NIA) to improve assessment of the agreement.

But there is considerable merit in proceeding further, and in this regard the Labor committee members emphasise the additional comments within *Report 165*:

“On this issue, and reinforcing the merit of the recommendation, it is important to note that in Blind Agreement: reforming Australia’s treaty-making process, the June 2015 Report of the Foreign Affairs, Defence and Trade References Committee, stated:

The Opposition favours incremental change building on the package of sensible reforms introduced by government in 1996. This is why the report makes practical recommendations aimed at improving the level of transparency in negotiating treaties and the quality of consultations between DFAT and stakeholders, and making parliament a real player in treaty-making.

Specifically, the report’s key recommendations are that JSCOT engage more in the oversight of trade agreements under negotiation and not wait until the end of the process; that parliamentarians and stakeholders be given access to treaty text on a confidential basis during negotiations and not a token look at the end as with the TPP; that trade agreements be subject to an independent cost-benefit analysis prepared up front at the commencement of negotiations.

Indeed, Recommendation 8 of the Blind Agreement report was as follows:

Recommendation 8

5.31 The committee recommends that a cost-benefit analysis of trade agreements be undertaken by an independent body, such as the Productivity Commission, and tabled

in parliament prior to the commencement of negotiations or as soon as is practicable afterwards. The cost-benefit analysis should inform the government's approach to negotiations.

5.32 *The committee further recommends that:*

- *treaties negotiated over many years be the subject of a supplementary cost-benefit analysis towards the end of negotiations; and*
- *statements of priorities and objectives, and cost-benefit analyses stand automatically referred to Joint Standing Committee on Treaties for inquiry and report upon their presentation to parliament.*

This recommendation was repeated in broad terms by a number of people who appeared before the Committee in the course of the TPP inquiry.

For example, Pat Randal of AFTINET gave evidence in Sydney on 26 September:

Briefly on the process: trade agreements are conducted behind closed doors and the text is not made available until after it has been agreed. The decision to authorise the signing of a trade agreement is made by cabinet, and it is only after that when the agreement is tabled in parliament and examined by this committee. As you know, parliament votes only on the implementing legislation, not the whole agreement. This process was examined by a Senate committee last year, and they produced a report which was quite critical of the process, aptly called Blind agreement. We have made detailed recommendations for changes to this process. We believe that draft text should be released and, in particular, the final text of trade agreements should be released for public and parliamentary scrutiny before it is actually signed by government. There should also be independent studies done and made available to parliament before signing—and certainly before the implementing legislation is endorsed.

We note that in the case of the TPP the call for independent assessments of the economic, health, human rights and environmental impacts of the TPP has come not only from a broad range of community organisations like our network but also from the Productivity Commission, the Australian Competition and Consumer Commission and public health experts. So there is quite a strong, wide range of opinion about the need for such studies to be done.

Alan Kirkland, CEO, Choice, gave the following evidence (Sydney, 26.09.16):

Due to these concerns, we would encourage the committee to recommend that implementing legislation for the TPP not be introduced or passed until there is an independent cost-benefit analysis conducted by a body such as the Productivity Commission [...]

We are not here to represent the interests of producers, but I would say that what we think should happen is proper analysis that weighs up the costs and benefits to the

Australian community that is done in a way that allows people participating in the debate to see that independent analysis and reach their own view, and we do not have that sort of information available at the moment.

Dr Elizabeth Thurbon, appearing in her personal capacity, gave the following evidence (Sydney, 26.09.16):

I would suggest that under the previous Labor government we came a long way towards having a set of clearly articulated principles to guide our trade policy that reflected Australia's long-term national economic interests. Those principles outlined in the Gillard government's trade policy statement included no ISDS, the rejection of TRIPS-Plus IP provisions, ensuring that the Productivity Commission reviews all trade agreements in order to assess their economic value and not signing trade deals that do not have demonstrable independently-modelled economic benefits for our nation.

[...] Wherever possible, it is the responsibility of the government to make decisions based on evidence. I think the best evidence to draw on would be independent modelling by the Productivity Commission."

The evidence taken by this committee remains consistent with those further comments.

As has been noted in the committee view at paragraph 7.69, there are significant benefits, especially in the public perception of the benefits of trade agreements, to be had from the Australian government commissioning modelling to be included in the NIA for trade agreements.

Informed decision-making, not just for members of Parliament, but also for the wider community requires openness and transparency with respect to the negotiation of trade agreements.

Thankfully the Victorian Government has commissioned independent economic analysis by Grant Thornton. If we want more people to support open markets, government has to be more open. The independent economic analysis on behalf of the Victorian Government is very important in this respect. It provides important information as to the potential benefits of a new free trade agreement.

A future Shorten Labor Government will commission independent economic modelling before signature of all new free trade agreements.

Hon Michael Danby MP

Mr Ross Hart MP

Senator Hon Kristina Keneally

Senator Jenny McAllister

Ms Susan Templeman MP