4

Issues

4.1 Although business and industry are overwhelmingly supportive of the proposed Korea-Australia Free Trade Agreement (KAFTA) a number of issues are causing concern amongst the wider community. In particular, the perceived dangers associated with the inclusion of an investor-state dispute settlement (ISDS) mechanism in the agreement and mooted changes to intellectual property rights.

4.2 Other issues specifically related to KAFTA include:

- the benefits of third party certification of the origin of products *versus* self-certification;
- possible flaws in the economic modelling undertaken to support implementing the agreement;
- the potential effect of implementation of the agreement on the Australian automotive industry;
- perceived lack of labour market testing provisions in the movement of natural persons chapter; and
- perceived weakness of the labour and environment chapters.

4.3 Several broader issues regarding Free Trade Agreements (FTAs) more generally were also raised including:

- utilisation of FTAs and possible regulatory confusion due to the proliferation of such agreements;
- levels of stakeholder consultation during treaty negotiations and the need for reform of the Australian treaty making process; and
- monitoring of the impact of FTAs on the economy.

Investor-state dispute settlement mechanisms

4.4 KAFTA includes an ISDS mechanism. These mechanisms provide a means for foreign investors to settle disputes with host governments through a third party outside of either country's formal judicial system.[1] ISDS provisions are designed to protect foreign investors from direct or indirect expropriation of their investments. Originally set up to protect foreign investors in developing countries, ISDS clauses are now included in the majority of FTAs.[2]

4.5 DFAT told the Committee that Korea had refused to sign the Agreement without the inclusion of an ISDS mechanism. DFAT explained that, faced with Korea's position, the Australian Government took measures to ensure that the final ISDS mechanism addressed the growing concerns over these provisions:

> The inclusion of an ISDS mechanism was essential to Korea and we negotiated a modern balanced mechanism that includes a range of explicit ISDS safeguards at least as strong as any other Australian agreement and certainly stronger than the majority to protect the government's ability to regulate in the public interest, including for public health and the environment.[3]

4.6 According to the RIS, the ISDS in KAFTA will promote investor confidence by providing for international arbitration of FTA-based investment disputes.[4] To succeed in an ISDS claim, an investor must establish that the host government has breached an investment obligation.

4.7 KAFTA contains a significant range of carve-outs and safeguards to protect regulation in areas of key public policy concerns including public welfare, health, culture and the environment. Foreign investment screening decisions are also carved-out from the scope of the ISDS mechanism. Procedural safeguards to deter frivolous claims and contain costs are also included.[5]

4.8 Some witnesses expressed blanket opposition to ISDS mechanisms in all FTAs. Dr Rimmer told the Committee that based on the way the current

---

1 Productivity Commission, *Bilateral and Regional Trade Agreements: Productivity Commission Research Report*, November 2010, p. 265.

2 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 265.

3 Ms Jan Adams, Deputy Secretary, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 5 August 2014, p. 6.

4 RIS, para 74.

5 RIS, para 76.

system is working an ISDS mechanism was unnecessary in any FTA.[6] Dr Tienhaara expressed a similar opinion, stating that 'trade agreements should be about trade and should not include investor-state dispute elements'.[7]

4.9 On the other hand, a number of witnesses told the Committee that they had no concerns over the inclusion of ISDS mechanisms in FTAs. When the beef industry became aware that the ISDS provisions were holding up the KAFTA negotiations, they actively lobbied the Government to come to a compromise on the issue.[8] The wine industry saw the inclusion of such mechanisms as providing 'protection against sovereign risk due to the introduction of social engineering policies and legislation'.[9] The wine industry stressed that they were neutral regarding the inclusion of an ISDS mechanism in KAFTA but did not see it as a threat as Australia has a strong regulatory system in place.[10]

4.10 A number of witnesses drew the Committee's attention to the findings of the Productivity Commission's 2010 report, *Bilateral and Regional Trade Agreements*, which concluded that 'experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions'.[11] Further, the report found that:

> 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.[12]

4.11 The risks identified by the Productivity Commission and reiterated by witnesses include:

- **'regulatory chill'**: governments may be hesitant to introduce regulations, particularly in the areas of environmental legislation or taxation, because it could be challenged and leave the government open to compensation claims;[13]

6 Dr Matthew Rimmer, *Committee Hansard*, Canberra, 14 July 2014, p. 3.

7 Dr Kyla Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 9.

8 Mr Malcolm John Foster, Chairman, KAFTA Beef Industry Taskforce, *Committee Hansard,* Sydney, 29 July 2014, p. 19.

9 Winemakers' Federation of Australia, *Submission 4*, p. [5].

10 Mr Anthony Nicholas Battaglene, General Manager, Strategy and International Affairs, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 5 August 2014, pp. 2 & 4.

11 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 274.

12 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 271.

13 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 271.

- **rights of investors**: foreign investors gain greater legal rights than domestic businesses by granting them access to third-party arbitration;[14]
- **compensation payments**: foreign investors have been awarded large compensation payments running into billions of dollars;[15] and
- **international tribunals**: the tribunals are made up of three corporate lawyers and usually hold closed hearings. The tribunal members are practicing advocates, not independent judges. There is no system of precedents and no appeal system.[16]

4.12 Several submissions to the Committee cited the 2014 report of the United Nations Committee on Trade and Development (UNCTAD) which found that the number of ISDS cases lodged annually had risen from five in 1993 to 57 in 2013. The report estimates the total number of ISDS cases lodged as 568 but warns that the figure may be higher as the proceedings do not take place publicly.[17] Dr Tienhaara informed the Committee that, of these cases, 274 have been concluded and that approximately 43 per cent were decided in favour of the State and 31 per cent in favour of the investor with approximately 26 per cent settled out of court.[18]

4.13 The nature of the international tribunals set up to arbitrate ISDS cases is considered by some as problematic. The tribunals lack a system of precedent or an appeals process which can be perceived to promote inconsistency and unfairness. Dr Ranald pointed out that this meant that 'decisions about cases with similar facts can have quite different outcomes'[19] and Dr Tienhaara told the Committee it creates 'uncertainty for regulators'.[20]

4.14 The three arbitrators for a case are chosen from a pool of arbitration investment law experts: one by the complainant, one by the defendant and the third is mutually agreed by both parties. Stressing the absence of judicial independence, Dr Tienhaara articulated the concerns of many with the system:

> Arbitrators lack the independence of judges because they were chosen by the parties to the dispute and paid by the hour. Additionally, individuals may act as an arbitrator in one case and

14 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 272.

15 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 272.

16 Productivity Commission, *Bilateral and Regional Trade Agreements*, p. 273.

17 Dr Kyla Tienhaara, *Submission 1*, p. 4; Australian Fair Trade and Investment Network (AFTINET), *Submission 42*, p. 6; Dr Matthew Rimmer, *submission 45*, p. 17.

18 Dr Tienhaara, *Submission 1.1*.

19 Dr Ranald, AFTINET, *Committee Hansard*, Sydney, 29 July 2014, p. 1.

20 Dr Kyla Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 8.

> as a legal representative for a claimant in another, which creates serious issues of conflict of interest.[21]

4.15 Asked why health and environment regulations were particularly at risk, Dr Tienhaara identified two reasons: frequent regulatory change to accommodate scientific and technological advances and the costs of adjusting to such change for affected industries:

> Basically health and environment tend to be areas where regulation is often being ratcheted up. It is regulatory change that is the problem under ISDS. Existing regulations cannot be challenged; it is when you increase regulation that it gets challenged. So these are areas where we want to keep improving. We constantly have new scientific evidence and new technologies that we want to introduce so that we can improve health and environment … these are very important issues that we can do something about. The other part of it is that health and environmental regulation can be quite costly for industries to adjust to, especially if we are talking about big mining companies and the big fossil fuel industry. If you start ratcheting up regulations in the environmental field, it can be quite costly for them so these are the types of regulations that are often going to get challenged.[22]

4.16 The Committee noted that KAFTA includes a range of safeguards and carve-outs designed to mitigate the risks associated with ISDS mechanisms. The Department of Foreign Affairs and Trade (DFAT) is confident that the safeguards cover public policy areas including the environment, health and welfare.[23] DFAT said that the protections 'to safeguard the right to regulate' have been evolving since the early ISDS mechanisms were included in trade agreements and that the Korea agreement provides a 'very good balance between the rights of sovereign governments to regulate and investor protection rights'.[24]

4.17 DFAT categorised the safeguards into five groups:

- the carve out of the Foreign Investment Review Board decisions from investor-state dispute settlement;
- the exceptions;

---

21 Dr Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 8.

22 Dr Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 12.

23 Ms Jan Adams, Deputy Secretary, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 5 August 2014, p. 7.

24 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 9.

- the schedules of reservations which allow Australia to reserve policy space to maintain or adopt new measures in specified sensitive areas;
- safeguards built into the core investment obligations; and
- the procedural protections.[25]

4.18 Witnesses conceded that the exemptions and protections in KAFTA go further than previous agreements. Dr Rimmer admitted that KAFTA was 'certainly better' than the Hong Kong Bilateral Investment Treaty.[26] Dr Tienhaara acknowledged the Government's efforts to improve the ISDS mechanism and said that 'KAFTA is much better worded than previous treaties'.[27]

4.19 Dr Tienhaara also stated that the fair and equitable treatment standard included in KAFTA as a safeguard is one of the 'most abused standards in international investment law' and that linking it to customary international law left it open to 'expansive interpretations'. She concluded that:

> Both of these purported safeguards are also susceptible to the most favoured nation treatment loophole. Through MFN investors can effectively import broader standards from earlier treaties to which Australia is party, into KAFTA.[28]

4.20 The current case involving Philip Morris' challenge to Australia's plain packaging tobacco laws was repeatedly cited as an example of the dangers of ISDS mechanisms. The Committee asked a range of witnesses if the proposed additional safeguards in KAFTA would prevent such a case happening in the future. The general response was that until the safeguards are tested it is difficult to determine how successful they will be.[29]

4.21 Dr Rimmer argued that such a challenge could not be ruled out as it could be brought to test the scope of the exemptions:

> … I think what would happen is a tobacco company would bring an action in relation to an investor-state dispute settlement regime and Australia would have to defend that, and then they would have to try to invoke the exemptions. But the tobacco industry would argue that it is not a matter of health, it is a matter of intellectual property or it is a matter of trade or a range of other

25 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 6.

26 Dr Rimmer, *Committee Hansard*, Canberra, 14 July 2014, p. 4.

27 Dr Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, pp. 9–10.

28 Dr Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 8.

29 See Dr Tienhaara, *Committee Hansard*, Canberra, 14 July 2014, p. 9 and Dr Ranald, AFTINET, *Committee Hansard*, Sydney, 29 July 2014, p. 3.

> current issues. There would be a debate about the scope of the exemptions.[30]

4.22 DFAT considered that the safeguards included in the ISDS mechanism in KAFTA would mitigate the risk of frivolous claims being lodged, explaining how the procedural protections would operate:

> The first of those is an expedited procedure to dismiss frivolous claims at an early stage of the proceedings and potentially to award costs against an investor in those circumstances. Another key procedural protection is the ability of the parties to issue a joint interpretation of any obligation in the agreement which is then binding on a tribunal. This is valuable because if the parties think that a tribunal is interpreting an obligation in an overly broad way, in a way that increases the exposure of the parties in ways they had not anticipated, they can issue a joint interpretation of what they consider that obligation to require and that will be binding on any tribunal.[31]

Intellectual property rights

4.23 The intellectual property rights chapter of KAFTA has drawn considerable attention from academics and stakeholders regarding the proposed need for changes to Australian intellectual property law and the inclusion of intellectual property in the definition of investment with regard to the investor-state dispute mechanism. Other concerns raised with the Committee include the prescriptive nature of the chapter, the lack of recognition of the broader public interests of intellectual property rights, and possible changes to fair use provisions.

4.24 The NIA implied that Australia is currently non-compliant with its obligations under the Australia-US Free Trade Agreement and the Australia-Singapore Free Trade Agreement and that changes to the *Copyright Act 1968* were required in due course to correct the situation. In order to effect the changes it was suggested that the High Courts' decision in *Roadshow Films Pty Ltd v iiNet Ltd* would need to be nullified.[32]

---

30 Dr Matthew Rimmer, *Committee Hansard*, Canberra, 14 July 2014, p. 4.

31 Mr Richard Braddock, Directory, Office of Trade Negotiations, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 7.

32 NIA, para 17.

4.25 While there was limited support for this position[33], the majority of evidence received by the Committee took exception to the proposal. It was described variously as 'incorrect'[34] and 'inaccurate and misleading'.[35] Asked to explain the need for the proposed changes, the Attorney-General's Department (AGD) told the Committee that the three free trade agreements mentioned 'require Australia to provide a legal incentive for cooperation between ISPs and copyright owners'.[36] The High Court decision 'cast some doubt on the effectiveness of those provisions in giving effect to that obligation'.[37]

4.26 To clarify their position AGD said that, prior to the High Court's decision Australia 'complied with this obligation through technology neutral "authorisation liability" provisions contained in sections 36 and 101 of the *Copyright Act 1968*'.[38] However, the High Court's decision:

> … substantially limited the circumstances in which ISPs will be found liable for authorising the infringements of subscribers, giving rise to some risk that Australia could be perceived as not fully complying with this obligation.[39]

4.27 In a comprehensive and detailed argument Professor Weatherall, an intellectual property specialist, refutes this suggestion, maintaining that Australia does not have such an obligation under these free trade agreements. Further she contends that existing Australian law provides the necessary legal incentives and that the High Court decision does not need to be reversed.[40]

4.28 Other submitters support Professor Weatherall's claims. Dr Rimmer informed the Committee that the High Court's decision is 'consistent with Australia's international obligations' and that there is 'no pretext for overturning the ruling of the High Court of Australia under the guise of international law'.[41]

4.29 The proposed nullification of the High Court's decision and mooted changes to the *Copyright Act 1968* also raised concerns over 'policy

---

33 See, for example, News Corp Australia, *Submission 74*; Music Rights Australia, *Submission 73*.

34 Professor Kimberlee Weatherall, *Committee Hansard*, Sydney, 29 July 2014, p. 13.

35 Dr Matthew Rimmer, *Submission 45*, p. 49.

36 Mr Andrew Kenneth Walter, Assistant Secretary, Commercial and Administrative Law Branch, Civil Law Division, Attorney-General's Department (AGD), *Committee Hansard*, Canberra, 5 August 2014, p. 18.

37 Mr Walter, AGD, *Committee Hansard*, Canberra, 5 August 2014, p. 18.

38 Attorney-General's Department (AGD), *Submission 75*, p [1].

39 AGD, *Submission 75*, p. [1].

40 Professor Weatherall, *Submission 49*, pp. 8–11.

41 Dr Rimmer, *Submission 45*, p. 49. See also Australian Digital Alliance, *Submission 56*, p. 4.

laundering'. The Australian Digital Alliance pointed out that the NIA and RIS provide no details on what the proposed changes to the Act would be or any analysis of the possible impact of changes.[42] AFTINET were quite blunt in their criticism of the proposal:

> The introduction of legislation to nullify a High Court decision which would have the effect of greatly strengthening copyright law in favour of copyright holders is an issue of great public interest, not only to internet service providers as an industry sector, but also to consumers. Such a proposal should be fully debated and rigorously scrutinised by the democratic parliamentary process, not presented as a done deal in legislation to implement a trade agreement.[43]

4.30 KAFTA includes intellectual property rights within the definition of investment in the ISDS mechanism. Dr Rimmer informed the Committee that this considerably extended the power of intellectual property owners as they could use the ISDS mechanism to challenge a 'wide range of public regulation'.[44] He warned that Canada had been attacked by pharmaceutical companies in this way under the North American Free Trade Agreement (NAFTA).[45] While acknowledging the carve-outs included to protect public interest in the ISDS mechanism, the Australian Digital Alliance voiced concerns that 'they are simply not wide enough to cover the various public policy areas that may require a change to copyright settings in the future'.[46]

4.31 There is also concern that the intellectual property chapter 'locks in' existing Australian intellectual property law. Professor Weatherall described its detailed, prescriptive nature as 'harmful to Australia's long term interests'.[47] It will constrain Australia's flexibility in this area, stifling innovation and creativity.[48] She indicated the difficulty of amending international agreements once they are adopted and explained that this would complicate Australia's capacity to respond to economic, social and technical change:

> IP law has been amended countless times in the last 15 years. Technology has changed even more in that time. How can we

42 Australian Digital Alliance, *Submission 56*, p. 3.

43 AFTINET, *Submission 42*, p. 4.

44 Dr Rimmer, *Submission 42*, p. 38–39.

45 Dr Rimmer, *Committee Hansard*, Canberra, 14 July 2014, p. 1.

46 Australian Digital Alliance, *Submission 56*, p. 6.

47 Professor Weatherall, *Submission 49*, p. 3.

48 Professor Weatherall, *Submission 49*, p. 1.

> presume to predict how technology will operate and what an appropriate IP law will look like in even 5 years, let alone 20?[49]

4.32 The implications of the extension of the copyright term to 70 years were also drawn to the Committee's attention. The extension strengthens the rights of copyright owners and increases the difficulties faced by cultural institutions dealing with orphan works.[50] The Australian Digital Alliance provided an example of the extent of the problem for Australia citing the National Library collection:

> … the National Library estimates that its collection holds over 2 million unpublished works, of which over half are orphans, and other libraries, museums, archives and galleries all face similar problems.[51]

4.33 Overall there was concern that the intellectual property rights chapter strengthened the rights of copyright holders but did not recognise the broader public interest in access to knowledge and information. Dr Rimmer stated that the chapter failed to consider the objectives and purposes of intellectual property law:

> … such as providing for access to knowledge, promoting competition and innovation, protecting consumer rights, and allowing for the protection of public health, food security, and the environment.[52]

4.34 The Australian Digital Alliance identified the risks inherent in not having balancing provisions within the chapter:

> Lack of any language recognising that intellectual property rules need to balance protection for rightsholders with legitimate public interests in promoting innovation and accessing culture and knowledge, as well as legitimate consumer concerns around areas such as privacy, may weigh towards an enforcement heavy interpretation of any disputes.[53]

4.35 Professor Weatherall identified a number of areas where lack of protection for non-rights holders could cause concern including access to reasonably priced medicines. She also emphasised the right to due process and the rights of third parties affected by enforcement procedures.[54]

---

49 Professor Weatherall, *Submission 49*, p. 4.
50 Australian Digital Alliance, *Submission 56*, p. 6.
51 Australian Digital Alliance, *Submission 56*, p. 6.
52 Dr Rimmer, *Submission 45*, p. 43.
53 Australian Digital Alliance, *Submission 56*, p. 6.
54 Professor Weatherall, *Submission 49*, p. 14.

4.36 The Committee asked Professor Weatherall how the lack of balance could be redressed in future agreements:

> … preambular-type text that actually recognises the other interests that are involved in making IP law; affirmation of things like the TRIPS articles 7 and 8, which again recognise interests in the making of intellectual property law; provisions that deal with the interests of others in enforcement actions, particularly defendants, and protect the interest of defendants and third parties, requiring revenues to be proportional, requiring measures to be proportional, requiring fair and equitable procedures in IP; and, more broadly, provisions that positively recognise, for example, the right of a country to introduce fair use.[55]

Certificates of origin

4.37 One aspect of KAFTA that concerned Australian Chamber of Commerce and Industry (ACCI) was the perceived ambiguities surrounding Certificates of Origin. Article 3.15 sets out the requirements for a Certificate of Origin stating that the document shall be completed by the exporter or producer. ACCI maintain that, according to international definitions, such a self-certification document would more properly be called a Declaration of Origin.[56] Article 3.16 provides for authorised bodies to issue Certificates of Origin which ACCI claims directly contradicts the provision in Article 3.15.[57] ACCI argued that third-party authorisation of a Certificate of Origin is required to maintain the integrity of the system:

> Without a Certification process there is no basis for trust in the statement of the exporter, and entities engaged in international trade along with Customs authorities will be rightly sceptical of the claims of the transaction.[58]

4.38 When the Committee asked business and industry about these concerns, there appeared to be no confusion and there was support for self-certification.[59] The horticultural industry explained that, while its

55 Professor Weatherall, *Committee Hansard*, Sydney, 29 July 2014, p. 14.

56 Australian Chamber of Commerce and Industry (ACCI), *Submission 63*, p. 16.

57 ACCI, *Submission 63*, p. 23.

58 ACCI, *Submission 63*, p. 16.

59 Mr Brent Finlay, President, National Farmers' Federation (NFF), *Committee Hansard*, Sydney, 29 July 2014, p. 28; Mr Gregory Beashel, Managing Director and Chief Executive Officer, Queensland Sugar Ltd, *Committee Hansard*, Brisbane, 30 July 2014, p. 5.

members would use third-party certification if it was deemed valuable, the option of self-certification was important for them:

> For a lot of horticultural producers, which are not in the main centres, being able to do it yourself is a great advantage, without having to organise a third party to come to do that certification. It adds to the cost as well and sometimes to the time delay. When you are exporting fresh produce, a lot of product is obviously time sensitive. A lot of horticultural exporters wanted to have at least the option of doing self-certification.[60]

4.39 A number of witnesses indicated that ACCI is a beneficiary of the current system, acting as the third-party certifier for Certificates of Origin and accepting fees for the process.[61]

Economic modelling

4.40 The RIS stated that economic modelling carried out for DFAT by the Centre for International Economics (CIE) predicts that KAFTA could provide an annual boost to the Australian economy of $650 million after 15 years.[62] According to the CIE KAFTA will be worth $5 billion in additional income to Australia over that period and by 2030 Australia's exports could be 25% higher (or $3.5 billion). Further, KAFTA could create 1 700 jobs in its first year of operation.[63] AFTINET questioned the significance of these figures considering that it represents only 0.04 per cent of GDP.[64] They drew the Committee's attention to the Productivity Commission's findings that the general equilibrium model used to establish the figures is generally overoptimistic—overestimating the gains and underestimating the losses.[65]

4.41 Further the model relies on a range of favourable assumptions.[66] The Australian Manufacturing Workers' Union (AMWU) and AFTINET indicated that the expected losses to employment in the automotive manufacturing industry have not been factored into the economic

60 Mr Chris Langley, Market Access Manager, The Office of Horticultural Market Access (OHMA), *Committee Hansard*, Sydney, 29 July 2014, p. 46.

61 Mr Langley, OHMA, *Committee Hansard*, Sydney, 29 July 2014, p. 46; Mr Joyce, ANIC, *Committee Hansard*, 30 July 2014, pp. 13–14.

62 RIS, para 27.

63 NIA, para 8.

64 AFTINET, *Submission 42*, p. 17.

65 AFTINET, *Submission 42*, p. 17.

66 AFTINET, *Submission 42*, p. 17.

modelling for KAFTA.[67] They claim that the economic modelling assumes that the operations would already have ceased at the time of the implementation of KAFTA.[68]

4.42 Evidence to the Committee suggests that the gains to individual sectors of the economy may be significant, as shown in Chapter 3 of this report. However, AMWU cautioned that the assessment of KAFTA had to be made with regard to its impact on the whole of the economy:

> It is a question of whether the agreement should be signed or not, from our point of view, and I think from the government's point of view it is one of the national interests; it is not of sectoral interests.[69]

Manufacturing industry

4.43 The RIS states that, while KAFTA will increase competitive pressure for some Australian manufacturers, the elimination of Korea's tariffs of up to 13 per cent on Australian industrial exports will create opportunities for Australian manufacturers.[70] The CIE predicts that manufacturing exports could be 53 per cent higher after 15 years of KAFTA's entry into force.[71]

4.44 However, there is controversy regarding the effect of KAFTA on the Australian automotive industry. Questions remain as to whether the negotiation for KAFTA influenced the original decision of the major auto manufacturers to close their Australian operations and also questions whether the implementation of KAFTA will hasten the announced closures.

4.45 DFAT told the Committee that they consulted regularly with the relevant auto manufacturers throughout the six or seven years of the negotiating process for KAFTA.[72] DFAT discussed the impact of different phasing arrangements would have on the companies' operations and ensured

67 Dr Tom Skladzien, National Economic and Industry Adviser, Australian Manufacturing Workers' Union (AMWU), *Committee Hansard*, Sydney, 29 July 2014, p. 33; Dr Ranald, AFTINET, *Committee Hansard*, Sydney, 29 July 2014, p. 4.

68 AFTINET, *Submission 42*, p. 17; Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 33.

69 Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2104, p. 38.

70 RIS, para 51.

71 RIS, para 51.

72 Consultations began in January 2009 and continued until October 2013. DFAT held meetings with the Federation of Automotive Products Manufacturers and the Federal Chamber of Automotive Industries as well as Ford Australia, Toyota Australia and GM Holden. For details of meeting dates see DFAT, *Supplementary submission 76.1*.

that transition periods for the 'tariff phase-outs of some of the elements of the Korean auto imports' was included in the final Agreement.[73] At the beginning of that period closure of Australian operations was not expected but conditions within the industry changed over that time.[74] AMWU emphasised that Ford and Holden both referred to the pending free trade agreements with Korea and Japan when announcing their intention to close their Australian operations.[75]

4.46 However, the AMWU's major concern was the impact of the possible early closure of automotive operations due to a fall in demand. The Union informed the Committee that such an eventuality would curtail the transition programs that have been put in place for both the workers and supply chain firms.[76]

4.47 The Committee noted that Korea is Australia's largest market for gearboxes and second largest export market for car engines and that the eight per cent tariff on both these items will be eliminated immediately. Asked if that would benefit the industry and serve to mitigate some of the effects of the closures, the AMWU was of the view that Australia will not produce either car engines or gearboxes once the automotive industry ceases operation.[77]

4.48 The Committee notes that the AMWU has a 'longstanding policy of opposing bilateral trade agreements'.[78]

Movement of Natural Persons

4.49 In the Movement of Natural Persons chapter in KAFTA, Australia has made a commitment not to apply labour market testing on Korean nationals entering Australia temporarily as service suppliers or investors.[79] Labour market testing (LMT) requires employers to test for suitably qualified and experienced Australian citizens to fill an available

73 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 10.

74 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 8 and Mr Paul Trotman, General Manager, Trade and International Branch, Department of Industry, *Committee Hansard*, Canberra, 5 August 2014, p. 16.

75 Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, pp. 33 and 38.

76 Australian Manufacturing Workers' Union (AMWU), *Submission 69*, p. 6–7.

77 Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 34–35.

78 Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 32.

79 RIS, para 77.

position before engaging a temporary foreign worker. Korea has retained the right to apply labour market testing to professionals entering Korea.[80]

4.50 Currently contractual service suppliers usually enter Australia through the 457 visa program which has provision for labour market testing although exemptions apply. Submitters to the inquiry expressed concern over the lack of clarity around the proposal in KAFTA and the apparent binding obligation to grant LMT-exempt status in the 457 program to '*all* categories of Korean national covered by the agreement'.[81]

4.51 AFTINET consider that Australia's concession to waive LMT as opposed to Korea's retention of the right indicates an imbalance in the agreement and pointed to the possible impact on unemployment in Australia.[82]

Labour and environment chapters

4.52 The labour and environment chapters of KAFTA were criticised by some witnesses. Both are described as 'weak' with 'low standards' and are censured for lack of enforceability.[83]

4.53 There is concern that the labour chapter does not seek to improve labour standards or rights in either country as it only requires the parties to 'endeavour to adopt or maintain' the principles and rights contained in the International Labour Organization's (ILO) *Declaration on Fundamental Principles and Rights at Work*.[84] Similarly, the environment chapter has been labelled 'aspirational' and doubt has been expressed over its ability to effectively protect the environment.[85]

Utilisation of FTAs

4.54 While supporting the adoption and implementation of KAFTA, ACCI expressed concern over the proliferation of trade agreements and the consequent 'cumulative effects of divergent and novel procedures'

80 *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, Chapter 10, Annex 10B, Article 10.

81 Construction, Forestry, Mining and Energy Union (CFMEU), *Submission 71*, p. 2.

82 Dr Ranald, AFTINET, *Committee Hansard*, Sydney, 29 July 2014, p. 4; AFTINET, *Submission 42*, p. 17.

83 Dr Rimmer, *Submission 45*, pp. 57–58, 71–74; AFTINET, *Submission 42*, pp. 14–16.

84 Dr Rimmer, *Submission 45*, p. 72; AFTINET, *Submission 42*, pp. 14–15.

85 Dr Rimmer, *Submission 45*, p. 57; AFTINET, *Submission 42*, p. 16.

confronting business and industry.[86] ACCI is interested in the operability of these agreements and practical aspects of access for end users. They suggested that the difficulties imposed by the complexity of compliance requirements could discourage utilisation of the agreements.[87]

4.55 The ACCI's assertion was supported by the AMWU who directed the Committee's attention to the Productivity Commission's findings that Australian industry have been underutilising these agreements.[88] The AMWU identified a number of issues:

> … in order to utilise a bilateral trade agreement, there are a whole bunch of regulatory hurdles that you need to jump over as a business. Often, businesses just do not have the resources, the knowledge and the time to jump over all of those hurdles.[89]

4.56 The industries and businesses that the Committee raised this issue with were strongly of the view that their members were definitely taking advantage of the opportunities provided by bilateral trade agreements.[90] A number of them stressed that they were predominantly export industries so such agreements were extremely important to their members.[91] For example, the Australian Nut Industry Council told the Committee that free trade agreements are vital to the growth of their industry:

> I think our exporters know how to find a market, particularly macadamia, almonds and walnuts. These industries are entirely focused on exports; they have expanded with the intention of exporting … The trees were planted to export, so when people invested substantial sums of money in an orchard, they have targeted their market, which are export markets. And if the export markets are there, like we are opening up the Korean market, that is going to provide further impetus into nut farming in Australia.[92]

---

86 ACCI, *Submission 63*, p. 3.

87 ACCI, *Submission 63*, pp. 2–3.

88 Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 33.

89 Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 34.

90 Mr Malcolm John Foster, Chairman, KAFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 24; Mr Langley, OHMA, *Committee Hansard*, Sydney, 29 July 2014, p. 47.

91 See for example Mr Anthony Nicholas Battaglene, General Manager, Strategy and International Affairs, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 5 August 2014, p. 1; Mr Finlay, NFF, *Committee Hansard*, Sydney, 29 July 2014, p. 28; Mr Jeffrey Scott, Chief Executive Officer, Australian Table Grape Association, *Committee Hansard*, Sydney, 29 July 2014, p. 45; Mr Christopher Kenneth Joyce, Board Director, Australian Nut Council, *Committee Hansard*, Brisbane, 30 July 2014, p. 8.

92 Mr Joyce, Australian Nut Council, *Committee Hansard*, Brisbane, 30 July 2014, p. 9.

Treaty making process

Consultation

4.57 The Committee received conflicting evidence on the amount of industry and stakeholder consultation that took place during the negotiation process for KAFTA. On the one hand the majority of business and industry representatives were satisfied with the level and quality of consultation they had received and praised the accessibility and professionalism of the department staff they had contact with. On the other there is criticism of a lack of transparency and accusations of secrecy.

4.58 The Committee notes that DFAT received 66 submissions for KAFTA and consulted 181 separate stakeholders.

4.59 The dairy industry said they were 'kept well informed' and made aware of changes as they occurred.[93] The beef industry had 'very good access to government' and received regular feedback on the negotiations as they took place.[94] The National Farmers' Federation spoke of their cooperative and effective relationship with DFAT.[95] The sugar industry told the Committee that they had a 'very strong, very open and very honest relationship with the DFAT negotiating team'.[96] Smaller industries felt they had as much access as larger interests with the wine industry finding the consultation process 'outstanding'.[97]

4.60 Industry also highlighted the need to be proactive to ensure that their needs were known and appreciated by the negotiators. The sugar industry stressed that they prioritised trade negotiations and ensured that they were actively involved in the process.[98] The nut industry told the Committee that, after being left out of the AUSFTA, they had launched a concerted effort to bring themselves to the attention of DFAT. Over the last five years the potential of their industry has been recognised:

93 Mr Peter Brendan Myers, International Trade Development Manager, Trade and Strategy Division, Dairy Australian, *Committee Hansard*, Canberra, 14 July 2014, p. 23.

94 Mr Foster, KAFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 18.

95 Mr Tony Mahar, General Manager, Policy, National Farmers' Federation (NFF), *Committee Hansard*, Sydney, 29 July 2014, p. 30.

96 Mr Warren Peter Males, Head, Economics, Canegrowers, *Committee Hansard*, Brisbane, 30 July 2014, p. 5.

97 Mr Battaglene, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 5 August 2014, p. 2.

98 Mr Dominic Nolan, Chief Executive Officer, Australian Sugar Milling Council and Joint Secretary, the Australian Sugar Industry Alliance, *Committee Hansard*, Brisbane, 30 July 2014, p. 5.

> If you keep presenting your case, providing the data and providing the information to all levels of government and you have a solid case, which I think the nut industry has, you get listened to. You present your case in a logical, coherent fashion and you present the data and the information, you get listened to.[99]

4.61 However, business and industry were pragmatic about both the need for confidentiality in the negotiation process and the need for compromise. The beef industry said that compromise is a given in trade negotiations:

> FTAs are, by their nature, a give-and-take-affair. Both sides of the agreement are looking for things. You never get all the things that you want to get. They tend to be a compromise.[100]

4.62 With regard to confidentiality, the wine industry expressed it bluntly:

> We do not believe, like some others, that it should all be public, because, if you have interest groups—and we would be the same—they would be out there objecting to something and you would never get any decisions happening.[101]

4.63 The conflict over the success or otherwise of the consultation process appears to reside in access to the specific content and text of the treaty before it is finalised. The Australian Industry Group, while appreciative of the accessibility and professionalism of DFAT officials during the negotiations for KAFTA, argued that lack of information on the final content of the document was detrimental to their members:

> For many SMEs the timing for abolishing tariffs on a particular tariff line—overnight, or over a longer period—is crucial. But this level of detail was not available. Negotiators were constrained by the policy to not reveal the terms of offers. We recognise the obligation to hold closely the negotiating position of the other side. However, we do believe that the offers of the Australian side should be explained clearly to those affected by them. It is Australian industry which will implement the advantages of freeing up trade. But it is also industry which will bear the brunt of rapid erosion of domestic markets. And it is industry which has the expertise to advise on the effect of proposed measures and to highlight some of the unintended outcomes.[102]

---

99 Mr Joyce, Australian Nut Council, *Committee Hansard*, Brisbane, 30 July 2014, p. 13.

100 Mr Foster, KAFTA Beef Industry Taskforce, *Committee Hansard*, Sydney, 29 July 2014, p. 18.

101 Mr Battaglene, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 5 August 2014, p. 2.

102 Australian Industry Group (AIG), *Submission 64*, p. [2].

4.64 DFAT explained that their consultation process is extensive and comprehensive. They advertise for, and receive, submissions from a broad range of interested parties and make themselves available to talk to all stakeholders. They also hold ongoing briefings throughout negotiations with interested groups including community groups, NGOs, unions and businesses to keep them updated on the 'entire trade negotiating agenda, including the specific FTA'.[103]

4.65 With regard to the level of detail provided to stakeholders, DFAT told the Committee that they provide very detailed information, particularly when they need to ensure that technical or administrative proposals are going to work effectively:

> We would be very explicit to relevant groups and companies and interested parties as to what the positions were and what the outcomes were when we got to outcomes in particular areas … When it is very technical and you need to know whether a quota-administration system is going to suit our industry, for example, then we would work with text with our stakeholders.[104]

4.66 Asked about the apparent conflicting evidence the Committee had received regarding the level of industry and community consultation being undertaken, DFAT suggested that different groups are more actively engaged in the consultation process:

> … I think there are differing amounts of priority that different groups attach to engaging with the negotiators throughout the course of proceedings … we are very open to meeting and discussing issues with groups coming from all different angles— … across intellectual property and public welfare as well as the commercial interests. … there are different degrees of interest in terms of active engagement from the relative groups.[105]

Reforms to process

4.67 The criticism of the treaty making process received during the Committee's inquiry into KAFTA reflects ongoing dissatisfaction with the treaty making process in Australia more generally. Constitutional responsibility for treaty making in Australia lies with the Executive Government. After the Senate Legal and Constitutional Committee's report, *Trick or Treaty?* was published in November 1996 the Government agreed to:

103 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 7.

104 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 8.

105 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 11.

- table treaties in both Houses of Parliament before ratification;
- establish a treaties council for consultation with the states; and
- support the establishment of the Joint Standing Committee on Treaties (JSCOT).

4.68 Despite these reforms the process continues in some cases to be perceived as undemocratic and secretive and these concerns largely focus on the lack of access to the full text of an agreement before it is signed. The AMWU suggests that the Parliament should have greater power to scrutinise and make amendments to the text of draft trade treaties.[106] Asked how this might work in practical terms the AMWU said they would like to see the draft treaty subject to the usual parliamentary legislative process:

> … we would like to see parliament have a debate and a process much like this process, if not this process, consider the entire text of the agreement, for parliamentarians to be able to provide amendments to the text of the agreement, not necessarily the implementing legislation, and for the text of the agreement to follow through the usual parliamentary process that legislation itself does.[107]

4.69 Several witnesses and submitters directed the attention of the Committee to the treaty making process in the US. While constitutional responsibility for the treaty making process in the US is different to that in Australia, the industry consultation framework is more structured. There is an advisory committee system in the Office of the United States Trade Representative (USTR), consisting of 28 advisory committees with a total membership of approximately 700 citizen advisors.[108] Cleared advisors are provided with access to the text of draft treaties, but there appears to be some debate about the extent of the access. Asked about the level of access to draft treaty text for the US advisory committee members, DFAT suggested that it was limited:

> I do not think the US groups get copies of the entire text. … They get US proposals and sometimes they might get small pieces of text.[109]

4.70 ACCI see merit in the US system, suggesting that it is a way of retaining the degree of confidentiality needed to progress negotiations while

106 AMWU, *Submission 69I,* p. 11. See also Dr Rimmer, *Submission 45*, pp. 9–10.

107 Dr Skladzien, AMWU, *Committee Hansard*, Sydney, 29 July 2014, p. 32.

108 Office of the United States Trade Representative (USTR), http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees, accessed 13 August 2014.

109 Ms Adams, DFAT, *Committee Hansard,* Canberra, 5 August 2014, p. 8.

assuring that accredited advisers have access to the detail of the draft text.[110] Asked why this would be an improvement on the current consultation process that industry in general appear to support, ACCI told the Committee it would provide more detail of the actual negotiation position as well as the proposed text. Further it would allow for an exchange of views amongst the accredited advisers that could promote a consistent approach.[111]

4.71 Enlarging on this proposal, ACCI recommends the establishment of a Centre of Excellence for International Trade Policy that would include industry groups, academia and the Productivity Commission who would be directly involved in the negotiations process.[112]

4.72 ACCI also suggests that one way of increasing transparency for preferential trade agreements is to develop a model agreement incorporating international standards to be used as the basis for future negotiations.[113] ACCI told the Committee such a model would promote consistency and improve confidence in what each agreement contains:

> We think it would add transparency to the process if Australia had a model agreement which was available to all to see, including potential other partners … I think that would be a great benefit and comfort to industry, frankly, about where the negotiators' guidelines are going to be.[114]

4.73 Questioned as to the practicality of this approach, ACCI maintained that precedents in best practice already exist through the WTO process and that these could be drawn on to develop a workable model that could gain consensus support.[115]

Monitoring of FTAs

4.74 A recurring issue throughout the inquiry was the apparent absence of any ongoing monitoring and evaluation of FTAs and the lack of data regarding their impact on the economy.

---

110 Mr Bryan Clark, Director of Trade and International Affairs, Australian Chamber of Commerce and Industry (ACCI), *Committee Hansard*, Canberra, 14 July 2014, p. 18. See also ACCI, *Submission 63*, p. 38.

111 Mr Clark, ACCI, *Committee Hansard*, Canberra, 14 July 2014, p. 18.

112 ACCI, *Submission 63*, p. 38

113 ACCI, *Submission 63*, p. 13.

114 Mr Clark, ACCI, *Committee Hansard*, Canberra, 14 July 2014, p. 17.

115 Mr Clark, ACCI, *Committee Hansard*, Canberra, 14 July 2014, p. 19–20.

4.75 ACCI stressed the importance of the role of post-implementation assessment to ensure that the predicted economic benefits eventuate.[116] To assist this goal ACCI proposes that all trade agreements contain a requirement that all parties collect and share data on the utilisation rates of each agreement.[117] This data could then be evaluated by an independent body such as the Productivity Commission to provide a realistic analysis of the overall impact of the agreement on the Australian economy.[118]

4.76 Asked what monitoring and evaluation of FTAs is taking place, DFAT informed the Committee that it was difficult to specifically measure the impact of individual FTAs as the effect of the removal of tariff barriers could not be isolated from broader influences on the economy:

> … the government's role is to eliminate the border barriers, and the market dynamics of what then happens in the absence of government imposed tariffs, what happens in any particular trade area, will depend on global circumstances.[119]

4.77 However, DFAT said that there are internal processes in place to regularly review and assess policy trends but admitted that this process did not amount to a systematic collection of data that could be made publicly available.[120]

116 ACCI, *Submission 63*, p. 37.

117 ACCI, *Submission 63*, p. 37.

118 ACCI, *Submission 63*, pp. 39–40.

119 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 14.

120 Ms Adams, DFAT, *Committee Hansard*, Canberra, 5 August 2014, p. 14.