Dissenting Report—The Hon Kelvin Thomson MP and The Hon Melissa Parke MP

As members of the Joint Standing Committee on Treaties (JSCOT), we cannot support the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014)* (KAFTA) in its present form.

Summary Overview

Many submissions from agriculture and business organisations supported KAFTA on the grounds that it provides increased market access for Australian goods and services into Korean markets, especially for agricultural goods.

However, the task of the Committee and the Parliament is to assess whether the agreement is in the overall national interest, not only in the interest of particular industries. The National Interest Analysis does not provide convincing evidence about the benefit of KAFTA to the overall national interest.

The CIE report done for the National Interest Analysis, which estimates the overall benefit to the Australian economy, uses general equilibrium modelling based on assumptions which the Productivity Commission 2010 *Report on Bilateral and Regional Trade Agreements* concluded overestimate the economic gains from trade liberalisation and underestimate the losses. The overall predicted increase in GDP after 15 years is minute, an increase of just $650 million or 0.04% in 2030. Dr Tom Skladzien, a former economic modeller with experience of these models, now serving as the National Economic Adviser for the Australian Manufacturing Workers' Union provided evidence that this magnitude could not be considered as anything but insignificant in such models.[1]

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[1] Transcript available at:
http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Public_Hearings

The modelling assumes away the impacts on the vehicle industry of the implementation of zero tariffs from 2015, two years before the predicted closure of the industry, which may well accelerate job losses and allow less time for retraining and other transition programmes.

The National Interest Analysis does not weigh the estimated miniscule gain of 0.04% in GDP after 15 years against any of the losses which may well be experienced as a result of the agreement, either in employment losses or in other losses. These include regulatory risks and costs to government arising from ISDS, possible unfair competition from goods produced without enforceable labour rights for workers and without enforceable environmental standards, increased costs to business and consumers resulting from copyright changes, and losses to government revenue from tariff reductions. Overall, these losses mean that the KAFTA is not in Australia's national interest.

Specific areas of concern

There were 74 submissions and 11 letters sent to the committee. Concerns were raised by 34 submissions and letters about the inclusion in KAFTA of the right of foreign investors to sue governments over domestic legislation, known as Investor State Dispute Settlement or ISDS (chapter 11). These submissions came from a wide range of community organisations, including the Australian Fair Trade Investment Network (AFTINET), representing 60 community organisations, the Conference of Leaders of Religious Institutes of New South Wales, the New South Wales Nurses and Midwives Association, the Australian Guild of Screen Composers, the Australian Digital Alliance, the Australian Manufacturing Workers Union, and from academic specialists.

Four submissions from experts in copyright law (Professor Matthew Rimmer, Professor Kimberlee Weatherall, the Australian Digital Alliance and the Electronic Frontiers Foundation) and a number of other submissions strongly criticised the intellectual property chapter of KAFTA and disagreed with the recommendation of the national interest assessment that the KAFTA requires changes to Australia's copyright law to nullify the High Court decision *Roadshow Films Pty Ltd versus iiNet Ltd*

Concerns were also raised by a number of submissions about the lack of enforceable labour rights (Chapter 17) and environmental standards (chapter 18), and the lack of requirements by the Australian government to enable local labour market testing before permitting the entry of temporary migrant workers (Chapter 10).

The submission from the Australian Chamber of Commerce and Industry criticised the system of Rules of Origin in the KAFTA text and claimed that they would prevent many Australian exporters from taking advantage of additional market access to Korean markets. The submission recommended that the passage

of implementing legislation and ratification of the agreement be delayed pending re-negotiation of the rules of origin.

Investor State Dispute Settlement - Australian Labor Party Platform

Labor is committed to opposing low-quality piecemeal trade agreements in favour of fair and transparent, multilateral agreements that are based on widespread consultation, provide for appropriate, minimum and enforceable labour and environmental standards, take account of the social and economic impacts of the agreement and allow for sovereign governments to continue making decisions in the interests of their citizens. (Chapter 2, paragraph 73).

Labor supports the principle of national treatment — that foreign and domestic companies are treated equally under the law. Labor does not support, however, the inclusion of provisions in trade agreements that confer greater legal rights on foreign businesses than those available to domestic businesses. Nor does Labor support the inclusion of provisions that would constrain the ability of the government to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. Labor will not ask this of its trading partners in future trade agreements. (Chapter 2, paragraph 80).

Summary of submissions and recommendation on ISDS

Thirty four submissions objected to the inclusion of ISDS in KAFTA. These submissions argued that ISDS gives additional special rights to foreign investors to sue governments for damages in international tribunals over domestic legislation, rights which are not available to domestic investors. This represents a breach of the principle of competitive neutrality with respect to the home country of a business, with Korean businesses gaining potential competitive advantage over Australian businesses due to their country of origin. It is important to note that this competitive neutrality violation exists regardless of 'safeguards' used to protect the democratic right of Australians to implement social and environmental policies.

Additional problems with the inclusion of ISDS included how these clauses are practically used and implemented. Submissions argued that the ISDS tribunal system has two fundamental flaws:

1) ISDS has no independent judiciary. ISDS arbitration panels are made up of investment law experts, most of whom represent investor complainants, since only investors can take actions in the ISDS system. ISDS panellists can be an advocate one month and an arbitrator the next. In Australia and in other countries, judges cannot continue to be practising lawyers, because of obvious conflicts of interest. Unlike permanently employed, independent judges, arbitrators are also paid by the hour, which gives an incentive for cases to drag on. Most cases take from 3 to 5 years and some take longer.

2) ISDS has no system of precedents or appeals, so decisions can be inconsistent. In Australia and other domestic legal systems, independent judges are required to take account of previous decisions or precedents in a structured and systematic way. There is also an appeal system to higher courts. This helps to ensure that decisions are consistent. The lack of precedents or appeals in the ISDS system means that arbitrators are completely unfettered in their decision-making.

The AFTINET submission quoted Juan Fernandez-Armesto, an arbitrator from Spain who observed:

> "When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all. Three private individuals are entrusted with the power to review, without any restrictions or appeal procedure, all actions of the government, all decisions of the courts and all laws and regulations emanating from Parliament." (Eberhardt and Olivet 2012:34)

In addition to the lack of independent judiciary and lack of precedents in appeals, the ISDS system has developed legal concepts which are not found in domestic legal systems. Originally, ISDS was designed to compensate investors for the actual taking of real property. However, it has developed and elaborated the concept of "indirect expropriation "which does not exist in most national legal systems, including in Australia. This means that many changes in domestic law or policy which adversely affect investors can be argued to be indirect expropriation and therefore eligible for compensation. Concepts like "fair and equitable treatment" have also evolved into a standard which requires governments to have a higher level of transparency and consultation with foreign investors than that which is available to domestic ones.

These submissions argued that, given the fundamental flaws in the system, the proposed "safeguards" for health and environmental law and policy in KAFTA are not adequate.

The first "safeguard" sentence in the KAFTA reads: "except in rare circumstances non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations" (KAFTA, 2014: Chapter 11, annex 2B). Many legal experts have pointed out that the phrase "except in rare circumstances" leaves a very big loophole, to the discretion of arbitrators which recent cases in other agreements with this clause have used to advantage (Public Citizen, 2010).

The second "safeguard" is a more limited definition of "fair and equitable treatment" for foreign investors (KAFTA, 2014, chapter 11, clause 11.5.2 and

Annex 2A). However case studies show that tribunals have again exercised a wide discretion, ignored these limitations and applied the previous higher standard (Public Citizen, 2012a)

These two clauses are identical to those contained in the Central American Free Trade Agreement and the US-Peru Free Trade Agreement. Case studies show that clauses in these agreements have not deterred investors from suing over environmental regulation. For example, the Renco mining company is using ISDS to sue a Peru court decision which required the company to deal with pollution from its lead mine (Public Citizen, 2010, 2014).

A third "safeguard" is a reference to the general protections for "human, animal or plant life" in article XX of the WTO General Agreement on Tariffs and Trade (KAFTA, 2014, Article 22.1). This article puts the burden on governments to prove that the law or policy is not a disguised restriction on trade and is "necessary" for the protection of health or the environment compared with other possible measures. Governments have tried to use this clause in WTO government-to-government disputes to defend health and environmental legislation, but have only been successful in one out of 35 cases in the WTO (Public Citizen, 2012b).

The committee heard evidence that, as a result of widespread community concern about the inclusion of ISDS in the proposed Trans-Atlantic Trade and Investment Partnership agreement between the US and the EU, the European Commission launched a public consultation about ISDS. A submission by over 100 legal experts from Europe and North America has assessed proposed safeguards for health and environmental legislation which could be included in the TTIP. These safeguards are far more extensive than those included in the KAFTA. However, the submission found that these were not sufficient to exclude ISDS cases against health and environmental legislation (Schepel *et al*, 2014).

The committee heard evidence about US Lone Pine mining company using ISDS to sue the provincial government of Québec claiming damages of $250 million for an environmental review of shale gas mining. This review was introduced in response to community concerns about environmental impacts.

In New South Wales, three environmentally controversial mining developments are owned by Korean investors. The New South Wales government has introduced additional environmental regulation of mining in response to community concerns. If the Korea FTA is ratified and contains ISDS, and these mines were refused permission to proceed, it would be possible for those companies to use ISDS to sue the New South Wales government for damages (Ranald, 2014).

A recent paper by Australian High Court Chief Justice French has also raised concerns about the impact of ISDS cases on national judicial systems and decisions. He notes that

> "Professor Brook Baker of North Eastern University School of Law in a note about the Eli Lilly case, posed a rather rhetorical question, but one which fairly arises when considering proceedings of that kind in relation to well-established, respected and independent judiciaries:
>
> 'After losing two cases before the appellate courts of a western democracy should a disgruntled foreign multinational pharmaceutical company be free to take that country to private arbitration claiming that its expectation of monopoly profits had been thwarted by the court's decision? Should governments continue to negotiate treaty agreements where expansive intellectual property-related investor rights and investor-state dispute settlement are enshrined into hard law? ' " (French 2014:9)

Several witnesses made the point that successive Australian governments have managed to negotiate the Australia-US Free Trade Agreement, the Malaysia Free Trade Agreement, and the Japan Australia Economic Partnership Agreement without the inclusion of ISDS.

All of this evidence suggests that the inclusion of ISDS in the KAFTA presents major risks and potential costs which could result from the Australian government being sued for damages over domestic legislation or policy at local, state or Federal level, and over court decisions.

Recommendation:

1. **That the Parliament delays passage of the implementing legislation for KAFTA pending re-negotiation to exclude ISDS provisions from KAFTA.**

Copyright Australian - Labor Party National Platform

Labor will vigorously oppose any WTO rules or other trade agreements, interpretations or proposals or other trade agreements that would require Australia to privatise its health, education and welfare sectors, undermine the Pharmaceutical Benefits Scheme, reduce government rights to determine the distribution of government funding within these sectors, or which would require us to remove protection of our cultural industries. Labor will oppose attempts to privatise water services under WTO rules. As part of Australia's forward trade objectives Labor believes that federal, state, territory and local governments should retain the flexibility to implement effective policies to encourage industry development, research and development, regional development and appropriate environmental, employment and procurement standards. Labor will not support the expansion of intellectual property rights, which would extend monopoly patent rights to charge higher prices and would give copyright holders greater rights, at the expense of consumers. (Chapter 2, paragraph 86)

Summary of submissions and recommendations on Copyright

Four submissions from experts in copyright law (Professor Matthew Rimmer, Professor Kimberlee Weatherall, the Australian Digital Alliance and the Electronic Frontiers Foundation) and a number of other submissions strongly criticised the intellectual property chapter of KAFTA

Professor Kimberlee Weatherall argued that chapter 13 of KAFTA "contains provisions which reflect bad policy and are contrary to the trends in IP law reform internationally, including provisions explicitly criticised by expert committees established to consider reform of Australian IP law." (Weatherall, 2014: 2)

These submissions also disagreed with the recommendation of the national interest assessment that the KAFTA requires changes to Australia's copyright law to nullify the High Court decision *Roadshow Films Pty Ltd versus iiNet Ltd,* which found that ISPs are not liable for authorising the infringements of subscribers

All made the point that this would be a fundamental change in the balance of Australia's copyright law in favour of copyright holders. Such a major change should be proposed and debated through the normal Parliamentary process, not rushed through Parliament as part of implementing legislation for a trade agreement.

Recommendations:

2. **Australia's negotiating stance on intellectual property should depend on an assessment of Australia's national interest, based on evidence not assumption, and be informed by analysis focused *specifically* on (a) whether Australian stakeholders are experiencing specific issues in IP in the other negotiating Party or Parties, (b) whether those issues can be (best) addressed through a trade agreement, and (c) the impact of any solutions on Australian interests, including the interests of other stakeholders and the broader public interest in freedom to make innovation policy.**

3. **The Committee should not support the many constraints which chapter 13 of KAFTA places on Australian innovation and IP policy-making;**

4. **The Committee should reject the assertion in the National Interest Analysis that Australia's existing free trade agreements with Singapore and the US, and KAFTA chapter 13, require reversal of the High Court's decision in *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16. Australia does not have an obligation to impose liability on internet access providers for their users' copyright infringements.**

5. **The Parliament should oppose the amendment of the Copyright Act 1968 to nullify the High Court's decision in *Roadshow Films Pty Ltd versus iiNet Ltd.***

Summary of submissions and recommendation on Rules of Origin

Several organisations, including the Australian Chamber of Commerce and Industry (ACCI), the AMWU, and the Australian Export Council (AEC), raised concerns regarding the ability of Australian businesses to access preferential trade treatment under KAFTA.

Citing evidence from the Productivity Commission, the AMWU raised the general point that past preferential trade agreements have not been utilised by Australian businesses to the degree the government would expect. This has meant that the expected benefits from these agreements have not been realised.

The ACCI and AEC raised specific concerns regarding the rules of origin chapter that they view as undermining the ability of Australian industry to properly access concessional treatment that they are entitled to under the KAFTA.

In their submission, the AEC state:

> "The AEC is of the view that further work will be necessary on a number of fronts, including advancing the agenda for our exporters, assisting with trade facilitation and assisting with work to further streamline the Rules of Origin (ROO) under the KAFTA. The ECA notes with interest the position of other submissions that the ROO would benefit from improvement and would encourage Government to appoint members of relevant agencies to immediately establish full engagement with industry to further improve those ROO."

The ACCI state:

> "the draft treaty text of KAFTA Chapter 3 (Rules of Origin chapter) contains several procedural requirements that are not only inconsistent with a number of Australia's other PTA, but are also inconsistent with customary international trade documentation for ordinary trade occurring outside the PTA. With the growing importance of supply chains and multiple movements of goods through trade zones, such needless inconsistency risks an obstruction to trade, rather than being trade facilitating"

A chief concern is the certification of a "Certificate of Origin' which allows Australian exports to gain preferential tariff treatment. In their submission, ACCI state:

> "The requirement of KAFTA Article 3.15 for a 'Certificate of Origin' to be completed by the exporter or producer *without* Certification actually occurring is inconsistent with international procedural conventions relating to this document type. The KAFTA document is, properly, a Declaration of Origin, and should be titled as such."

It is thus claimed that Australian industry will not receive the benefits from KAFTA that are intended due to poorly designed rule of origin provisions. These

are serious issues that cannot and should not be avoided or swept under the rug. They undermine the benefits of the KAFTA and need to be addressed.

Without a proper Certificate of Origin, certified under government backed procedures, Australian exports to Korea seeking preferential tariff treatment can and will be questioned on their country of origin and Australian exporters will not be able to provide government backed certification, leading to long and costly additional certification procedures. Australian businesses will be discouraged from taking advantage of preferential treatment under KAFTA, and the agreement will be of little benefit to.

The AMWU submission and past research by the Productivity Commission makes clear, Australian businesses already rarely take advantage of existing preferential trade agreements.

This finding has been confirmed by an August 2014 survey of Australian exporters by the Hong Kong and Singapore Banking Company, which found that

> "Australian exporters have been slow to take advantage of the business benefits of FTAs. On average each FTA signed by Australia is used only by 19% of Australian exporters "(HSBC, 2014).

Placing additional barriers to access to the KAFTA by having inadequate rules of origin procedures, only serves to increase the likelihood this agreement will be less utilised by Australian business than past agreements.

Recommendation:

6. **That the Parliament delays passage of implementing legislation for KAFTA pending a re-negotiation of Chapter 3 of the draft agreement to address the concerns raised by stakeholders regarding the rules of origin, their certification and commercial dispute resolution procedures.**

Labour Rights and Migrant Worker Program

The Construction, Forestry, Mining and Energy Union's (CFMEU) submission to JSCOT on KAFTA raised serious and legitimate concerns in relation to the migrant worker program and KAFTA's impact on the movement of people.

The CFMEU stated KAFTA appears to expand the areas where employers can be granted access to 457 visas for Korean nationals without Labour Market Testing (LMT), diminishing the need to look for qualified Australian workers first and show that none are available to do the work.

The CFMEU state the extent to which KAFTA removes the LMT requirements is not clear, and the Deputy Chair has placed Questions on Notice to DFAT officials to try and clarify the uncertain issues around this component of the Treaty. The CFMEU is concerned that KAFTA appears to show Australia is granting LMT-exempt status in the 457 visa program to all categories of Korean nationals covered by the agreement. On the other hand however, the Korean Government

appears to be retaining the right to apply LMT, numerical quotas and other restrictions to Australian citizens and permanent residents under its temporary visa program.

Australia's Migrant Worker Programs should not be used as part of the negotiations for bilateral Trade Agreements. Migrant Worker Programs should be a matter for the Australian Parliament and should be reviewed and adjusted according to the economic and social circumstances Australia may be experiencing in any given period. Australia's unemployment rate has now increased to 6.4%, with over 790,000 Australian currently out of work, and a combined total of over 1 million reported to be underemployed. Opening our labour market to foreign nationals who are exempt from local LMT requirements will increase our current unemployment levels, place downward pressure on domestic workplace wages, conditions and standards, and damage the work prospects of young Australians.

Recommendation

7. **That the Parliament delay passage of implementing legislation for KAFTA pending a re-negotiation to ensure Australian workers are not adversely disadvantaged through diminished Labour Market Testing provisions.**

Manufacturing

KAFTA has the potential to bring forward the closure of Ford, Holden and Toyota automotive manufacturing. The announced closure of Ford, Holden and Toyota manufacturing in 2016-17 does not guarantee the companies will continue operating until then. The AMWU states the timing of closure will depend largely on volumes up until then. A significant drop in volumes could potentially cause an early departure of more of these manufacturing operations. The AMWU states KAFTA and similar bilateral agreements with Japan and China will have impacts on the competitiveness of Australian made cars and will contribute to a decline in volumes.

Early closure will have devastating consequences for the employees and supply chain businesses. It is vitally important Government measures are appropriately implemented and given time to help retrain and reskill employees so they can be linked in with new employment opportunities, and that supply chain operations are given time to invest and develop new products, and to be linked in with new markets.

Australia's economy should be diverse, robust and highly skilled. The shrinking of our manufacturing sector will damage Australia's ability to develop, design, manufacture and produce large scale, high quality manufacturing products; and have broader economic and social implications.

Recommendation

8. **That the Government provide opportunities for Australian automotive workers to be re-skilled and find new employment, and supply manufacturers the opportunity to diversify and find new markets.**

Conclusion

As members of the Joint Standing Committee on Treaties (JSCOT), we cannot support the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014)* (KAFTA) in its present form. We believe that re-negotiation needs to take place in order to resolve the issues we have raised in this Dissenting Report regarding ISDS, Copyright, Rules of Origin and Labour Market Testing. These are all serious issues that if handled poorly could have adverse consequences for our sovereignty our economy and our legal system, as well as for IP providers, consumers, and unemployed Australians.

The Hon Kelvin Thomson MP
(Deputy Chair)

The Hon Melissa Parke MP

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