

Other Issues

Introduction

- 5.1 Although concerns over labour mobility tended to dominate the inquiry, a number of other issues were identified. This chapter looks first at the investor-state dispute settlement (ISDS) mechanism included in ChAFTA before moving on to concerns around tariff and non-tariff barriers and the constraints imposed by domestic legislation.
- 5.2 It then examines a range of other concerns including the possible effect of ChAFTA on Australian standards with regard to food labelling and the importation of electrical goods. The chapter also considers a number of chapters that have been left out of ChAFTA and finally looks at some suggestions on reforming the treaty making process.

Investor-state dispute settlement mechanism

- 5.3 Originally conceived to protect foreign investors in developing countries from direct or indirect expropriation of their investments, ISDS mechanisms have become common place in free trade agreements over the last decade. ISDS provisions have attracted criticism as the number of disputes has increased, leading to a perception that the provisions threaten state sovereignty and exert undue influence on government policy decisions.
- 5.4 Many of the concerns raised with regard to the ISDS provisions in ChAFTA have been raised in the Committee's previous inquiries into FTAs. However, an additional major concern in relation to the ISDS

chapter in ChAFTA is that it is 'unfinished' and does not provide important definitions of key concepts.¹

- 5.5 It should be noted that Australia and China signed a bilateral investment treaty containing ISDS provisions in 1988.² The inclusion of an ISDS mechanism in ChAFTA is seen as an opportunity to include safeguards that are not contained in the 1988 bilateral treaty.³
- 5.6 Article 9.9 of ChAFTA provides for a review of the investment legal framework between the two countries, including consideration of the existing 1988 bilateral investment treaty, within three years of entry into force of ChAFTA.⁴
- 5.7 The Department of Foreign Affairs and Trade (DFAT) advised that the apparently unfinished nature of the chapter on the ISDS provisions had to be seen in the context of China's developing FTA program:

The situation is due to the fact that China is just starting to enter into negotiations for full investment agreements or investment chapters in FTAs. So far China has not made the sorts of commitments in FTAs that we would have in the Japan or Korea agreements, for example.⁵

- 5.8 China is currently negotiating bilateral treaties with the United States (USA) and the European Union (EU) and is in the process of developing its investment policy. In three years China will be in a better position to determine the commitments it expects from ISDS provisions:

By that time, their policy will have evolved and they may have concluded by then with the US and the EU. We would be able to then incorporate a modern standardised, if you like, set of investment commitments that China will have with their major investors at that point in time.⁶

1 In particular, definitions of 'minimum standard of treatment' and 'expropriation'. Australian Fair Trade and Investment Network Ltd (AFTINET), *Submission 21*, 12; Dr Romaine Rutnam, *Submission 22*, p. 2; Dr Kyla Tienhaara, Research Fellow, RegNet, College of Asia and the Pacific, Australian National University (ANU), *Submission 36*, p. 6.

2 *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments* (Beijing, 11 July 1988).

3 Ms Jan Adams, Deputy Secretary, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, 7 September 2015, p. 36.

4 *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (ChAFTA)*, Article 9.9: Future Work Program, p. 90.

5 Ms Adams, DFAT, *Committee Hansard*, Canberra, 17 August 2015, p. 22.

6 Ms Adams, DFAT, *Committee Hansard*, Canberra, 17 August 2015, p. 22.

5.9 There was concern that the re-negotiated provisions will not come before the parliament for review.⁷ DFAT assured the Committee that these provisions will be dealt with as a new agreement and come before the Joint Standing Committee on Treaties (JSCOT) in the usual way to ensure parliamentary scrutiny of any new conditions:

... [at this point] parliament will not be voting on future commitments. Those commitments will come back as a new part of an agreement which will go through a JSCOT process ...⁸

5.10 An added benefit of the review could be the opportunity it provides for wider community consultation. HopgoodGanim lawyers suggested that the review process could incorporate a structured consultation program:

We submit to this committee that this presents an opportunity for community consultation on the further articles to be added. We recommend that a program of consultation be run seeking input into these further articles to be included in ChAFTA.⁹

5.11 As it stands, the scope of the ISDS provisions in ChAFTA are quite narrow, applying only to 'national treatment' and 'most-favoured-nation treatment'. The provisions protect investments and investors from discriminatory or less favourable treatment. With regard to national treatment, Chinese investors are covered during the establishment and acquisition phase while Australian investors are not. This is seen as unusual and prompted claims that the provisions are unbalanced and 'lopsided'.¹⁰ Dr Tienhaara calls it 'puzzling':

Whichever option is chosen it is customary that both parties have the same obligations; reciprocity is a fundamental principle in trade negotiations. It is puzzling that in the national treatment provision in ChAFTA, Australia has committed to non-discrimination in the case of establishment and acquisition phase but China has not.¹¹

5.12 However, Lexbridge Lawyers argue that the impact of the differing provisions is lessened by Australia's use of its 'carve-out' prerogative:

In practical terms, this difference, while significant, may not be as great as first appears as Australia has exercised its ability to 'carve-

7 AFTINET, *Submission 21*, p. 12; Dr Romaine Rutnam, *Submission 22*, p. 2; Dr Kyla Tienhaara, Research Fellow, RegNet, College of Asia and the Pacific, ANU, *Submission 36*, p. 6.

8 Ms Adams, DFAT, *Committee Hansard*, Canberra, 17 August 2015, p. 22.

9 Mr Lea Fua, Senior Associate, HopgoodGanim, *Committee Hansard*, Brisbane, 27 July 2015, p. 15.

10 AFTINET, *Submission 21*, p. 11; Dr Romaine Rutnam, *Submission 22*, pp. 1-2.

11 Dr Kyla Tienhaara, Research Fellow, RegNet, College of Asia and the Pacific, ANU, *Submission 36*, p. 4.

out' existing measures and policy space from the National Treatment obligations. For Australia the most significant treatment at the pre-establishment stage of investment is related to the review of investments which are required to be notified to the Foreign Investment Review Board (FIRB). The FIRB may refuse notified investments or approve them subject to certain conditions. In ChAFTA Australia, consistent with its standard practice, has carved out the key elements of the FIRB investment screening regime from the National Treatment obligation.¹²

- 5.13 There is some consensus that the safeguard provisions included in the ISDS chapter to protect government decisions regarding health and the environment are a positive development.¹³ In particular the mechanism in Article 9:11 for issuing a public welfare notice has been singled out as innovative. This notice is issued by the relevant government if it considers that the public welfare exemptions apply to a claim, and imposes a compulsory 90 day consultation period. This occurs early in the process, before a matter is taken to arbitration, and is expected to deter a claimant from proceeding with a dispute.¹⁴ However, concern remains that investors will continue to 'dispute the legitimacy of the stated public welfare objectives of governments as well as the efficacy of particular measures'.¹⁵
- 5.14 While some safeguards have been included in the ISDS provisions, disquiet has been expressed over the standard of transparency in the ISDS chapter. It is considered that with regard to transparency, ChAFTA is a backward step.¹⁶ Compared with Australia's recent FTAs, including the Korea Australia Free Trade Agreement (KAFTA), ChAFTA 'significantly limits transparency' by allowing the respondent state to decide to withhold documents from the public or conduct proceedings in private.¹⁷
- 5.15 To counter these issues, the Committee was also reminded by the Business Council of Australia (BCA) and the Export Council of Australia (ECA) that

12 Lexbridge Public International Lawyers, *Submission 46*, 2.1.

13 Business Council of Australia (BCA), *Submission 76*, p. 15; Dr Kyla Tienhaara, Research Fellow, RegNet, College of Asia and the Pacific, *Submission 36*, p. 8.

14 Lexbridge Public International Lawyers, *Submission 46*, 4.1.

15 Dr Kyla Tienhaara, Research Fellow, RegNet, College of Asia and the Pacific, ANU, *Submission 36*, p. 8.

16 AFTINET, *Submission 21*, p. 12.

17 Dr Kyla Tienhaara, Research Fellow, RegNet, College of Asia and the Pacific, ANU, *Submission 36*, p. 10.

such provisions serve to protect Australian investors operating in foreign markets.¹⁸

- 5.16 Although serious concerns remain regarding the inclusion of ISDS provisions in FTAs, it was suggested to the Committee that these mechanisms have become part of international trade agreements and are 'here to stay'.¹⁹ Australia, like other countries, has to accept and alleviate the risks inherent in ISDS mechanisms.
- 5.17 In ChAFTA the ECA believes that a 'balanced position has been achieved'²⁰ and Lexbridge Lawyers concluded that the risks have been mitigated by the included safeguards and narrow scope of the provisions:

Taken together, these factors lead to the conclusion that the exposure under ChAFTA – in terms of a challenge to legitimate government regulation – is significantly less than the vast majority of Australia's agreements. In this regard, ChAFTA provides an example of a modern, balanced approach to ISDS.²¹

Scale of the Chinese market

- 5.18 While the size of the Chinese market provides enormous potential for Australian exporters, the Committee was warned that the scale of the market also presents considerable risks. There is a danger that Australian enterprises, particularly in the services sector, will be overwhelmed by the size of the projects they are asked to take on.
- 5.19 ThomsonAdsett, an architectural firm specialising in aged and health care facilities that has been active in the Chinese market for over 30 years, advised that Australian providers need to understand the implications of the size of the market:

The single biggest barrier to entry in this market is the difference in scale between typical project opportunities of a similar type in Australia as compared to China. Consideration needs to be given by Government on how we maximise this opportunity without risking failure through scale disadvantage.²²

18 Business Council of Australia (BCA), *Submission 76*, p. 15; Export Council of Australia (ECA), *Submission 61*, p. 5.

19 Mr Fua, HopgoodGanim, *Committee Hansard*, Brisbane, 27 July 2015, p.16.

20 ECA, *Submission 61*, p. 4.

21 Lexbridge Public International Lawyers, *Submission 46*, 5.

22 ThomsonAdsett, *Submission 82*, p. 2.

- 5.20 In order to leverage the possibilities of the Chinese market without being ‘swamped’, Australian companies will need assistance to navigate the complex Chinese business environment. Relationships are the key and identifying and building relevant relationships is an area where the Australian government may be able to assist:

The problem we have in China, which is one that I think government can play a role in solving, is not knowing who it is that we should be talking to and who actually makes the decisions. There is a plethora of organisations, a complex web of apparently equal levels of seniority in competing departments within the government and within competing interests within the government. It becomes quite complex to know who to deal with, unless you are a very large and sophisticated company with very strong networks, and that is an area where, at a [government to government] level, there can be a very useful contribution made.²³

- 5.21 To successfully manage the size and scale of the Chinese market, many Australian producers, especially food producers, are aiming to capitalise on high-value premium products. The Australian Food and Grocery Council (AFGC) recognise the necessity of focusing on this end of the market.²⁴ Australian rock lobster and abalone producers are targeting high-demographic groups with premium product.²⁵ The pork industry are not attempting to enter the mainstream market but compete at the upper end of the market:

The interest that we have for China is certainly around high-value niche markets. Australia produces 0.03 per cent of the world’s pork, so to think that we can go in there and supply substantial quantities of pork into China is quite misleading at best. We can, however, target a high-value niche product into China. We have specialities in supplying into Singapore a chilled overnight freight product and we would be looking at extending that type of service to Chinese consumers.²⁶

23 Mr David Keith Lane, Chairman, ThomsonAdsett, *Committee Hansard*, Brisbane 27 July 2015, p. 23.

24 Australian Food and Grocery Council (AFGC), *Submission 49*, p. 6.

25 Mr Matthew Rutter, General Manager, Marketing and Business Development, Geraldton Fishermen’s Co-operative, on behalf of Seafood Trade Advisory Group (STAG), *Committee Hansard*, Perth, 25 August 2015, p. 51.

26 Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited (APL), *Committee Hansard*, Canberra, 7 September 2015, p. 18.

Tariffs

- 5.22 While the overall tariff reductions for Australian business and industry have been welcomed, there are concerns over a number of issues. China has excluded several agricultural products from further liberalisation – retaining existing tariffs – and placed discretionary safeguards on others. Australia has removed or reduced tariffs on some Chinese imports that will have a detrimental effect on a number of Australian businesses.

Remaining tariffs

- 5.23 Grain growers are disappointed that tariffs have been retained on wheat and canola. High tariffs also remain on rice and maize.²⁷ However, they are hopeful that the in-built review process will deliver tariff reductions over time.²⁸

Safeguards

- 5.24 Under ChAFTA, China may apply a safeguard, or upper limit, to beef and dairy products from Australia. For beef this has been set at 170 000 tonnes, which is 10 per cent above Australia's historical calendar-year peak beef shipments to China. The Australian Red Meat Industry warned that, if triggered, the safeguard has the 'potential to disrupt trade flows – with the applied tariffs reverting to the pre-ChAFTA levels'.²⁹
- 5.25 However, the Red Meat Industry mitigated this statement, explaining that the safeguard has been set at approximately 24 000 tonnes above current shipments plus 10 per cent, providing a comfortable buffer. Additionally, China is able to choose whether to apply this safeguard:
- ... it is a discretionary safeguard, so it will not automatically come in; there will be discussions with Chinese officials about whether they need it. So, if there is strong demand and the Chinese see the need for extra beef to come in, there is that discretionary option for them.³⁰
- 5.26 The dairy industry also faces discretionary safeguards on milk powders and condensed and evaporated milks. The volume is higher than existing trade and contains a compound annual growth rate of five per cent until at least year fifteen, equating to 34 694 tonnes. Exports in 2014 were 13 376

27 Grains Industry Market Access Forum (GIMAF), *Submission 47*.

28 GrainGrowers, *Submission 59*, pp. 4-5.

29 Australian Red Meat Industry, *Submission 20*; Teys Australia Pty Ltd, *Submission 32*.

30 Mr Michael Finucan, General Manager, International Markets, Meat and Livestock Australia (MLA), *Committee Hansard*, Sydney, 31 July 2015, p. 25.

tonnes.³¹ The dairy industry is confident that the safeguard will not be triggered under current expectations:

With the initial volume and the growth rate included, we would anticipate that we would not run into that safeguard upper limit in the implementation phases of the China-Australia free trade agreement.³²

Inequitable tariff reductions

5.27 Inequitable tariff reductions will put some Australian industries at a disadvantage. The Australian pulp and paper industry was one example drawn to the Committee's attention. The industry is estimated to support 18 000 jobs with a gross sales income of over \$9 billion.³³ The Australian Forest Products Association (AFPA) points out that under ChAFTA, the Australian tariff on paper products – including tissue, copy paper, newsprint and packaging papers – will either immediately be reduced to zero or fall to zero within three to five years, while there will be no change to the Chinese tariffs for the same products:

The majority of paper and paperboard products imported from China have historically had a 5% tariff imposed on them which would be removed under the proposed ChAFTA. By comparison, tariff rates on Australian paper exports to China would remain in force at 5% to 7.5% in most cases.³⁴

5.28 The Australian Industry Group (AiG) also drew attention to the imbalance in some tariff reductions, singling out the Australian Fibre Packaging Industry. It stressed that the Australian packaging industry is globally competitive but is facing significant pressure from imports, particularly from China. The tariff reductions proposed in ChAFTA will further exacerbate the problem, with AiG estimating that the industry will face 'almost \$1 billion of Chinese imports over the next four years'.³⁵

5.29 Armstrong World Industries, Australia's only remaining manufacturer of vinyl flooring, faces a similar situation. The tariff on Chinese imports of vinyl flooring will drop to zero on implementation of ChAFTA, while the tariff on Australian imports to China will phase out over five years. Armstrong World Industries understands the need for free trade

31 Australian Dairy Industry (ADI), *Submission 45*, p. 3.

32 Mr Peter Myers, International Trade Development Manager, Dairy Australia, *Committee Hansard*, Canberra, 17 August 2015, p. 11.

33 Australian Forest Products Association (AFPA), *Submission 85*, p. 3.

34 AFPA, *Submission 85*, p. 4-5.

35 Australian Industry Group (AiG), *Submission 86*.

agreements but urges the Government to establish a level of equity for Australian businesses facing competition from Chinese imports.³⁶

- 5.30 Misclassification of product can also led to inequitable tariff treatment. Packer Leather, a company that exports kangaroo leather to 19 countries, including China, told the Committee that the Harmonised System (HS) classification applied to kangaroo leather places the Company at a disadvantage. Cow hides and skins face a lower tariff than kangaroo leather:

Currently kangaroo leather is classified under HS code 4113-90-00 Other. This has dutiable effect of 14 per cent as a base rate. It is also notable that this same HS code is also used for goat/kid skins, swine and reptiles. Here we have a unique Australian material found nowhere else in the world in its natural state but which appears to suffer from a perhaps poorly classified HS code when compared to bovine leather. By comparison, the bovine leather rate is only five per cent.³⁷

- 5.31 Packer Leather suggests that a more equitable outcome would be achieved by re-classifying kangaroo leather so that it falls within the lower tariff applying to cow hides and skins.³⁸

Non-tariff barriers

- 5.32 As with previous FTAs, non-tariff barriers are a major concern. The ECA cautions that, despite the merits of ChAFTA, it does not address the non-tariff barriers inherent in China's complex and multi-layered regulatory framework.³⁹ The ECA identified a number of non-tariff barriers including:

- information about local language, culture and business practices;
- understanding local regulations;
- payment issues; and
- regulations that favour local firms.⁴⁰

36 Mr Michael Keam, Strategic Marketing Manager, Commercial Flooring, Armstrong World Industries (Australia) Pty Ltd, *Committee Hansard*, 28 August 201, p. 21.

37 Mr Graham Roy Packer, Director and International Marketing Director, Packer Leather, *Committee Hansard*, Brisbane, 27 July 2015, p. 6.

38 Mr Packer, Packer Leather, *Committee Hansard*, Brisbane, 27 July 2015, p. 6.

39 ECA, *Submission 61*, p. 11.

40 ECA, *Submission 61*, p.11.

- 5.33 BHP Billiton stressed that in today's interconnected global trading conditions it is often red tape and non-tariff barriers that pose the biggest threat to the 'flow of goods, services, people and ideas'.⁴¹ BHP provided the example of recently introduced Chinese import regulations for coal:

A recent example of global supply chain inefficiency in the resources sector was the introduction of China's new import restrictions for trace elements in coal. These regulations, and the testing regime that has been put in place at the border, have caused delays and uncertainty for Australian exporters and our customers.⁴²

Protocols

- 5.34 The National Farmers' Federation (NFF) warns that, for many commodities, non-tariff barriers will significantly inhibit trade with China, particularly Australian pork and rice.⁴³ Both commodities require import protocols and export processor accreditation before Australian product can be imported.⁴⁴

- 5.35 Australian Pork Limited (APL) told the Committee that currently there is no Australian pork sold into China. The industry is optimistic about the potential of the Chinese market for its product but cannot take advantage of the opportunities presented by ChAFTA until the protocols and accreditation are in place.⁴⁵ APL understands that the negotiation of the protocols and accreditation system is a separate process to the FTA negotiations.

- 5.36 The Department of Agriculture has indicated that it could take five to ten years for the process to be completed.⁴⁶ Progress on the sale of pork may be slow until China prioritises the request to develop the protocols:

The reason that it might take that long is not just about the detail of the protocols but, in fact, to engage China to actually undertake the investigations that are required. We have made a request for China to consider access to pig meat from Australia, but they have not yet taken up our request to develop the protocol.⁴⁷

41 BHP Billiton (BHP), *Submission 77*, p. 2.

42 BHP, *Submission 77*, p. 2.

43 National Farmers' Federation (NFF), *Submission 48*.

44 NFF, *Submission 48*.

45 Ms Kerr, APL, *Committee Hansard*, Canberra, 7 September 2015, p. 20.

46 Ms Kerr, APL, *Committee Hansard*, Canberra, 7 September 2015, p. 21.

47 Mr Simon Smalley, North Asia, Trade and Market Access Division, Department of Agriculture, *Committee Hansard*, Canberra, 7 September 2015, p. 35.

Sanitary and phytosanitary regulations

5.37 Sanitary and phytosanitary (SPS) regulations continue to present a primary non-tariff barrier for many industries. While the Grain Industry Market Access Forum (GIMAF) welcomed the tariff reduction on pulses, for example, they indicated that without the necessary phytosanitary regulations the tariff reduction was ineffective:

This is positive news for the pulse industry but is tempered with the fact that no pulses are currently traded to China from Australia due to the absence of a phytosanitary protocol. Until this is resolved the tariff reduction is not relevant as China does not allow trade currently, however will provide an improved trading environment if SPS conditions can be successfully negotiated.⁴⁸

Regulations

5.38 Non-tariff barriers are of concern to the service industries set to benefit from the implementation of ChAFTA. The Law Council of Australia acknowledges the progress that has been made for Australian lawyers wishing to practice in China but cautions that many inhibiting regulations are still in place:

... it is disappointing that the unnecessarily burdensome provisions that currently apply to foreign lawyers have not been eliminated in full or in part and therefore will continue to apply to lawyers wishing to establish outside the PFTZ [Shanghai Pilot Free Trade Zone] and within it. These include minimum residency and post-admission experience requirements, and lengthy prior establishment of offices in China as a pre-requisite to qualify for the establishment of a 'commercial association' office in the PFTZ. This latter restriction prevents potential new law firm entrants from taking immediate advantage of the benefits provided by the FTA and PFTZ.⁴⁹

Australian policy and regulation

5.39 As in previous FTA reviews, the difficulties imposed by domestic policy and regulation on trade liberalisation were brought to the Committee's

48 GIMAF, *Submission 47*.

49 Law Council of Australia, *Submission 58*.

attention. The Financial Services Council (FSC) reiterated the need for full implementation of the 2010 Johnson Report.⁵⁰ It welcomed implementation of the Investment Manager Regime but stressed that further taxation initiatives are required:

... the completion of other taxation-related initiatives such as the development of collective investment vehicle regime and the reduction of withholding tax rates are still required to increase inflows as well as support Australian investment managers in exporting their services through the Asia Region Funds Passport (ARFP) initiative.⁵¹

- 5.40 The aged care services sector expects ChAFTA to open up possibilities for the industry. Although it is poised to take advantage of those possibilities, it considers that domestic regulation may hamper its efforts. Aged care is a highly regulated industry and changes to the regulatory environment often happen at short notice:

In recent years the industry has been subject to substantial, annual changes to legislation, with final detail often provided in the weeks (or days) before the date of implementation. While such a significant administrative burden is imposed upon us, our focus is on managing domestic regulatory requirements and the capacity to take advantage of opportunities such as those presented by ChAFTA are reduced.⁵²

- 5.41 The fishing industry also felt regulatory hurdles were inhibiting access to the opportunities presented by ChAFTA:

The fishing industry is highly regulated, to the extent that sometimes I wonder how some of these guys continue to operate. In the export field, you have got the EPBC Act [Environment Protection and Biodiversity Conservation Act]. You have then got to get your wildlife trade operation processes underway. So there is always something that is required for the fishing industry to leap over hurdles.⁵³

50 Australian Financial Centre Forum, *Australia as a Financial Centre-Building on our Strengths*, November 2009.

51 Financial Services Council (FSC), *Submission 39*.

52 Leading Age Services Australia WA, *Submission 81*.

53 Mr John Harrison, Chief Executive, Western Australian Fishing Industry Council (WAFIC), *Committee Hansard*, Perth, 25 August 2015, p. 30.

Maintaining Australian standards

- 5.42 There is a perception that ChAFTA has the potential to threaten Australia's control of the standard of goods entering the country. In particular, concerns have been raised about food labelling and electrical goods.
- 5.43 CHOICE, among others, suggests that provisions in ChAFTA will negatively influence Australian policy on food labelling and make it difficult to change food labelling laws.⁵⁴ Food labelling has not been specifically excluded from the ISDS provision, causing concern that changes to food labelling regulations could provoke an ISDS case.⁵⁵
- 5.44 However, DFAT maintains that the ISDS provisions do not apply to food labelling and that all importers must meet Australia's food labelling requirements:
- Investor-state dispute settlement does not apply to imports of food stuffs – the worlds do not overlap. Investor-state dispute settlement, really only gives an investor in Australia, covered by the agreement – so a Chinese investor established in Australia – the ability to directly enforce the obligations in the investment chapter of the agreement.⁵⁶
- 5.45 The importation of sub-standard electrical products into the Australian market and subsequent safety issues were raised by the electrical industry and unions.⁵⁷ DFAT offered assurance that ChAFTA does not reduce China's conformity and assessment obligations and provides an avenue for Australia to work with China on improving this area:
- ... it does not reduce our standards or our enforcement, in any way. In fact, we do have capacity under the agreement to work more intensively with China on improving conformity and assessment processes.⁵⁸

Omissions

- 5.46 ChAFTA does not contain separate chapters on labour and environmental standards. Such chapter were included in the FTA with Korea. Dedicated

54 CHOICE, *Submission 33*.

55 AFTINET, *Submission 21*, pp. 14-15.

56 Ms Adams, DFAT, *Committee Hansard*, Canberra, 7 September 2015, p. 37.

57 NECA, *Submission 52*; ETU, *Submission 44*.

58 Ms Adams, DFAT, *Committee Hansard*, Canberra, 17 August 2015, p. 25.

chapters on these areas are seen as a means of encouraging compliance with the standards of the International Labour Organisation (ILO) and international environmental standards.⁵⁹

5.47 DFAT told the Committee that the chapters and issues included in each individual FTA are determined by the two countries negotiating the agreement and therefore vary from agreement to agreement.⁶⁰

5.48 The ECA suggests that the absence of these chapters could indicate that Australia and China are satisfied that the importance of these issues is recognised through other agreements.⁶¹ However, the ECA also notes the lack of a chapter on government procurement and urges the Australian Government to continue to work on developing commitments in this area. Under Article 16.8 of ChAFTA, both governments agree to negotiate on government procurement, with a view to making reciprocal commitments.⁶²

Treaty making process

5.49 As with inquiries into previous FTAs, many comments were made on the treaty making process itself. In particular, there was criticism of the lack of access to the text of a proposed treaty – to scrutinise and test the treaty’s effectiveness and viability – *before* it is signed.⁶³

5.50 There were also suggestions to improve the future interpretation of treaty text. The Committee received a proposal from Dr Rebecca LaForgia for an interpretative declaration to be developed and attached to ChAFTA. This would promote clarity and openness around the interpretation of the text.⁶⁴ The interpretative declaration would be created by the Executive and interpret ambiguous sections of the text, particularly the provisions in Article 14 governing the Joint Commission.⁶⁵ The declaration should also allow public access to reports from the Joint Commission.⁶⁶ Dr LaForgia

59 AFTINET, *Submission 21*, pp. 12–14.

60 Ms Adams, DFAT, *Committee Hansard*, Canberra, 17 August 2015, p. 24.

61 ECA, *Submission 61*, p. 12.

62 ECA, *Submission 61*, p. 12.

63 Dr Patricia Ranald, Coordinator, Australian Fair Trade and Investment Network Ltd (AFTINET), *Committee Hansard*, Sydney, 31 July 2015, p. 15.

64 Dr Rebecca LaForgia, *Submission 56*.

65 Dr Rebecca LaForgia, *Submission 56*, pp. 6–9.

66 Dr Rebecca LaForgia, *Committee Hansard*, Melbourne, 28 August 2015, pp. 13–14.

suggests that this would provide a means of ensuring that the working of ChAFTA is transparent over the long term.⁶⁷

- 5.51 Ms Anna George, a former ambassador and multilateral negotiator with DFAT, proposes that JSCOT provide a 'forensic' record of the evidence it receives during its inquiry into ChAFTA to ensure that the material is readily available for future reference:

I would urge [JSCOT] ... to prepare, as part of its Report, a specific section that formally records the public service and the government's responses to *the scope, interpretation and implementation obligations of the Agreement*. A record such as this should be capable of serving as a concise and clear formal record of evidence given and provide a failsafe 'living' record after the 'ink is dry' on [JSCOT's] deliberations.⁶⁸

- 5.52 Ms George urges this course of action to pre-empt the future misinterpretation of the treaty text, particularly with regard to the links between the sanitary and phytosanitary, technical barriers to trade and investment provisions and the areas of public health and public welfare:

... throughout the language, where you are looking at the public welfare side, it goes from public welfare to public health – there is no clear line such that you can say that we are discussing this and this is what is out of scope, specifically. The language is very loose. It can be interpreted many ways, and if you look at both the WTO language and the language in the treaty and the language that is used in the ISD[S] provisions and how that all operates, these issues can be picked out in little elements of it.⁶⁹

- 5.53 Ms George's concerns are driven by the threat posed by antimicrobial resistance (AMR) and the spread of noncommunicable diseases. Ms George considers that, under ChAFTA, Australia's legitimate efforts to protect its environment and people could leave it open to litigation.⁷⁰

67 Dr Rebecca LaForgia, *Submission 56*, p. 8.

68 Ms Anna George, *Submission 57*.

69 Ms Anna George, *Committee Hansard*, Perth, 25 August 2015, p. 41.

70 Ms George, *Committee Hansard*, Perth, 25 August 2015, p. 40.

