



PARLIAMENT OF AUSTRALIA

# **Strengthening Australia's approach to trade negotiations**

**Joint Standing Committee on Trade and Investment Growth**

April 2024

CANBERRA

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# Foreword

An open approach to international trade is in Australia's best interests, with trade and investment being fundamental to the success of many Australian industries. Open trade creates well paid, secure jobs, improves our economic resilience, and contributes to economic growth and increased living standards for Australians.

Australia is a leading participant in international trade, being party to key multilateral and plurilateral agreements as well as a strong supporter of the global rules-based trading system. Australia also has an extensive architecture of bilateral and regional trade and agreements with over 30 partner economies, as well as 15 bilateral investment agreements.

Australia's agreements work to reduce barriers to international trade and investment for the benefit of both industry and consumers by providing access to key export markets, as well as access to more goods and services, at lower cost for both producers and consumers.

Throughout the inquiry the Committee has sought to examine Australia's approach to the negotiation of trade and investment agreements to better understand the effect of agreements on stakeholders and how the benefits of trade are shared. In this regard, the Committee has made eight recommendations that it believes will strengthen Australia's approach to negotiating trade and investment agreements, contributing to better outcomes and ensuring that agreements are of greatest benefit to the Australian community.

The Committee was particularly drawn to evidence outlining how we should evaluate whether trade and investment agreements are in the national interest. That is, if they provide an overall net benefit to Australia rather than to a narrow set of interests or particular sectors. While trade brings substantial benefits to many Australians, it has the potential to have widespread impacts across the economy, society, and the environment, with some experiencing costs and being disadvantaged. Further, an important element of the national interest is to ensure that trade commitments do not unduly weaken domestic policy objectives or the ability of the Australian Government to make decisions in the interests of its citizens.

The impacts of trade agreements must be effectively identified, understood, and accounted for or remedied if we are to be certain that an agreement is providing an overall net benefit. To this end, comprehensive, in-depth, and independent modelling and analysis as well as wider assessment of economic, social, and environmental impacts are essential components in the process for determining whether trade agreements are in the national interest. Such impact assessments should consider the implications of Australia's trade commitments in areas such as health, gender, labour, and human rights as well as for regional communities and First Nations people.

To facilitate enduring benefits of trade for Australia it is also imperative that the national interest is not a one-off assessment, rather it must be re-examined using real world experience as part of the practice for regular post-implementation review of agreements.

As well as ensuring genuine net benefit, robust processes for determining the national interest are vital to assuring that public confidence is maintained in Australia's trade objectives and in Australia's position at the centre of international trade. This remains more important than ever in the face of significant challenges arising in the global trade environment over recent years.

To provide consistency and certainty, there may be considerable merit in outlining the approach to determining the national interest in a legislative framework, alongside elements of the process for stakeholder consultation and requirement for regular reviews of agreements.

The Committee's final report builds on its interim report published on 6 February 2024, that made five recommendations focussed on improving transparency, accountability, and oversight in the process for negotiating Australia's trade and investment agreements.

On behalf of my Committee colleagues, I would like to thank all those who took part in the inquiry process by providing written submissions and giving evidence at public hearings.

I would also like to thank my Committee colleagues and the Secretariat staff for their work on this inquiry.

**Mr Steve Georganas MP**

**Chair**



# Terms of reference

The Joint Standing Committee on Trade and Investment Growth shall inquire into and report on the approach adopted by the Australian government when negotiating trade and investment agreements with trading partners, including:

- a. How the Australian Government develops a negotiating mandate and framework which factors in whole of government priorities;
- b. How the priorities for, States and Territory Governments, businesses, workers and other relevant stakeholders are considered and incorporated into a negotiating mandate;
- c. The consultation process undertaken with interested parties, including representatives of industry and workers throughout the process;
- d. The steps taken to ensure transparency and parliamentary oversight;
- e. How the economic, social and environmental impacts of an agreement are considered and acted upon;
- f. The steps taken to ensure agreements protect and advance Australia's national interests, including the ability to regulate in the public interest;
- g. The steps taken to ensure agreements protect and advance Australia's cultural interests;
- h. Whether agreements appropriately ensure First Nations Australians can participate and benefit in trade;
- i. How the Australian approach compares with other, similar countries; and
- j. How the process could be appropriately legislated to enshrine this approach in law.





# Members

## ***Chair***

Mr Steve Georganas MP Adelaide, SA

## ***Deputy Chair***

Hon Scott Buchholz MP Wright, QLD

## ***Members***

Senator the Hon Matthew Canavan QLD

Senator the Hon Richard Colbeck TAS

Senator Dorinda Cox WA

Hon Dr David Gillespie MP Lyne, NSW

Ms Tania Lawrence MP Hasluck, WA

Mr Jerome Laxale MP Bennelong, NSW

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# Abbreviations

AAA	Australian Alliance for Animals
A-A-NZFTA	ASEAN-Australia-New Zealand Free Trade Agreement
A-EUFTA	Australia-European Union Free Trade Agreement
A-IECTA	Australia-India Economic Cooperation and Trade Agreement
ASEAN	Association of Southeast Asian Nations
A-UKFTA	Australia-United Kingdom Free Trade Agreement
A-USFTA	Australia-United States Free Trade Agreement
ABF	Australian Border Force
ACC	Australian Copyright Council
ACTU	Australian Council of Trade Unions
AFTINET	Australian Fair Trade and Investment Network
Ai Group	Australian Industry Group
AMNF	Australian Nursing and Midwifery Federation
AMWU	Australian Manufacturing Workers' Union
APL	Australian Pork Limited
Austrade	Australian Trade and Investment Commission
AWU	Australian Workers' Union
BCA	Business Council of Australia
BIT	bilateral investment treaty
CGE	Computable General Equilibrium
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DAFF	Department of Agriculture, Fisheries and Forestry

DEA	Australia-Singapore Digital Economy Agreement
DFAT	Department of Foreign Affairs and Trade
EANO	Economic Analysis of the Negotiated Outcome
ETU	Electrical Trades Union
EU	European Union
FDI	foreign direct investment
FTA	free trade agreement
FWO	Fair Work Ombudsman
G7	Group of Seven
GABC	German Australian Business Council
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GDP	gross domestic product
GI	geographical indication
GPA	Agreement on Government Procurement
GTA	Grain Trade Australia
HSI Australia	Humane Society International Australia
ILO	International Labour Organization
IP	intellectual property
IPR	intellectual property rights
ISDS	investor-state dispute settlement
JSCOT	Joint Standing Committee on Treaties
MCF	Melbourne Climate Futures
MEAA	Media, Entertainment and Arts Alliance
MNP	movement of natural persons

MUA	Maritime Union of Australia
NFF	National Farmers' Federation
NIA	National Interest Analysis
NZ	New Zealand
NZ MFAT	New Zealand Ministry of Foreign Affairs and Trade
ODA	Official Development Assistance
PACER Plus	Pacific Agreement on Closer Economic Relations Plus
PHAA	Public Health Association of Australia
PSI	Public Services International
PTA	preferential trade agreement
RCEP	Regional Comprehensive Economic Partnership
RIS	Regulatory Impact Statement
RMAC	Red Meat Advisory Council
S-AFTA	Singapore-Australia Free Trade Agreement
SDG	Sustainable Development Goals
SIA	Sustainability Impact Assessment
SME	Small and medium-sized enterprise
SPA	Screen Producers Australia
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSD	Trade and Sustainable Development
UN	United Nations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UK	United Kingdom
US	United States
WIPO	World Intellectual Property Organization
WTO	World Trade Organization



# List of recommendations

## Recommendation 1

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- 3.56** The Committee recommends that the Australian Government require an independent review, including modelling and analysis, to be undertaken on each proposed or under review trade and investment agreement.

## Recommendation 2

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- 3.57** The Committee recommends that the Australian Government establish a consistent approach to assessing and reviewing trade and investment agreements. This should include impact analyses of the economic, social, and environmental implications of agreements to assist the Government to make decisions in the national interest.

## Recommendation 3

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- 3.58** The Committee recommends that the trade advisory committee and cleared advisors (Interim Report recommendation 1) be provided with the outcomes of the independent modelling and analysis (recommendation 1) as well as the impact assessment (recommendation 2) to improve transparency and the depth of stakeholder consultation in the negotiation of trade and investment agreements.

## Recommendation 4

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- 4.85** The Committee recommends that the Australian Government seek to include human rights, labour and environmental chapters in its trade agreements that reflect, and where appropriate contain specific references to, relevant United Nations and International Labour Organization conventions and declarations to which Australia is a signatory.

## Recommendation 5

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- 5.170** The Committee recommends that the Australian Government should seek to not include provisions in trade and investment agreements that waive labour market and skills testing or include investor state dispute settlement (ISDS) provisions.

## **Recommendation 6**

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**5.171 The Committee recommends that the Department of Foreign Affairs and Trade (DFAT) consult with stakeholders in emerging technologies on proposed provisions in trade agreements to ensure that the ability of future governments to regulate such technologies in the public interest is not limited.**

## **Recommendation 7**

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**5.172 The Committee recommends the Australian Government consider the inclusion of provisions that protect and promote Australian First Nations intellectual property in its bilateral trade negotiation framework.**

## **Recommendation 8**

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**7.27 The Committee recommends that the Australian Government establish a legislative framework for the negotiation of Australia's trade and investment agreements.**







# 1. Introduction

## Overview

- 1.1 Throughout the inquiry, evidence reflected the significance of international trade and investment to Australia, noting that it forms the basis for the success of many Australian industries and contributes to increased living standards. Australia's trade is underpinned by an extensive architecture of trade and investment agreements, which are negotiated by the Department of Foreign Affairs and Trade (DFAT).
- 1.2 Submitters and witnesses widely emphasised the importance of Australia's trade and investment agreements being in the national interest or providing a net benefit. Some raised concerns with the current approach to assessing the national interest, with regard to how broad impacts are considered, how costs are identified, and the need for analysis to be independent. Subsequently, suggestions were made for broad and independent economic, social, and environmental impact assessments to assist in determining whether trade agreements are in the national interest.
- 1.3 The Committee received evidence proposing that Australia's trade and investment agreements should be consistent with its commitments to human rights, labour, and the environment, including specifying commitments to relevant international standards. Some raised concerns with the inclusion of non-trade provisions in Australia's trade agreements, suggesting that such objectives are best achieved through other mechanisms, or that they may increase barriers to trade and have negative impacts on domestic industries.
- 1.4 Submitters and witnesses outlined the importance of public interest regulation and raised concerns that the inclusion of certain provisions in Australia's trade and investment agreements may restrict or undermine the Australian Government's ability to act in the public interest across a range of policy areas. It was widely proposed that stronger safeguards are needed including specific exemptions in agreements and the exclusion of certain provisions from agreements.
- 1.5 The Committee received evidence outlining a range of priorities and considerations for Australia's approach to trade. Some identified the need for new trade agreements and better utilisation of existing agreements to continue to build export opportunities. Others discussed that the multilateral framework and rules-based trading system is in Australia's best interests, while some noted the benefit of the bilateral and plurilateral approach in the absence of progress at the multilateral level.
- 1.6 During the inquiry, evidence was provided in relation to the benefits of enshrining the content of trade agreements in a legislative framework, as well as the suitability of a legislative approach and key considerations and risks.

# About this inquiry

## Objectives and scope

- 1.7 On 9 August 2023, the Joint Standing Committee on Trade and Investment Growth (the Committee), adopted the inquiry following a referral from Senator the Hon Don Farrell, Minister for Trade and Tourism.
- 1.8 Throughout the inquiry the Committee received substantial evidence proposing how the Australian Government's approach to negotiating trade and investment agreements could be improved with regard to both the process for developing agreements and the content of agreements.
- 1.9 The Committee published an interim report for the inquiry on 6 February 2024 titled *Interim report: Inquiry into the Australian Government's approach to negotiating trade and investment agreements* (Interim Report). The Interim Report provided an examination of the evidence proposing the need for greater transparency, accountability, and oversight in the process for negotiating trade agreements, with a focus on stakeholder consultation and engagement, the provision of information to the public and the role of the Parliament. The Interim Report made five recommendations to strengthen the Australian Government's approach to trade negotiations and contribute to better outcomes for Australia.
- 1.10 The Committee's final report builds on the Interim Report to explore the evidence relating to the content of trade and investment agreements, with particular consideration given to determining that agreements are in the national interest, upholding international standards in relation to human rights, labour, and the environment, and protecting the ability of the Australian Government to regulate in the public interest across a range of policy areas. It also reflects on evidence outlining priorities, focus areas and considerations for Australia's future approach to trade and considers the suitability of a legislative framework for the content of Australia's trade and investment agreements.
- 1.11 In undertaking this inquiry, the Committee acknowledges the strong track record of the Department of Foreign Affairs and Trade (DFAT) over many years in negotiating Australia's extensive architecture of trade and investment agreements.
- 1.12 Overall, as noted in the Interim Report, the Committee is of the view that the Australian Government's approach to the negotiation of trade and investment agreements has served Australia well and largely remains fit for purpose. However, the Committee believes that Australia's approach to trade can be strengthened by more robust processes for determining that agreements are in the national interest, as well as certain protections that uphold core values and retain the Australian Government's ability to regulate in the public interest. Such improvements would contribute to trade agreements that ensure greater opportunities and benefits for more Australians.

## Conduct of the inquiry

- 1.13 On 10 August 2023 the Committee issued a media release to announce the inquiry and call for submissions. The Committee invited submissions from a range of people and organisations with an interest in Australia’s approach to negotiating trade and investment agreements by 22 September 2023. This included federal and state government departments and agencies, industry groups and peak bodies, think tanks, academics, unions, and the general public.
- 1.14 The Committee received 54 submissions and an additional 11 supplementary submissions. The full list of submissions and other additional information presented to the inquiry are available in Appendix A.
- 1.15 The Committee held eight days of public hearings:
- 13 September 2023 in Canberra, ACT
  - 20 October 2023 in Canberra, ACT
  - 3 November 2023 in Melbourne, VIC
  - 15 November 2023 in Canberra, ACT
  - 1 December 2023 in Canberra, ACT
  - 13 December 2023 in Canberra, ACT
  - 1 March 2024 in Canberra, ACT
  - 14 March 2024 by videoconference.
- 1.16 A list of witnesses who attended these public hearings is available in Appendix B. Transcripts for all public hearings can be found on the Committee’s website.

## Acknowledgements

- 1.17 The Committee would like to thank everyone who provided written submissions and gave evidence at public hearings.

## Report structure

- 1.18 This report is structured in seven chapters, including this introduction:
- Chapter 2 highlights the benefits of trade and investment for Australia and the importance of open trade to many Australian industries. It also provides an overview of Australia’s trade and investment agreement architecture and notes some key factors that have shaped the context for Australia’s trade negotiations over time.
  - Chapter 3 focusses on the need for trade and investment agreements to be in the national interest and how the national interest is determined. It discusses the current approach to determining the national interest and assessing economic

impacts and reviews proposals for broader economic, social and environmental impact assessments in determining the national interest.

- Chapter 4 details views on the inclusion of international standards in relation to human rights, labour and the environment in Australia's trade and investment agreements to ensure that trade does not undermine international commitments, that domestic industries are not subject to uneven competition, and the potential for trade agreements to improve conditions. It also considers that social and ethical objectives may be more appropriately achieved by other mechanisms, as well as concerns about negative impacts arising from the inclusion of non-trade provisions on domestic industries.
- Chapter 5 identifies the importance of public interest regulation and summarises concerns that provisions in Australia's trade and investment agreements may restrict or undermine the Australian Government's ability to act in the public interest in certain policy areas including investor state dispute settlement provisions, creative and cultural industries, government procurement, digital trade and e-commerce, and intellectual property rights.
- Chapter 6 provides an overview of a range of priorities, focus areas and considerations raised by submitters for Australia's future approach to trade. It covers the need for new and upgraded trade agreements to secure market access and better facilitating trade opportunities under existing agreements. It also discusses types of trade agreements and reform, including the preference for a multilateral approach, and the role for bilateral and plurilateral agreements.
- Chapter 7 considers the benefits of a legislative approach to the content of Australia's trade and investment agreements and outlines evidence relating to the suitability of a legislative approach.



## 2. Background and context

### Overview

- 2.1 Throughout the inquiry, the Committee received evidence highlighting the significance of international trade and investment to Australia. Open trade and investment bring benefits to Australian producers and consumers, increasing prosperity and improving living standards. Submitters noted that open trade and access to overseas markets is vital to the continued success of many Australian business and industries, particularly the agricultural sector.
- 2.2 Australia's trade and investment activity is underpinned by an extensive architecture of bilateral, plurilateral and multilateral free trade agreements (FTAs) as well as bilateral investment treaties (BITs). The Department of Foreign Affairs and Trade (DFAT) leads the negotiation and development of Australia's trade and investment agreements with support from other relevant departments and agencies.
- 2.3 The nature of Australia's trade and investment agreements has changed over time, and several factors continue to shape the context for Australia's approach to trade negotiations. Broadly, these include an increase scope and complexity of agreements over time as well as more recent changes in the international trade environment.

### Benefits of trade and investment for Australia

- 2.4 Submitters and witnesses widely identified the vital role of international trade in enhancing Australia's prosperity, promoting economic growth and achieving higher living standards.<sup>1</sup> To illustrate the extent of the contribution of trade to the Australian economy, the Productivity Commission advised that exports accounted for 27 per cent of Australia's gross domestic product (GDP) in 2022-23 (\$685 billion), with imports accounting for 22 per cent (\$547 billion).<sup>2</sup> Trade is also estimated to support one in four full-time equivalent or almost 3 million Australian jobs.<sup>3</sup>

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<sup>1</sup> See, for example: Australian Industry Group, Submission 4, p. 3; Productivity Commission, Submission 13, p. 4; Red Meat Advisory Council, Submission 16, p. 4; Business Council of Australia, Submission 19, p. 2; Department of Foreign Affairs and Trade, Submission 41, pp. 8–9; Austrade, Submission 42, p. 1; Department of Agriculture, Fisheries and Forestry, Submission 45, p. 3.

<sup>2</sup> Productivity Commission, Submission 13, p. 4, citation omitted.

<sup>3</sup> Department of Foreign Affairs and Trade, Submission 41, p. 8; Austrade, Submission 42, p. 1.

2.5 Greater export and import of goods and services functions to improve domestic productivity and contributes to the improved wellbeing of Australians.<sup>4</sup> The Productivity Commission explained that exports enable Australia to earn foreign income to buy goods and services that it does not produce or that are expensive to produce domestically, while also providing significant employment and higher incomes.<sup>5</sup> Imported goods and services are used by Australian businesses as inputs to production and to expand the range of goods and services available for Australian consumers.<sup>6</sup>

2.6 A key benefit of trade is increased competition between producers.<sup>7</sup> The Productivity Commission explained that:

Imports also provide additional competition to Australian producers, strengthening and deepening Australian markets and lowering the cost, and improving the quality, of Australia goods and services. This extra competition helps make Australian producers more efficient and internationally competitive, by lowering their input costs and the costs of Australian producers that use their outputs as inputs into their own production. It also lowers costs to Australian consumers.<sup>8</sup>

2.7 Dr Hazel Moir also described how the benefits of international trade flow from increased competition:

International trade is an important mechanism for increasing competition for the benefit of both consumers (through lower prices, more choice and higher quality) and producers (through better inputs allowing more efficient production and through the competitive impetus to improve innovation and customer focus).<sup>9</sup>

2.8 The Department of Foreign Affairs and Trade (DFAT) submitted that the benefits of Australia's trade are shared across the community, including through broad economic growth and a stronger labour market.<sup>10</sup>

2.9 However, some submitters argued the benefits of trade for Australia should be more widely and equitably shared.<sup>11</sup> For example, the Australian Council of Trade Unions (ACTU) noted that while trade is a vehicle for economic growth, job creation, and raising living standards:

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<sup>4</sup> Productivity Commission, Submission 13, p. 4; Department of Foreign Affairs and Trade, Submission 41, p. 8.

<sup>5</sup> Productivity Commission, Submission 13, p. 4. See also: Department of Foreign Affairs and Trade, Submission 41, p. 8.

<sup>6</sup> Productivity Commission, Submission 13, p. 4. See also: Department of Foreign Affairs and Trade, Submission 41, p. 8.

<sup>7</sup> Productivity Commission, Submission 13, p. 4; Dr Hazel Moir, Submission 28, p. 1.

<sup>8</sup> Productivity Commission, Submission 13, p. 4.

<sup>9</sup> Dr Hazel Moir, Submission 28, p. 1.

<sup>10</sup> Department of Foreign Affairs and Trade, Submission 41, p. 8.

<sup>11</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 6–7; Australian Small Business and Family Enterprise Ombudsman, Submission 11, p. 1; Electrical Trades Union of Australia, Submission 30, p. 3; Australian Council of Trade Unions, Submission 49, p. 1–3.

The most important objective of trade policy should be to deliver benefits to workers, the community and the economy by increasing opportunities for local businesses, creating quality local jobs, and protecting public services. The benefits of trade must be shared among our community, and promote equitable development abroad.<sup>12</sup>

- 2.10 Foreign investment also plays a vital role in Australia's economy and in advancing prosperity.<sup>13</sup> The development of Australia's highly successful minerals, energy, and agriculture industries have been substantially underpinned by foreign investment.<sup>14</sup> Foreign investment in Australia exceeds outbound investment from Australia, in 2022 investment in Australia totalled \$4.6 trillion while outbound investment totalled \$3.7 trillion.<sup>15</sup>
- 2.11 DFAT summarised the benefits of foreign investment in Australia as delivering higher productivity; building the economy and creating jobs by improving business links to global supply chains; offering capital to finance new businesses and expand existing businesses; providing finance for infrastructure; and encouraging competition and innovation by delivering new knowledge and technology.<sup>16</sup> On the other hand, the ability for Australia to invest internationally provides the opportunity to diversity investment, as well as the opportunity for business to expand markets, acquire new technology and integrate into global value chains.<sup>17</sup>
- 2.12 The importance of ensuring that trade and investment agreements are in the national interest and provide a net benefit to Australia as well as how the national interest is determined and how economic, social, and environmental impacts are assessed is discussed further in Chapter 3.

## Importance of open trade and investment for Australian industries

- 2.13 Submitters widely drew attention to the importance of trade to the success of many Australian industries.<sup>18</sup> It was noted that Australian agriculture, fisheries, and forestry in particular, are strongly dependent on trade with over 70 per cent of produce exported.<sup>19</sup> In 2022, agricultural exports contributed a record \$78 billion to the Australian economy.<sup>20</sup>

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<sup>12</sup> Australian Council of Trade Unions, Submission 49, p. 1.

<sup>13</sup> Productivity Commission, Submission 13, p. 11; Department of Foreign Affairs and Trade, Submission 41, pp. 8 and 19.

<sup>14</sup> Department of Foreign Affairs and Trade, Submission 41, p. 8.

<sup>15</sup> Productivity Commission, Submission 13, p. 11.

<sup>16</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 8 and 19.

<sup>17</sup> Department of Foreign Affairs and Trade, Submission 41, p. 19.

<sup>18</sup> See, for example: Australian Organic Limited, Submission 3, p. 3; Grain Trade Australia, Submission 6, p. 1; GrainGrowers Limited, Submission 12, p. 1; Red Meat Advisory Council, Submission 16, p. 4; Grains Australia, Submission 17, p. 1; National Farmers' Federation, Submission 35, p. 7; Australian Pork Limited, Submission 39, p. 3; Department of Agriculture, Fisheries and Forestry, Submission 45, p. 3.

<sup>19</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 3; National Farmers' Federation, Submission 35, p. 7.

<sup>20</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 3.

- 2.14 Grain Trade Australia (GTA) advised that international trade underpins the Australian grain industry, which provides substantial economic benefits, especially in regional and rural areas.<sup>21</sup> Around 65 to 75 per cent of Australian grain is exported.<sup>22</sup> In 2022-23, the forecast farm-gate value of Australian grain was \$30.7 billion and the export value was \$28.3 billion, amounting to more than 33 per cent of the Australia's gross value of annual agricultural production.<sup>23</sup>
- 2.15 The Red Meat Advisory Council (RMAC) outlined the significance of trade to Australia's red meat industry:
- Access to overseas markets is critical not only for the export of produce and underpinning our domestic industries, but also for the sourcing of inputs, technology and capital equipment. These trade transfers are paramount for business efficiency. This efficiency can only be derived by Australia embracing trade and, where necessary, trade liberalisation.<sup>24</sup>
- 2.16 The Department of Agriculture, Fisheries and Forestry (DAFF) reflected that the Australian agriculture sector relies on the predictability and stability of export markets provided by improved preferential access through trade agreements.<sup>25</sup>
- 2.17 Consequently, submitters emphasised that continued trade liberalisation and prioritising improved market access in trade negotiations is crucial to maintaining and growing Australia's agricultural industries.<sup>26</sup> For example, the National Farmers' Federation (NFF) stated that: '... agricultural trade needs to be free and liberalised and distortions such as tariffs, subsidies and other technical market access barriers should be limited and where possible removed.'<sup>27</sup>
- 2.18 Similarly, GrainGrowers Limited explained: 'Australian growers are some of the least subsidised in the world, relying on a free and open trading environment to ensure ongoing profitability and sustainable growth.'<sup>28</sup>
- 2.19 Both the NFF and Australia Pork Limited (APL) reflected that Australia is a trusted supplier of agricultural products and that Australian agricultural industries have a strong global reputation for providing high-quality, safe, and sustainable food.<sup>29</sup>

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<sup>21</sup> Grain Trade Australia, Submission 6, p. 2.

<sup>22</sup> Grain Trade Australia, Submission 6, p. 1.

<sup>23</sup> Grain Trade Australia, Submission 6, p. 1.

<sup>24</sup> Red Meat Advisory Council, Submission 16, p. 4.

<sup>25</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 3.

<sup>26</sup> See, for example: Grain Trade Australia, Submission 6, pp. 1–2; CropLife Australia, Submission 9, p. 2; GrainGrowers Limited, Submission 12, p. 1; Red Meat Advisory Council, Submission 16, p. 4; Grains Australia, Submission 17, p. 2; National Farmers' Federation, Submission 35, p. 8; Australian Pork Limited, Submission 39, p. 3.

<sup>27</sup> National Farmers' Federation, Submission 35, p. 8.

<sup>28</sup> GrainGrowers Limited, Submission 12, p. 1.

<sup>29</sup> National Farmers' Federation, Submission 35, p. 7; Australian Pork Limited, Submission 39, p. 3.

- 2.20 Evidence emphasising the need for a continued focus on new and existing trade agreements to improve market access, including through the removal of tariff and non-tariff barriers is discussed further in Chapter 6.

## Australia's trade and investment architecture

- 2.21 This section describes Australia's current trade and investment agreement architecture and the different types of trade and investment agreements that Australia has entered into with partner countries.

### Types of trade and investment agreements

- 2.22 Australia has a range of multilateral, plurilateral, regional, and bilateral trade and investment agreements, including both legally binding treaties and non-legally binding arrangements—such as memorandums of understanding—with other economies.<sup>30</sup>
- 2.23 The negotiation of Australia's multilateral and plurilateral trade agreements occurs under the auspices of the World Trade Organization (WTO).<sup>31</sup> A multilateral trade agreement is one that all WTO members are a party to; in contrast, a plurilateral trade agreement is one that WTO members can choose to participate in.<sup>32</sup>
- 2.24 WTO multilateral trade agreements include the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the WTO Agreement on Trade Facilitation, and the WTO Agreement on Fisheries Subsidies.<sup>33</sup> Australia's participation in WTO plurilateral trade agreement negotiations include the upgrade to the WTO Information Technology Agreement, the WTO Agreement on Government Procurement (GPA), and WTO negotiations on e-commerce, investment facilitation, and services rules.<sup>34</sup>
- 2.25 In addition to multilateral and plurilateral agreements, Australia has settled a series of regional and bilateral free trade agreements (FTAs) with other countries.<sup>35</sup>
- 2.26 DFAT gave evidence that Australia's trade-related arrangements serve to:
- ... help safeguard and promote Australia's national trade and investment interests in key export markets, building on WTO commitments. FTAs reduce or eliminate barriers to trade in goods, services and investment and enable Australian exporters and investors to benefit from the same or better preferential access than our competitors and their investors enjoy in overseas markets. FTAs

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<sup>30</sup> Department of Foreign Affairs and Trade, Submission 41, p. 9.

<sup>31</sup> Department of Foreign Affairs and Trade, Submission 41, p. 9.

<sup>32</sup> Department of Foreign Affairs and Trade, Submission 41, p. 9.

<sup>33</sup> Department of Foreign Affairs and Trade, Submission 41, p. 9.

<sup>34</sup> Department of Foreign Affairs and Trade, Submission 41, p. 9.

<sup>35</sup> Department of Foreign Affairs and Trade, Submission 41, p. 9.

also enhance people-to-people links, strengthen bilateral relationships and promote regional economic integration and collaboration.<sup>36</sup>

2.27 Australia has also negotiated a range of bilateral investment treaties (BITs) with partner countries. DFAT explained that: 'BITs are treaties... that include rules to promote and protect two-way investment... These investment rules provide protections and greater certainty for Australian investors overseas and foreign investors in Australia.'<sup>37</sup> For example, BITs may include rules relating to non-discrimination, appropriation of an investor's property, and fair and equitable treatment for investors.<sup>38</sup>

## **Australia's bilateral and regional trade agreements**

2.28 Australia currently has 18 regional and bilateral trade agreements in force with 30 economies (listed below with entry-into-force dates):

- Australia-United Kingdom FTA (31 May 2023)
- Australia-India Economic Cooperation and Trade Agreement (29 December 2022)
- Regional Comprehensive Economic Partnership (1 January 2022)
- Pacific Agreement on Closer Economic Relations (13 December 2020)
- Indonesia-Australia Comprehensive Economic Partnership Agreement (5 July 2020)
- Peru-Australia FTA (11 February 2020)
- Australia-Hong Kong FTA (17 January 2020)
- Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (30 December 2018)
- China-Australia FTA (20 December 2015)
- Japan-Australia Economic Partnership Agreement (15 January 2015)
- Korea-Australia FTA (12 December 2014)
- Malaysia-Australia FTA (1 January 2013)
- Association of Southeast Asian Nations (ASEAN)-Australia-New Zealand FTA (1 January 2010)
- Australia-Chile FTA (6 March 2009)
- Thailand-Australia FTA (1 January 2005)
- Australia-United States FTA (1 January 2005)
- Singapore-Australia FTA (28 July 2003)

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<sup>36</sup> Department of Foreign Affairs and Trade, Submission 41, p. 10.

<sup>37</sup> Department of Foreign Affairs and Trade, Submission 41, p. 10.

<sup>38</sup> Department of Foreign Affairs and Trade, Submission 41, p. 19; Australian Industry Group, Submission 4, p. 2.

- Australia-New Zealand Closer Economic Relations Trade Agreement (1 January 1983).<sup>39</sup>
- 2.29 Australia's trade agreements accounted for 81 per cent of Australia goods trade in 2021-22 (85 percent of exports and 75 per cent of imports).<sup>40</sup>
- 2.30 Additionally, Australia is continuing to undertake negotiations to secure four more agreements (listed with negotiation launch dates):
- Australia-European Union FTA (June 2018)
  - Australia-India Comprehensive Economic Cooperation Agreement (first commenced in May 2011; suspended in 2016; recommenced in September 2021)
  - Indo-Pacific Economic Framework (September 2022).<sup>41</sup>
  - Australia-United Arab Emirates Comprehensive Economic Partnership Agreement (December 2023).<sup>42</sup>
- 2.31 A further FTA—the Australia-Gulf Cooperation Council (GCC) FTA—remains under consideration.<sup>43</sup> Negotiations for an Australia-GCC FTA commenced in July 2007 but were later paused, with the last of four negotiating rounds happening in June 2009.<sup>44</sup> Stakeholders remain able to make written submissions to DFAT on the potential to recommence these negotiations.<sup>45</sup>

## Australia's foreign investment agreements

- 2.32 Australia is currently a party to 15 BITs with the following countries (listed below with entry-into-force dates):
- Argentina (11 January 1997)
  - China (11 July 1988)
  - Czech Republic (29 June 1994)
  - Egypt (5 September 2022)
  - Hungary (10 May 1992)
  - Laos (8 April 1995)
  - Lithuania (10 May 2022)
  - Pakistan (14 October 1998)

<sup>39</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 16–18.

<sup>40</sup> Productivity Commission, Submission 13, p. 13, citation omitted.

<sup>41</sup> Department of Foreign Affairs and Trade, Submission 41, p. 15.

<sup>42</sup> Australia-UAE Comprehensive Economic Partnership Agreement (CEPA), Department of Foreign Affairs and Trade, accessed 14 March 2024, <https://www.dfat.gov.au/trade/agreements/negotiations/australia-uae-comprehensive-economic-partnership-agreement-cepa>.

<sup>43</sup> Department of Foreign Affairs and Trade, Submission 41, p. 18.

<sup>44</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 18–19.

<sup>45</sup> Department of Foreign Affairs and Trade, Submission 41, p. 19.

- Papua New Guinea (20 October 1991)
- Philippines (8 December 1995)
- Poland (27 March 1992)
- Romania (22 April 1994)
- Sri Lanka (14 March 2007)
- Turkey (29 June 2009)
- Uruguay (23 January 2022).<sup>46</sup>

2.33 Both BITs and FTAs facilitate foreign investment in Australia.<sup>47</sup> More recently, FTAs often contain an investment chapter with requirements to safeguard investment activities.<sup>48</sup> For example, DFAT explained that Australia’s FTAs have provisions that seek to:

- attract beneficial investment by showcasing Australia as an open and attractive investment destination;
- preserve the operation of Australia’s foreign investment framework, particularly the Foreign Investment Review Board which allows screening of investment; and
- facilitate greater access to overseas markets for Australian investors.<sup>49</sup>

## **Australian Government departments and agencies**

2.34 Australian Government departments and agencies work collectively to negotiate, implement, and upgrade Australia’s trade and investment agreements. Although different departments and agencies have different roles, they are responsible for considering and assessing the national interest in the negotiation process, including engaging with relevant stakeholders.

2.35 This section details the evidence that the Committee received about the roles of departments and agencies in negotiating trade and investment agreements.

### **Foreign Affairs and Trade portfolio**

2.36 DFAT and the Australian Trade and Investment Commission (Austrade) within the Foreign Affairs and Trade portfolio play a central part in negotiating and promoting Australia’s trade and investment agreements.

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<sup>46</sup> Department of Foreign Affairs and Trade, Submission 41, p. 20.

<sup>47</sup> Department of Foreign Affairs and Trade, Submission 41, p. 19.

<sup>48</sup> Department of Foreign Affairs and Trade, Submission 41, p. 19.

<sup>49</sup> Department of Foreign Affairs and Trade, Submission 41, p. 19.

## Department of Foreign Affairs and Trade

- 2.37 DFAT leads and coordinates whole-of-government negotiations for most of Australia's trade and investment agreements.<sup>50</sup> This includes forming a negotiating position and obtaining a negotiating mandate through Cabinet; conducting negotiations with partner countries; engaging with interested stakeholders, including other departments and agencies; and, where necessary, preparing a National Interest Analysis (NIA) and Impact Analysis for the consideration of the Joint Standing Committee on Treaties (JSCOT).<sup>51</sup>
- 2.38 In addition to finalising negotiations, DFAT supports businesses to be aware of and understand that advantages and conditions of FTAs.<sup>52</sup> For instance, the FTA Portal website is a DFAT resource that provides: '... information to businesses for all Australia's in-force FTAs, as well as for those FTAs that are signed but not yet in force, to help business prepare for their entry into force.'<sup>53</sup>

## Austrade

- 2.39 Austrade has responsibility for promoting, facilitating, and accelerating trade and foreign investment between Australia and other countries.<sup>54</sup> As an agency with a network of representatives in 107 domestic and international locations, Austrade receives intelligence from a wide range of potential investors.<sup>55</sup> Before and during the negotiation of trade and investment agreements, Austrade shares its market insights with DFAT and other departments and agencies.<sup>56</sup>
- 2.40 Austrade also plays a key role in the implementation of trade and investment agreements. For instance, it frequently engages with businesses to inform them of how to best take advantage of trade and investment agreements and uses the feedback that it receives to support the development of fact sheets and guidance materials for potential investors.<sup>57</sup>

## Agriculture, Fisheries and Forestry portfolio

- 2.41 DAFF is closely involved in trade agreement negotiations, offering expertise in areas such as agricultural market access and sanitary and phytosanitary measures.<sup>58</sup> It collaborates closely with DFAT on the development and conclusion of negotiating mandates to ensure that its stakeholders' perspectives and broader biosecurity,

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<sup>50</sup> Department of Foreign Affairs and Trade, Submission 41, p. 24; Department of Agriculture, Fisheries and Forestry, Submission 45, p. 4.

<sup>51</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 25 and 34.

<sup>52</sup> Department of Foreign Affairs and Trade, Submission 41, p. 31.

<sup>53</sup> Department of Foreign Affairs and Trade, Submission 41, p. 31.

<sup>54</sup> Austrade, Submission 42, p. 1.

<sup>55</sup> Austrade, Submission 42, p. 2.

<sup>56</sup> Austrade, Submission 42, p. 2.

<sup>57</sup> Austrade, Submission 42, p. 3.

<sup>58</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 3.

environmental and sustainability considerations are incorporated into trade agreements.<sup>59</sup>

- 2.42 DAFF leads the negotiations of commodity-specific trade agreements.<sup>60</sup> For example, DAFF is currently renegotiating the Agreement between Australia and the European Community on Trade in Wine. This includes responsibility for: ‘... developing the negotiating mandate, leading consultation with relevant agencies and the wine industry and the treaty making process when negotiations are finalised.’<sup>61</sup> DAFF also supports the continuing administration of these commodity-specific trade agreements and any commodity-specific dialogues formed as part of an FTA.<sup>62</sup>

## Home Affairs portfolio

- 2.43 The Department of Home Affairs and the Australian Border Force (ABF) within the Home Affairs portfolio participate throughout the trade agreement negotiation process, including the development of negotiating mandates and implementation.<sup>63</sup>

### Department of Home Affairs

- 2.44 The Department of Home Affairs is responsible for the movement of natural persons (MNP) components of FTAs.<sup>64</sup> This role has evolved over time, with MNP-related parts of FTAs expanding to contain ‘more extensive movement offerings, such as skills exchange, working holiday maker programs, and post study employment options.’<sup>65</sup>

### Australian Border Force

- 2.45 The ABF, as Australia’s customs service that facilitates the movement of people and goods across the border, leads the portfolio’s participation in the negotiating and implementation of FTAs. It is responsible for the movement of goods aspects of trade agreement negotiations (excluding tariff levels and rules of origin, which are developed between DFAT, DAFF and the Department of Industry Science and Resources with the engagement of the ABF).<sup>66</sup> Additionally, to implement each FTA, the ABF is required to implement legislative changes so that the agreement can enter into force.

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<sup>59</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 3.

<sup>60</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 3.

<sup>61</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 4.

<sup>62</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 4.

<sup>63</sup> Department of Home Affairs, Submission 10, p. 3.

<sup>64</sup> Department of Home Affairs, Submission 10, p. 3.

<sup>65</sup> Department of Home Affairs, Submission 10, p. 3.

<sup>66</sup> Department of Home Affairs, Submission 10, p. 3.

## Australia's trade and investment context

2.46 Some submitters reflected on how the nature of Australia's trade and investment agreements has changed over time, as well as factors that have and will continue to shape the context for Australia's approach to trade negotiations. Broadly, these were an increase in the scope and complexity of agreements over time as well as more recent changes in the international environment including the breakdown of the multilateral trade framework and a rise protectionism.

### Scope and complexity of agreements

2.47 Many submitters and witnesses reflected that Australia's trade and investment agreements have become broader in scope and more complex over time.<sup>67</sup> The Productivity Commission summarised that:

Our early agreements focused on removing tariff and non-tariff barriers (such as quotas) to international trade in goods. Subsequent agreements included barriers to trade in services, including the temporary movement of people, and then to include impediments to international investment. Recent agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership [CPTPP], include a raft of additional provisions that cover areas such as digital trade, health, the environment, labour, and anti-corruption.<sup>68</sup>

2.48 DFAT similarly explained that: 'While early trade agreements focused on reducing or eliminating import tariffs on goods, the benefits of contemporary agreements are much broader and include improved rules across a range of sectors including intellectual property, e-commerce and government procurement.'<sup>69</sup>

2.49 Referring to the Australia–United Kingdom Free Trade Agreement (A-UKFTA) as an example, the Productivity Commission noted that it contains 32 chapters with those in addition to trade and investment including intellectual property, government procurement, competition policy and consumer protection, state-owned enterprises and designated monopolies, innovation, labour, environment, development, trade and gender equity, animal welfare and antimicrobial resistance.<sup>70</sup>

2.50 Dr Hazel Moir similarly observed that agreements have expanded over time to include many issues beyond tariff barriers and quotas such as government

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<sup>67</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 7; Department of Home Affairs, Submission 10, p. 3; Productivity Commission, Submission 13, p. 13; Dr Hazel Moir, Submission 28, Attachment 1, pp. 2–4; Electrical Trades Union, Submission 30, p. 2; Department of Foreign Affairs and Trade, Submission 41, p. 9; Department of Agriculture, Fisheries and Forestry, Submission 45, p. 6.

<sup>68</sup> Productivity Commission, Submission 13, p. 13. See also: Department of Foreign Affairs and Trade, Submission 41, p. 9.

<sup>69</sup> Department of Foreign Affairs and Trade, Submission 41, p. 9.

<sup>70</sup> Productivity Commission, Submission 13, p. 7. See also: Australian Fair Trade and Investment Network, Submission 8, p. 7.

procurement, capital mobility, competition policy, labour standards and environmental goals.<sup>71</sup>

- 2.51 The Productivity Commission explained that the content of contemporary trade and investment agreements is far broader and more comprehensive than what is required to gain market access for Australian goods, services, and investment.<sup>72</sup> Therefore, it observed that: ‘... modern trade agreements look much more like ‘broad cooperation’ agreements in which countries commit to solving a range of problems bilaterally or in small or more extended groups.’<sup>73</sup>

## International environment

- 2.52 Australia has historically been a strong supporter of the international rules-based trading system and has generally advocated for a multilateral approach to trade.<sup>74</sup> However, several submitters observed that the multilateral approach to international trade, particularly through WTO, has stalled in recent years.<sup>75</sup>
- 2.53 The Productivity Commission explained that the breakdown of multilateral trade negotiations in 2011 led to fundamental changes in international trade and noted that bilateral agreements that were previously limited in number have become increasingly common.<sup>76</sup> It stated that: ‘After the breakdown of the Doha round, there was a proliferation of, at first, bilateral, and then plurilateral, trading agreements that sought to circumvent the failure of the multilateral round to advance trade reform.’<sup>77</sup>
- 2.54 Some submitters noted the rise in international trade protectionism in recent years.<sup>78</sup> For example, DAFF reflected that the international trade environment is becoming increasingly complex due to rising protectionism and increasing strategic challenges.<sup>79</sup>
- 2.55 The Productivity Commission suggested that the causes of rising protectionist sentiment include concerns about economic resilience and stable supply chains, especially during the COVID-19 pandemic; geopolitical conflicts, such as the Russian invasion of Ukraine; the challenges associated with climate change mitigation and

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<sup>71</sup> Dr Hazel Moir, Submission 28, Attachment 1, p. 4. See also: Australian Fair Trade and Investment Network, Submission 8, p. 7.

<sup>72</sup> Productivity Commission, Submission 13, p. 4.

<sup>73</sup> Productivity Commission, Submission 13, p. 4.

<sup>74</sup> Productivity Commission, Submission 13, p. 12; Department of Foreign Affairs and Trade, Submission 41, p. 8.

<sup>75</sup> GrainGrowers Limited, Submission 12, p. 1; Productivity Commission, Submission 13, p. 12; National Farmers’ Federation, Submission 35, p. 7.

<sup>76</sup> Productivity Commission, Submission 13, p. 12.

<sup>77</sup> Productivity Commission, Submission 13, p. 12.

<sup>78</sup> GrainGrowers Limited, Submission 12, p. 1; Productivity Commission, Submission 13, p. 5; German Australian Business Council, Submission 25, p. 3; New Zealand Ministry of Foreign Affairs and Trade, Submission 33, p. 1; Department of Agriculture, Fisheries and Forestry, Submission 45, pp. 3 and 6.

<sup>79</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 6.

adaptation; and some major countries' recent policy responses, which have often incited replies from other economies.<sup>80</sup>

- 2.56 The New Zealand Ministry of Foreign Affairs and Trade (NZ MFAT) also observed the global trend away from trade openness and an increasing discontent with globalisation:

The two assumptions that have shaped our trade policy over the past thirty years—that global market openness will continue to increase over time, and the multi-lateral rules-based system will continue to strengthen and expand—have been seriously tested by rising protectionism.

Domestically, discontent with globalisation has grown, and with it, reservations about the balance in trade agreements between market access for our exporters, national sovereignty and policy space for regulators.<sup>81</sup>

## Committee Comment


- 2.57 The Committee recognises that open international trade and investment makes a significant contribution to the Australian economy and to the wellbeing of Australians. Further, it notes that many successful Australian industries are underpinned by access to export markets and are supported by access to foreign capital.
- 2.58 The Committee acknowledges the strong track record of DFAT over many years in negotiating, maintaining, and promoting Australia's extensive architecture of trade and investment agreements. Overall, the Committee is of the view that Australia's trade and investment agreements have largely served Australia well.
- 2.59 The Committee notes that the nature of Australia's trade and investment agreements has changed over time, with agreements becoming broader in scope and more complex. Further, that changes to the international environment have necessarily shaped Australia's approach to trade with the response to the breakdown of the multilateral approach being to seek a range of bilateral and regional agreements to continue to pursue the benefits of international trade. The recent rise in protectionist and anti-globalisation sentiment poses a significant challenge for Australia's interests as an economy reliant on open international trade.

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<sup>80</sup> Productivity Commission, Submission 13, p. 5.

<sup>81</sup> New Zealand Ministry of Foreign Affairs and Trade, Submission 33, p. 1.





## 3. Determining the national interest and assessing impacts

### Overview

- 3.1 During the inquiry, submitters and witnesses provided evidence emphasising the importance of Australia's trade and investment agreements being in the national interest. Whether an agreement is in the national interest is determined through the development of the negotiating mandate (including stakeholder consultation), the formal National Interest Analysis (NIA), economic modelling to consider economic impacts, and both qualitative and quantitative consideration of economic, social, and environmental impacts.
- 3.2 Several concerns were raised with the current approach to assessing whether proposed trade and investment agreements are in the national interest. These included how impacts on wider elements of the economy and society are accounted for, insufficient identification of costs and those that may be disadvantaged, and the Department of Foreign Affairs and Trade (DFAT) being responsible for both negotiating and assessing agreements.
- 3.3 Subsequently, submitters put forward the need for broader and independent economic, social, and environmental impact assessments of trade agreements prior to, during and after negotiations. It was suggested that such assessments would more accurately identify the overall costs and benefits of agreements and contribute to more effectively determining whether trade agreements provide a net benefit and are in the national interest.

### Determining the national interest

- 3.4 The benefits of trade and investment for Australia, including the importance of trade to the success of many of Australia's industries, are outlined in Chapter 2. While the potential benefits of trade were widely acknowledged, many submitters emphasised that Australia's trade and investment agreements must produce an overall net benefit for Australia.<sup>1</sup> For example, the Productivity Commission explained that:

It is important that the anticipated benefits from any proposed agreement outweigh the anticipated costs. That is, it is important that each agreement will

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<sup>1</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, pp. 6–7; CropLife Australia, Submission 9, p. 5; Productivity Commission, Submission 13, p. 7; Grains Australia, Submission 17, p. 2; Dr Hazel Moir, Submission 28, Attachment 1, p. 1; Electrical Trades Union, Submission 30, p. 2; Department of Foreign Affairs and Trade, Submission 41, pp. 6 and 37.

result in an expected net benefit to Australia and for Australians. Producing an expected net benefit is a prerequisite for being in the national interest.<sup>2</sup>

- 3.5 Dr Hazel Moir submitted that: ‘There must be one over-riding objective for trade treaties – the benefits to Australia as a whole must outweigh the costs.’<sup>3</sup> Similarly, CropLife Australia observed that: ‘Australia’s entry into a comprehensive FTA [free trade agreement] with any nation or region must be contingent upon it being in our national interest.’<sup>4</sup>
- 3.6 Others reflected that trade and investment agreements are not goals in themselves and should not only be entered into where there is a clear benefit.<sup>5</sup> For example, Grains Australia explained that in their view: ‘Government should not make trade agreements at any cost. Any negotiations should be in Australia’s national interest, and in the interest of Australia[’s] agriculture sector. Securing best possible terms for the Australian grain industry will always outweigh the commitment to closing negotiations and settling on agreements lacking benefit.’<sup>6</sup>
- 3.7 Some submitters underscored that while trade contributes to economic growth and improved living standards, there are both winners and losers from trade agreements.<sup>7</sup>
- 3.8 The Productivity Commission highlighted the need for broad consideration of the national interest, with benefits shared across the economy and society: ‘The decision to enter into a broad cooperation or a trade agreement should reflect an expected net overall benefit to the entire Australian community rather than one that reflects narrow commercial interests.’<sup>8</sup>
- 3.9 The Electrical Trades Union (ETU) acknowledged the potential benefits of trade while citing the need for broad consideration of the national interest and to actively pursue more widely shared benefits of trade:

Well calibrated trade policy has the potential to drive job creation, improved living standards, economic growth, and lower inequality. Sharing the benefits of trade across the Australian economy, uplifting workers and communities at home and abroad, is not something that simply happens naturally as a result of removing barriers to international trade. Fair trade must be actively pursued as a distinct policy objective, distinct from our current approach of prioritising the needs of investors and private businesses above broader national interest considerations.<sup>9</sup>

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<sup>2</sup> Productivity Commission, Submission 13, p. 8.

<sup>3</sup> Dr Hazel Moir, Submission 28, Attachment 1, p. 1.

<sup>4</sup> CropLife Australia, Submission 9, p. 5.

<sup>5</sup> Productivity Commission, Submission 13, p. 7; Grains Australia, Submission 17, p. 2; Dr Hazel Moir, Submission 28, Attachment 1, p. 8.

<sup>6</sup> Grains Australia, Submission 17, p. 2.

<sup>7</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 6–7; Dr Hazel Moir, Submission 28, Attachment 1, p. 1.

<sup>8</sup> Productivity Commission, Submission 13, pp. 16–17.

<sup>9</sup> Electrical Trades Union, Submission 30, p. 2. See also: Australian Council of Trade Unions, Submission 49, p. 1.

3.10 The Productivity Commission noted that given the majority of Australia's trade is now covered by trade agreements, there should be careful consideration as to whether there are net benefits from negotiating new agreements.<sup>10</sup>

3.11 The Department of Foreign Affairs and Trade (DFAT) explained that there are a range of mechanisms throughout the negotiation process that assist to determine whether a trade agreement is in the national interest:

An initial consideration of the national interest informs the political decision to start formal consideration of commencing a negotiation. Consideration of the national interest also underpins government decisions on the negotiating mandate. In making these assessments, the Government is informed by the extensive consultations and stakeholder engagement processes..., which allow for a wide range of views to inform Australia's approach before and during negotiations.

An assessment of whether a trade-related agreement is in the national interest is supported by various other mechanisms including Parliamentary review, stakeholder engagement and independent analysis.<sup>11</sup>

## National Interest Analysis and economic impact assessment

3.12 DFAT advised that the formal vehicle for examining whether new trade and investment agreements are in the national interest is the National Interest Analysis (NIA).<sup>12</sup> All major proposed treaty actions to be tabled in the Parliament are accompanied by NIAs, including all free trade agreements (known as category 1) and bilateral investment treaties (BITs; known as category 2).<sup>13</sup> NIAs are tabled in the Parliament alongside the treaty itself.<sup>14</sup> NIAs for all previous trade agreements are publicly available.<sup>15</sup>

3.13 NIAs for trade and investment agreements are prepared by DFAT on a whole-of-government basis in consultation with other key government agencies.<sup>16</sup> DFAT outlined some of the key factors examined in the NIA to determine whether entering into a proposed treaty action is in Australia's national interest:

NIAs include a discussion of the foreseeable economic, environmental, social and cultural effects of the treaty action; the obligations imposed by the treaty; its direct financial costs to Australia; how the treaty would be implemented

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<sup>10</sup> Professor Alexander Robson, Acting Chair, Productivity Commission, *Committee Hansard*, Melbourne, 3 November 2023, p. 37.

<sup>11</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 6 and 37.

<sup>12</sup> Department of Foreign Affairs and Trade, Submission 41, p. 37.

<sup>13</sup> Department of Foreign Affairs and Trade, Submission 41, p. 34. Note: Minor treaty actions (known as category 3) are not tabled in Parliament and do not require an NIA. These may include minor amendments to the annexes of an FTA that do not significantly impact the national interest and will have a negligible effect.

<sup>14</sup> Department of Foreign Affairs and Trade, Submission 41, p. 37.

<sup>15</sup> Department of Foreign Affairs and Trade, Submission 41, p. 38.

<sup>16</sup> Department of Foreign Affairs and Trade, Submission 41, p. 37.

domestically; what consultation has occurred in relation to the treaty action; and whether or not the treaty provides for withdrawal or denunciation.<sup>17</sup>

- 3.14 DFAT advised that it undertakes various forms of quantitative and qualitative analysis on the prospect of commencing trade agreement negotiations, including independent analysis in the form of feasibility studies which may contain independent economic modelling.<sup>18</sup> It further explained that:

Some FTA feasibility studies are primarily based on detailed economic analysis and modelling, while others are focused on political economy matters. Typically, feasibility studies look at current trade barriers, the potential for market growth in areas of interest to the parties and, to varying levels of detail, a cost-benefit analysis of entering into FTA negotiations.<sup>19</sup>

- 3.15 DFAT elaborated on economic modelling and other analysis undertaken to inform trade negotiations and to review agreements once in force:

DFAT also considers independent analysis and modelling to assess the impact an agreement might have on the overall economy and Australian society. Modelling frameworks such as Computable General Equilibrium (CGE) modelling can be useful in understanding the economy-wide impacts of changes to trade policy.

This approach is also regularly undertaken within impact assessments and post-implementation reviews of FTAs. At the conclusion of negotiations, DFAT conducts qualitative and quantitative analyses using relevant trade data, industry reporting and industry consultation to assess the potential impacts of the negotiated outcome of trade and investment agreements. This process can be repeated to assess the real-life impacts of an agreement once it has entered into force.<sup>20</sup>

- 3.16 DFAT stated that it approaches economic modelling to inform the feasibility and impact of trade agreements on a case-by-case basis, in part due to the limitations of modelling in assessing the impact of trade agreements.<sup>21</sup> These limitations include the availability and reliability of data; the challenge of modelling an agreement under negotiation; the difficulty in estimating and validating parameters corresponding to the real-world effects of non-tariff barriers, trade facilitation, rules of origin and increased regulatory certainty; challenges in qualifying political, social, and environmental impacts; and sensitivity of outcomes to methodology, model closures and assumptions.<sup>22</sup>

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<sup>17</sup> Department of Foreign Affairs and Trade, Submission 41, p. 34. See also p. 37.

<sup>18</sup> Department of Foreign Affairs and Trade, Submission 41, p. 38.

<sup>19</sup> Department of Foreign Affairs and Trade, Submission 41, p. 39.

<sup>20</sup> Department of Foreign Affairs and Trade, Submission 41, p. 38.

<sup>21</sup> Department of Foreign Affairs and Trade, Submission 41, p. 39.

<sup>22</sup> Department of Foreign Affairs and Trade, Submission 41, p. 39.

## Concerns with National Interest Analysis and economic impact assessment

- 3.17 Several submitters were of the view that the current NIA process does not provide an adequate assessment of the costs and benefits of a proposed agreement.<sup>23</sup> For example, the Australian Council of Trade Unions (ACTU) argued that both the NIA and Regulatory Impact Statement (RIS) are insufficient for determining the impact of a trade agreement because there is no assessment of the labour, social, health, environmental impacts, or the impact on jobs, regions, women, and Indigenous communities.<sup>24</sup>
- 3.18 Similarly, ActionAid Australia suggested that the NIA: ‘... almost always reflects favourably on agreements without providing a genuine analysis of their potential costs and benefits.’<sup>25</sup> AFTINET, the ETU, and the ACTU also observed that NIAs almost always provide a favourable assessment and recommend that proposed treaty action be taken.<sup>26</sup>
- 3.19 Dr Moir contended that current approaches to assessing impacts and determining the national interest do not sufficiently account for the costs or identify those that may be disadvantaged by trade agreements.<sup>27</sup> Dr Moir told the Committee that: ‘There’s a real unwillingness to do a simple evaluation of who the winners and losers are. There are always losers in trade treaties. There’s not a proper assessment, in my view, of those losses and how those losses might be recompensed in some way if a government is intent on favouring other parts of society.’<sup>28</sup>
- 3.20 Dr Moir also commented on the inherent challenges in undertaking economic modelling of trade agreements and the differing views amongst economists about the most appropriate models.<sup>29</sup> Furthermore:

Despite reservations about the value of some types of general equilibrium models in analysing the impact of trade treaties, more realistic models are available. And there are a range of data which can throw light on the magnitudes of gains and losses, and the principal groups affected. Current treaty assessments do not seem to make use of this wide range of available information and analysis. In particular, they seem to assiduously avoid identifying losers.<sup>30</sup>

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<sup>23</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 8; Australian Workers’ Union, Submission 24, p. 4; Dr Hazel Moir, Submission 28, p. 4; Electrical Trades Union, Submission 30, p. 10; Australian Manufacturing Workers’ Union, Submission 43, pp. 2–3; ActionAid Australia, Submission 48, p. 8; Australian Council of Trade Unions, Submission 49, p. 7.

<sup>24</sup> Australian Council of Trade Unions, Submission 49, p. 7.

<sup>25</sup> ActionAid Australia, Submission 48, p. 8

<sup>26</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 8 and 11; Electrical Trades Union, Submission 30, p. 10; ActionAid Australia, Submission 48, p. 8; Australian Council of Trade Unions, Submission 49, p. 7.

<sup>27</sup> Dr Hazel Moir, Submission 28, p. 4.

<sup>28</sup> Dr Hazel Moir, *Committee Hansard*, Canberra, 13 December 2023, p. 14.

<sup>29</sup> Dr Hazel Moir, Submission 28, Attachment 1, p. 7; Dr Hazel Moir, *Committee Hansard*, Canberra, 13 December 2023, p. 14.

<sup>30</sup> Dr Hazel Moir, Submission 28, Attachment 1, p. 7.

- 3.21 Public Services International (PSI) specifically cautioned against the use of CGE modelling, stating that:
- ... the Australian government should not consider or rely on computable general equilibrium (CGE) modelling when assessing the impact of these agreements, given the widely criticised assumptions inherent in CGE modelling which are not able to reflect the actual text of the trade/investment agreements being analysed or the real world.<sup>31</sup>
- 3.22 Some submitters raised concerns with DFAT being responsible for both negotiating trade agreements and determining whether they are in the national interest.<sup>32</sup> For example, the ETU commented that: 'The fact that the same Government department responsible for negotiating trade agreements, DFAT, is tasked with presenting a balanced assessment of whether those agreements will deliver positive outcomes is a conflict of interest that must be addressed.'<sup>33</sup>
- 3.23 Some submitters focussed on the timing of analyses, noting that NIAs are not available to the public or the Parliament prior to being tabled in the Parliament, after the agreement is already signed.<sup>34</sup>
- 3.24 The Department of Home Affairs nominated that the NIA process could be improved by reviewing whether trade agreement provisions are binding or non-binding and on which agreement partners, as well as whether they constrain an existing practice or create new obligations that may restrict future policy.<sup>35</sup>
- 3.25 The ACTU underscored the need for more comprehensive analysis to be undertaken by illustrating that the impact assessment undertaken by the European Union (EU) for the proposed Australia-European Union FTA (A-EUFTA) identified potential job losses in the Australia labour market as consequence of the agreement, particularly in the automotive and machinery sectors.<sup>36</sup>
- 3.26 The Maritime Union of Australia (MUA) suggested that in the negotiation of the Australia-United Kingdom Free Trade Agreement (A-UKFTA) inadequate analysis of economic, social, and environmental impacts: '... led to acceptance of an International Maritime Services Annex which is contrary to Australia's national interest.'<sup>37</sup>

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<sup>31</sup> Public Services International, Submission 40, p. 7.

<sup>32</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 8 and 11; Australian Workers' Union, Submission 24, p. 4; Electrical Trades Union, Submission 30, p. 10; ActionAid Australia, Submission 48, p. 8; Australian Council of Trade Unions, Submission 49, p. 7.

<sup>33</sup> Electrical Trades Union, Submission 30, p. 10.

<sup>34</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 8; Electrical Trades Union, Submission 30, pp. 3 and 10; Australian Manufacturing Workers' Union, Submission 43, pp. 2–3; Australian Council of Trade Unions, Submission 49, p. 7.

<sup>35</sup> Department of Home Affairs, Submission 10, p. 5.

<sup>36</sup> Australian Council of Trade Unions, Submission 49, pp. 7–8.

<sup>37</sup> Maritime Union of Australia, Submission 14, p. 6.

## Economic, social and environmental impact assessment

### Content of impact assessments

- 3.27 Many submitters proposed the need for broader impact assessments to determine whether trade and investment agreements are in the national interest.<sup>38</sup> ActionAid Australia explained that such impact assessments would allow unintended impacts to be identified and mitigated, or if necessary, for relevant provisions to be removed from trade agreements.<sup>39</sup>
- 3.28 A range of areas to be considered by broader impacts assessments were put forward in evidence.<sup>40</sup> For example, AFTINET called for: ‘... assessments of how the agreement relates to other whole-of-government priorities and the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, health, gender and environmental impacts, and impacts on First Nations Peoples.’<sup>41</sup>
- 3.29 Similarly, the ETU stated that a new process should be established to undertake assessments: ‘... that more comprehensively assess a broad range of potential impacts and implications from trade agreements. This robust analysis should include consideration of the economic, social, environmental, labour, regional, regulatory, and First Nations impacts of agreements across every sector, region, and strata of Australian society.’<sup>42</sup>
- 3.30 The Australian Manufacturing Workers’ Union (AMWU) also declared that: ‘All agreements should undergo an independent economic assessment and national interest test to determine whether Australian workers and industries, and the community as a whole, truly benefit from the agreement that has been negotiated.’<sup>43</sup>
- 3.31 The Public Health Association of Australia (PHAA) proposed the routine use of independent health, environmental and human rights impact assessments.<sup>44</sup> It added that given the potential impact of trade agreements on many aspects of health, health impact assessments should be undertaken to consider the potential effects and make recommendations to mitigate health harms and improve benefits.<sup>45</sup>

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<sup>38</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 3; Maritime Union of Australia, Submission 14, p. 6; Electrical Trades Union, Submission 30, p. 10; Union Aid Abroad-APHEDA, Submission 32, p. 2; Public Health Association of Australia, Submission 36, pp. 4–5; Australian Manufacturing Workers’ Union, Submission 43, pp. 2–3; ActionAid Australia, Submission 48, pp. 8–9.

<sup>39</sup> ActionAid Australia, Submission 48, pp. 8–9.

<sup>40</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 3; Productivity Commission, Submission 13, p. 16; Maritime Union of Australia, Submission 14, p. 6; Electrical Trades Union, Submission 30, p. 10; Union Aid Abroad-APHEDA, Submission 32, p. 2; Public Health Association of Australia, Submission 36, pp. 4–5; Australian Manufacturing Workers’ Union, Submission 43, pp. 2–3; ActionAid Australia, Submission 48, pp. 8–9.

<sup>41</sup> Australian Fair Trade and Investment Network, Submission 8, p. 3.

<sup>42</sup> Electrical Trades Union, Submission 30, p. 10.

<sup>43</sup> Australian Manufacturing Workers’ Union, Submission 43, pp. 2–3.

<sup>44</sup> Public Health Association of Australia, Submission 36, pp. 4–5.

<sup>45</sup> Public Health Association of Australia, Submission 36, pp. 4–5.

- 3.32 ActionAid Australia called for all trade agreements to undergo mandated independent gender, human rights, and environmental impact assessments to identify and mitigate any negative impacts.<sup>46</sup> ActionAid Australia further elaborated that:

Gender and human rights Impact assessments are critical in determining the gendered impacts of trade rules, ensuring these rules align with Australia's domestic and international gender equality strategies, and identifying how these rules may impact on Australia's international women's rights and sustainable development obligations. Human rights impact assessments should assess the impact of trade agreements on First Nations peoples, and Australia's obligations under the United Nations Declaration on the Rights of Indigenous Peoples.<sup>47</sup>

- 3.33 Focussing on the maritime and shipping industry, the MUA proposed that an 'economic and social cost-benefit analysis' should be undertaken of key agreement provisions that examines the impact on Australian businesses including service providers and supply chain businesses, rather than just the producers of goods that benefit from a trade agreement.<sup>48</sup> It also noted the need to consider the impact on investment in affected segments of the supply chains, the impact on domestic employment, and ensuring consistency with human rights and labour standards.<sup>49</sup>

- 3.34 The Productivity Commission highlighted the need for broader considerations of the costs to business, government, and consumers in determining the national interest:

While trade and investment form an important part of what is in Australia's national interest and for improving the wellbeing of Australians, other considerations such as the cost to business of complying with the proposed arrangements and the cost to government of administering these arrangements should also be taken into consideration. Any wider costs should also be factored in (such as impacts on other producers and consumers).<sup>50</sup>

- 3.35 Melbourne Climate Futures (MCF) suggested the need for 'sustainability impact assessments' to be undertaken to contribute to the negotiation and implementation of trade agreements that work to incentivise climate-friendly goods and services, and trade that reduces the economy's reliance on emissions-intensive goods and services.<sup>51</sup>

- 3.36 In proposing broader impact assessments, submitters generally noted that such assessments should be independent but did not provide further detail.<sup>52</sup>

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<sup>46</sup> ActionAid Australia, Submission 48, pp. 2 and 8.

<sup>47</sup> ActionAid Australia, Submission 48, p. 8.

<sup>48</sup> Maritime Union of Australia, Submission 14, p. 6.

<sup>49</sup> Maritime Union of Australia, Submission 14, p. 6.

<sup>50</sup> Productivity Commission, Submission 13, p. 16.

<sup>51</sup> Melbourne Climate Futures, Submission 20, p. 3.

<sup>52</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 3; Australian Workers' Union, Submission 24, p. 2; Dr Hazel Moir, Submission 28, Attachment 1, p. 1, Electrical Trades Union, Submission 30, p. 10; Union Aid Abroad-APHEDA, Submission 32, p. 2; Public Health Association of Australia, Submission 36, pp. 4–5; Australian Manufacturing Workers' Union, Submission 43, pp. 2–3, ActionAid Australia, Submission 48, p. 8; Australian Council of Trade Unions, Submission 49, pp. 7–8.

## Timing of impact assessments

- 3.37 Some submitters also commented on the timing of proposed broader impact assessments in the development of trade and investment agreements.<sup>53</sup> For example, ActionAid Australia suggested that impact assessments should be conducted prior to the commencement of trade negotiations to inform their scope, before the agreement is signed and after the agreement has been implemented.<sup>54</sup>
- 3.38 The ETU recommended that the government should undertake a preliminary 'national interest assessment' prior to the commencement of negotiations to inform government and Parliamentary decision-making:
- ... beyond simply being released as a post-hoc justification for agreements that are already signed, there should be a requirement to conduct these independent National Interest Assessments prior to the commencement of any negotiations on anticipated or likely potential outcomes.
- This initial pre-emptive NIA should be required to be made public and tabled in the Parliament for JSCOT [Joint Standing Committee on Treaties] review and Parliamentary debate to inform a more open and transparent decision around whether to pursue an agreement, and which priorities and objectives should be incorporated into a negotiating mandate for DFAT.<sup>55</sup>
- 3.39 Several other submitters also linked broader independent impact assessments to providing greater public transparency and informing the Parliament in its role in oversight and scrutiny of trade and investment agreements, including as part of an increased role for the Parliament.<sup>56</sup> For example, the AMWU suggested that robust, independent assessments of whether agreements are in the national interest must be undertaken prior to signing. It added that: 'This must include assessments of the likely economic, social, environmental and health impacts of any agreement, and must be made public for debate, consultation, and review by relevant parliamentary committees.'<sup>57</sup> The role of the Parliament in the development of trade and investment agreements is discussed in Chapter 4 of the Interim Report.
- 3.40 Several submitters suggested that broader independent impact assessments should also be undertaken once a trade agreement is in force as part of a periodic review

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<sup>53</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 3; Electrical Trades Union, Submission 30, p. 10; Union Aid Abroad-APHEDA, Submission 32, p. 2; Public Health Association of Australia, Submission 36, pp. 4–5; ActionAid Australia, Submission 48, pp. 8–9; Australian Council of Trade Unions, Submission 49, pp. 37–38.

<sup>54</sup> ActionAid Australia, Submission 48, pp. 8–9. See also: Public Health Association of Australia, Submission 36, pp. 4–5.

<sup>55</sup> Electrical Trades Union, Submission 30, p. 10.

<sup>56</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, pp. 3 and 12; Electrical Trades Union, Submission 30, pp. 10–11; Australian Manufacturing Workers' Union, Submission 43, pp. 2–3; Australian Council of Trade Unions, Submission 49, pp. 37–38.

<sup>57</sup> Australian Manufacturing Workers' Union, Submission 43, pp. 2–3. See also: Australian Council of Trade Unions, Submission 49, pp. 37–38.

process.<sup>58</sup> For example, the ACTU proposed that: 'Independent evaluations of the agreement should be held five years after the agreement comes into force, and at five yearly intervals thereafter. These evaluations should examine the economic, employment, environmental, social, health and gender impacts of the agreement, and be made publicly available.'<sup>59</sup>

- 3.41 ActionAid Australia outlined that ex post impact assessments would enable the assessment of the actual impacts of an agreement once it has been implemented and, if necessary, allow them to be rectified.<sup>60</sup> The post-implementation review of trade agreements is considered in Chapter 5 of the Interim Report.
- 3.42 AFTINET, the ETU, the AMWU, ActionAid Australia and the ACTU all specified that proposed independent impact assessments should be made publicly available, prior to trade agreements being finalised.<sup>61</sup>
- 3.43 The Productivity Commission reflected on the importance of broad and in-depth public and stakeholder consultation to determining the national interest.<sup>62</sup> However, Dr Moir noted that interested parties or stakeholders are mostly providing input based on sectional interests and will use consultation to the shape policy in their interest rather than in the national interest.<sup>63</sup> The contribution of enhanced stakeholder consultation and engagement processes to improving outcomes in the negotiation of trade and investment agreements is discussed in Chapter 2 of the Interim Report.

## Impact assessment in the European Union

- 3.44 Several submitters noted that the EU undertakes analysis of the economic, social, and environmental impacts of trade agreements, including an initial Impact Assessment prior to the commencement of negotiations and a Sustainability Impact Assessment (SIA) during negotiations.<sup>64</sup>
- 3.45 The Delegation of the European Union to Australia (Delegation of the EU) stated that impact assessments: '... describe the likely economic, environmental, social and whenever relevant, human rights impacts... the impact assessment must verify problems, identify underlying causes, assess whether EU action is needed and

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<sup>58</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p.11–12; Electrical Trades Union, Submission 30, pp. 3 and 12; ActionAid Australia, Submission 48, p. 9; Australian Council of Trade Unions, Submission 49, pp. 37–38.

<sup>59</sup> Australian Council of Trade Unions, Submission 49, pp. 37–38

<sup>60</sup> ActionAid Australia, Submission 48, p. 9

<sup>61</sup> Australian Fair Trade and Investment Network, Submission 8, p. 12; Electrical Trades Union, Submission 30, p. 10; ActionAid Australia, Submission 48, pp. 8–9, Australian Council of Trade Unions, Submission 49, pp. 37–38.

<sup>62</sup> Productivity Commission, Submission 13, pp. 4–5.

<sup>63</sup> Dr Hazel Moir, Submission 28, Attachment 1, p. 3.

<sup>64</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 9–10; Department of Foreign Affairs and Trade, Submission 41, pp. 54–55; Delegation of the European Union to Australia, Submission 46, pp. 3–4; Australian Council of Trade Unions, Submission 49, pp. 9–10.

analyse the advantages and disadvantages of available solutions and their impacts.<sup>65</sup>

- 3.46 The Delegation of the EU also detailed its SIAs, which it noted feature wide-ranging consultation with stakeholders and are made publicly available alongside a response to the analysis from the European Commission:

Building on the Impact Assessment, the SIA examines specific subjects in greater depth than the first assessment. The SIA cover topics where the agreement is most likely to have an impact on sustainability issues, or where the agreement opens opportunities for achieving non-trade policy objectives and give actionable negotiation recommendations. SIAs are conducted by independent external consultants in parallel with the negotiations and help identify possible trade-offs, to ensure that the related policy choices are optimised.<sup>66</sup>

- 3.47 The ACTU reflected on the EU's SIA process noting that it is conducted in parallel to trade negotiations by independent external consultants to provide a robust analysis of the potential economic, social, human rights, and environmental impacts that the agreement could have.<sup>67</sup>

- 3.48 The Delegation of the EU further explained that once negotiations are finalised, the European Commission conducts an Economic Analysis of the Negotiated Outcome (EANO) to inform the European Council, the European Parliament, and member states in their approval processes.<sup>68</sup> The EANO is made publicly available.<sup>69</sup>

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<sup>65</sup> Delegation of the European Union to Australia, Submission 46, p. 3.

<sup>66</sup> Delegation of the European Union to Australia, Submission 46, p. 3.

<sup>67</sup> Australian Council of Trade Unions, Submission 49, p. 10.

<sup>68</sup> Delegation of the European Union to Australia, Submission 46, p. 4.

<sup>69</sup> Delegation of the European Union to Australia, Submission 46, p. 4; Australian Council of Trade Unions, Submission 49, p. 10.

## Committee comment

- 3.49 The Committee strongly agrees that Australia's trade and investment agreements must be in the national interest, providing a net benefit for Australia. Further, it recognises that more widely shared benefits and a broad consideration of the impacts on the economy and society are essential to ensuring that trade agreements are genuinely in the national interest.
- 3.50 The Committee also notes that trade agreements are a means to an end rather than an end in themselves. The recent approach to the A-EUFTA negotiations demonstrates that Australia is not prepared to enter into an agreement that does not bring significant benefits and that may be detrimental to the national interest.
- 3.51 The Committee acknowledges that there are many complexities and challenges inherent in analysing the impacts of trade agreements and determining the national interest.
- 3.52 The Committee is of the view that the NIA and economic modelling undertaken by DFAT are important and valuable tools in determining whether trade agreements are in the national interest and generate real economic benefits. However, it is also of the view that there would be considerable benefit in analysis of agreements being undertaken by an independent body, to remove the perception of any conflict and to ensure public confidence in the assessment of the national interest.
- 3.53 The Committee recognises that while trade can bring substantial benefits to many, there will likely always be costs and some that are disadvantaged. These must be effectively identified and accounted for, both to factor into determining national interest, and to ensure those disadvantaged are provided assistance where required.
- 3.54 The Committee acknowledges that trade agreements have the potential to impact many areas of the economy, society, and the environment. As such, the Australian Government must have a comprehensive understanding of the economic, social, and environmental impacts of an agreement informed by evidence-based assessments if it is to be certain that an agreement is providing an overall net benefit, beyond narrow economic and commercial considerations. Such assessments should consider, but not be limited to, impacts such as economic, social, environmental, health, gender, labour, human rights, regional communities, and First Nations people.
- 3.55 The Committee agrees that formal consideration of the national interest, including broad impact assessment, should be undertaken prior to, during and after the negotiation of trade and investments agreements. Assessment of the national interest is informative for stakeholders, the public and the Parliament in their role in the development of trade and investment agreements.

# Recommendations

## Recommendation 1

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**3.56** The Committee recommends that the Australian Government require an independent review, including modelling and analysis, to be undertaken on each proposed or under review trade and investment agreement.

## Recommendation 2

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**3.57** The Committee recommends that the Australian Government establish a consistent approach to assessing and reviewing trade and investment agreements. This should include impact analyses of the economic, social, and environmental implications of agreements to assist the Government to make decisions in the national interest.

## Recommendation 3

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**3.58** The Committee recommends that the trade advisory committee and cleared advisors (Interim Report recommendation 1) be provided with the outcomes of the independent modelling and analysis (recommendation 1) as well as the impact assessment (recommendation 2) to improve transparency and the depth of stakeholder consultation in the negotiation of trade and investment agreements.





## 4. Human rights, labour and environmental standards

### Overview

- 4.1 The Committee received evidence proposing that Australia's trade and investment agreements should be consistent with its commitments on human rights, labour, and the environment. Further, some were of the view that Australia's trade agreements should specify and include binding commitments to relevant international standards and conventions regarding human rights, labour, and the environment.
- 4.2 Submitters suggested that the inclusion of international standards would ensure that Australia's trade activity does not undermine its values and commitments by contributing to increases in the violation of human rights and labour rights, as well as environmental destruction. Further, to ensure that domestic producers and workers are not subject to increased competition from countries without commitments to such standards. It was also noted that international trade has the capacity to advance social and ethical objectives such as sustainable development, improving gender equality, contributing to climate change goals, and enhancing animal welfare.
- 4.3 On the other hand, some raised concerns with the inclusion of non-trade provisions in Australia's trade and investment agreements. It was suggested that social and ethical objectives may be better and more appropriately achieved through other mechanisms, while others noted that the inclusion of the policy objectives of trading partners can increase barriers to trade and may have negative impacts on domestic industries. This was particularly raised in relation to the impact of some sustainability and environmental provisions on Australia's agricultural sector.

### Upholding international standards

- 4.4 The Australian Fair Trade and Investment Network (AFTINET) contended that trade policy should be consistent with, and not undermine, Australia's commitments on human rights, labour, and the environment.<sup>1</sup>

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<sup>1</sup> Australian Fair Trade and Investment Network, Submission 8, p. 13.

4.5 To that end, some submitters specified that commitments to relevant international standards on human rights, labour, and the environment should be included in Australia's trade and investment agreements.<sup>2</sup> For example, AFTINET stated:

To ensure that the benefits of trade are shared both globally and nationally, and that environmental standards are protected, trade agreements should be underpinned by commitments to agreed international United Nations [UN] and International Labour Organisation [ILO] standards on human rights, labour rights and environmental standards including agreements on Indigenous Peoples' rights and climate change.<sup>3</sup>

4.6 Submitters in favour of including specific commitments to relevant international standards generally suggested that Australia should not enter into trade agreements without such commitments, and some added that it should be a legislative requirement.<sup>4</sup>

4.7 There was also a focus on the need for the inclusion of human rights, labour, and environmental standards in trade agreements to be binding and underpinned by robust enforcement mechanisms.<sup>5</sup> For example, ActionAid Australia recommended that Australia's agreements include an accessible mechanism to enable workers and communities to seek redress for human rights and environmental violations.<sup>6</sup>

4.8 Both AFTINET and CPSU-SPSF Group emphasised that Australia's agreements should not undermine international standards by facilitating increased trade with countries without commitments to those standards.<sup>7</sup> CPSU-SPSF Group explained that:

Whilst trade does offer opportunities to improve the living standards of Australia, trade must be fair and not do so at the expense of labour, environment or human rights here or elsewhere... agreements without requirements for human rights, environmental and labour standards simply allow a trade agreement to reward a race to the bottom...<sup>8</sup>

4.9 CPSU-SPSF Group also suggested that some trade agreements have operated in conflict with Australian Government policy priorities by enabling lower labour and manufacturing standards, greater preferential migration flows, and an increase in

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<sup>2</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, pp. 13–15; Electrical Trades Union, Submission 30, p. 2; CPSU-SPSF Group, Submission 38, pp. 2–4; Australian Manufacturing Workers' Union, Submission 43, p. 1; Australian Council of Trade Unions, Submission 49, pp. 13–23.

<sup>3</sup> Australian Fair Trade and Investment Network, Submission 8.2, p. 4.

<sup>4</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 13–15; Electrical Trades Union, Submission 30, p. 2; CPSU-SPSF Group, Submission 38, pp. 2–4; Australian Manufacturing Workers' Union, Submission 43, p. 1; Australian Council of Trade Unions, Submission 49, pp. 13–23.

<sup>5</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8.2, p. 4; Electrical Trades Union, Submission 30, p. 6; ActionAid Australia, Submission 48, p. 5; Australian Council of Trade Unions, Submission 49, pp. 17 and 22.

<sup>6</sup> ActionAid Australia, Submission 48, p. 11.

<sup>7</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 13–15; CPSU-SPSF Group, Submission 38, p. 2.

<sup>8</sup> CPSU-SPSF Group, Submission 38, p. 2.

imported goods with reduced environmental standards.<sup>9</sup> As an example, it referred to the Australia-India Economic Cooperation and Trade Agreement (A-IECTA) stating that India: ‘... has a well-documented presence of child and (forced) labour, making significant contributions to the population of the world in modern slavery. Meanwhile Australian jurisdictions have all been legislating to combat modern slavery.’<sup>10</sup>

- 4.10 The Department of Foreign Affairs and Trade (DFAT) advised that Australia’s: ‘... more recent agreements include a range of provisions which promote a positive agenda on issues such as the environment and protection and promotion of labour rights.’<sup>11</sup> It specified that of Australia’s 18 trade agreements in force, five have environment and labour chapters.<sup>12</sup>

## **Human rights, rights of indigenous peoples, gender equality and sustainable development**

- 4.11 Many submitters and witnesses broadly emphasised the need for Australia’s trade and investment agreements to be consistent with international commitments to human rights.<sup>13</sup>
- 4.12 AFTINET and the Australian Council of Trade Unions (ACTU) specified that Australia’s trade agreements should include enforceable commitments to UN human rights conventions and declarations, including:
- The Universal Declaration of Human Rights
  - The International Covenant on Civil and Political rights
  - The International Covenant on Economic, Social and Cultural Rights
  - The UN Convention on the Elimination of All Forms of Racial Discrimination
  - The UN Convention on the Elimination of All Forms of Discrimination Against Women
  - The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
  - The Convention on the Rights of the Child
  - The Convention on the Rights of Persons with Disabilities

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<sup>9</sup> CPSU-SPSF Group, Submission 38, p. 4.

<sup>10</sup> CPSU-SPSF Group, Submission 38, p. 3, citation omitted.

<sup>11</sup> Department of Foreign Affairs and Trade, Submission 41, p. 6.

<sup>12</sup> Department of Foreign Affairs and Trade, Submission 41, p. 6. Note: Australia’s five trade agreements with environment and labour chapters are the Australia-United States Free Trade Agreement (A-USFTA), the Korea-Australia Free Trade Agreement (K-AFTA), the Peru-Australia Free Trade Agreement (P-AFTA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Australia-UK Free Trade Agreement (A-UKFTA).

<sup>13</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 13; Electrical Trades Union, Submission 30, p. 2; Union aid Abroad-APHEDA Submission 32, p. 2; Public Services International, Submission 40, p. 11; Australian Council of Trade Unions, Submission 49, pp. 21–22.

- The UN Declaration on the Rights of Indigenous Peoples.<sup>14</sup>
- 4.13 The Public Health Association of Australia (PHAA) and ActionAid Australia referred to the need for assessing the impact of trade and investment agreements on human rights to identify, understand and respond to issues as part of broader independent economic, social, and environmental impact assessments (discussed further in Chapter 3).<sup>15</sup>
- 4.14 In addition to broad alignment with human rights, some submitters specifically referred to the need for trade agreements to be consistent with Australia’s domestic and international commitments on the rights of indigenous peoples, gender equality and women’s rights, and encouraging sustainable development.

## Rights of indigenous peoples

- 4.15 Several submitters raised the importance of ensuring that Australia’s trade and investment agreements protect the rights of First Nations people and are consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>16</sup> AFTINET explained that fundamental rights contained in UNDRIP should not be compromised by trade agreements including the right to non-discrimination, cultural recognition, protection of land rights and the minimum standards for the survival, dignity and well-being of indigenous peoples.<sup>17</sup>
- 4.16 Union Aid Abroad-APHEDA and the ACTU underscored that trade agreements must safeguard the right to free, prior and informed consent.<sup>18</sup> Public Services International (PSI) suggested that agreements with any potential to undermine indigenous rights and priorities should include a comprehensive exemption that retains Australia’s ability to adopt or maintain measures necessary to protect or promote the rights and interests of First Nations people, including fulfilling obligations under legal, constitutional or treaty arrangements.<sup>19</sup>
- 4.17 The Australian Nursing and Midwifery Federation (ANMF), AFTINET and PSI specifically drew attention to the potential impact of investor state dispute settlement (ISDS) provisions on the rights of First Nations people, including the right to free, prior, and informed consent about investment in projects on traditional lands.<sup>20</sup> In the context of global ISDS cases that have undermined indigenous peoples’ rights,

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<sup>14</sup> Australian Fair Trade and Investment Network, Submission 8, p. 13; Australian Council of Trade Unions, Submission 49, pp. 21–22.

<sup>15</sup> See, for example: Public Health Association of Australia, Submission 36, pp. 4–5; ActionAid Australia, Submission 48, pp. 8–9.

<sup>16</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 5; Australian Fair Trade and Investment Network, Submission 8, pp. 21–22; Union aid Abroad-APHEDA Submission 32, p. 2; Public Services International, Submission 40, pp. 11–12; ActionAid Australia, Submission 48, p. 8; Australian Council of Trade Unions, Submission 49, pp. 21–22.

<sup>17</sup> Australian Fair Trade and Investment Network, Submission 8, p. 21

<sup>18</sup> Union Aid Abroad-APHEDA, Submission 32, p. 2; Australian Council of Trade Unions, Submission 49, p. 23.

<sup>19</sup> Public Services International, Submission 40, pp. 11–12.

<sup>20</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 5; Australian Fair Trade and Investment Network, Submission 8, pp. 21–22; Public Services International, Submission 40, pp. 11–12.

AFTINET observed that: ‘... While there are some exemptions in Australian trade agreements for laws relating to Aboriginal and Torres Strait Islander communities, there is no general exemption which would totally exclude a similar ISDS case.’<sup>21</sup> ISDS provisions are considered further in Chapter 5.

- 4.18 ActionAid Australia noted that human rights impact assessments should include assessment of the impact of trade agreements on First Nations people and Australia’s obligations under UNDRIP.<sup>22</sup>

## Gender equality and women’s rights

- 4.19 Some submitters drew attention to the impact of international trade on gender equality and women’s rights and advocated for Australia’s trade agreements to better reflect commitments to improve gender equality outcomes.<sup>23</sup>

- 4.20 ActionAid Australia observed that while international trade can make a positive contribution to gender equality, trade agreements designed without consideration of gender impacts can worsen outcomes for women.<sup>24</sup> It specified that trade rules that reduce workers’ rights, facilitate the privatisation of public services, and reduce access to affordable medicines can particularly exacerbate gender inequities in the economy and increase poverty among women.<sup>25</sup>

- 4.21 ActionAid Australia detailed the importance of employment to gender equality and pointed to the potential effect of international trade on women’s employment, such as in export-oriented manufacturing sectors that are characterised by insecure work, poor working conditions, and few entitlements.<sup>26</sup> It elaborated that:

Australia should take this opportunity to lift women workers out of poverty by ensuring that Australia’s trade agreements include enforceable labour rights provisions that support the transformation of women’s work by progressing the realisation of decent employment and living wages, alongside a wider action to mandate Australian companies to undertake human rights due diligence across their supply chains.<sup>27</sup>

- 4.22 It was observed that increased transparency in the process for negotiating Australia’s trade agreements, as well as improved consultation with civil society and experts in women’s rights is important to ensure provisions that may result in negative impacts for women are identified and addressed.<sup>28</sup> Several submitters also underscored the importance of assessing the impacts of trade and investment agreements on gender equality to identify, understand and respond to issues as part of broader independent

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<sup>21</sup> Australian Fair Trade and Investment Network, Submission 8, p. 22.

<sup>22</sup> ActionAid Australia, Submission 48, p. 8.

<sup>23</sup> Union Aid Abroad-APHEDA, Submission 32, pp. 1–2; ActionAid Australia, Submission 48, pp. 2 and 5.

<sup>24</sup> ActionAid Australia, Submission 48, pp. 2 and 5.

<sup>25</sup> ActionAid Australia, Submission 48, p. 5.

<sup>26</sup> ActionAid Australia, Submission 48, p. 10.

<sup>27</sup> ActionAid Australia, Submission 48, p. 10.

<sup>28</sup> ActionAid Australia, Submission 48, pp. 2 and 5–6.

economic, social, and environmental impact assessments (discussed further in Chapter 3).<sup>29</sup>

- 4.23 ActionAid Australia welcomed recent steps to improve the gender-responsiveness of Australia's trade policy, including the move to include gender chapters in trade agreements, while also emphasising that gender chapters need to be enforceable under dispute resolution processes.<sup>30</sup>
- 4.24 DFAT advised that the Australia-United Kingdom Free Trade Agreement (A-UKFTA) contains the first 'trade and gender equality' chapter for Australia and outlined Australia's approach to the inclusion of gender quality provisions in trade agreements:

Australia supports the inclusion of gender equality provisions in trade agreements, where such provisions reinforce the relevance and importance of gender equality to trade, investment and economic prosperity.

Australia's objectives for gender equality provisions in trade agreements include commitments to gender equality (including incorporation of our international commitments) and women's economic empowerment through trade; enhanced cooperation activities with our trading partners to improve capacities and conditions for women, including for women-led businesses; and establishing a forum for dialogue on trade and gender equality.<sup>31</sup>

## Sustainable development

- 4.25 Several submitters drew attention to the potential for international trade to contribute to improved sustainable development outcomes and advocated for Australia's trade policy to better support its development objectives.<sup>32</sup> For example, ActionAid Australia explained that trade can have a positive impact on sustainable development, however it can also lead to unequal social and economic outcomes, undermining progress towards the Sustainable Development Goals (SDGs).<sup>33</sup>
- 4.26 Union Aid Abroad-APHEDA and ActionAid Australia were of the view that there should be greater alignment between Australia's trade policy and the objectives under Australia's new International Development Policy.<sup>34</sup> Union Aid Abroad-APHEDA stated that: '... there is clearly no benefit in negotiating trade agreements that undermine development goals' and called for Australia to set a new bar for fairer

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<sup>29</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 3; Union Aid Abroad-APHEDA, Submission 32, p. 2; Public Health Association of Australia, Submission 36, pp. 4–5; ActionAid Australia, Submission 48, pp. 5–6.

<sup>30</sup> ActionAid Australia, Submission 48, p. 5.

<sup>31</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 40–41.

<sup>32</sup> Union Aid Abroad-APHEDA, Submission 32, pp. 1–2; ActionAid Australia, Submission 48, p. 2.

<sup>33</sup> ActionAid Australia, Submission 48, p. 2.

<sup>34</sup> Union Aid Abroad-APHEDA, Submission 32, p. 2; ActionAid Australia, Submission 48, p. 2.

trade agreements to ensure that: ‘... trade negotiations serve Australia’s development policy as much as its trade policy.’<sup>35</sup>

- 4.27 AFTINET, Union Aid Abroad–APHEDA and the ACTU suggested that Australia should work with developing country trading partners and provide resources through its Official Development Assistance (ODA) programs to adopt, develop and implement international standards on human rights, labour, and the environment.<sup>36</sup> The ACTU proposed that:

In addition to working with partner governments to lift labour standards, the Australian Government should support programs through Official Development Assistance (ODA) that enhance and resource the capacity of unions to protect workers’ rights, including promoting and supporting ILO standards, monitoring and assisting in the enforcement of clauses in labour chapters in trade agreements, and engaging with temporary migrant workers, including pre-departure and on return from Australia.<sup>37</sup>

- 4.28 DFAT advised that Australia’s regional and multilateral economic cooperation is an important tool for delivering development assistance in the Indo-Pacific.<sup>38</sup> It explained that:

Australia’s aid for trade supports partners to implement their FTA [free trade agreement] obligations and integrate into the rules-based multilateral trading system, with the WTO [World Trade Organization] at its core. Areas of support include economic infrastructure, trade and investment regulations and standards, trade facilitation, supply chain resilience, and inclusive access to international markets and trade finance.<sup>39</sup>

- 4.29 DFAT highlighted the Pacific Agreement on Closer Economic Relations Plus (PACER Plus) as a regional, development-centred and comprehensive agreement covering goods, services and investment.<sup>40</sup> It also outlined Australia’s \$46 million contribution through the Regional Trade for Development initiative to provide technical assistance and capacity building – with a particular focus on the needs of lesser developed ASEAN [Association of Southeast Asian Nations] members Cambodia, Laos and Vietnam – to support implementation of commitments under the RCEP [Regional Comprehensive Economic Partnership] and the A-A-NZFTA [ASEAN-Australia-New Zealand Free Trade Agreement].<sup>41</sup>

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<sup>35</sup> Union Aid Abroad–APHEDA, Submission 32, p. 2.

<sup>36</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 13–15; Union Aid Abroad–APHEDA, Submission 32, p. 2; Australian Council of Trade Unions, Submission 49, p. 17.

<sup>37</sup> Australian Council of Trade Unions, Submission 49, p. 17.

<sup>38</sup> Department of Foreign Affairs and Trade, Submission 41, p. 22.

<sup>39</sup> Department of Foreign Affairs and Trade, Submission 41, p. 22.

<sup>40</sup> Department of Foreign Affairs and Trade, Submission 41, p. 22.

<sup>41</sup> Department of Foreign Affairs and Trade, Submission 41, p. 23.

## Labour rights

- 4.30 Many submitters advocated for Australia's trade agreements to better support internationally agreed labour rights.<sup>42</sup> For example, PSI stated that: 'Trade and investment agreements should be protecting and promoting internationally committed labour standards and should not be lowering current domestic labour and employment rights, occupational health and safety legislation and standards.'<sup>43</sup>
- 4.31 It was broadly argued that labour rights should be included in Australia's trade and investment agreements to ensure that domestic producers are not subject to competition from countries with lower labour standards and to avoid contributing to further exploitation of workers in those countries.<sup>44</sup> For example, the ACTU explained that trade should not be a 'race to the bottom on workers' rights' and contended that the inclusion of enforceable labour rights is important in setting a level the playing field to ensure that companies cannot just locate themselves in jurisdictions with lower wages and conditions.<sup>45</sup>
- 4.32 Similarly, the Electrical Trades Union (ETU) submitted that including international labour rights in agreements: '... protects Australia from perverse outcomes such as domestic production being undercut by exploited overseas workforces or the erosion of our own labour standards at home.'<sup>46</sup> PSI also stated that including core labour rights in agreements would ensure: '... that governments are not encouraged to utilise low wages, poor conditions, insecure work and an absence of effective trade unions as a competitive advantage.'<sup>47</sup>
- 4.33 Some also focussed on the role that ensuring commitments to international labour rights in trade agreements can play in lifting working conditions and improving economic development in partner countries.<sup>48</sup> DFAT advised that the promotion and protection of international labour standards in Australia's trade agreements does contribute to economic growth and development in partner countries.<sup>49</sup>
- 4.34 Ms Michele O'Neil, President of the ACTU, outlined how Australia's trade policy has implications for overseas workers, noting that the decline in Australia's textile,

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<sup>42</sup> See, for example: Media, Entertainment and Arts Alliance, Submission 5, p. 6; Australian Nursing and Midwifery Federation, Submission 7, p. 4; Australian Fair Trade and Investment Network, Submission 8, pp. 13–14; Uniting Church in Australia, Synod of Victoria and Tasmania, Submission 22, p. 1; Electrical Trades Union of Australia, Submission 30, p. 7; ActionAid Australia, Submission 48, p. 10; Australian Council of Trade Unions, Submission 49, p. 13.

<sup>43</sup> Public Services International, Submission 40, p. 3.

<sup>44</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 13; Electrical Trades Union, Submission 30, p. 6; Public Services International, Submission 40, p. 7; Australian Council of Trade Unions, Submission 49, p. 13.

<sup>45</sup> Australian Council of Trade Unions, Submission 49, p. 13.

<sup>46</sup> Electrical Trades Union, Submission 30, p. 6.

<sup>47</sup> Public Services International, Submission 40, p. 7.

<sup>48</sup> Electrical Trades Union, Submission 30, p. 6.

<sup>49</sup> Department of Foreign Affairs and Trade, Submission 41, p. 39.

clothing and footwear industries resulted in domestic jobs being shifted to countries with low labour standards.<sup>50</sup> Further, Ms O’Neil told the Committee that:

The ultimate result of that was over 1,100 garment workers, mainly young women, were killed when Rana Plaza collapsed on them. They were sewing clothes for export into Australia and many other countries that had done trade changes resulting in that work going to Bangladesh. So this is a very human consequence. We can’t say that we don’t have a responsibility in terms of workers’ rights both in Australia and internationally.<sup>51</sup>

- 4.35 The ACTU raised concerns that the RCEP between the ten members states of the ASEAN and Australia, China, Republic of Korea, Japan, and New Zealand (NZ) contains no labour or human rights provisions.<sup>52</sup> It noted that: ‘... over half of the 15 countries party to RCEP are ranked among the worst countries in the world for workers’ rights.’<sup>53</sup> The ETU also suggested that many of Australia’s trade agreements, including those with China, India, Indonesia, and Malaysia, do not recognise international labour rights.<sup>54</sup>
- 4.36 Submitters proposed that Australia should not enter trade agreements with countries that violate international labour rights and that it should require countries to demonstrate commitments to such rights.<sup>55</sup> For example, the ACTU submitted that: ‘The Australian Government should require potential trading partners to demonstrate respect for fundamental workers’ rights before agreeing to negotiate a deal with them.’<sup>56</sup>
- 4.37 Several submitters advocated for Australia’s trade and investment agreements to include a labour chapter that aligns with commitments made to ILO core conventions.<sup>57</sup> The ANMF, AFTINET, the ETU and the ACTU specified the need for agreements to reference the following ILO conventions:
- The right of workers to freedom of association and the effective right to collective bargaining (ILO Conventions 87 and 98)
  - The elimination of all forms of forced or compulsory labour (ILO Conventions 29 and 105)

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<sup>50</sup> Ms Michele O’Neil, President, Australian Council of Trade Unions, *Committee Hansard*, Melbourne, 3 November 2023, p. 5.

<sup>51</sup> Ms Michele O’Neil, President, Australian Council of Trade Unions, *Committee Hansard*, Melbourne, 3 November 2023, p. 5.

<sup>52</sup> Australian Council of Trade Unions, Submission 49, p. 5.

<sup>53</sup> Australian Council of Trade Unions, Submission 49, p. 5.

<sup>54</sup> Electrical Trades Union, Submission 30, p. 6.

<sup>55</sup> Electrical Trades Union, Submission 30, p. 6; Australian Manufacturing Workers’ Union, Submission 43, p. 1; Australian Council of Trade Unions, Submission 49, p. 13.

<sup>56</sup> Australian Council of Trade Unions, Submission 49, p. 13.

<sup>57</sup> See, for example: Media, Entertainment and Arts Alliance, Submission 5, p. 6; Australian Nursing and Midwifery Federation, Submission 7, p. 4; Australian Fair Trade and Investment Network, Submission 8, pp. 13–14; Electrical Trades Union of Australia, Submission 30, p. 7; Union Aid Abroad-APHEDA, Submission 32, p. 2; CPSU-SPSF Group, Submission 38, p. 4; Public Services International, Submission 40, p. 7; ActionAid Australia, Submission 48, p. 10; Australian Council of Trade Unions, Submission 49, p. 16.

- The effective abolition of child labour (ILO Conventions 138 and 182)
  - The elimination of discrimination in respect of employment and occupation (ILO Conventions 100 and 111)
  - A safe and healthy working environment (ILO Conventions 185 and 187).<sup>58</sup>
- 4.38 The ETU and the ACTU were of the view that labour chapters in some of Australia's trade agreements, such as the Australia-United States Free Trade Agreement (A-USFTA) are not effective because they do not reference core ILO conventions when defining internationally recognised labour rights.<sup>59</sup> The ACTU further suggested that labour chapters in some of Australia's current agreements are not effective due to narrow provisions meaning the burden of proof required is too high to be practical, no reference to core ILO conventions, lack of effective enforcement mechanisms, no role for unions and no avenue for workers to seek remedy for violations of their rights.<sup>60</sup>
- 4.39 Submitters that advocated for the inclusion of labour rights in trade agreements underscored the need to ensure that provisions are supported by strong enforcement mechanisms.<sup>61</sup> For example, the ACTU stated that: 'Australia must ensure robust, fully enforceable labour rights provisions in agreements it negotiates, with accountability mechanisms for governments and businesses. These provisions must be as enforceable as the rest of the trade agreement with material consequences if these commitments are not followed.'<sup>62</sup>
- 4.40 DFAT outlined that Australia seeks to include robust labour provisions in trade agreements, including: '... commitments to uphold internationally recognised labour rights through the adoption and enforcement of associated laws and standards and consultation on implementation issues.'<sup>63</sup> It added that ILO Declaration on Fundamental Principles and Rights at Work usually forms the benchmark for labour chapters in Australia's more recent trade agreements.<sup>64</sup>
- 4.41 DFAT also highlighted that the proposed Australia-European Union Free Trade Agreement (A-EUFTA) includes ambitious and enforceable outcomes on labour issues and workers rights' including: '... cooperation between Australia and the EU [European Union] on the inter-linkages between trade and employment, labour market adjustment, core labour standards, decent work in global supply chains,

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<sup>58</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 4; Australian Fair Trade and Investment Network, Submission 8, pp. 13–14; Electrical Trades Union of Australia, Submission 30, p. 7; Australian Council of Trade Unions, Submission 49, p. 16.

<sup>59</sup> Electrical Trades Union of Australia, Submission 30, p. 7; Australian Council of Trade Unions, Submission 49, pp. 14–15.

<sup>60</sup> Australian Council of Trade Unions, Submission 49, pp. 14–15.

<sup>61</sup> See, for example: Media, Entertainment and Arts Alliance, Submission 5, p. 6; Australian Nursing and Midwifery Federation, Submission 7; Electrical Trades Union, Submission 10, pp. 2 and 6; ActionAid Australia, Submission 48, p. 11; Australian Council of Trade Unions, Submission 49, pp. 13 and 17.

<sup>62</sup> Australian Council of Trade Unions, Submission 49, p. 13.

<sup>63</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 39–40.

<sup>64</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 39–40.

social protection and social inclusion, social dialogue, gender equality, and forced or compulsory labour.<sup>65</sup>

## Environment, biodiversity, climate change and animal welfare

- 4.42 Submitters and witnesses provided evidence in relation to the inclusion of environmental protections in Australia's trade agreements, including biodiversity and conservation, sustainability, climate change, and animal welfare.<sup>66</sup>
- 4.43 Some submitters proposed that Australia's trade agreements should reflect and contain commitments to international environmental standards.<sup>67</sup> For example, in reference to the A-EUFTA, the Australian Alliance for Animals (AAA) proposed that the recognition of the importance of multilateral environmental agreements and the requirement for each party to implement the standards of such agreements should be specified in trade agreements.<sup>68</sup>
- 4.44 AFTINET and the ACTU specified that Australia's trade agreements should include enforceable commitments to UN multilateral environmental agreements, including:
- The Montréal Protocol on Hydrofluorocarbons
  - The International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978
  - The UN Convention on International Trade in Endangered Species
  - The UN Convention on Biological Diversity
  - The UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001)
  - The UN Framework Convention on Climate Change 1992, the Paris Agreement 2015, and subsequent Climate Change Agreements at COP 26 2021 and COP 27 2022.<sup>69</sup>

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<sup>65</sup> Department of Foreign Affairs and Trade, Submission 41, p. 40.

<sup>66</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 14; Red Meat Advisory Council, Submission 16, p. 10; Melbourne Climate Futures, University of Melbourne, Submission 20, pp. 1–2; German Australian Business Council, Submission 25, pp. 4–5; Australian Alliance for Animals, Submission 29, Attachment 1, p. 8; CPSU-SPSF Group, Submission 38, p. 4; Department of Agriculture, Fisheries and Forestry, Submission 45, p. 6; Australian Council of Trade Unions, Submission 49, pp. 21–22.

<sup>67</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 14; Red Meat Advisory Council, Submission 16, p. 10; Melbourne Climate Futures, University of Melbourne, Submission 20, pp. 1–2; German Australian Business Council, Submission 25, pp. 4–5; Australian Alliance for Animals, Submission 29, Attachment 1, p. 8; CPSU-SPSF Group, Submission 38, p. 4; Australian Council of Trade Unions, Submission 49, pp. 21–22.

<sup>68</sup> Australian Alliance for animals, Submission 29, Attachment 1, p. 8.

<sup>69</sup> Australian Fair Trade and Investment Network, Submission 8, p. 14; Australian Council of Trade Unions, Submission 49, pp. 21–22.

- 4.45 AFTINET stated that Australia’s trade agreements should not contain provisions that negatively impact on or undermine environmental standards by increasing competition from countries without commitments to those standards.<sup>70</sup>
- 4.46 Five of Australia’s 18 FTAs include an environment chapter: the A-USFTA, the Korea-Australia FTA, the Peru-Australia FTA, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the A-UKFTA.<sup>71</sup> The upgraded A-A-NZFTA, expected to enter into force in 2024, contains a dedicated trade and sustainable development chapter.<sup>72</sup>
- 4.47 The AAA described the CPTPP as the most far-reaching agreement to which Australia is a signatory with regards to environmental protections. It noted that the agreement recognises the importance of multilateral environmental agreements in protecting the environment and includes provisions requiring parties to fulfil obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora amongst other commitments.<sup>73</sup>
- 4.48 The Red Meat Advisory Council (RMAC) identified that the CPTPP and the A-UKFTA include provisions to ensure high levels of environmental protection.<sup>74</sup> It added that the A-UKFTA includes provisions to allow Australia and the United Kingdom (UK) to collaborate on trade-connected environmental issues, such as climate change, the low-carbon transition, overfishing and illegal wildlife trade.<sup>75</sup> The A-UKFTA also acknowledges the role of implementing international climate change treaties, such as the Paris Agreement, to support effective environmental protection.<sup>76</sup>

## Climate change

- 4.49 The Committee received evidence that focussed on the interaction between international trade and global climate change commitments.<sup>77</sup> Professor Margaret Young, Melbourne Climate Futures (MCF) at the University of Melbourne outlined the relationship between trade and greenhouse gas emissions, and argued that trade agreements have significant scope to support efforts to address climate change:

... trade is so heavily bound up with climate change. For example, the World Trade Organisation [WTO] has compiled figures that suggests that the greenhouse gas emissions generated by trade are, on average, 20 per cent to 30 per cent of global greenhouse gas emissions. This suggests that it’s within trade agreements and within trade relations between states that you can actually really

<sup>70</sup> Australian Fair Trade and Investment Network, Submission 8, p. 14.

<sup>71</sup> Department of Foreign Affairs and Trade, Submission 41, p. 39.

<sup>72</sup> Department of Foreign Affairs and Trade, Submission 41, p. 39.

<sup>73</sup> Australian Alliance for Animals, Submission 29, Attachment 1, pp. 25–26.

<sup>74</sup> Red Meat Advisory Council, Submission 16, p. 10.

<sup>75</sup> Red Meat Advisory Council, Submission 16, p. 10.

<sup>76</sup> Red Meat Advisory Council, Submission 16, p. 10.

<sup>77</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 14; Melbourne Climate Futures, University of Melbourne, Submission 20, pp. 3–4; German Australian Business Council, Submission 25, p. 7.

harness the potential to reduce that very large proportion of greenhouse gas emissions.<sup>78</sup>

- 4.50 MCF submitted that Australia could enhance climate considerations in its trade negotiations to help realise the potential for agreements to contribute to climate change goals.<sup>79</sup> It elaborated that this could be achieved through:
- Provisions to strengthen climate commitments, including net zero goals by advancing the mitigation, adaptation, and finance goals of the Paris Agreement.
  - Provisions to facilitate trade and investment in climate-related areas such as the liberalisation of green goods and services and promoting low-carbon investments.
  - Dispute resolution to ensure accountability and cooperation between parties to deepen engagement towards climate change goals.<sup>80</sup>
- 4.51 The German Australian Business Council (GABC) indicated that Australia has significant opportunities to benefit from an increase in climate-focussed international trade, particularly with regard to green hydrogen, and noted the need for a trade agreement between Australia and the EU to secure these opportunities.<sup>81</sup>
- 4.52 DFAT highlighted the Singapore-Australia Green Economy Agreement as a specific arrangement to progress green economy objectives and to support the transition to net-zero emissions. It noted that as a less-than-treaty level agreement, it does not include market access obligations or legally binding commitments.<sup>82</sup>

## Animal welfare

- 4.53 RSPCA Australia advised that animals, animal products and animal by-products make up a substantial amount of Australia's trade.<sup>83</sup> In 2022, 39 per cent (\$30 billion) and 26 per cent (\$9 billion) of Australia's exports and imports respectively included live animals, animal products and animal by-products.<sup>84</sup>
- 4.54 Several submitters advocated for a greater consideration of animal welfare in Australia's trade agreements.<sup>85</sup> The AAA noted the increasing importance of animal welfare in international trade and observed that: '... it has not traditionally featured in trade and investment agreements to which Australia is a party, nor has it been considered a high priority by Australian trade negotiators.'<sup>86</sup>

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<sup>78</sup> Professor Margaret Young, Melbourne Law School, Melbourne Climate Futures, University of Melbourne, *Committee Hansard*, Melbourne, 3 November 2023, p. 24.

<sup>79</sup> Melbourne Climate Futures, University of Melbourne, Submission 20, pp. 3–4.

<sup>80</sup> Melbourne Climate Futures, University of Melbourne, Submission 20, p. 3.

<sup>81</sup> German Australian Business Council, Submission 25, p. 7.

<sup>82</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 20–21.

<sup>83</sup> RSPCA Australia, Submission 23, p. 1

<sup>84</sup> RSPCA Australia, Submission 23, p. 1.

<sup>85</sup> See, for example: RSPCA Australia, Submission 23, p. 2; Australian Alliance for Animals, Submission 29, p. 1; Humane Society International Australia, Submission 53, p. 2.

<sup>86</sup> Australian Alliance for Animals, Submission 29, p. 1.

- 4.55 Both RSPCA Australia and the AAA identified the A-UKFTA as a recent exception that includes a dedicated animal welfare chapter.<sup>87</sup> RSPCA Australia noted that the chapter recognises animal sentience, requires collaboration on animal welfare improvements, and includes a provision aimed at combatting the illegal trade of native animals.<sup>88</sup>
- 4.56 Dr Jed Goodfellow, Director of Policy at the AAA, suggested that Australia faces two key consequences if it does not give animal welfare greater consideration in trade:
- ... in the context of negotiating with trading partners which have lower standards of animal welfare compared to Australia. The risk there is that our domestic standards of production could be undermined by cheaper imports. In the context of negotiating with trading partners which have comparatively higher standards of animal welfare, the risk there is that we have market access issues for Australian exports.<sup>89</sup>
- 4.57 RSPCA Australia suggested that a lack of consideration of animal welfare in trade agreements: ‘... exposes Australia to reputational damage ...’ and leads to the ‘... erosion of exporting industries’ social license to operate, and declines in consumer trust amongst national and international communities.’<sup>90</sup> Similarly, Dr Goodfellow told the Committee that during the A-UKFTA negotiations animal welfare concerns received significant media attention in the UK, which damaged the reputation of Australia’s agriculture industry.<sup>91</sup>
- 4.58 RMAC suggested that animal welfare organisations have misrepresented the nature of animal welfare practices in agriculture to harm Australia’s international reputation:
- It is incredibly frustrating for the red meat industry to observe activist groups operating directly against our national interest as an agricultural exporting nation. These groups have sought to undermine Australian agriculture’s reputation internationally through their recent interventions associated with the United Kingdom and European Union free trade agreement negotiations. They generally present self-serving representations of the state of animal welfare or other sustainability matters in Australia that are not reflective of the reality or broader community views about agriculture and our production systems.<sup>92</sup>
- 4.59 RSPCA Australia, the AAA, and Humane Society International Australia (HSI Australia) recommended that DFAT formulate an animal welfare trade policy in collaboration with animal welfare groups to inform Australia’s trade negotiations.<sup>93</sup> Ms

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<sup>87</sup> RSPCA Australia, Submission 23, p. 3; Australian Alliance for Animals, Submission 29, p. 1.

<sup>88</sup> RSPCA Australia, Submission 23, p. 3.

<sup>89</sup> Dr Jed Goodfellow, Director, Policy, Australian Alliance for Animals, *Committee Hansard*, Canberra, 20 October 2023, p. 13.

<sup>90</sup> RSPCA Australia, Submission 23, p. 7.

<sup>91</sup> Dr Jed Goodfellow, Director, Policy, Australian Alliance for Animals, *Committee Hansard*, Canberra, 20 October 2023, p. 15.

<sup>92</sup> Red Meat Advisory Council, Submission 16, p. 12.

<sup>93</sup> RSPCA Australia, Submission 23, p. 5; Australian Alliance for Animals, Submission 29, p. 2; Humane Society International Australia, Submission 53, p. 2.

Nicola Beynon, Head of Campaigns at HSI Australia, elaborated on the benefits of developing an animal welfare trade policy for Australia's trade negotiations:

Setting such a coherent policy would have advantages for negotiators in that they would be approaching each new agreement with consistent goals and objectives, rather than being reactive and ad hoc in response to proposals from other countries. This would surely bring negotiating efficiencies. For example, when the EU first proposed animal welfare provisions for its FTA with Australia and then the UK it was quite novel for Australia, and Australia's comparatively lower animal welfare standards caused difficulties in negotiations ... The policy wouldn't be static; it would evolve and learn from each negotiation, respond to precedents, and be regularly updated with public consultation.<sup>94</sup>

## Approach taken by the European Union

- 4.60 Some submitters detailed elements of the approach taken by the EU to support and promote commitments to issues such as human rights, labour, and environmental standards in its trade agreements.<sup>95</sup>
- 4.61 The ACTU drew attention to the EU's policy of requiring countries it negotiates trade agreements with to commit to implementing international labour and environmental standards through Trade and Sustainable Development Chapters (TSD).<sup>96</sup> This requires countries to commit to implementing the Paris Agreement, obliges countries to implement basic workers' rights and environmental standards, and promotes the respect of core human rights and workers' rights standards set out in UN and ILO conventions.<sup>97</sup> It also noted that plans are in place to enhance the inclusion of these rights and standards by introducing monitoring and compliance mechanisms, including the possibility of trade sanctions for breaches of core TSD provisions.<sup>98</sup>
- 4.62 The AAA described that the trade agreements currently under negotiation by the EU: '...reflect the EU's approach to trade policy, which places a strong emphasis on values-based trade, particularly with respect to sustainable development – both in terms of labour rights and environmental protection.'<sup>99</sup>
- 4.63 The GABC described the EUs approach as developing a level playing field on labour and environmental laws that apply in other countries, in response to their impact on costs and competitiveness.<sup>100</sup>

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<sup>94</sup> Ms Nicola Beynon, Head of Campaigns, Humane Society International Australia, *Committee Hansard*, Canberra, 20 October 2023, p. 14.

<sup>95</sup> German Australian Business Council, Submission 24, p. 4; Australian Alliance for Animals, Submission 29.1, p. 10; Australian Council of Trade Unions, Submission 49, p. 22.

<sup>96</sup> Australian Council of Trade Unions, Submission 49, p. 22.

<sup>97</sup> Australian Council of Trade Unions, Submission 49, p. 22.

<sup>98</sup> Australian Council of Trade Unions, Submission 49, p. 22.

<sup>99</sup> Australian Alliance for Animals, Submission 29, Attachment 1, p. 20.

<sup>100</sup> German Australian Business Council, Submission 24, p. 4.

## Inclusion of non-trade provisions

4.64 DFAT advised that while Australia seeks to embed high-quality commitments on issues such as labour, gender equality, the environment and climate change in trade agreements, some trading partners may not regard trade agreements as an appropriate vehicle to advance these issues or may be reluctant to make binding commitments.<sup>101</sup> It explained Australia's approach when this is the case:

To this end, Australia has sought to demonstrate that maintaining high environmental, gender equality and labour standards need not harm economic competitiveness, but rather support shared economic prosperity. Effective advocacy, capacity building and cooperation activities are crucial to reinforcing and demonstrating such arguments. It can be difficult to overcome perceptions that trading partners that do not sign up to binding commitments on these issues have a competitive edge in regional value chains.<sup>102</sup>

4.65 On the other hand, the Department of Agriculture, Fisheries and Forestry (DAFF) observed that Australia's trading partners are increasingly asking for sustainability and environmental objectives and conditionalities to be included in agreements, as well as adherence to multilateral environmental agreements.<sup>103</sup>

4.66 Some submitters were of the view that the inclusion of non-trade provisions in trade agreements (e.g. human rights, labour and environmental standards) is either not necessary or is detrimental to trade objectives.<sup>104</sup>

4.67 The Productivity Commission stated that: '... It is not clear why the objectives being targeted by the non-trade provisions of broad cooperation agreements are best addressed through inclusion in these agreements, rather than through other means.'<sup>105</sup> The Productivity Commission suggested that including non-trade provisions in trade agreements is often not the most effective way of pursuing policy objectives.<sup>106</sup> It explained that: 'More conventional means are often more effective, such as through diplomacy, other (that is, non-trade) agreements or through fora such as, for issues relating to labour standards and working conditions, the International Labour Organization [ILO].'<sup>107</sup>

4.68 The Productivity Commission also observed that including provisions aiming to achieve social and ethical objectives by requiring countries to adopt practices in the

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<sup>101</sup> Department of Foreign Affairs and Trade, Submission 41, p. 41.

<sup>102</sup> Department of Foreign Affairs and Trade, Submission 41, p. 41.

<sup>103</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 6. See also: Red Meat Advisory Council, Submission 16, p. 10.

<sup>104</sup> See, for example: Productivity Commission, Submission 13, pp. 8 and 17–18; National Farmers' Federation, Submission 35, pp. 10–11.

<sup>105</sup> Productivity Commission, Submission 13, p. 8.

<sup>106</sup> Productivity Commission, Submission 13, p. 17.

<sup>107</sup> Productivity Commission, Submission 13, pp. 17–18.

areas such as labour, environmental, and cultural and human rights risks increasing barriers to trade and investment.<sup>108</sup>

- 4.69 The National Farmers' Federation (NFF) emphasised that trade agreements should only be about trade and with regard to the EU's recent approach stated that: 'FTAs should promote liberalisation, economic growth and expand market access. The NFF is very concerned about the government's willingness to participate in the creation of an international norm which imports trading partners' domestic policy agenda onto Australian shores.'<sup>109</sup>
- 4.70 Mr Kade Denton, General Manager, Trade and Economics at the NFF told the Committee that: 'The EU does have a very determined approach to using their heft and their weight in international forums to push policies, especially in the sustainability space, that benefit them and that are in line with their worldview, potentially to the detriment of other countries.'<sup>110</sup>
- 4.71 The Productivity Commission noted the role of international trade in economic development and explained that non-trade provisions may reduce the potential economic benefits of trade: '... including broader issues within trade and investment agreements risks diverting the focus away from trade and investment and may well be counterproductive by stifling the economic development that would, in due course, bring about improvements in labour and environmental standards.'<sup>111</sup>

## Impact of non-trade provisions on the agriculture sector

- 4.72 Several submissions raised concerns about the inclusion of non-trade provisions by trading partners that impose regulatory requirements on Australia's agricultural exports.<sup>112</sup> For example, the NFF expressed reservations about the inclusion of additional terms, such as sustainability requirements, within trade agreements that extend beyond market access and tariff reduction.<sup>113</sup>
- 4.73 DAFF identified that: '... market access requirements have become increasingly complex, with trading partners placing regulatory burdens that exporters must meet.'<sup>114</sup> It added that such conditions in biosecurity, food safety, animal welfare, sustainability, traceability and geographical indications could: '... lock Australia into meeting regulatory requirements that are not in the national interest and could effectively act as barriers to trade or place restrictions on domestic production.'<sup>115</sup>

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<sup>108</sup> Productivity Commission, Submission 13, p. 17.

<sup>109</sup> National Farmers' Federation, Submission 35, p. 10.

<sup>110</sup> Mr Kade Denton, General Manager, Trade and Economics, National Farmers' Federation, *Committee Hansard*, Canberra, 20 October 2023, p. 7.

<sup>111</sup> Productivity Commission, Submission 13, p. 17.

<sup>112</sup> See, for example: Australian Organic Limited, Submission 3, p. 10; Grain Trade Australia, Submission 6, p. 2; CropLife Australia, Submission 9, p. 2; GrainGrowers Limited, Submission 12, p. 1; National Farmers' Federation, Submission 35, p. 10; Department of Agriculture, Fisheries and Forestry, Submission 45, p. 6.

<sup>113</sup> National Farmers' Federation, Submission 35, p. 10.

<sup>114</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 6.

<sup>115</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 6.

4.74 The NFF advised that linking policy objectives to market access arrangements can occur through specific sustainability chapters or more directly through a conditionality clause relating to a certain objective, for example the NZ-EU FTA only allows the import of grass-fed beef into the EU.<sup>116</sup> The NFF explained that linking sustainability provisions to market access may require Australian farming practices to change in order to access the trading partner's market and that such provisions: '... cannot consider or account for the unique context of Australian production systems. Practice change driven by imported policy objectives rather than evidence-based research and on-farm decision-making will create unpredictable and adverse economic, environmental and social implications.'<sup>117</sup>

4.75 CropLife Australia contended that the EU's Farm to Fork Strategy aims to control the use of crop protection products, such as chemical pesticides, within the territory of its trading partners.<sup>118</sup> It added that to implement this measure, the EU considers environmental aspects when determining its import tolerances (that is, maximum residue limits) for pesticides no longer permitted in the EU.<sup>119</sup> CropLife Australia outlined that:

This policy ... undermines the ability of trading partners to maintain an [sic] increase food production and deliver measurable sustainability outcomes in a way that is suitable for their own production environment. This erodes the ability of the world to deliver global food security, reduce greenhouse gas emissions associated with global food production and protect the world's unique environments.<sup>120</sup>

4.76 Mr Denton of the NFF outlined concerns that the inclusion of some environmental provisions in trade agreements can resemble protectionist measures:

We are concerned about it. How countries use environmental regulations, whether they're in the carbon reduction space or in the chemical space, and how they use them as protectionist measures or stealthy protectionist measures is a concern for us. We have a pretty strong position that there is opportunity to collaborate and there is opportunity that you can get from collaboration on these issues. They should be dealt with separately to trade agreements and they should be dealt with separately to market access.<sup>121</sup>

4.77 The Productivity Commission also noted that including certain non-trade provisions in agreements: '... may amount to protectionism by stealth.'<sup>122</sup>

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<sup>116</sup> National Farmers' Federation, Submission 35, p. 10.

<sup>117</sup> National Farmers' Federation, Submission 35, pp. 10–11.

<sup>118</sup> CropLife Australia, Submission 9, p. 3.

<sup>119</sup> CropLife Australia, Submission 9, p. 3.

<sup>120</sup> CropLife Australia, Submission 9, p. 3.

<sup>121</sup> Mr Kade Denton, General Manager, Trade and Economics, National Farmers' Federation, *Committee Hansard*, Canberra, 20 October 2023, p. 7.

<sup>122</sup> Productivity Commission, Submission 13, p. 18.

## Committee comment

- 4.78 The Committee believes that Australia has an obligation to uphold international standards in relation to human rights, labour, and the environment. Trade and investment agreements should be consistent with and not undermine commitments to internationally agreed standards in these areas.
- 4.79 In alignment with Australia's economic, social, and environmental values and interests, it is imperative to ensure that trade agreements do not undermine human rights and labour rights or cause environmental degradation in other countries. This is not only consistent with our international commitments, but helps to ensure that domestic producers are not undercut by cheaper imports which do not have to comply with more stringent standards.
- 4.80 As such, the Committee is of the view that it is preferable that trade agreements should make reference to the same basic international rights and standards to which Australia has committed. This includes where appropriate, making specific reference and binding commitments to multilateral agreements such as ILO conventions and UN declarations to which Australia is a signatory.
- 4.81 The Committee welcomes the inclusion of the chapters in the A-UKFTA relating to environmental protection, trade and gender equality, and animal welfare.
- 4.82 The Committee suggests that it may not always be appropriate nor practical for Australia to use trade agreements as a vehicle to impose its values and interests on other countries. Broadly, the Committee considers that if Australia does not want the values and interests of trading partners imposed on it, then Australia should be careful about the values it seeks to introduce via trade agreements.
- 4.83 The Committee also notes that in many cases, the inclusion of social and environmental objectives in trade agreements may be at the proposal of the other negotiating party. In this case Australia may not be able to avoid including such provisions if they are necessary to obtain an agreement.
- 4.84 The Committee notes the suggestion that the inclusion of non-trade provisions such as social and environmental objectives has the potential to be used to conceal protectionist measures and that Australia must continue to be mindful of this in its approach to trade negotiations.

## Recommendations

### Recommendation 4

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- 4.85 The Committee recommends that the Australian Government seek to include human rights, labour and environmental chapters in its trade agreements that reflect, and where appropriate contain specific references to, relevant United**

**Nations and International Labour Organization conventions and declarations to which Australia is a signatory.**



## 5. Protecting the right to regulate in the public interest

### Overview

- 5.1 Submitters provided considerable evidence outlining the importance of public interest regulation and raised concerns that the inclusion of certain chapters or provisions in Australia's trade and investment agreements may restrict or undermine the Australian Government's ability to act in the public interest across a range of policy areas. This chapter summarises the evidence in relation to investor-state dispute settlement (ISDS) provisions, creative and cultural industries, government procurement, labour and migration, digital trade and e-commerce, and intellectual property.
- 5.2 While various safeguards are already in place, it was widely proposed that more are needed including specific exemptions in Australia's trade and investment agreements to explicitly retain the government's ability to regulate in the public interest, or that Australia should exclude certain provisions from agreements.

### Regulation in the public interest

- 5.3 Many submitters and witnesses highlighted the importance of ensuring that trade and investment agreements maintain the ability for the Australian Government to regulate in the public interest.<sup>1</sup> For example, the Electrical Trades Union (ETU) explained that:
- Trade should be a mechanism for furthering Australia's own national interests, not an impediment to governing in the public interest... At present international trade obligations may serve to limit government's ability to effectively implement important policy levers aimed at advancing public health and safety, local economic development, supporting domestic industry, and reducing national emissions.<sup>2</sup>
- 5.4 Similarly, the Australian Council of Trade Unions (ACTU) commented that trade agreements must be consistent with and promote the Australian Government's policy

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<sup>1</sup> See, for example: Grail Australia, Submission 2, p. 3; Australian Industry Group, Submission 4, p. 2; Australian Fair Trade and Investment Network, Submission 8, pp. 3 and 15; Australian Workers' Union, Submission 24, p. 3; Electrical Trades Union, Submission 30, p. 8; Public Health Association of Australia, Submission 36, p. 6; Department of Foreign Affairs and Trade, Submission 41, p. 42; Australian Council of Trade Unions, Submission 49, p. 13.

<sup>2</sup> Electrical Trades Union, Submission 30, p. 8.

agenda in the national interest, which requires ensuring that trade agreements retain full rights to regulate in the public interest.<sup>3</sup>

- 5.5 The Public Health Association of Australia (PHAA) observed that trade agreements have increasingly impacted on the ability of governments to regulate as they extend beyond trade in goods and services into areas that were previously matters for domestic policy making.<sup>4</sup> Further, in the context of public health measures the PHAA stated that:

It is highly important that trade agreements ensure that Australia can still maintain regulatory control over medicines, vaccines and harmful products such as tobacco, alcohol and vaping products. It is in our national interest to protect the capacity of our Commonwealth and state and territory governments to ensure public policy is not impeded by trade commitments.<sup>5</sup>

- 5.6 Dr Hazel Moir advised that while domestic regulation can act as a barrier to trade in services, it is often in place to achieve social and cultural objectives:

The desire to increase trade in services raises many more issues as potential barriers to trade – many service industries regulated to achieve a broad array of social, economic and cultural outcomes. Industries such as finance, law, education, entertainment, communications, transport and health raise many issues beyond market economics. Countries have developed a variety of regulatory procedures to ensure that these industries operate to achieve critical social and cultural goals as well as operating competitively.<sup>6</sup>

- 5.7 Some submitters called for the exclusion of certain policy areas from trade and investment agreements as well as including broad exemptions aimed at preserving the ability to regulate.<sup>7</sup> For example, the Australian Fair Trade and Investment Network (AFTINET) proposed that Australia's trade policy should have 'red lines' to protect public interest regulation.<sup>8</sup>
- 5.8 The Australian Industry Group (Ai Group) also reflected that: 'Trade agreements should be crafted to defend Australia's capacity to regulate [in the] nation's interest such as public health, safety, environmental protection, and cyber security.'<sup>9</sup>
- 5.9 The Department of Foreign Affairs and Trade (DFAT) advised that Australia's trade and investment agreements include a range of specific safeguards and broad

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<sup>3</sup> Australian Council of Trade Unions, Submission 49, p. 13.

<sup>4</sup> Public Health Association of Australia, Submission 36, p. 6.

<sup>5</sup> Public Health Association of Australia, Submission 36, p. 6.

<sup>6</sup> Dr Hazel Moir, Submission 28.1, p. 3.

<sup>7</sup> See, for example: Media, Entertainment and Arts Alliance, Submission 5, p. 3; Australian Fair Trade and Investment Network, Submission 8, pp. 6–8; Electrical Trades Union, Submission 30, p. 2; Screen Producers Australia, Submission 26, p. 4; APRA AMCOS, Submission 34, pp. 2–4; Australian Council of Trade Unions, Submission 49, pp. 27–28.

<sup>8</sup> Australian Fair Trade and Investment Network, Submission 8, p. 8.

<sup>9</sup> Australian Industry Group, Submission 4, p. 2.

reservations to protect the right of the Australian Government to regulate in the public interest.<sup>10</sup> DFAT further explained that:

... the general exceptions provisions of our [free trade agreements (FTAs)] provide policy space for core legitimate public policy objectives including: the protection of the environment, human and animal life; protection of national treasures of artistic, historic or archaeological value; public morals, public order and privacy; conservation of exhaustible natural resources and in relation to products of prison labour.

Australia ensures that existing legislation cannot be considered inconsistent with any FTA obligations through its schedules of non-conforming measures for services and investment, and also provides broad policy reservations that explicitly preserve the government's ability to legislate nine key areas of policy sensitivity including for social services established or maintained for a public purpose, such as social welfare, social security, public education, health and public utilities. Exceptions for services supplied in the exercise of governmental authority are also included.

We ensure our trade agreements preserve the Australian Government's right to regulate and make domestic policy on labour laws and worker's rights.<sup>11</sup>

- 5.10 The Department of Agriculture, Fisheries and Forestry (DAFF) noted that one of its main objectives in trade negotiations is to ensure that agreements do not restrict the ability of the Australian Government to continue to regulate in the public interest with regard to biosecurity.<sup>12</sup>
- 5.11 However, notwithstanding these safeguards, many submitters and witnesses expressed concerns that provisions in Australia's trade and investment agreements may restrict the capacity of the Australian Government to make policy and regulatory decisions in the public interest.<sup>13</sup> Broadly, concerns were raised in relation to ISDS provisions, creative and cultural industries, government procurement, labour and migration, digital trade and e-commerce, and intellectual property.

## Investor-state dispute settlement provisions

- 5.12 DFAT referred to investor-state dispute settlement (ISDS) provisions as: '... a mechanism that provides foreign investors, including Australian investors overseas, with the right to access an international tribunal to resolve investment disputes.'<sup>14</sup>

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<sup>10</sup> Department of Foreign Affairs and Trade, Submission 41, p. 42.

<sup>11</sup> Department of Foreign Affairs and Trade, Submission 41, p. 42.

<sup>12</sup> Department of Agriculture, Fisheries and Forestry, Submission 45, p. 7.

<sup>13</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 15; Australian Workers' Union, Submission 24, p. 3; Screen Producers Australia, Submission 26, p. 4; Electrical Trades Union of Australia, Submission 30, p. 9; Public Health Association of Australia, Submission 36, p. 6; Public Services International, Submission 40, p. 8.

<sup>14</sup> Department of Foreign Affairs and Trade, Submission 41, p. 20.

ISDS provisions are present in ten of Australia's trade agreements and all 15 of its bilateral investment treaties (BITs).<sup>15</sup>

5.13 Many submitters characterised ISDS provisions as giving international corporations the ability to sue governments for policy and regulatory decisions taken in the public interest that may impact on their profits.<sup>16</sup> For example:

- Grail Australia: ISDS provisions '... empower foreign investors to claim high levels of compensation from a national government if they show successfully in a World Trade tribunal that their investment has been negatively affected by a government law or regulation.'<sup>17</sup>
- ETU: ISDS provisions allow '... foreign investors and private companies to sue governments for pursuing laws, policies, and regulations that may impact their profits...'<sup>18</sup>
- PHAA: ISDS provisions '... enable foreign investors to sue governments in international tribunals for perceived breaches of their investor rights under an agreement which includes this mechanism.'<sup>19</sup>
- CPSU-SPSF Group: ISDS provisions '... allow large corporations to prevail over the public interest, when they can claim damage to their property rights.'<sup>20</sup>
- ActionAid Australia: ISDS provisions '... give multinational companies the right to sue government in secret tribunals for policy decisions that impact on their investments.'<sup>21</sup>

5.14 AFTINET contended that ISDS provisions provide additional legal rights to international corporations compared to local ones and are a means to bypass the domestic legal system:

ISDS gives increased legal rights to international corporations, enabling them to bypass national courts and sue governments for millions and even billions of dollars in international tribunals over changes in law or policy, even if the changes are in the public interest.<sup>22</sup>

5.15 Dr Moir suggested that ISDS provisions: '... preference the interests of foreign producers over domestic producers and citizens...'<sup>23</sup>

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<sup>15</sup> Australian Fair Trade and Investment Network, Submission 8, p. 15; Department of Foreign Affairs and Trade, Submission 41, p. 20; Australian Council of Trade Unions, Submission 49, p. 23, citation omitted.

<sup>16</sup> Grail Australia, Submission 2, p. 4; Australian Fair Trade and Investment Network, Submission 8, p. 15; Public Health Association of Australia, Submission 36, p. 6; ActionAid Australia, Submission 48, p. 9; Australian Council of Trade Unions, Submission 49, p. 23.

<sup>17</sup> Grail Australia, Submission 2, p. 4.

<sup>18</sup> Electrical Trades Union, Submission 30, p. 8.

<sup>19</sup> Public Health Association of Australia, Submission 36, p. 6.

<sup>20</sup> CPSU-SPSF Group, Submission 38, p. 4.

<sup>21</sup> ActionAid Australia, Submission 48, p. 9.

<sup>22</sup> Australian Fair Trade and Investment Network, Submission 8, p. 15. See also: Grail Australia, Submission 2, p. 4.

<sup>23</sup> Dr Hazel Moir, Submission 28, p. 6.

## Impact of ISDS provisions

- 5.16 Submitters and witnesses widely raised concerns that ISDS provisions in trade and investment agreements impact on the ability of governments to regulate in the public interest across many key policy areas.<sup>24</sup> For example, the ETU stated that ISDS provisions: ‘... act as a constant threat hanging over policymakers, introducing the risk of costly and drawn-out legal battles for the crime of protecting people, environmental, and economic interests.’<sup>25</sup>
- 5.17 Some described ISDS provisions as a restriction on national sovereignty.<sup>26</sup> For example, Grail Australia declared that ISDS provisions are: ‘... a gross violation of the sovereign rights and responsibilities of a government to legislate for the welfare of its people, its land and the environment.’<sup>27</sup>
- 5.18 AFTINET highlighted that foreign investors have used ISDS provisions to seek compensation from governments for enacting a range of public interest regulation including public health measures such as tobacco regulation and medicine patents as well as environmental protections and the minimum wage.<sup>28</sup>
- 5.19 Several submitters recounted Phillip Morris’ use of ISDS provisions to launch a claim against the Australian Government over its introduction of tobacco plain packaging laws aimed at reducing rates of smoking in Australia.<sup>29</sup> It was noted that while Phillip Morris lost the case, it took five years to reach a conclusion and cost Australia \$12 million in legal fees.<sup>30</sup>
- 5.20 Some also referred to the example of Zeph Investments—a company owned by Mr Clive Palmer—which has initiated two ISDS claims against Australia (totalling \$341.3 billion) in relation to a mining lease in Western Australia and coal exportation permits for a mine in Queensland.<sup>31</sup>

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<sup>24</sup> See, for example: Grail Australia, Submission 2, p. 4; Australian Fair Trade and Investment Network, Submission 8, pp. 15–17; Melbourne Climate Futures, University of Melbourne, Submission 20, p. 3; Australian Workers’ Union, Submission 24, p. 3; Electrical Trades Union, Submission 30, p. 8; Public Health Association of Australia, Submission 36, p. 6; ActionAid Australia, Submission 48, p. 9; Australian Council of Trade Unions, Submission 49, p. 24.

<sup>25</sup> Electrical Trades Union, Submission 30, p. 8.

<sup>26</sup> Grail Australia, Submission 2, p. 4; Australian Workers’ Union, Submission 24, p. 3; Australian Council of Trade Unions, Submission 49, p. 24.

<sup>27</sup> Grail Australia, Submission 2, p. 4.

<sup>28</sup> Australian Fair Trade and Investment Network, Submission 8, p. 16.

<sup>29</sup> Australian Fair Trade and Investment Network, Submission 8, p. 17, citation omitted; Australian Workers’ Union, Submission 24, p. 3; Electrical Trades Union of Australia, Submission 30, p. 9; Public Health Association of Australia, Submission 36, p. 7, citation omitted; CPSU-SPSF Group, Submission 38, p. 4; Australian Council of Trade Unions, Submission 49, p. 24.

<sup>30</sup> Australian Fair Trade and Investment Network, Submission 8, p. 17, citation omitted; Australian Council of Trade Unions, Submission 49, p. 24, citation omitted.

<sup>31</sup> Australian Fair Trade and Investment Network, Submission 6, pp. 16–17; Melbourne Climate Futures, University of Melbourne, Submission 20, p. 5; Uniting Church in Australia, Synod of Victoria and Tasmania, Submission 22, p. 1; Australian Workers’ Union, Submission 24, p. 3; Australian Council of Trade Unions, Submission 49, p. 40.

- 5.21 AFTINET warned that while ISDS claims may be unsuccessful, like in the Phillip Morris case, Australia may have to spend years and tens of millions of dollars to defend them.<sup>32</sup> Similarly, the ACTU stated that ISDS provisions impose unnecessary costs on Australian taxpayers.<sup>33</sup>
- 5.22 In addition to the financial burden of legal costs and compensation, some focussed on the potential impact of ISDS provisions on government policy and regulatory decision making.<sup>34</sup> For example, ActionAid Australia declared that ISDS provisions: ‘... have a “regulatory chilling-effect” as governments may either delay the implementation of a policy measure while an ISDS case is being decided; or resolve against implementing a policy measure due to concern that it will lead to an ISDS claim.’<sup>35</sup>
- 5.23 The PHAA made a similar point with regard to the impact on public health regulation: ‘Due to the uncertainty of outcomes and the potentially high costs of defending ISDS cases, the mere threat of ISDS may deter and delay government from implementing policies that may be effective at protecting public health.’<sup>36</sup>
- 5.24 Several submitters considered that the threat of ISDS claims by international corporations may discourage certain options in Australia in relation to climate and energy policy.<sup>37</sup> Melbourne Climate Futures (MCF) indicated that ISDS provisions could impact on the achievement of the government’s target of net-zero emissions by 2050.<sup>38</sup> AFTINET observed that ISDS cases brought by fossil fuel companies against governments over environmental regulations and action to reduce carbon emissions have become increasingly common.<sup>39</sup>
- 5.25 Public Services International (PSI) drew attention to the potential for ISDS provisions to restrict the ability of subnational governments (i.e. state/territory and local) to regulate where agreements or chapters of agreements are binding on subnational governments.<sup>40</sup> It further explained that investors have used ISDS provisions to challenge subnational government decisions, which has resulted in federal governments attempting to clawback monetary damages that they have had to pay to investors for breaching agreements.<sup>41</sup>

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<sup>32</sup> Australian Fair Trade and Investment Network, Submission 8, p. 17.

<sup>33</sup> Australian Council of Trade Unions, Submission 49, pp. 24–25.

<sup>34</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 17; Melbourne Climate Futures, University of Melbourne, Submission 20, p. 3; Public Health Association of Australia, Submission 36, p. 7, citation omitted; Public Services International, Submission 40, p. 3; ActionAid Australia, Submission 48, p. 9.

<sup>35</sup> ActionAid Australia, Submission 48, p. 9, citation omitted.

<sup>36</sup> Public Health Association of Australia, Submission 36, p. 7, citation omitted.

<sup>37</sup> Australian Fair Trade and Investment Network, Submission 8, p. 17; Melbourne Climate Futures, University of Melbourne, Submission 20, p. 3; Australian Workers’ Union, Submission 24, p. 3; Electrical Trades Union, Submission 30, p. 9.

<sup>38</sup> Melbourne Climate Futures, University of Melbourne, Submission 20, p. 3.

<sup>39</sup> Australian Fair Trade and Investment Network, Submission 6, pp. 16–18.

<sup>40</sup> Public Services International, Submission 40, p. 3.

<sup>41</sup> Public Services International, Submission 40, p. 3. See also pp. 12–17 for examples of ISDS cases that have challenged subnational government measures.

5.26 ActionAid Australia stated that globally ISDS cases cost countries US\$8 million to defend on average, whereas the amount of compensation paid to successful claimants regularly exceeds US\$100 million, and further that costs are disproportionately borne by developing countries.<sup>42</sup> Likewise, PSI noted the significantly greater impact of ISDS provisions on the budgets and policy agendas of developing countries.<sup>43</sup>

### Global decline and withdrawal

5.27 Several submitters observed that the number of trade and investment agreements with ISDS provisions has declined in recent years with many governments withdrawing from existing agreements due to the recognition of their impact on enacting public interest measures.<sup>44</sup> As an example, AFTINET observed that, in July 2023, the European Union Commission suggested that all European Union (EU) member states coordinate a withdrawal from the Energy Charter Treaty, which includes ISDS provisions that fossil fuel companies have used to seek compensation for carbon abatement policies.<sup>45</sup>

5.28 PSI referred to studies which found that having ISDS provisions in trade and investment agreements does not lead to the claimed advantage of increased foreign direct investment (FDI).<sup>46</sup> Rather, other factors such as the size and growth potential of markets are the most powerful determinant in attracting FDI and countries have continued to attract FDI after withdrawing from agreements with ISDS provisions.<sup>47</sup>

### Exclusion and review

5.29 The Committee received evidence that widely supported the exclusion of ISDS provisions from existing and future trade agreements to protect the ability of the Australian Government to regulate in the public interest.<sup>48</sup> For example, CPSU-SPSF Group recommended that: 'There should be no opportunity for foreign business to

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<sup>42</sup> ActionAid Australia, Submission 48, p. 9, citation omitted.

<sup>43</sup> Ms Kate Lappin, Asia Pacific Regional Secretary, Public Services International, *Committee Hansard*, Melbourne, 3 November 2023, p. 14.

<sup>44</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 16–18; Dr Hazel Moir, Submission 28, p. 6; Public Services International, Submission 40, p. 11.

<sup>45</sup> Australian Fair Trade and Investment Network, Submission 8, p. 18.

<sup>46</sup> Public Services International, Submission 40.1, p. 10. See also: Australian Fair Trade and Investment Network, Submission 8, p. 15; Ms Sanya Smith, Legal Consultant, Public Services International, *Committee Hansard*, Melbourne, 3 November 2023, p. 18.

<sup>47</sup> Public Services International, Submission 40.1, p. 10.

<sup>48</sup> See, for example: Grail Australia, Submission 2, p. 4; Australian Nursing and Midwifery Federation, Submission 7, p. 5; Australian Fair Trade and Investment Network, Submission 8, p. 15; Uniting Church in Australia, Synod of Victoria and Tasmania, Submission 22, p. 1; Australian Workers' Union, Submission 24, p. 3; Dr Hazel Moir, Submission 28, p. 6; Electrical Trades Union of Australia, Submission 30, pp. 8–9; Union Aid Abroad-APHEDA, Submission 32, pp. 2–3; Public Health Association of Australia, Submission 36, pp. 6–7; CPSU-SPSF Group, Submission 38, pp. 4–5; Public Services International, Submission 40, pp. 9–10; ActionAid Australia, Submission 48, pp. 9–10; Australian Council of Trade Unions, Submission 49, pp. 23–25.

make a claim against Australian governments making legislation and public policy that is in the public interest of Australian citizens.<sup>49</sup>

- 5.30 DFAT advised that the Australian Government has committed to not including ISDS provisions within new trade agreements and to reviewing provisions within existing agreements.<sup>50</sup> It further explained that:

... when opportunities arise, the Government will actively engage in processes to reform existing ISDS mechanisms to further enhance appropriate protections for government's right to regulate in the public interest, including in relation to the environment and public health.<sup>51</sup>

- 5.31 Many submitters acknowledged the Australian Government's position and called for it to be maintained, while some also called for reviews of ISDS provisions in existing agreements to be expedited with a view to their removal.<sup>52</sup> In addition, AFTINET, ActionAid Australia and the ACTU advocated for the negotiation of bilateral side-letters between Australia and other nations party to multilateral and regional agreements that include ISDS provisions to exclude the application of those provisions between the two countries. For example, similar to those that are already in place between Australia and the United Kingdom (UK) and under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and New Zealand (NZ) under the ASEAN (Association of Southeast Asian Nations)-Australia-New Zealand Free Trade Agreement (A-A-NZFTA).<sup>53</sup>

- 5.32 It was noted that Australia's more recent agreements have not included ISDS provisions, such as the Australia-United Kingdom Free Trade Agreement (A-UKFTA), the Australia-India Economic Cooperation and Trade Agreement (A-IECTA), and the Regional Comprehensive Economic Partnership (RCEP).<sup>54</sup> AFTINET welcomed the exclusion of ISDS from recent agreements and those currently under negotiation but claimed that such provisions in existing agreements remain a serious threat to Australia's ability to regulate in the public interest.<sup>55</sup>

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<sup>49</sup> CPSU-SPSF Group, Submission 38, p. 4.

<sup>50</sup> Department of Foreign Affairs and Trade, Submission 41, p. 20; Australian Fair Trade and Investment Network, Submission 8, p. 15, citation omitted; ActionAid Australia, Submission 48, p. 10, citation omitted; Australian Council of Trade Unions, Submission 49, p. 25.

<sup>51</sup> Department of Foreign Affairs and Trade, Submission 41, p. 20.

<sup>52</sup> See, for example: Grail Australia, Submission 2, p. 4; Australian Nursing and Midwifery Federation, Submission 7, p. 5; Australian Fair Trade and Investment Network, Submission 8, p. 18; Uniting Church in Australia, Synod of Victoria and Tasmania, Submission 22, p. 1; Australian Workers' Union, Submission 24, p. 3; Electrical Trades Union, Submission 30, p. 9; Union Aid Abroad-APHEDA, Submission 32, pp. 2–3; Public Health Association of Australia, Submission 36, p. 6; CPSU-SPSF Group, Submission 38, p. 4; Public Services International, Submission 40, pp. 9–11; ActionAid Australia, Submission 48, pp. 9–10; Australian Council of Trade Unions, Submission 49, pp. 24–25.

<sup>53</sup> Australian Fair Trade and Investment Network, Submission 8, p. 18; ActionAid Australia, Submission 48, p. 10; Australian Council of Trade Unions, Submission 49, p. 25. See also: Uniting Church in Australia, Synod of Victoria and Tasmania, Submission 22, p. 1.

<sup>54</sup> Australian Fair Trade and Investment Network, Submission 8, p. 15; ActionAid Australia, Submission 48, pp. 9–10. See also: Dr Hazel Moir, Submission 28, p. 6.

<sup>55</sup> Australian Fair Trade and Investment Network, Submission 8, p. 15. See also: Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, Melbourne, 3 November 2023, p. 1.

- 5.33 The ACTU specifically advocated for codifying the commitment to exclude ISDS provisions from future trade and investment agreements in legislation:

Given the dire impacts ISDS can have on the Government's ability to regulate... and the chilling effect the threat of ISDS has on regulation - we urge the Australian Government to codify this commitment in legislation to ensure that future Australian Governments cannot include ISDS in agreements.<sup>56</sup>

## Creative and cultural industries

- 5.34 Cultural and creative industries, such as film, television, music, and others, make a considerable contribution to the Australian economy.<sup>57</sup> The Australian Copyright Council (ACC) advised that between 2011 and 2020, these industries regularly added more than \$100 billion per year to the economy, amounting to 6 to 7 per cent of gross domestic product (GDP).<sup>58</sup> Australia's cultural and creative industries are also a significant export industry, with the potential for further expansion.<sup>59</sup>
- 5.35 Many submitters emphasised that in addition to their economic contribution, cultural and creative industries play an important role in the wellbeing of society, as well as in the expression of Australia's culture and national identity.<sup>60</sup> The export of Australian cultural and creative products may also support the tourism industry and have considerable 'soft diplomacy' benefits.<sup>61</sup>
- 5.36 The Media, Entertainment and Arts Alliance (MEAA) explained that capacity for the government to regulate cultural and creative industries has played an important role in developing and protecting Australia's national identity, for example, through the requirement of local content quotas for commercial television.<sup>62</sup>
- 5.37 Screen Producers Australia (SPA) also reflected on the history and purpose of Australian Government regulation in film and television production, noting that it has been largely effective in ensuring that local audiences have access to Australian content.<sup>63</sup> SPA further suggested:

The aim of Australian media content regulations recognises that without regulation, Australian content, particularly more expensive drama, documentary and children's content, would be under-represented as the viewing audiences and markets for Australian content are small, Australian content is expensive to

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<sup>56</sup> Australian Council of Trade Unions, Submission 49, p. 25.

<sup>57</sup> Screen Producers Australia, Submission 26, p. 2; Australian Copyright Council, Submission 27, p. 2; APRA AMCOS, Submission 34, p. 1.

<sup>58</sup> Australian Copyright Council, Submission 27, p. 2, citation omitted.

<sup>59</sup> Screen Producers Australia, Submission 26, p. 2; APRA AMCOS, Submission 34, p. 4.

<sup>60</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 2; Australian Fair Trade and Investment Network, Submission 8, p. 6; Screen Producers Australia, Submission 26, p. 2; Australian Council of Trade Unions, Submission 49, pp. 27–28.

<sup>61</sup> Screen Producers Australia, Submission 26, p. 3.

<sup>62</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 4.

<sup>63</sup> Screen Producers Australia, Submission 26, pp. 3–4.

produce, and broadcasters have access to cheaper international content in the English language from the USA [United States] and UK.<sup>64</sup>

- 5.38 Submitters highlighted the potential impact of trade agreements and contended that agreements should not restrict the ability of the government to regulate, protect and promote Australia's cultural and creative industries.<sup>65</sup> For example, APRA AMCOS stated that the Australian Government must factor in the consequences of trade agreements on cultural industries during negotiations and that Australia: '... should not enter any trade agreements which have the effect of restraining or negatively impacting the protection and growth of Australia's cultural industries.'<sup>66</sup>
- 5.39 The MEAA called on the Australian Government to foster the growth the arts sector and shape both Australia's cultural and economic future through the recognition and protection of cultural industries in trade agreements.<sup>67</sup>
- 5.40 Likewise, SPA underscored its concern with the impact of trade agreements: '... on the capacity for the Australian Government to effectively regulate audio-visual businesses to reflect the cultural interests of Australian audiences as well as the economic interests of screen-related businesses.'<sup>68</sup>
- 5.41 APRA AMCOS noted support for the Australian Government's National Cultural Policy launched on 30 January 2023 and signified that it must not be undermined by standalone trade and investment agreements that run counter to its objectives.<sup>69</sup>
- 5.42 Several submitters noted the importance of maintaining the ability to regulate Australia's creative and cultural industries with respect to protecting First Nations culture and its role in the national identity.<sup>70</sup>
- 5.43 In their submission, DFAT acknowledged the importance of protecting and promoting Australia's cultural and creative industries, as well as their economic and social value:

Australia aims to protect and promote its unique cultural heritage, diversity, and expression in trade and investment negotiations. We recognise the economic and social value of cultural industries, including film, music, literature, visual arts, and other creative sectors. These industries contribute significantly to Australia's GDP, create jobs, and promote innovation and creativity. Australia is committed to the sustainable development of our cultural industries while promoting cultural

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<sup>64</sup> Screen Producers Australia, Submission 26, p. 3.

<sup>65</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 5; Australian Fair Trade and Investment Network, Submission 8, p. 6; Screen Producers Australia, Submission 26, p. 2; Public Services International, Submission 40, p. 11; Australian Council of Trade Unions, Submission 49, p. 27.

<sup>66</sup> APRA AMCOS, Submission 34, p. 2.

<sup>67</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 5.

<sup>68</sup> Screen Producers Australia, Submission 26, p. 2.

<sup>69</sup> APRA AMCOS, Submission 34, p. 2.

<sup>70</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 4; Australian Council of Trade Unions, Submission 49, p. 27.

diversity, fostering a vibrant creative economy, and preserving our unique cultural heritage and expression.<sup>71</sup>

### Impact of the Australia-United States Free Trade Agreement

- 5.44 Several submitters referred to the Australia-United States Free Trade Agreement (A-USFTA) to highlight the impact that certain provisions in trade agreements can have on the regulation of creative and cultural industries, particularly in relation to local content rules.<sup>72</sup>
- 5.45 Both the MEAA and SPA detailed that the A-USFTA restricts the Australian Government's ability to introduce regulations for some broadcasting and audiovisual services.<sup>73</sup> It was noted that while the A-USFTA contains an exemption for local content rules, they were frozen at the levels that were current when the agreement entered into force in 2005.<sup>74</sup> The MEAA explained that this means: '... Australia's local media content quotas cannot be increased above their current levels except in limited circumstances ... and if they are reduced in the future, they cannot later be restored to existing levels.'<sup>75</sup>
- 5.46 Several submitters detailed that as a result of the provisions in the A-USFTA, multichannel free-to-air commercial television content is capped at 55 per cent on no more than two channels, or 20 per cent of the total number of channels made available by a broadcaster, up to only three channels.<sup>76</sup> Additionally, the expenditure requirement on Australian content for subscription television is limited to 10 per cent with an obligation for consultation before going up to a maximum of 20 percent.<sup>77</sup> In relation to the music industry, APRA AMCOS explained that under the A-USFTA local music quotas for free-to-air radio broadcasting are capped at 25 per cent, which it noted is low compared to many countries where requirements are set in the range of 80 to 90 per cent.<sup>78</sup>
- 5.47 SPA described the A-USFTA provisions as: '... of significant advantage to the USA and a restriction on Australian Governments.'<sup>79</sup> It added that the provisions operate:

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<sup>71</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 41–42.

<sup>72</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 2; Australian Fair Trade and Investment Network, Submission 8, p. 6; Screen Producers Australia, Submission 26, p. 5; APRA AMCOS, Submission 34, pp. 3–4; Australian Council of Trade Unions, Submission 49, pp. 27–28.

<sup>73</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 4; Screen Producers Australia, Submission 26, p. 5.

<sup>74</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 4; Australian Fair Trade and Investment Network, Submission 8, p. 25; Australian Council of Trade Unions, Submission 49, p. 27.

<sup>75</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 4. See also, Screen Producers Australia, Submission 26, p. 5; Australian Fair Trade and Investment Network, Submission 8, p. 25; APRA AMCOS, Submission 34, p. 3–4; Australian Council of Trade Unions, Submission 49, p. 27.

<sup>76</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 4; Australian Fair Trade and Investment Network, Submission 8, p. 25; Screen Producers Australia, Submission 26, p. 5.

<sup>77</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 4; Australian Fair Trade and Investment Network, Submission 8, p. 25; Screen Producers Australia, Submission 26, p. 5.

<sup>78</sup> APRA AMCOS, Submission 34, p. 3–4.

<sup>79</sup> Screen Producers Australia, Submission 26, p. 5. See also: APRA AMCOS, Submission 34, p. 3.

‘... as an unnecessary and unwelcome intrusion for the Australian Government in considering any regulation of audiovisual services in the national interest.’<sup>80</sup>

- 5.48 APRA AMCOS outlined the potential impact that restrictions on local content rules under the A-USFTA can have on people employed within Australian cultural and creative industries:

This entrenched restriction on content quotas for Australian music on Australian radio stations demonstrates how trade and investment agreements can undermine local culture and have very real financial impacts on Australia’s songwriters and composers, who already face challenging economic conditions to simply survive as create practitioners. Reduced local content quotes for Australian free-to-air television are resulting in dramatically fewer local productions being made on behalf of commercial free-to-air broadcasters. This has an obvious detrimental impact on the livelihoods of numerous people employed in the creative industries.<sup>81</sup>

- 5.49 The MEAA, AFTINET, SPA and the ACTU also advised that the A-USFTA has the effect of restricting the ability of the Australian Government to enact local content rules in response to changes in technology and new media platforms.<sup>82</sup> For example, the ACTU explained that: ‘The A-USFTA significantly restricts the ability of the Australian Government to regulate streaming and other new audiovisual services that have developed since the agreement was negotiated.’<sup>83</sup>
- 5.50 Both the MEAA and AFTINET suggested that the Australian Government should seek to renegotiate the provisions affecting streaming services and other forms of new media that have developed since the A-USFTA was negotiated in 2004 to ensure that current and potential future local content requirements as well as other measures to support creative and cultural industries are exempted.<sup>84</sup>

### **Creative and cultural exemptions**

- 5.51 Some submitters advocated for the adoption of a broad exemption within trade agreements to ensure that the Australian Government maintains the ability to regulate creative and cultural industries in the public interest.<sup>85</sup> For example, the MEAA stated that the Australian Government should: ‘... ensure that our cultural

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<sup>80</sup> Screen Producers Australia, Submission 26, p. 6.

<sup>81</sup> APRA AMCOS, Submission 34, p. 4.

<sup>82</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 6 and 25–26; Screen Producers Australia, Submission 26, pp. 5–6; Australian Council of Trade Unions, Submission 49, p. 27.

<sup>83</sup> Australian Council of Trade Unions, Submission 49, p. 27.

<sup>84</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 4; Australian Fair Trade and Investment Network, Submission 8, p. 26.

<sup>85</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 3; Australian Fair Trade and Investment Network, Submission 8, p. 6; Screen Producers Australia, Submission 26, p. 4; APRA AMCOS, Submission 34, pp. 2–4; Australian Council of Trade Unions, Submission 49, pp. 27–28.

industries are protected and the ability to tell our own stories enhanced through a comprehensive cultural exclusion when negotiating all free trade agreements.<sup>186</sup>

- 5.52 Similarly, the ACTU stated that: 'Trade agreements must ensure that local content rules for all forms of media and subsidies to promote local cultural expression are exempted from trade rules.'<sup>187</sup> The SPA reflected that such an exemption for cultural and creative industries would recognise their important role in the expression of the nation's cultural identity, as well as their economic and global trade role.<sup>188</sup>
- 5.53 Both the MEAA and SPA reasoned that the case for a broad cultural exemption in trade agreements is supported by the technology-based nature of the industry, which means that how the public access media and culture is subject to ongoing change.<sup>189</sup> SPA explained that:
- How technology may develop and evolve for future audiences cannot be fully anticipated, meaning that policy flexibility is essential to adapt to future delivery platforms. Therefore, making regulations pertaining to an extant industry profile could serve to bind future regulatory action that the Australian Government may wish to make. A cultural exemption would provide future Australian Governments with the flexibility that may be needed to regulate cultural industries in the national interest.<sup>190</sup>
- 5.54 The MEAA observed that it is increasingly difficult to anticipate the impact of technological change even in the short-term and that without a broad exemption any new media platform invented after an agreement is negotiated can be subject to the provisions of that agreement.<sup>191</sup>
- 5.55 AFTINET noted that Australia's subsequent trade agreements have not included the restrictions on local content rules contained in the A-USFTA. It also stated that: 'The only way to ensure that the government has the right to regulate all forms of current and possible future media and cultural expression in these areas is to have a comprehensive cultural exclusion from such regulation in trade agreements.'<sup>192</sup>
- 5.56 Several submitters referenced the protections provided for creative and cultural industries within the Singapore-Australia Free Trade Agreement (S-AFTA) as a model for Australia's other trade agreements.<sup>193</sup> In particular, APRA AMCOS stated that the S-AFTA safeguards Australia's right to adopt or maintain any measure with respect to the creative arts, cultural heritage, and other cultural industries.<sup>194</sup> It added

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<sup>186</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 6.

<sup>187</sup> Australian Council of Trade Unions, Submission 49, p. 27. See also: Australian Fair Trade and Investment Network, Submission 8, p. 6.

<sup>188</sup> Screen Producers Australia, Submission 26, p. 4.

<sup>189</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 3; Screen Producers Australia, Submission 26, pp. 2 and 4.

<sup>190</sup> Screen Producers Australia, Submission 26, p. 4.

<sup>191</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 3.

<sup>192</sup> Australian Fair Trade and Investment Network, Submission 8, p. 26.

<sup>193</sup> Media, Entertainment and Arts Alliance, Submission 5, p. 4; APRA AMCOS, Submission 34, p. 3.

<sup>194</sup> APRA AMCOS, Submission 34, p. 3.

that the Australian Government should seek include equivalent provisions in future agreements.<sup>95</sup>

- 5.57 SPA drew attention to Canada as an example of a country that has adopted a principle in favour of an exemption for cultural industries within bilateral trade agreements.<sup>96</sup> The Canadian exemption: ‘... covers a broad range of products including books, magazines, periodicals, newspapers, film and video, audio and video music recordings, and radio, cable and television broadcasting.’<sup>97</sup> Its purpose is to ensure that Canada can: ‘... adopt and maintain programs and policies that support the creation and distribution of Canadian artistic expression or content, without conflicting with trade disciplines included under the terms of the agreement.’<sup>98</sup>
- 5.58 DFAT advised that Australia maintains cultural interest protections, such as broad policy reservations for audiovisual and cultural services, in its international trade commitments through the World Trade Organisation (WTO) and in FTAs. It added that these reservations ensure trade commitments do not affect Australia’s ability to introduce measures to protect and promote its cultural interests.<sup>99</sup>

## Government procurement

- 5.59 The Committee received evidence that identified the potential for provisions relating to government procurement in Australia’s trade and investment agreements to restrict the Australian Government’s ability to introduce measures in the public interest.<sup>100</sup>
- 5.60 Several submitters highlighted the importance of government procurement to the economy and its role as a policy tool to protect and promote the development of domestic industries and supply chains.<sup>101</sup> For example, the Australian Workers’ Union (AWU) stated that: ‘Government is a major actor in the economy and the single largest consumer of goods and services.’<sup>102</sup> The Australian Manufacturing Workers’ Union (AMWU) noted that: ‘Procurement is one of the strongest levers that government has to invest in Australian jobs and domestic supply chains.’<sup>103</sup>

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<sup>95</sup> APRA AMCOS, Submission 34, p. 3.

<sup>96</sup> Screen Producers Australia, Submission 26, p. 4.

<sup>97</sup> Screen Producers Australia, Submission 26, p. 4.

<sup>98</sup> Screen Producers Australia, Submission 26, p. 4, citation omitted.

<sup>99</sup> Department of Foreign Affairs and Trade, Submission 41, p. 43.

<sup>100</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 32; Australian Workers’ Union, Submission 24, pp. 4–5; Electrical Trades Union of Australia, Submission 30, p. 10; CPSU-SPSF Group, Submission 38, p. 5–6; Public Services International, Submission 40, p. 9; Australian Manufacturing Workers’ Union, Submission 43, pp. 4–5; Australian Council of Trade Unions, Submission 49, pp. 25–26.

<sup>101</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, p. 32; Australian Workers’ Union, Submission 24, pp. 4–6; Electrical Trades Union of Australia, Submission 30, p. 9; Australian Manufacturing Workers’ Union, Submission 43, p. 4; Australian Council of Trade Unions, Submission 49, p. 25.

<sup>102</sup> Australian Workers’ Union, Submission 24, p. 4.

<sup>103</sup> Australian Manufacturing Workers’ Union, Submission 43, pp. 4–5.

5.61 The ACTU specified that the Australian Government has a responsibility to use procurement decisions to:

- Drive better wages, conditions, job security, and job quality across the economy.
- Rebuild local supply chains and our national sovereign manufacturing capability.
- Contribute to our social and environmental objectives as a society, including on gender equality and Indigenous Australian's social and economic empowerment.<sup>104</sup>

5.62 The ACTU put forward the A-UKFTA as an example to demonstrate potentially restrictive provisions in trade agreements, noting that it contains non-discrimination clauses that limit the Australia from favouring domestic businesses over international ones in government procurement decisions.<sup>105</sup>

5.63 The AWU outlined that in addition to clauses within bilateral and regional FTAs, Australia is a party to the Agreement on Government Procurement (GPA), which sets limitations on the capacity of governments to favour local procurement.<sup>106</sup> The AWU explained that:

One of the primary constraints is the principle of non-discrimination, which mandates that all suppliers—be they domestic or foreign—must be treated equally in government procurement processes. Additionally, the GPA establishes financial thresholds that dictate when a procurement process must be open to foreign suppliers. Because of the 'most favoured nation' provisions in both the GPA and Australia's other free trade commitments, this means that all government procurement other than for construction services must be offered to Australia's trading partners once they exceed \$700,000 in value.<sup>107</sup>

5.64 Both the AWU and ACTU observed that while government procurement provisions in trade agreements seek to create an open and competitive international market for government contracts, they can restrict the ability of governments to develop local procurement strategies and preference domestic industries.<sup>108</sup> Likewise, CPSU-SPSF Group explained that trade agreements that require competitive tendering or foreign companies to be treated the same way as domestic companies can undermine local procurement policies with negative economic impacts on local workers, businesses and communities.<sup>109</sup>

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<sup>104</sup> Australian Council of Trade Unions, Submission 49, p. 26.

<sup>105</sup> Australian Council of Trade Unions, Submission 49, p. 26.

<sup>106</sup> Australian Workers' Union, Submission 24, p. 4.

<sup>107</sup> Australian Workers' Union, Submission 24, pp. 4–5.

<sup>108</sup> Australian Workers' Union, Submission 24, p. 4; Australian Council of Trade Unions, Submission 49, p. 26.

<sup>109</sup> CPSU-SPSF Group, Submission 38, pp. 5–6.

- 5.65 Some submitters specified that government procurement provisions in Australia’s trade agreements may limit the effectiveness of Australian Government commitments to expand local content requirements and introduce ‘buy Australian’ initiatives.<sup>110</sup>
- 5.66 Similarly, others noted that government procurement provisions may impact on the Australian Government’s capacity to use its significant purchasing power to support skills and industry policy, including initiatives to build Australia’s sovereign manufacturing capability and supply chains in strategic areas such as pharmaceuticals and renewable energy.<sup>111</sup> The AWU and ACTU noted the importance rebuilding sovereign manufacturing capacity given its decline has led to Australia having lower levels of economic complexity and research and development, resulting in real-world consequences such as supply chain disruptions during the COVID-19 pandemic.<sup>112</sup>
- 5.67 The AWU highlighted the Australian steel industry to demonstrate how support for domestic manufacturing industries can produce significant positive economic and social outcomes well-beyond the financial cost of purchasing domestic steel.<sup>113</sup>
- 5.68 Consequently, many submitters proposed that Australia’s trade and investment agreements should include flexible provisions or specific exemptions that ensure the Australian Government is able to use government procurement to protect and promote the public interest across a range of policy areas.<sup>114</sup> For example, the AMWU recommended that:
- The government must legislate to ensure that FTAs should not be signed where they could limit the government’s ability to preference local businesses in procurement decisions where they are made to assist SMEs [small and medium-sized enterprises], protect national security, promote ethical standards, develop or maintain sovereign industrial capabilities and protect and encourage the involvement of indigenous Australians.<sup>115</sup>
- 5.69 The Australian Small Business and Family Enterprise Ombudsman stated that government procurement provisions in trade agreements: ‘... should allow sufficient flexibility for officials to take account of the national economic benefits of a procurement (including strengthening sovereign capability by extending opportunities to First Nations businesses, domestic suppliers, start-ups and businesses pursuing

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<sup>110</sup> Australian Workers’ Union, Submission 24, p. 5; Electrical Trades Union of Australia, Submission 30, pp. 9–11; Australian Council of Trade Unions, Submission 49, p. 26.

<sup>111</sup> Australian Fair Trade and Investment Network, Submission 8, p. 32; Australian Workers’ Union, Submission 24, pp. 4–6; Public Services International, Submission 40, pp. 8; Australian Council of Trade Unions, Submission 49, pp. 25–26.

<sup>112</sup> Australian Workers’ Union, Submission 24, p. 4; Australian Council of Trade Unions, Submission 49, p. 25.

<sup>113</sup> Australian Workers’ Union, Submission 24, p. 4.

<sup>114</sup> Australian Fair Trade and Investment Network, Submission 8, p. 32; Australian Small Business and Family Enterprise Ombudsman, Submission 11, p. 2; Australian Workers’ Union, Submission 24, pp. 4–6; Electrical Trades Union of Australia, Submission 30, p. 9; CPSU-SPSF Group, Submission 38, pp. 5–6; Public Services International, Submission 40, pp. 8–9; Australian Manufacturing Workers’ Union, Submission 43, pp. 4–5; Australian Council of Trade Unions, Submission 49, pp. 25–26.

<sup>115</sup> Australian Manufacturing Workers’ Union, Submission 43, pp. 4–5.

innovation in products or processes) while ensuring that Australia does not engage in prejudicial decision making.<sup>116</sup>

- 5.70 Some submitters considered that Australia's approach to government procurement should take a wider interpretation of 'value for money' to recognise the full economic value of supporting domestic firms in procurement decisions.<sup>117</sup> The AWU specified that trade agreements should be designed to allow governments to have broader considerations in procurement decisions such as the whole of life costs of materials, the unfair economic advantages of dumping, the short-term nature of global supply, the long term impact of domestic industry closures, and the costs of substandard quality imported products.<sup>118</sup>
- 5.71 Both AFTINET and the ACTU noted that there are some exemptions in trade agreements to enable governments to preference certain suppliers and recommended that Australia should maintain current government procurement exclusions for SMEs, First Nations enterprises, national treasures, ethical standards, environmental standards, and for local government procurement.<sup>119</sup>
- 5.72 The ACC identified that the A-USFTA and the A-UKFTA include: 'Provisions to allow for beneficial measures for indigenous people in the context of government procurement.'<sup>120</sup> DFAT also stated that the A-UKFTA: '... reserved Australia's right to implement policy measures which provide more favourable treatment to First Nations People, such as the Indigenous Procurement Policy'.<sup>121</sup>

## Labour and temporary migration

- 5.73 The Committee received evidence suggesting that provisions in Australia's trade and investment agreements that waive labour market testing and skills testing requirements reduce employment opportunities for local workers, increase the number of temporary migrant workers vulnerable to exploitation, exacerbate long-term skills shortages, and undermine service and safety standards.<sup>122</sup>

### Labour market testing

- 5.74 Submitters and witnesses raised concern with provisions in Australia's trade agreements that waive labour market testing, suggesting that such provisions lead to

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<sup>116</sup> Australian Small Business and Family Enterprise Ombudsman, Submission 11, p. 2.

<sup>117</sup> Australian Fair Trade and Investment Network, Submission 8, p. 32; Australian Workers' Union, Submission 24, pp. 4–5.

<sup>118</sup> Australian Workers' Union, Submission 24, pp. 5–6.

<sup>119</sup> Australian Fair Trade and Investment Network, Submission 8, p. 32; Australian Council of Trade Unions, Submission 49, p. 26. See also: Electrical Trades Union, Submission 30, p. 9.

<sup>120</sup> Australian Copyright Council, Submission 27, pp. 5–7.

<sup>121</sup> Department of Foreign Affairs and Trade, Submission 41, p. 44.

<sup>122</sup> See, for example: Australian Nursing and Midwifery Federation, Submission 7, pp. 4 and 6; Australian Fair Trade and Investment Network, Submission 8, pp. 13–14 and 30–31; Electrical Trades Union of Australia, Submission 30, pp. 4–7; CPSU-SPSF Group, Submission 38, p. 3; Australian Council of Trade Unions, Submission 49, p. 13 and 21.

fewer jobs for local workers, facilitates an increase in temporary migrant workers vulnerable to exploitation, and contributes to long-term skills shortages.<sup>123</sup>

- 5.75 In its submission, the ETU described labour market testing as: ‘... a long-standing requirement for the use of temporary migrant labour, designed to ensure that migrant workers are only used in instances where a local shortage of necessary skills can be demonstrated.’<sup>124</sup>
- 5.76 The ACTU emphasised the role of labour market testing stating that: ‘Labour market testing is an important measure to ensure that employers properly advertise vacancies locally to provide workers with opportunities and to ensure that employers are not building their business model on exploiting temporary migrant workers.’<sup>125</sup>
- 5.77 Several of Australia’s trade agreements include provisions that waive the requirement for labour market testing for certain workers and businesses of trading partners.<sup>126</sup> The ETU pointed out that the Department of Home Affairs records 14 countries as being exempt from labour market testing due to Australia’s international trade obligations.<sup>127</sup>
- 5.78 DFAT outlined that all of Australia’s trade agreements other than the A-USFTA include provisions to waive labour market testing consistent with 1995 WTO commitments.<sup>128</sup> This includes waiving labour market testing for:
- independent executives (i.e. individuals establishing a new business in Australia);
  - highly skilled intra-corporate transferees;
  - service sellers (as business visitors) staying for a maximum of 12 months; and
  - highly skilled specialists who have been with their employer for at least two years.<sup>129</sup>
- 5.79 DFAT also advised that Australia’s bilateral trade agreements with the UK, Chile, China, Korea, Japan, Singapore and Thailand, and the CPTPP include commitments to waive labour market testing for contractual service suppliers.<sup>130</sup>
- 5.80 In relation to the CPTPP, AFTINET stated that:

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<sup>123</sup> See, for example: Grail Australia, Submission 2, p. 4; Australian Nursing and Midwifery Federation, Submission 7, p. 6; Australian Fair Trade and Investment Network, Submission 8, pp. 30–31; Australian Workers’ Union, Submission 24, p. 3; Electrical Trades Union of Australia, Submission 30, p. 6; Union Aid Abroad-APHEDA, Submission 32, p. 2; CPSU-SPSF Group, Submission 38, p. 3; Australian Council of Trade Unions, Submission 49, p. 21.

<sup>124</sup> Electrical Trades Union, Submission 30, p. 4.

<sup>125</sup> Australian Council of Trade Unions, Submission 49, p. 20.

<sup>126</sup> Australian Fair Trade and Investment Network, Submission 8, p. 30; Australian Workers’ Union, Submission, Submission 24, p. 3; Electrical Trades Union of Australia, Submission 30, p. 6; Department of Foreign Affairs and Trade, Submission 41, p. 40.

<sup>127</sup> Electrical Trades Union of Australia, Submission 30, p. 5.

<sup>128</sup> Department of Foreign Affairs and Trade, Submission 41, p. 40.

<sup>129</sup> Department of Foreign Affairs and Trade, Submission 41, p. 40.

<sup>130</sup> Department of Foreign Affairs and Trade, Submission 41, p. 40.

... the CPTPP commits Australia to accepting unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam as contractual service providers in a wide range of occupations, and removes labour market testing to establish whether there are local workers available.<sup>131</sup>

- 5.81 The ETU claimed that waiving the need for labour market testing allows employers: ‘... to overlook hiring Australian workers in favour of cheaper, more easily exploitable overseas workers.’<sup>132</sup>
- 5.82 Several submitters made the point that temporary migrant workers are at greater risk of not having their rights enforced and are more vulnerable to exploitation than other workers.<sup>133</sup> For example, the ACTU observed that: ‘... temporary migrant workers are regularly facing issues of wage and superannuation theft, discrimination and bullying, job insecurity, and risks to their health and safety.’<sup>134</sup>
- 5.83 Likewise, AFTINET cited studies demonstrating that temporary migrant workers are subject to conditions that do not meet Australian standards such as payment below minimum wage, excessive work hours, lack of workplace health and safety training, and limited freedom of association and collective bargaining rights.<sup>135</sup>
- 5.84 Both AFTINET and the ACTU drew a connection between the high risk of exploitation of temporary migrant workers and the fact that they are tied to their employer and face deportation if they lose their job, leaving them in a highly vulnerable position.<sup>136</sup>
- 5.85 The ETU explained that labour market testing waivers allows employers to rely on temporary migrant labour rather than investing in training, thereby exacerbating domestic skills shortages.<sup>137</sup> Mr James Miranda, National Policy and Research Officer at the ETU told the Committee how Australia’s trade agreements have contributed to the significant skills shortage in the electrical industry:

Labour market testing is how employers demonstrate that they are being affected by a skills shortage so they can get access to overseas labour. They need to demonstrate that they've tried to find local workers and were unable. [Waiving labour market testing] allows them to sidestep that and not even look on local labour markets and go straight overseas. It is driving the skill shortages, because you end up with a situation where it's cheaper, easier and more profitable to just go overseas in the instance of a skills shortage instead of trying to train up a domestic workforce. It undercuts domestic migration settings and reinforces this

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<sup>131</sup> Australian Fair Trade and Investment Network, Submission 8, p. 30.

<sup>132</sup> Electrical Trades Union, Submission 30, p. 5.

<sup>133</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 30–31; Electrical Trades Union, Submission 30, p. 5; CPSU-SPSF Group, Submission 38, pp. 3 and 5; Australian Council of Trade Unions, Submission 49, pp. 19–20.

<sup>134</sup> Australian Council of Trade Unions, Submission 49, p. 19.

<sup>135</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 30–31, citations omitted.

<sup>136</sup> Australian Fair Trade and Investment Network, Submission 8, pp. 30–31; Australian Council of Trade Unions, Submission 49, p. 20.

<sup>137</sup> Electrical Trades Union of Australia, Submission 30, p. 6.

negative feedback loop, where you have a skills shortage and you hire a temporary migrant worker because it's cheaper than an apprentice. It makes the skills shortage worse, so you go hire more temporary migrant labour.<sup>138</sup>

- 5.86 Some acknowledged that there is a role for temporary migrant labour, but only on the basis that its purpose is to address genuine labour and skills shortages as determined by robust labour market testing.<sup>139</sup> As such, submitters that raised concerns broadly recommended that the Australian Government should not enter into trade agreements that include provisions that waive labour market testing.<sup>140</sup>
- 5.87 Others advocated for migration aimed at addressing labour and skills shortages to be centred on permanent rather than temporary migration.<sup>141</sup> For example, the ACTU proposed that Australia's migration system: '... needs to be rebalanced in favour of permanent migration, where workers are given rights and protections, including ending the single-employer sponsorship model where workers are tied to their employers in favour of mobility where workers can move between employers.'<sup>142</sup>
- 5.88 Similarly, CPSU-SPSF Group suggested that: 'Where there are temporary migration arrangements in place for where there are skills shortages, there should be pathways for these workers to access security through pathways to permanent migration.'<sup>143</sup>
- 5.89 Several submitters emphasised that arrangements for temporary migrant workers should be considered part of migration and skills policy, rather than being included in trade agreements.<sup>144</sup> The Australian Nursing and Midwifery Federation (ANMF) specified that arrangements for genuine temporary labour shortages should be separate stand-alone government to government agreements and noted the Pacific Australia Labour Mobility scheme as an example.<sup>145</sup>
- 5.90 Some submitters also emphasised, that where temporary migrant workers are required, greater protections are needed.<sup>146</sup> For example, the ANMF noted that migration schemes: '... must contain protections for temporary and seasonal workers

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<sup>138</sup> Mr James Miranda, National Policy and Research Officer, Electrical Trades Union, *Committee Hansard*, Melbourne, 3 November 2023, p. 7.

<sup>139</sup> See, for example: Grail Australia, Submission 2, p. 4; Australian Nursing and Midwifery Federation, Submission 7, p. 6; Australian Fair Trade and Investment Network, Submission 8, p. 31; Electrical Trades Union of Australia, Submission 30, p. 5.

<sup>140</sup> Grail Australia, Submission 2, p. 4; Australian Workers' Union, Submission 24, p. 3; Electrical Trades Union, Submission 30, p. 5; Union Aid Abroad-APHEDA, Submission 32, p. 2; Australian Manufacturing Workers' Union, Submission 43, p. 4; Australian Council of Trade Unions, Submission 49, p. 20.

<sup>141</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 6; Australian Fair Trade and Investment Network, Submission 8, pp. 30–31; CPSU-SPSF Group, Submission 38, p. 5; Australian Council of Trade Unions, Submission 49, p. 20.

<sup>142</sup> Australian Council of Trade Unions, Submission 49, p. 20.

<sup>143</sup> CPSU-SPSF Group, Submission 38, p. 5.

<sup>144</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 6; Australian Fair Trade and Investment Network, Submission 8, p. 31; CPSU-SPSF Group, Submission 38, p. 5; Australian Council of Trade Unions, Submission 49, p. 20.

<sup>145</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 6. See also: Australian Fair Trade and Investment Network, Submission 8, p. 31.

<sup>146</sup> Grail Australia, Submission 2, p. 4; Australian Nursing and Midwifery Federation, Submission 7, p. 6; Australian Fair Trade and Investment Network, Submission 8, p. 31.

to ensure they are not exploited and enjoy the same rights as other workers in Australia.<sup>147</sup> Grail Australia similarly declared that: ‘... justice demands that labour laws and standards be equally applied to migrant and local workers.’<sup>148</sup>

- 5.91 The ETU and the ACTU acknowledged the Australian Government’s commitment to the development of a migration strategy that includes supporting domestic jobs, workers, and conditions; an evidence-based approach to addressing labour shortages; and reducing the exploitation of migrant workers.<sup>149</sup> However, the ACTU contended that provisions in trade agreements relating to temporary migrant workers are at odds with the objectives of the proposed migration and skills policy, while the ETU stated that the Australian Government cannot: ‘... allow international trade agreements to undercut their ability to effectively regulate the migration of skilled workers...’<sup>150</sup>
- 5.92 DFAT advised that in most of Australia’s trade agreements it is specifically stated that Australian Government retains the right to change visa sponsorship requirements, including for eligible occupations.<sup>151</sup>

### Licensing and skills testing

- 5.93 Some submitters also raised concerns with exemptions from mandatory skills testing and licensing requirements in Australia’s trade agreements.<sup>152</sup> The ETU explained that such provisions can undermine service and safety standards:

Licensing requirements and mandatory skills testing regimes for high-risk trades such as electricians serve a critical role in keeping workers and consumers safe by ensuring that all workers are suitably qualified and aware of Australian standards and regulations. FTA provisions removing mandatory skills testing requirements, such as those in the China-Australia Free Trade Agreement, introduce significant concerns around safety and quality assurance, putting migrant workers, their colleagues, and end users at risk of harm from faulty installations.<sup>153</sup>

- 5.94 The ETU added that other agreements, such as the A-UKFTA, have sought to introduce international mutual recognition of occupational licenses, and that given Australia has higher standards and requirements, these place the free movement of labour over worker and consumer safety.<sup>154</sup>

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<sup>147</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 6. See also: Australian Fair Trade and Investment Network, Submission 8, p. 31.

<sup>148</sup> Grail Australia, Submission 2, p. 4.

<sup>149</sup> Electrical Trades Union, Submission 30, p. 5; Australian Council of Trade Unions, Submission 49, p. 20.

<sup>150</sup> Electrical Trades Union, Submission 30, p. 5; Australian Council of Trade Unions, Submission 49, pp. 20–21.

<sup>151</sup> Department of Foreign Affairs and Trade, Submission 41, p. 40.

<sup>152</sup> Electrical Trades Union of Australia, Submission 30, pp. 4–5; CPSU-SPSF Group, Submission 38, p. 3; Australian Council of Trade Unions, Submission 49, p. 20.

<sup>153</sup> Electrical Trade Union, Submission 30, p. 4.

<sup>154</sup> Electrical Trades Union of Australia, Submission 30, p. 4.

- 5.95 The ETU also contended that unless migrant workers are appropriately licensed and have the required skills, they do not contribute to domestic skill development and knowledge transfer, potentially widening skills gaps.<sup>155</sup>
- 5.96 The CPSU-SPSF Group reflected that: ‘... [skills] standards cannot be reduced to enable external labour to work in Australia including under temporary visas. The aim of trade agreements should be [to] increase the local skill base or the human capital available to undertake work in Australia, whilst also upskilling the workers sent from partner countries.’<sup>156</sup>
- 5.97 Consequently, to address their concerns, the ETU and the ACTU recommended that Australia’s trade agreements should not include provisions that exempt trading partners from domestic occupational licensing and mandatory skills testing requirements.<sup>157</sup>

## Digital trade and e-commerce

- 5.98 Many submitters broadly drew attention to the potential for trade agreements to restrict the Australian Government’s ability to regulate in the public interest in relation digital trade and e-commerce. Specific areas of importance identified included market power and competition; data security, cross-border data flows and privacy; local presence of digital companies; access to algorithms and source code.<sup>158</sup> It was also noted that digital trade rules could impact on the ability of governments to regulate the emerging use of artificial intelligence.<sup>159</sup>
- 5.99 Some observed that retaining the ability to regulate across the digital economy is particularly important given that the rapid evolution and expansion of digital technology requires laws to be updated to remain effective and to ensure that rights afforded to Australians are maintained.<sup>160</sup> For example, PSI stated that:

Since digital technology is rapidly evolving and becoming more widely used (e.g. algorithms and big data), laws, regulations and policies also need to evolve to keep up and so these ecommerce/digital trade rules which restrict regulatory space are particularly problematic...<sup>161</sup>

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<sup>155</sup> Electrical Trades Union of Australia, Submission 30, p. 4.

<sup>156</sup> CPSU-SPSF Group, Submission 38, p. 3.

<sup>157</sup> Electrical Trades Union of Australia, Submission 30, p. 5; Australian Council of Trade Unions, Submission 49, p. 20.

<sup>158</sup> See, for example: Australian Nursing and Midwifery Federation, Submission 7, p. 6; Australian Fair Trade and Investment Network, Submission 8, pp. 26–30; APRA AMCOS, Submission 34, p. 5; CPSU-SPSF Group, Submission 38, p. 7; Public Services International, Submission 40, p. 8 and 40.1, pp. 1–4; Australian Council of Trade Unions, Submission 49, pp. 33–36.

<sup>159</sup> Australian Fair Trade and Investment Network, Submission 8, p. 29; Australian Council of Trade Unions, Submission 49, p. 33.

<sup>160</sup> Australian Fair Trade and Investment Network, Submission 8, p. 26; Public Services International, Submission 40.1, pp. 1–2; Australian Council of Trade Unions, Submission 49, p. 33.

<sup>161</sup> Public Services International, Submission 40.1, pp. 1–2.

- 5.100 On a similar note, the ACTU explained that a range of laws relating to employment, human rights, privacy, and competition need to be strengthened in response to the development of the digital economy.<sup>162</sup>
- 5.101 Submitters that raised concerns with the potential impact of digital trade provisions widely recommended that such provisions be excluded for Australia's trade agreements to ensure that the Australian Government preserves the ability to regulate the digital economy in the public interest.<sup>163</sup> For example, the ACTU declared that: 'The Australian Government must preserve the ability to regulate in the digital domain through excluding restrictions on the regulation of cross-border data flows, restrictions on requirements for local presence and storage of data, and restrictions on access to source code.'<sup>164</sup>

### Market power and competition

- 5.102 Several submitters referred to the need to ensure that trade agreements do not limit the Australian Government's ability to regulate with regard to the market power of the 'big tech companies.'<sup>165</sup> For example, APRA AMCOS submitted that: '... it is absolutely critical that Australia not concede any power to regulate these "Big Tech" entities as part of any multilateral agreements.'<sup>166</sup>
- 5.103 AFTINET suggested that the global digital trade agenda, strongly influenced by the US based digital industry, aims: '... to maximise the free flow of cross-border data and to establish a framework that restricts governments from regulating the digital domain and the operations of big tech companies.'<sup>167</sup>
- 5.104 APRA AMCOS also noted reports that the US: '...has put forward proposals in the negotiations which would have effectively precluded any efforts by member countries to regulate technology companies by preventing members from passing legislation that disproportionately affected the technology industry, including on matters such as market dominance.'<sup>168</sup>
- 5.105 AFTINET observed that when the News Media Bargaining Code was introduced in 2021, aimed at addressing power imbalances to support the sustainability of the Australian news media sector, some large tech companies suggested that the regulation may violate the non-discrimination rules in the A-USFTA by discriminating against US companies.<sup>169</sup>

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<sup>162</sup> Australian Council of Trade Unions, Submission 49, p. 33.

<sup>163</sup> Australian Fair Trade and Investment Network, Submission 8, p. 30; Public Services International, Submission 40, p. 8; Australian Council of Trade Unions, Submission 49, pp. 33 and 36.

<sup>164</sup> Australian Council of Trade Unions, Submission 49, p. 33.

<sup>165</sup> Australian Fair Trade and Investment Network, Submission 8, p. 26; APRA AMCOS, Submission 34, p. 5.

<sup>166</sup> APRA AMCOS, Submission 34, p. 5.

<sup>167</sup> Australian Fair Trade and Investment Network, Submission 8, p. 26.

<sup>168</sup> APRA AMCOS, Submission 34, p. 5.

<sup>169</sup> Australian Fair Trade and Investment Network, Submission 8, p. 27, citation omitted.

5.106 The ACTU noted setting deregulatory digital trade rules while the digital economy is still in development is likely to result in concentrated ownership and control of data, which may reduce the public good benefits of digitalisation.<sup>170</sup>

### **Cross-border data flows, data security and privacy**

5.107 Some submitters reflected on trade agreement provisions that facilitate cross-border data flows and restrict local data storage, noting particular implications for data security, consumer protection and privacy.<sup>171</sup> For example, AFTINET detailed that data security and privacy rights can be undermined by trade provisions that restrict the regulation of electronic transmissions and requirements for cybersecurity measures such as the encryption of personal data.<sup>172</sup>

5.108 AFTINET elaborated on the potential for digital trade provisions to undermine Australian privacy laws:

Rules that lock-in the free cross-border flow of data also enable companies to move data, including personal data, to jurisdictions where privacy laws are more limited, effectively allowing the evasion of privacy legislation. The inclusion of privacy and consumer protections in digital trade chapters, which require parties to have/enact privacy and consumer laws, is not enough to ensure privacy is upheld. Without a minimum standard for this privacy and consumer legislation there is no guarantee that once data is moved and stored offshore it will be subject to the same privacy standards as in Australia.<sup>173</sup>

5.109 Ms Sanya Smith, Legal Consultant at PSI, highlighted to the Committee how provisions in the CPTPP can lead to the disclosure of personal information:

... the Australian health record system requires that health records remain in Australia and are processed in Australia, where there are strong privacy safeguards. Otherwise, as provisions like the CPTPP say, this kind of personal information can be allowed to go anywhere in the world, including the US, even though they are not in the CPTPP ... If Facebook [a US company] has an office in Singapore and want to be protected by the CPTPP, they can send Australian data to the US. Foreigners' data has no privacy protection in the US.<sup>174</sup>

5.110 AFTINET emphasised that: '... governments must retain the ability to regulate security standards in order to reduce cybersecurity risks that threaten privacy rights

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<sup>170</sup> Australian Council of Trade Unions, Submission 49, p. 33.

<sup>171</sup> Australian Fair Trade and Investment Network, Submission 8, p. 28; CPSU-SPSF Group, Submission 38, pp. 6–7; Public Services International, Submission 40, p. 8; Australian Council of Trade Unions, Submission 49, p. 36.

<sup>172</sup> Australian Fair Trade and Investment Network, Submission 8, p. 28.

<sup>173</sup> Australian Fair Trade and Investment Network, Submission 8, p. 28.

<sup>174</sup> Ms Sanya Smith, Legal Consultant, Public Services International, *Committee Hansard*, Melbourne, 3 November 2023, p. 16.

and consumer protections.’ It added that: ‘The rapid emergence of new technologies could create new cybersecurity risks requiring new regulatory frameworks.’<sup>175</sup>

- 5.111 The ACTU highlighted that the privacy of data is an increasingly important concern for workers because new digital technologies, and their associated surveillance abilities, can generate significant volumes of information on individuals:

Many digital platform workers are subject to constant surveillance while working, and in 2015 it was reported that Uber had updated its privacy policy to allow the company to allow the company to track the location of users even when they are not using the app or when their phones are turned off, and to pass data to third parties. The trend of workplace surveillance has accelerated since the start of the COVID-19 pandemic and the rapid shift to ‘work from home’ arrangements for many workers.<sup>176</sup>

### Local presence of digital companies

- 5.112 Several submitters outlined that trade agreements with provisions enabling digital-based companies to operate in Australia without a local corporate presence could restrict the government’s ability to enact and enforce labour laws and workers’ rights, particularly in the gig-economy.<sup>177</sup> For example, the ANMF stated that trade rules that:

... enable corporations operating in the gig-economy to access Australian markets without a local presence, could restrict the government’s ability to implement regulation of labour rights and working conditions for digital platform workers. This would undermine Australian employment and work health and safety laws.<sup>178</sup>

- 5.113 The ACTU observed that enabling digital companies to operate in Australia without a local presence makes it difficult for workers seeking to hold these companies accountable under domestic law:

If the rights of a worker are violated by an online platform with no local presence, it is unclear how they obtain justice ... there is no entity to sue and the ability of domestic courts to enforce labour standards, as well as other rights, is fundamentally challenged.<sup>179</sup>

- 5.114 The ACTU highlighted the example of the Fair Work Ombudsman (FWO) ending its legal proceedings against Foodora—a food delivery company—after the company ceased its Australian operations in 2018, leaving over 1000 workers with just 31 per

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<sup>175</sup> Australian Fair Trade and Investment Network, Submission 8, p. 28.

<sup>176</sup> Australian Council of Trade Unions, Submission 49, p. 36.

<sup>177</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 6; Australian Fair Trade and Investment Network, Submission 8, p. 29–30; CPSU-SPSF Group, Submission 38, p. 7; Australian Council of Trade Unions, Submission 49, p. 33.

<sup>178</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 6.

<sup>179</sup> Australian Council of Trade Unions, Submission 49, p. 34. See also: Ms Kate Lappin, Asia-Pacific Regional Secretary, Public Services International, *Committee Hansard*, Melbourne, 3 November 2023, p. 15.

cent of their owed entitlements.<sup>180</sup> The FWO ended its proceedings after concluding that it be unlikely to result in compensation for workers or monetary consequences for Foodora.<sup>181</sup>

- 5.115 AFTINET and the ACTU also noted the potential for digital companies operating without a local presence to evade Australia taxation law.<sup>182</sup>

### Algorithms and source code

- 5.116 Some submitters raised the need to ensure that provisions in trade agreements do not restrict government access to algorithms and source code—which underpin digital platforms, and by extension, many aspects of the digital economy.<sup>183</sup>

- 5.117 Access to algorithms and source code was predominantly raised in the context of ensuring transparency in decision making, particularly in relation to potential bias and discrimination in employment.<sup>184</sup> For example, Ms Kate Lappin, Asia-Pacific Regional Secretary at PSI, told the Committee about the implications of a lack of access to algorithms:

We have seen algorithms around the world be highly discriminatory. If we can't access those algorithms, how can we prove their discrimination, including in the delivery of public services?

It could also be in the recruitment of workers. It could be in the decision about who gets promoted. It could be in the decision about how you allocate shifts to an Uber driver, for example. If we want to have decent employment, we need to see how algorithms are actually distributing work. It might be distributing it against women who are driving while pregnant. We don't know. We have no idea what these algorithms are doing.<sup>185</sup>

- 5.118 The ACTU also observed that access to algorithms is important to being able to ensure the employment rights of digital platform workers are upheld:

The work of digital platform workers in particular is dictated by complicated algorithms, and workers are not provided with any information about how the algorithm makes decisions. Digital platform food delivery riders ... report being penalised by the algorithm for taking time off, reducing their hours, or refusing jobs. They reported receiving fewer jobs as a result of being unavailable, and platforms deactivating their accounts as a result of not accepting jobs.

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<sup>180</sup> Australian Council of Trade Unions, Submission 49, p. 34.

<sup>181</sup> Australian Council of Trade Unions, Submission 49, p. 34.

<sup>182</sup> Australian Fair Trade and Investment Network, Submission 8, p. 30; Australian Council of Trade Unions, Submission 49, p. 28.

<sup>183</sup> Australian Fair Trade and Investment Network, Submission 8, p. 27; Public Services International, Submission 40, p. 8; Australian Council of Trade Unions, Submission 49, p. 35.

<sup>184</sup> Australian Fair Trade and Investment Network, Submission 8, p. 27; Australian Council of Trade Unions, Submission 49, p. 35; Ms Kate Lappin, Asia-Pacific Regional Secretary, Public Services International, *Committee Hansard*, Melbourne, 3 November 2023, p. 15.

<sup>185</sup> Ms Kate Lappin, Asia-Pacific Regional Secretary, Public Services International, *Committee Hansard*, Melbourne, 3 November 2023, p. 15.

...

There is an urgent need for the Australian Government to regulate digital platforms to ensure platforms respect certain minimum rights and protections, and that algorithms governing work are transparent and accountable.<sup>186</sup>

- 5.119 AFTINET suggested that there is increasing evidence that algorithms can be utilised by companies reduce competition, therefore access to algorithms and source code is vital to identify and address possible breaches of competition law.<sup>187</sup>
- 5.120 AFTINET also noted access to algorithms and source code may be important to enacting regulation in the public interest with regard to misinformation and rapidly emerging artificial intelligence.<sup>188</sup>

### Developments in digital trade rules

- 5.121 DFAT explained that the Australia-Singapore Digital Economy Agreement (DEA) builds on the CPTPP to establish new rules and standards to enable business and consumers to benefit from the digital economy.<sup>189</sup>
- 5.122 The ACTU raised concerns with the DEA and noted that the National Interest Test found that it will limit Australia's policy flexibility to enact measures to restrict data flows and require local data storage but considers the costs will outweigh the benefits.<sup>190</sup> The ACTU further expressed concern that the Australian Government is leading the push for digital trade rules at the WTO following the DEA.<sup>191</sup>
- 5.123 The Committee received evidence outlining that while Australia has recently agreed to digital trade rules such as those in the upgrade to the A-A-NZFTA signed in August 2023, the US recently changed its approach to its proposed digital trade rules in plurilateral WTO negotiations.<sup>192</sup> Specifically, in October 2023, the US withdrew its proposals on data flows, data localisation, source code and non-discriminatory treatment of digital products as part of the ongoing plurilateral WTO Joint Statement Initiative on E-Commerce negotiations.<sup>193</sup> PSI explained that the US withdrew these proposals to conduct: '... internal consultations on these sensitive areas to ensure it can achieve its regulatory objectives, including to address anticompetitive behaviour.'<sup>194</sup>
- 5.124 PSI also submitted that members of the European Parliament have subsequently called on the EU to: '... follow the steps of the US, and step back from outdated

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<sup>186</sup> Australian Council of Trade Unions, Submission 49, p. 35.

<sup>187</sup> Australian Fair Trade and Investment Network, Submission 8, p. 27.

<sup>188</sup> Australian Fair Trade and Investment Network, Submission 8, p. 29.

<sup>189</sup> Department of Foreign Affairs and Trade, Submission 41, p. 9.

<sup>190</sup> Australian Council of Trade Unions, Submission 49, pp. 33–34, citation omitted.

<sup>191</sup> Australian Council of Trade Unions, Submission 49, pp. 33–34.

<sup>192</sup> Public Services International, Submission 40.1, p. 3; Ms Kate Lappin, Asia-Pacific Regional Secretary, Public Services International, *Committee Hansard*, Melbourne, 3 November 2023, p. 14.

<sup>193</sup> Public Services International, Submission 40.1, pp. 3–4.

<sup>194</sup> Public Services International, Submission 40.1, p. 3.

proposals that favour US-based Big Tech corporations at the expense of European workers, small businesses, democracy, and human and fundamental rights.<sup>195</sup>

## Intellectual property rights

- 5.125 The ACC identified that most of Australia's trade agreements contain a dedicated chapter on intellectual property rights.<sup>196</sup>
- 5.126 Submitters broadly raised concerns with the inclusion of intellectual property provisions in Australia's trade agreements in relation to the potential impact on public health and medicines, First Nations rights and opportunities to participate in trade, and creative and cultural industries.

## Patents and monopolies on medicines

- 5.127 Submitters raised concerns that provisions in trade agreements relating to patents over medicines and treatments reduce affordable access to medicines and health care.<sup>197</sup>
- 5.128 The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets a minimum patent monopoly period of 20 years for WTO Members, with some limited exceptions for least developed countries and for medical emergencies.<sup>198</sup>
- 5.129 The PHAA stated that the requirements contained in TRIPS for 20-year patent terms along with other intellectual property rights: '... enables high prices for new drugs and delays the availability of generic medicines and other health technologies, putting them out of reach of millions of people in developing countries.'<sup>199</sup>
- 5.130 The ACTU highlighted that some Australia's trade agreements include provisions known as 'TRIPS-Plus' that extend intellectual property rules beyond those set by TRIPS, including the CPTPP, the A-UKFTA and the A-USFTA.<sup>200</sup>
- 5.131 AFTINET stated that TRIPS-Plus provisions have progressively strengthened patent rights on medicines, resulting in further reduced access to affordable medicines.<sup>201</sup> It further explained that:

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<sup>195</sup> Public Services International, Submission 40.1, p. 3, citation omitted.

<sup>196</sup> Australian Copyright Council, Submission 27, p. 6.

<sup>197</sup> See, for example: Grail Australia, Submission 2, p. 4.; Australian Nursing and Midwifery Federation, Submission 7, p. 5; Australian Fair Trade and Investment Network, Submission 8, p. 19; Public Health Association of Australia, Submission 36, pp. 6–7; ActionAid Australia, Submission 48, p. 11–12; Australian Council of Trade Unions, Submission 49, pp. 31–32.

<sup>198</sup> Public Health Association of Australia, Submission 36, p. 7; Australian Council of Trade Unions, Submission 49, pp. 31–32.

<sup>199</sup> Public Health Association of Australia, Submission 36, p. 7.

<sup>200</sup> Australian Fair Trade and Investment Network, Submission 8, p. 19; Australian Council of Trade Unions, Submission 49, pp. 31–32.

<sup>201</sup> Australian Fair Trade and Investment Network, Submission 8, p. 19.

TRIPS-Plus provisions... include rules to extend monopoly rights beyond 20 years, strengthen patent enforcement measures, and reduce the WTO flexibilities for developing countries. These provisions are associated with increased drug prices, delayed availability and increased costs to consumers and governments.<sup>202</sup>

- 5.132 Likewise, the PHAA suggested that TRIPS-Plus provisions in bilateral and regional agreements further entrench the impact of intellectual property rights provisions and place access to medicines further out of reach.<sup>203</sup>
- 5.133 AFTINET cited studies that indicate that extending medicine monopolies in bilateral and regional agreements can result in significant costs to government.<sup>204</sup> The ACTU submitted that the transition to generic medicines after the 20-year patent period is crucial to the financial sustainability of the Pharmaceutical Benefits Scheme, with studies demonstrating the significant costs of extended patents and conversely the savings provided by generic medicines.<sup>205</sup>
- 5.134 The ANMF and AFTINET suggested that while intellectual property law grants monopolies to patent holders to provide incentives for innovation, with regard to medicines there is a need to find a balance between monopoly rights and affordable access.<sup>206</sup> The ACTU suggested that there is little evidence that extension of patents to provide longer monopolies has a significant effect on investment and innovation.<sup>207</sup>
- 5.135 Some submitters emphasised the potential impact of extended patents on access to medicines in low-income countries.<sup>208</sup> ActionAid Australia highlighted the impact of intellectual property provisions on access to medicines in low-income countries and particularly on women:

Intellectual property rules, including TRIPS and TRIPS plus rules can extend medicine monopolies for pharmaceutical companies, reducing access to affordable medicines in low-income countries. Women are most impacted when trade rules increase the price of medicines due to their disproportionate risk of poverty, specific reproductive health needs and increased vulnerability to illness is due to their experience of gender-based discrimination and violence. Reform of intellectual property rules is critical to ensure that trade agreements facilitate affordable access to medicines in low-income countries.<sup>209</sup>

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<sup>202</sup> Australian Fair Trade and Investment Network, Submission 8, p. 19, citations omitted.

<sup>203</sup> Public Health Association of Australia, Submission 36, p. 7.

<sup>204</sup> Australian Fair Trade and Investment Network, Submission 8, p. 19, citation omitted.

<sup>205</sup> Australian Council of Trade Unions, Submission 49, p. 32, citations omitted.

<sup>206</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 5; Australian Fair Trade and Investment Network, Submission 8, pp. 19–20.

<sup>207</sup> Australian Council of Trade Unions, Submission 49, p. 32, citation omitted. See also: Australian Fair Trade and Investment Network, Submission 8, p. 20.

<sup>208</sup> Australian Fair Trade and Investment Network, Submission 8, p. 19, Public Health Association of Australia, Submission 36, p. 7.

<sup>209</sup> Action Aid, Submission 48, pp. 11–12.

- 5.136 The ANMF, AFTINET and the PHAA indicated that the intellectual property rights contained in TRIPS contributed to low-income countries having limited access to vaccines during the COVID-19 pandemic.<sup>210</sup> As a result, the PHAA stated that: ‘To ensure equitable access to pandemic countermeasures in future, it will be important to secure a comprehensive and workable waiver of IPRs [intellectual property rights] that can be activated during pandemics.’<sup>211</sup>
- 5.137 Some submitters also raised data protection monopolies, a separate monopoly which applies in addition to the twenty-year patent monopoly on medicines, particularly in relation to biologic medicines that include products such as new treatments for cancer and immune conditions.<sup>212</sup> AFTINET stated that data protection results in longer periods before the introduction of low-cost versions of expensive medicines by delaying access to the data needed to produce the low-cost versions.<sup>213</sup> It added that: ‘Trade agreements should not be the vehicle for extension of monopolies which contradict basic principles of competition and free trade and impose huge and needless costs on our public health system, which is already under pressure.’<sup>214</sup>
- 5.138 Several submitters broadly recommended that the Australian Government should not enter into trade agreements that contain provisions that extend patent monopolies or data protection monopolies on medicines.<sup>215</sup> ActionAid Australia specifically proposed that: ‘Australia should exclude TRIPS Plus provisions that extend medicine monopolies and ensure that trade agreements do not undermine the flexibilities provided to least developed countries under the TRIPS agreement.’<sup>216</sup>

## First Nations

- 5.139 Submitters and witnesses broadly reflected on the interaction of the international intellectual property framework with the rights and the interests of First Nations people.<sup>217</sup>
- 5.140 AFTINET contended that at the global level intellectual property rules under TRIPS have been detrimental to the rights of indigenous peoples because they do not adequately account for collective ownership or development of traditional culture and knowledge.<sup>218</sup>
- 5.141 The ACC identified that some of Australia’s trade agreements include measures relating to the protection of artworks of cultural significance, traditional folklore, and

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<sup>210</sup> Australian Fair Trade and Investment Network, Submission 8, p. 20; Public Health Association of Australia, Submission 36, p. 7.

<sup>211</sup> Public Health Association of Australia, Submission 36, p. 7.

<sup>212</sup> Australian Fair Trade and Investment Network, Submission 8, p. 20.

<sup>213</sup> Australian Fair Trade and Investment Network, Submission 8, p. 20.

<sup>214</sup> Australian Fair Trade and Investment Network, Submission 8, p. 20.

<sup>215</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 5; Australian Fair Trade and Investment Network, Submission 8, p. 21; Union Aid Abroad-APHEDA, Submission 32, p. 2; ActionAid Australia, Submission 48, p. 12; Australian Council of Trade Unions, Submission 49, p. 32.

<sup>216</sup> ActionAid Australia, Submission 48, pp. 11–12.

<sup>217</sup> See, for example: Australian Nursing and Midwifery Federation, Submission 7, p. 5; Australian Fair Trade and Investment Network, Submission 8, pp. 22–23; Australian Copyright Council, Submission 27, p. 7.

<sup>218</sup> Australian Fair Trade and Investment Network, Submission 8, p. 22.

knowledge.<sup>219</sup> However, it also noted that the copyright regime is generally ill-suited to protecting traditional culture, knowledge, and folklore as it does not protect factual information and the duration of protection is time limited.<sup>220</sup>

- 5.142 The Committee heard evidence of some of the practical issues facing small First Nations organisations in protecting their intellectual property abroad. Ms Lynette Yu-Mackay, Chairperson of Nagula Jarndu Designs, Yawuru Jarndu Aboriginal Corporation, based in Broome, described the experience of collaborating with overseas companies to produce First Nations designed textiles:

I think we were very nervous before we ventured into that first exercise. I won't say nervous—we were petrified, because we had no idea, once we started negotiating and doing business with an overseas company, how our designs and products would be protected. We just took that risk. We went ahead and did it, but we were bitten. If they did copy our stuff, we didn't know what help there was for us.<sup>221</sup>

- 5.143 i2i Global highlighted that there are significant commercial opportunities for First Nations interests in indigenous botanicals. Further, it was noted that potential export opportunities for indigenous botanicals are undermined by the inability to contest authenticity or supply chain credentials, for example in the use of Kakadu plum as an ingredient in skin care products.<sup>222</sup>

- 5.144 Some submissions raised the potential for a geographic indications (GI) system to be included in future trade agreements to enhance First Nations protections and trade opportunities.<sup>223</sup> For example, Mr Darren Godwell, Chief Executive Officer at i2i Global explained to the Committee that recognition of First Nations knowledge in indigenous botanicals through GIs would provide substantial benefits:

...by Australia securing Indigenous botanicals and naming them by species and by usage, by upholding similar standards to those that have been developed over many decades in the EU, we would, in effect, capture the export values of those wholesale markets immediately for Australian businesses and producers, primary producers in regional and remote parts of Australia.<sup>224</sup>

- 5.145 The German Australian Business Council (GABC) also referred to the potential for GIs in future trade agreements:

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<sup>219</sup> Australian Copyright Council, Submission 27, p. 7.

<sup>220</sup> Australian Copyright Council, Submission 27, pp. 2–3 and 6–7.

<sup>221</sup> Ms Lynette Yu-Mackay, Chairperson, Nagula Jarndu Designs, Yawuru Jarndu Aboriginal Corporation, *Proof Hansard*, Canberra, 14 March 2024, p. 12

<sup>222</sup> Mr Darren Godwell, Chief Executive Officer, i2i Global, *Proof Hansard*, Canberra, 14 March 2024, p. 3.

<sup>223</sup> German Australian Business Council, Submission 25, p. 9, Mr Matthew Duckworth, Assistant Secretary, Services Competition and Intellectual Property Branch, Office of Global Trade Negotiations; Deputy Chief Negotiator, Australia-EU Free Trade Agreement, Department of Foreign Affairs and Trade, *Proof Hansard*, Canberra, 1 March 2024, pp. 8–9; Mr Darren Godwell, Chief Executive Officer, i2i Global, *Proof Hansard*, Canberra, 14 March 2024, p. 3.

<sup>224</sup> Mr Darren Godwell, Chief Executive Officer, i2i Global, *Proof Hansard*, Canberra, 14 March 2024, p. 3.

... the European Union [EU] has recently passed legislation extending the scope of Geographical Indications (GI) to craft and industrial products. We know that Australia has traditionally been reluctant to introduce a GI system. However, we note that the system could be used to promote traditional goods coming from First Nations communities.<sup>225</sup>

5.146 The ANMF and AFTINET both called for specific protections in intellectual property rules for indigenous art, culture, and the use of traditional plants.<sup>226</sup> Similarly, Grail Australia stated that: 'Indigenous knowledge of medicines derived from nature's resources also need protection from individuals and companies seeking to claim patents on such medicines.'<sup>227</sup> The GABC noted the importance of ensuring that traditional knowledge remains free to use, and that communities are rewarded for use of genetic resources identified through traditional knowledge.<sup>228</sup> Similar issues regarding the authenticity of First Nations art and experience have also been noted in the tourism sector.<sup>229</sup>

5.147 DFAT advised that intellectual property rights are raised as a priority by First Nations stakeholders and that beneficial terms have been included in bilateral agreements (such as the A-UKFTA) and are being pursued in multilateral agreements, particularly at the World Intellectual Property Organization (WIPO).<sup>230</sup> It elaborated that:

Australia is supporting negotiations at WIPO for a multilateral agreement (in the Intergovernmental Committee on intellectual property, genetic resources, traditional knowledge and folklore (IGC)) that would allow IP [intellectual property] offices to require disclosure of genetic resources and associated traditional knowledge used in patent applications, providing a potential new revenue stream for First Nations stakeholders.<sup>231</sup>

5.148 DAFF also noted ongoing work to support First Nations people to develop consumer and export markets for native foods, including to establish the intellectual property rights of Indigenous agricultural products.<sup>232</sup>

## **Creative and cultural industries**

5.149 APRA AMCOS and the ACC underlined the importance of copyright for the protection of Australia's creative and cultural industries.<sup>233</sup> APRA AMCOS asserted that trade and investment agreement negotiations should not allow for any evasion of

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<sup>225</sup> German Australian Business Council, Submission 25, p. 9.

<sup>226</sup> Australian Nursing and Midwifery Federation, Submission 7, p. 5; Australian Fair Trade and Investment Network, Submission 8, p. 23. See also: German Australian Business Council, Submission 25, p. 9.

<sup>227</sup> Grail Australia, Submission 2, p. 4.

<sup>228</sup> German Australian Business Council, Submission 25, p. 9.

<sup>229</sup> Mr Haydyn Bromley, Chair, South Australian Aboriginal Tourism Operators Council, in evidence before the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Committee Hansard*, Adelaide, 20 February 2024, pp. 35–36.

<sup>230</sup> Department of Foreign Affairs and Trade, Submission 41, pp. 44–45.

<sup>231</sup> Department of Foreign Affairs and Trade, Submission 41, p. 45.

<sup>232</sup> Department of Agriculture, Fisheries and Forestry. Submission 45, p. 8.

<sup>233</sup> Australian Copyright Council, Submission 27, pp. 3 and 6; APRA AMCOS, Submission 34, p. 3.

Australia's copyright framework, which: '... provides vital provisions for copyright owners and revenue mechanisms for creative practitioners and those who invest in creative practices.'<sup>234</sup>

5.150 DFAT explained that one of the ways Australia protects its cultural interests is through intellectual property protection and that the government works to promote international standards on the protection, management, and use of intellectual property rights, which help underpin trade and investment, and enable innovation and creativity.<sup>235</sup>

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<sup>234</sup> APRA AMCOS, Submission 34, p. 3.

<sup>235</sup> Department of Foreign Affairs and Trade, Submission 41, p. 43.

## Committee Comment

- 5.151 The Committee is of the view that, as with any negotiation, it expected that Australia will need to make concessions to secure benefits through trade agreements. However, the Committee considers that the Australian Government's ability as a sovereign nation to protect its citizens should not be compromised.
- 5.152 The Committee recognises that successive Australian Governments have consistently defended certain 'red lines' in trade negotiations, such as protecting national security or biosecurity, or limiting foreign ownership of critical infrastructure. There is value in regular consideration of the approach to these issues in trade negotiations. As a key principle, the Committee agrees that Australia's trade and investment agreements should not unduly restrict the ability for the Australian Government to make policy and regulatory decisions that it deems to be in the public interest.
- 5.153 As such, it is necessary for Australia's trade and investment agreements to include exemptions or exclude provisions where it is apparent that the right to regulate in the public interest is weakened. The Committee welcomes DFAT's advice that Australia already has specific safeguards and broad reservations in place across key policy areas. However, it is notable that despite these safeguards and exemptions, the Committee received substantial evidence raising concerns.
- 5.154 It is important to have a comprehensive understanding of the impact of proposed agreements, including whether safeguards and exemptions are required to ensure the Australian Government's right to regulate in the public interest. To this end, it is important to take lessons from previous negotiations, as has been done with aspects of the A-USFTA and ISDS provisions more broadly. Further, the Committee notes enhanced stakeholder consultation and post-implementation review of agreements (see Chapters 1 and 5 of the Interim Report) as well as independent National Interest Analysis and impact assessments (see Chapter 3) would assist to achieve this objective.
- 5.155 In general, the Committee is reluctant to overly restrict the flexibility of Australian trade negotiators by requiring the Government to rule in, or out, specific content in future trade agreements. However, the Committee considers that the further safeguards may be required for particular 'red line' matters.
- 5.156 The Committee is persuaded by the view that ISDS provisions in trade and investment agreements have the potential to impose significant costs on governments and can act to delay or deter governments from making regulatory decisions in the public interest. As widely identified in evidence, the challenge by Phillip Morris to the Australian Government's introduction of tobacco plain packaging laws is a high-profile and informative case for Australia. Although the decision in this case ultimately upheld the rights of the Australian Government, the decision came following significant cost to the Australian taxpayer.

- 5.157 The Committee is not of the view that conferring such rights to international investors is Australia's national interest. Further, it is notable that the global trend appears to be against including ISDS provisions in agreements, and many countries are increasingly seeking to withdraw from such arrangements.
- 5.158 The Committee welcomes the Australian Government's commitment to not include ISDS provisions in new trade and investment agreements. Further, it notes that while Australia's most recent agreements do not include ISDS provisions, many earlier agreements include provisions that remain open to being utilised. As such, it would be prudent to seek opportunities to limit the effect of ISDS provisions or remove them from agreements, including through further bilateral arrangements.
- 5.159 The Committee recognises the significant contribution of creative and cultural industries to the Australian economy, as well as their vital role in social wellbeing, cultural expression, and the national identity. As such, the Australian Government must maintain the ability to protect and promote Australia's creative and cultural industries in recognition of these broader benefits.
- 5.160 The Committee notes evidence outlining that certain provisions in the A-USFTA placed limits on the Australian Government's ability to support Australian broadcasting and audiovisual services. It is particularly noteworthy that it may restrict the ability to regulate platforms and services arising from new technology. The Committee considers that Australia's subsequent agreements have been informed by its experience with the A-USFTA and is of the view that the safeguards in the S-AFTA demonstrate a robust commitment to protecting the creative and cultural industries that can act as a model for future agreements.
- 5.161 The Committee notes the technology-based nature of some sections of the creative and cultural industries, and the importance of ensuring that provisions in trade and investment agreements are sufficiently flexible to accommodate developments in technology.
- 5.162 The Committee acknowledges the views of submitters seeking to ensure that clauses in trade agreements do not undermine the ability to leverage the purchasing power of Australian Governments to stimulate Australian jobs, manufacturing and the economy. However, the Committee notes that such clauses also have the potential to open up new markets to Australian producers, and to generate savings to the Australian taxpayer.
- 5.163 Rather than imposing restrictions on such clauses through legislation, the Committee considers that greater promotion and support to Australian industry would assist them in taking advantage of opportunities offered, both through Australian procurement but also through new opportunities in foreign markets.
- 5.164 The Committee accepts that access by Australian business to foreign skilled labour can be a way support the economy by addressing short term labour shortages. However, the Committee considers the preference should always be to boost Australian employment opportunities, particularly in the medium to long term. It is also accepted that temporary migrant workers are more often vulnerable to

exploitation. For these reasons, the Committee does not support provisions in Australia's trade agreements which remove or weaken the obligation to test the Australian labour market prior to seeking overseas labour.

- 5.165 The Committee is also concerned at any suggestion that mutual recognition of skills could lead to a diminution of standards or compromise safety. The Committee supports mutual recognition of qualifications in circumstances only where it is demonstrated that the counterpart country's standards meet or exceed those in the equivalent Australian industry.
- 5.166 The Committee notes that digital trade and e-commerce is a fast-evolving space. There is considerable activity within government to review and respond to the potential implications of new technologies on the economy and society, however there is often a gap between the adoption of new and emerging technology and the ability of Australian regulators to keep pace.
- 5.167 The Committee takes seriously the risk that a trade agreement, even if based on the best information available to negotiators at the time, might inadvertently prevent the ability of a future Australian Government to regulate in response to new technologies. The Committee considers regular review of agreements (see Interim Report Recommendation 5) is one way to ensure that agreements remain up to date.
- 5.168 Given the complexity of the issues raised, the Committee considers that DFAT should engage appropriate experts on matters raised in submissions when negotiating relevant sections of trade agreements, including market power and competition; data security, cross-border data flows and privacy; local presence of digital companies; access to algorithms and source code. Such engagement could come through the trade advisory committee and cleared advisor system (see Interim Report Recommendation 1).
- 5.169 The Committee considers there are considerable opportunities to be gained for First Nations communities through enhanced trade, but that the benefits need to flow through to the Traditional Owners themselves. While encouraged by efforts to seek better recognition through the multilateral system, the Committee considers First Nations people would benefit from adoption of specific protections, such as a Geographic Indicators style regime, to recognise and protect First Nations intellectual property in bilateral trade agreements.

## Recommendations

### Recommendation 5

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- 5.170 The Committee recommends that the Australian Government should seek to not include provisions in trade and investment agreements that waive labour market and skills testing or include investor state dispute settlement (ISDS) provisions.**

## **Recommendation 6**

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**5.171 The Committee recommends that the Department of Foreign Affairs and Trade (DFAT) consult with stakeholders in emerging technologies on proposed provisions in trade agreements to ensure that the ability of future governments to regulate such technologies in the public interest is not limited.**

## **Recommendation 7**

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**5.172 The Committee recommends the Australian Government consider the inclusion of provisions that protect and promote Australian First Nations intellectual property in its bilateral trade negotiation framework.**





## 6. Future priorities and focus areas

### Overview

- 6.1 Throughout the inquiry the Committee received evidence broadly outlining a range of priorities, focus areas and considerations for Australia's approach to trade into the future. In relation to new and existing trade agreements, some submitters emphasised the need for continued focus on market access, particularly for agricultural products, through the removal of both tariffs and non-tariff barriers. Others identified the need to build awareness and capacity to assist business to utilise opportunities under existing agreements, particularly for small and medium sized enterprises (SMEs). The complexity and costs of using agreements was also discussed, particularly those that arise from rules of origin.
- 6.2 Submitters also reflected on the preference for certain types of trade agreements and reform. Many observed that the multilateral framework and rules-based trading system is in Australia's best interests, and that it should remain the priority for Australia. In relation to bilateral and plurilateral agreements, several noted their inferiority to multilateral agreements and the potential limited value in further such agreements, while others emphasised their significant benefit in the absence of progress on multilateral outcomes. Some submitters also discussed the issue of dumping and whether Australia's anti-dumping framework is fit for purpose.

### Establishing new and utilising existing agreements

#### Market access, tariffs, and non-tariff barriers

- 6.3 The Committee received evidence emphasising that Australia should continue to prioritise maintaining, gaining, and improving export market access for agricultural products by seeking to reduce distortions in global markets.<sup>1</sup> The significance of open market access for Australia's agricultural industries is discussed in Chapter 2.
- 6.4 Several submitters suggested that Australia should focus on concluding bilateral agreements currently under negotiation, upgrading existing agreements and seeking opportunities for new agreements.<sup>2</sup> For example, Australian Pork Limited (APL) stated that it encourages the Australian Government to conclude agreements

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<sup>1</sup> See, for example: Grain Trade Australia, Submission 6, pp. 1–2; CropLife Australia, Submission 9, p. 2; GrainGrowers Limited, Submission 12, p. 1; Red Meat Advisory Council, Submission 16, p. 5; National Farmers' Federation, Submission 35, p. 6; Australian Pork Limited, Submission 39, p. 3.

<sup>2</sup> See, for example: Business Council of Australia, Submission 19, p. 2; National Farmers' Federation, Submission 35, p. 8; Australian Pork Limited, Submission 39, p. 3.

currently under negotiation, improve existing agreements, and initiate new agreements with important trading partners.<sup>3</sup> Similarly, the National Farmers' Federation (NFF) suggested that there are opportunities to secure market access by ratifying signed trade agreements and working with partner nations to ensure that they come into effect quickly as well as negotiating remaining commercially advantageous bilateral agreements.<sup>4</sup>

6.5 The NFF, CropLife Australia, GrainGrowers Limited and APL all specified the need for 'commercially meaningful' export market access to be placed at the centre of Australia's trade negotiations.<sup>5</sup> The NFF elaborated that in some cases improved market access outcomes achieved by agreements are not logistically feasible or financially viable to be utilised by the agriculture sector.<sup>6</sup> Similarly, CropLife Australia stated that: '...the negotiation of an FTA [free trade agreement] must result in commercially meaningful outcomes... there is little benefit in entering into Free Trade Agreements [FTAs] if they do not provide farmers with genuine, unfettered access to the trading partner's market.'<sup>7</sup>

6.6 Submitters emphasised that improved market access must be achieved through addressing both tariff and non-tariff barriers to trade.<sup>8</sup> For example, GrainGrowers Limited explained that: 'Capturing the ongoing benefits of liberalising trade will require Australia's trade negotiations to continue to focus on traditional barriers, such as tariffs and tariff-rate quotas, along with broader technical market access and multilateral engagement.'<sup>9</sup>

6.7 Mr Kade Denton, General Manager, Trade and Economics at the NFF told the Committee that there are opportunities to improve access under existing agreements:

I think too much of a focus on what's next often means that we miss the question around are we fulfilling the existing opportunities as much as we can. I think that there are a lot of non-tariff measures and non-tariff barriers that are hindering the uptake of that existing market access...<sup>10</sup>

6.8 To improve market access, including through addressing non-tariff barriers, the NFF recommended that the Australian Government:

- Ensure trade agreements have review and cooperation mechanisms, encompass a systemic approach on resolving non-tariff barriers and include the 'most favoured nation' principle.

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<sup>3</sup> Australian Pork Limited, Submission 39, p. 3.

<sup>4</sup> National Farmers' Federation, Submission 35, p. 8.

<sup>5</sup> CropLife Australia, Submission 9, p. 2; GrainGrowers Limited, Submission 12, p. 1; National Farmers' Federation, Submission 35, p. 6; Australian Pork Limited, Submission 39, p. 3. See also: Department of Agriculture, Fisheries and Forestry, Submission 45, pp. 5–6.

<sup>6</sup> National Farmers' Federation, Submission 35, p. 11.

<sup>7</sup> CropLife Australia, Submission 9, p. 2.

<sup>8</sup> CropLife Australia, Submission 9, p. 2; GrainGrowers Limited, Submission 12, p. 1.

<sup>9</sup> GrainGrowers Limited, Submission 12, p. 1

<sup>10</sup> Mr Kade Denton, General Manager, Trade and Economics, National Farmers' Federation, *Committee Hansard*, Canberra, 20 October 2023, pp. 4–5.

- Review, and where necessary, renegotiate existing bilateral agreements to ensure that Australian agricultural products have the most favourable and, at a minimum, competitive access rights.
- Beyond tariff reductions, actively work with trading partners and domestic industry to resolve non-tariff barriers that have a tangible impact on market access.<sup>11</sup>

6.9 The NFF also emphasised the importance of promoting and protecting Australia’s global trading reputation as a leading exporter of high-quality, safe, and sustainable food and fibre. It noted that doing so is critical to secure new market opportunities and the resilience and longevity of the agricultural sector.<sup>12</sup>

## Awareness and facilitation of opportunities under existing agreements

6.10 Some submitters indicated that there are barriers in place preventing the uptake of opportunities under existing trade agreements and that Australia should focus on assisting businesses to better utilise the opportunities available.<sup>13</sup> For example, the Australian Industry Group (Ai Group) advised that many businesses have limited awareness of the potential benefits of Australia’s trade agreements or find it difficult to navigate the complexities.<sup>14</sup> Likewise, the Business Council of Australia (BCA) stated that: ‘Australian business has not always been able to make the best use of FTAs, either due to a lack of understanding of an agreement’s provisions or because of the complexity of rules that make the agreement less workable.’<sup>15</sup>

6.11 The Productivity Commission observed that the substantial increase in the number of bilateral trade agreements has resulted in ‘ad hoc and piecemeal’ arrangements that impose large compliance costs on businesses that seek to utilise Australia’s trade agreements.<sup>16</sup>

6.12 Mr Kade Denton, General Manager, Trade and Economics at the NFF told the Committee about the importance of providing information to facilitate opportunities under existing agreements:

That should be a strong focus for the government to make sure... that there is enough information out there for businesses and farmers to make informed decisions about what market opportunities they take up when there is that question around risk in the market—that is an opportunity for farmers to make business decisions, and it's making sure they have the information available to do that in an informed way.<sup>17</sup>

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<sup>11</sup> National Farmers’ Federation, Submission 35, p. 8.

<sup>12</sup> National Farmers’ Federation, Submission 35, pp. 7–9.

<sup>13</sup> See, for example: Australian Industry Group, Submission 4, p. 3; Business Council of Australia, Submission 19, p. 2.

<sup>14</sup> Australian Industry Group, Submission 4, p. 3.

<sup>15</sup> Business Council of Australia, Submission 19, p. 2.

<sup>16</sup> Productivity Commission, Submission 13, p. 13.

<sup>17</sup> Mr Kade Denton, General Manager, Trade and Economics, National Farmers’ Federation, *Committee Hansard*, Canberra, 20 October 2023, pp. 4–5.

- 6.13 Ai Group outlined that increased use of agreements could be supported by an comprehensive outreach and training strategy led by the Department of Foreign Affairs and Trade (DFAT) and the Australian Trade and Investment Commission (Austrade) in collaboration with industry bodies that could include engagement with stakeholders on their needs and concerns, consultation on agreements to design simpler to use provisions, customised sector-specific training programs, in person workshops and seminars, digital learning platforms, and communications campaigns outlining opportunities and showcasing success stories.<sup>18</sup>
- 6.14 The BCA noted that consultation and engagement during the negotiation process assists to socialise the benefits of trade agreements and ensure stronger uptake once in force.<sup>19</sup>
- 6.15 Austrade outlined its responsibility to facilitate trade and investment and stated that it: ‘... focusses its trade facilitation efforts on: marketing and promotion activities that highlight Australia’s expertise and credentials; assisting Australian businesses reach markets through trade information services; connecting individual businesses to potential buyers; and undertaking economic and data analysis to support trade and investment market insights.’<sup>20</sup> It also explained that it regularly engages with businesses to provide education on how to benefit from an agreement and routinely supports business delegations to maximise the uptake and benefit from agreements.<sup>21</sup>
- 6.16 DFAT outlined some of the online methods it uses to support business to understand the benefits and requirements of Australia’s trade agreements including the FTA Portal website providing easy to access information; a suite of materials on objectives, updates and outcomes of trade negotiations; and specific user guides for each agreement.<sup>22</sup> It further explained that it enhances business awareness and use of agreements by participating in industry stakeholder events; maintaining an active social media presence; fielding queries from businesses; direct engagement with the business sector; and producing the regular ‘Business Envoy’ magazine to provide updates, insights, opportunities and showcase success.<sup>23</sup>

### **Small and medium sized enterprises**

- 6.17 Several submitters noted that small and medium enterprises (SMEs) face significant challenges in entering international markets and deriving benefits from Australia’s trade and investment agreements.<sup>24</sup>
- 6.18 The Australian Small Business and Family Enterprise Ombudsman advised that Australian SMEs contribute a significantly smaller proportion of goods exports in

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<sup>18</sup> Australian Industry Group, Submission 4, pp. 3–5.

<sup>19</sup> Business Council of Australia, Submission 19, p. 2.

<sup>20</sup> Austrade, Submission 42, p. 1.

<sup>21</sup> Austrade, Submission 42, p. 4.

<sup>22</sup> Department of Foreign Affairs and Trade, Submission 41, p. 3.

<sup>23</sup> Department of Foreign Affairs and Trade, Submission 41, p. 3.

<sup>24</sup> Australian Industry Group, Submission 4, pp. 3–4; Australian Small Business and Family Enterprise Ombudsman, Submission 11, p. 1; German Australian Business Council, Submission 25, pp. 2 and 8.

comparison to countries in both Group of Seven (G7) and European Union (EU).<sup>25</sup> It recommended that to maximise opportunities Australia should ensure a dedicated SME chapter in its trade and investment agreements, as well as integration of relevant provisions throughout agreements to reflect the commercial and operational realities of SMEs.<sup>26</sup>

- 6.19 Mrs Sarah Whelan, Chief Executive Officer of the Karratha and Districts Chamber of Commerce and Industry, noted some of the barriers facing SMEs in remote areas:

Definitely it would be the knowledge. A lot of people are unsure of how to go about it and how to enter those markets. They do have products and services that are available, but making those connections with the international market is challenging because of where to start ... The other one would be the logistics. We have a lot of ports up here, but a lot of them are privately owned, so it is understanding the logistics because we are quite remote. How to go about it would be another one. And also access to financial resources, because, obviously, if you are going out to that global scale, how do you access funding?<sup>27</sup>

- 6.20 Austrade advised that the majority of clients for its outreach and engagement activities, both direct one-on-one and broad engagement, are SMEs, with activities targeted on first identifying their priorities for what is included in agreements and then understanding how agreements can be utilised.<sup>28</sup>
- 6.21 Dr Robert Harrison, Board Member at the German Australian Business Council (GABC), told the Committee that in Germany local chambers of commerce and industry are successfully utilised to support uptake of opportunities under the EU's trade agreements, including many SME's.<sup>29</sup> Dr Harrison added that: '... that's one of the ways that the Australian government could help and the state governments could really help engage small and medium businesses within it... it's this hand-holding experience that I think has been extremely successful and that, in my experience, is somewhat lacking in Australia.'<sup>30</sup>
- 6.22 Voices of Korean-Australian Businesses noted the potential for diaspora communities to contribute to identifying business opportunities in their communities to take advantage of trade agreements.<sup>31</sup>

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<sup>25</sup> Australian Small Business and Family Enterprise Ombudsman, Submission 11, p. 1.

<sup>26</sup> Australian Small Business and Family Enterprise Ombudsman, Submission 11, pp. 1–3.

<sup>27</sup> Mrs Sarah Whelan, Chief Executive Officer, Karratha & Districts Chamber of Commerce & Industry Inc, *Proof Hansard*, 14 March 2024, p. 7.

<sup>28</sup> Ms Philippa King, Deputy Chief Executive Officer, Policy and Programs and Mr Daniel Boyer, Deputy Chief Executive Officer, Trade and Investment, Austrade, *Committee Hansard*, Canberra, 13 December 2023, p. 3.

<sup>29</sup> Dr Robert Harrison, Board Member, German Australian Business Council, *Committee Hansard*, Canberra, 20 October 2023, pp. 47–48.

<sup>30</sup> Dr Robert Harrison, Board Member, German Australian Business Council, *Committee Hansard*, Canberra, 20 October 2023, pp. 47–48.

<sup>31</sup> Voices of Korean Australian Businesses, Submission 54, pp. 1–2.

## Complexity and costs of agreements

- 6.23 The Productivity Commission noted the increased complexity arising from the proliferation of bilateral trade agreements, many of which have inconsistencies, making them difficult to understand and to administer as well as imposing significant compliance costs.<sup>32</sup> It stated that as a result: ‘The detrimental effects of compliance and administration costs can easily outweigh the expected gain to businesses and consumers from the lower tariff rates that flow from these agreements, such that they may not produce a net overall benefit.’<sup>33</sup>
- 6.24 The Productivity Commission noted that administration costs will be lower when agreements are as simple as possible and broad rather than product or sector specific.<sup>34</sup> It advised that the primary source of complexity is associated with rules of origin that are required by bilateral and plurilateral agreements to determine which goods have access to provisions under an agreement.<sup>35</sup> It added that trade agreements will not deliver their potential benefits unless future agreements reduce rules of origin stringency and work toward removing them altogether.<sup>36</sup> This could be most effectively achieved by unilateral (most favoured nation) tariff liberalisation that would make importing simpler and less costly and assist Australian exporters through lower input costs.<sup>37</sup>
- 6.25 The Department of Home Affairs also commented on changes to rules of origin to support increased trade:
- ... to support use of FTAs by Australian exporters, the implementation of FTAs needs to include a focus on ensuring they remain current by either transposing [rules of origin] to the current tariff nomenclature or amending FTAs to include new [rules of origin] that reflect modern production processes. Where [rules of origin] have been transposed, these should be implemented expeditiously in order to benefit Australian traders.<sup>38</sup>

## Types of trade agreements and reform

- 6.26 Submitters provided evidence in relation to the types of trade agreements and trade reform that Australia should pursue in the future, particularly focussing on the preference for multilateral agreements and the rules-based trading system over bilateral and plurilateral agreements, whilst also recognising a role for bilateral and plurilateral agreements in the absence of progress on multilateral outcomes.

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<sup>32</sup> Productivity Commission, Submission 13, pp. 15 and 18.

<sup>33</sup> Productivity Commission, Submission 13, p. 18.

<sup>34</sup> Productivity Commission, Submission 13, p. 18.

<sup>35</sup> Productivity Commission, Submission 13, p. 15.

<sup>36</sup> Productivity Commission, Submission 13, p. 12, citation omitted.

<sup>37</sup> Productivity Commission, Submission 13, p. 18.

<sup>38</sup> Department of Home Affairs, Submission 10, pp. 3–4.

- 6.27 As noted in Chapter 2, the multilateral trade framework and global rules-based trading system has broken down in recent years, subsequently leading to a rise in bilateral and plurilateral agreements.

## Multilateral agreements and the rules-based trading system

- 6.28 Submitters highlighted that Australia has benefitted from and strongly supported a multilateral approach to trade and the global rules-based trading system.<sup>39</sup> DFAT explained the benefits of the global rules-based trading system for Australia:

Australia's economy relies on the predictability and stability provided by a strong, open and rules based global trading system, centred on the World Trade Organization (WTO). The WTO's framework of rules enhances transparency and market access for our exporters and investors, and provides a mechanism for all WTO members, regardless of size or economic weight, to enforce those rules. ... [Australia's] bilateral and regional agreements rest on the foundation of global trade rules established under the WTO.<sup>40</sup>

- 6.29 Ms Philippa King, Deputy Chief Executive Officer, Policy and Programs at Austrade also explained that the multilateral framework underpins Australia's approach to trade and that Australia has always supported the multilateral system:

The multilateral framework is the overall underpinning of the way we trade and invest as a country... We're known as an open economy; as an economy that wants to do business with others and has continued over many years to pursue outcomes that liberalise markets globally; and as a strong backer of those efforts in the multilateral system and a strong supporter of that system.<sup>41</sup>

- 6.30 The Productivity Commission also noted Australia's history of support for the international rules-based global trading system as well as of efforts to reform and modernise these rules.<sup>42</sup> It added that in recognition of the distortionary effects that selective trade barriers, Australia has advocated for a non-discriminatory multilateral approach to trade whereby developed countries are treated equally with concessions for developing countries.<sup>43</sup>

- 6.31 Several submitters broadly identified that Australia's best interests are held in multilateral agreements and the global rules-based trading system.<sup>44</sup> For example,

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<sup>39</sup> See, for example: Productivity Commission, Submission 13, p. 12; Department of Foreign Affairs and Trade, Submission 41, p. 8; Ms Philippa King, Deputy Chief Executive Officer, Policy and Programs, Austrade, *Committee Hansard*, Canberra, 13 December 2023, p. 6.

<sup>40</sup> Department of Foreign Affairs and Trade, Submission 41, p. 8.

<sup>41</sup> Ms Philippa King, Deputy Chief Executive Officer, Policy and Programs, Austrade, *Committee Hansard*, Canberra, 13 December 2023, p. 6.

<sup>42</sup> Productivity Commission, Submission 13, p. 12.

<sup>43</sup> Productivity Commission, Submission 13, p. 12.

<sup>44</sup> See, for example: Media, Entertainment and Arts alliance, Submission 5, p. 2; Australian Fair Trade and Investment Network, Submission 8, p. 3; Productivity Commission, Submission 13, p. 12; Red Meat Advisory Council, Submission 16, pp. 4–5; Dr Hazel Moir, Submission 28, p. 5; National Farmers' Federation, Submission 35, p. 6; Department of Foreign Affairs and Trade, Submission 41, p. 8.

Australian Fair Trade and Investment Network (AFTINET) stated that: ‘... non-discriminatory multilateral rules-based trade negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners.’<sup>45</sup>

- 6.32 The Media, Entertainment and Arts Alliance (MEAA) noted that it considers that Australia’s trade objectives are best achieved through multilateral agreements and specified that multilateralism delivers greater benefits to Australia than those achieved in bilateral trade agreements.<sup>46</sup>
- 6.33 The Red Meat Advisory Council (RMAC) explained how the multilateral, rules-based trading system has benefitted the red meat industry:
- The multilateral process, despite its shortcomings, has preserved and enhanced Australia’s economic interests. In so doing, WTO negotiations concluded to date have produced direct benefits for the red meat sector by reducing a number of border protection measures – primarily through tariff reductions as well as transparency of trading partners’ technical barriers to trade. The WTO has also proved invaluable via the rules that govern trade and in settling trade disputes, which has directly assisted in keeping some of our key markets open or via reinstating lost access.<sup>47</sup>
- 6.34 Dr Hazel Moir outlined that multilateral agreements are favourable in comparison to bilateral agreements: ‘... the reason why multi-lateral agreements are strongly preferred to bilateral agreements is that they set a global level playing field, fostering improved competition for all parties. In contrast, bilateral treaties can be trade diverting rather than trade enhancing, reducing the chances that they promote welfare and, in some cases, even leading to a reduction in welfare.’<sup>48</sup>
- 6.35 RMAC stated that the WTO remains the best opportunity to fix many of the structural problems associated with market access, such as domestic support measures and export subsidies, and that many distortions to trade in agriculture can only be addressed multilaterally.<sup>49</sup> The NFF recommended that Australia should: ‘Advocate for a re-invigorated World Trade Organization (WTO) capable of playing a functional role in upholding the rules-based trading system, and vigorously pursue Australia’s interests in the multilateral space.’<sup>50</sup>
- 6.36 Ai Group suggested that as future benefits from agreements focussed on market access objectives reach a plateau, Australia must redirect its focus toward building an open global trade system and establishing rules for emerging trade issues.<sup>51</sup>

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<sup>45</sup> Australian Fair Trade and Investment Network, Submission 8, p. 3.

<sup>46</sup> Media, Entertainment and Arts alliance, Submission 5, p. 2.

<sup>47</sup> Red Meat Advisory Council, Submission 16, pp. 4–5

<sup>48</sup> Dr Hazel Moir, Submission 28, p. 5.

<sup>49</sup> Red Meat Advisory Council, Submission 16, p. 4.

<sup>50</sup> National Farmers’ Federation, Submission 35, p. 6.

<sup>51</sup> Australian Industry Group, Submission 4, p. 3.

6.37 Mr Tim Yeend, Associate Secretary, Trade and Investment Group at DFAT told the Committee that while bilateral and regional agreements have increased in recent years, a multilateral approach remains the fundamental goal and that Australia remains committed to supporting and reforming the multilateral system so that it delivers for Australia, the region and globally.<sup>52</sup>

## Bilateral and plurilateral agreements

6.38 Some submitters provided evidence challenging the merits the bilateral and plurilateral agreements, while others acknowledged that a multilateral approach is preferred but identified a role for bilateral and plurilateral agreements.

6.39 Both the Productivity Commission and Dr Moir contended that bilateral and plurilateral trade agreements are more accurately described as 'preferential trade agreements' [PTAs] which make preferential arrangements for trade between countries signatory to the agreement.<sup>53</sup> Such agreements may primarily divert existing trade from one country to another rather than create new trade and may provide little if any net benefit.<sup>54</sup> They also result in fragmented rules governing international trade which impose substantial compliance costs on business seeking to utilise the agreements.<sup>55</sup>

6.40 The Productivity Commission indicated that while multilateral agreements are strongly preferable, bilateral and plurilateral agreements can be beneficial in the absence of progress on multilateral negotiations:

Preferential trade agreements are practical workarounds to the impasse on multilateral reform. Given their fragmented and piecemeal nature, they are inferior to multilateral reform and involve compliance costs. They are generally viewed as being better than no reform, but it is important to avoid preferential agreements from being barriers to multilateral agreements.<sup>56</sup>

6.41 Several submitters that argued in favour of a multilateral approach explained the important role for bilateral agreements given the lack of multilateral outcomes.<sup>57</sup> Mr Pat O'Shannassy, Chief Executive Officer at Grain Trade Australia (GTA) told the Committee that: 'In terms of the free trade agreements [FTAs], we believe very strongly in free trade and a rules-based trading system. In free trade agreements

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<sup>52</sup> Mr Tim Yeend, Associate Secretary, Trade and Investment Group, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, p. 8.

<sup>53</sup> Productivity Commission, Submission 13, pp. 4 and 14; Dr Hazel Moir, Submission 28, p. 5.

<sup>54</sup> Productivity Commission, Submission 13, p. 14; Dr Hazel Moir, Submission 28, p. 5.

<sup>55</sup> Productivity Commission, Submission 13, p. 13.

<sup>56</sup> Productivity Commission, Submission 13, p. 13.

<sup>57</sup> Red Meat Advisory Council, Submission 16, pp. 4–5; National Farmers' Federation, Submission 35, p. 7; Mr Pat O'Shannassy, Chief Executive Officer, Grain Trade Australia, *Committee Hansard*, Canberra, 20 October 2023, p. 1.

[FTAs], where the more multilateral system has probably not succeeded as we would like, they at least allow us to trade on a bilateral basis.<sup>58</sup>

- 6.42 Similarly, RMAC argued in favour of a multilateral approach to international trade whilst stating that the multilateral process should be supplemented by closer bilateral ties with strategically important trading partners.<sup>59</sup> The NFF also reflected that as multilateral forums have stalled, bilateral agreements are the primary tool for trade liberalisation and expanding market access.<sup>60</sup>
- 6.43 Both the Productivity Commission and DFAT suggested that bilateral and plurilateral agreements can provide the basis for progress toward multilateral outcomes.<sup>61</sup> Mr Tim Yeend, Associate Secretary, Trade and Investment Group at DFAT told the Committee that: ‘... it’s not always easy to advance the multilateral agenda, but what we’ve seen is that quite often the agreements you strike at the bilateral or the regional level can be building blocks to multilateral outcomes.’<sup>62</sup> The Productivity Commission proposed that Australia should continue to invest in the development of plurilateral and sector specific agreements, adding that: ‘A plurilateral approach to trade negotiation can bring many of the benefits of multilateral negotiation and may be a stepping stone to multilateral liberalisation.’<sup>63</sup>
- 6.44 Some submitters made the point that bilateral and plurilateral agreements should be consistent with the multilateral rules-based trading system and not act as a barrier to future multilateral agreements.<sup>64</sup>
- 6.45 DFAT and Austrade noted that Australia’s national interest is best served by having a complimentary set of bilateral, plurilateral and multilateral agreements.<sup>65</sup>

### **Marginal benefits of future agreements and unilateral reform**

- 6.46 Some submitters contended that the scope for gains from additional trade agreements may be marginal, particularly as FTAs already cover most of Australia’s major trading partners outside the EU.<sup>66</sup> Professor Alexander Robson, Acting Chair at the Productivity Commission, explained the potential limited scope for further gains:

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<sup>58</sup> Mr Pat O’Shannassy, Chief Executive Officer, Grain Trade Australia, *Committee Hansard*, Canberra, 20 October 2023, p. 1.

<sup>59</sup> Red Meat Advisory Council, Submission 16, pp. 4–5.

<sup>60</sup> National Farmers’ Federation, Submission 35, p. 7.

<sup>61</sup> Productivity Commission, Submission 13, p. 19; Mr Tim Yeend, Associate Secretary, Trade and Investment Group, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, pp. 7 and 8.

<sup>62</sup> Mr Tim Yeend, Associate Secretary, Trade and Investment Group, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, p. 7.

<sup>63</sup> Productivity Commission, Submission 13, p. 19.

<sup>64</sup> See, for example: Red Meat Advisory Council, Submission 16, p. 4; Mr Pat O’Shannassy, Chief Executive Officer, Grain Trade Australia, *Committee Hansard*, Canberra, 20 October 2023, p. 1; Dr Hazel Moir, *Committee Hansard*, Canberra, 13 December 2023, p. 19.

<sup>65</sup> Mr Tim Yeend, Associate Secretary, Trade and Investment Group, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, p. 7; Ms Philippa King, Deputy Chief Executive Officer, Policy and Programs, Austrade, *Committee Hansard*, Canberra, 13 December 2023, p. 6.

<sup>66</sup> Australian Industry Group, Submission 4, p. 3; Productivity Commission, Submission 13, pp. 13–14.

While moving towards greater liberalisation of trade arrangements is still likely to be beneficial, there is a good chance that the specific benefits of PTAs, both for exports and imports, may have plateaued.<sup>67</sup>

- 6.47 Similarly, Ai Group indicated that: ‘With FTAs established with its major trading partners... the returns from the market access objectives are approaching a plateau.’<sup>68</sup>
- 6.48 The Productivity Commission noted the gains from reductions in tariff barriers and the removal of other restrictions on imported goods as a result of trade agreements, while stating that: ‘... the potential for similar gains from future agreements will decline as the number of agreements to which Australia is a signatory increase and as more of Australia’s trade is covered by such agreements.’<sup>69</sup> Consequently, Australia may have already realised most of the advantages of increased competition and cheaper goods and services arising from bilateral trade agreements.<sup>70</sup>
- 6.49 The Productivity Commission outlined the case for Australia to take unilateral action, that is introducing reform to reduce trade barriers without trading partners taking similar actions, noting that doing so could bring substantial benefits in the national interest.<sup>71</sup> As an example, it drew attention to previous research suggesting that revenue from remaining tariffs in Australia is effectively negated by the administration and compliance costs of those tariffs.<sup>72</sup> It added that the case for retaining tariffs as a negotiating tool is weak given that they are already low, impose significant costs on importers, and that it forgoes benefits that could increase wellbeing.<sup>73</sup>
- 6.50 Dr Moir argued that as Australia now has very low tariffs, the major source of benefit is in domestic reform rather than market access for exporters.<sup>74</sup> ‘When Australia reduces tariffs, many consumers benefit and many firms find their input costs reduced. This economy wide improvement in competitiveness contrasts sharply with the small set of beneficiaries from improved access to a particular segment of an overseas market...’<sup>75</sup>

## Anti-dumping framework

- 6.51 Both the Australian Workers’ Union (AWU) and Australian Council of Trade Unions (ACTU) submitted that a robust anti-dumping policy is critical to ensuring Australian industry remains competitive.<sup>76</sup>

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<sup>67</sup> Professor Alexander Robson, Acting Chair, Productivity Commission, *Committee Hansard*, Melbourne, 3 November 2023, p. 37.

<sup>68</sup> Australian Industry Group, Submission 4, p. 3.

<sup>69</sup> Productivity Commission, Submission 13, pp. 13–14.

<sup>70</sup> Productivity Commission, Submission 13, p. 20.

<sup>71</sup> Productivity Commission, Submission 13, p. 20.

<sup>72</sup> Productivity Commission, Submission 13, p. 20, citation omitted.

<sup>73</sup> Productivity Commission, Submission 13, p. 18.

<sup>74</sup> Dr Hazel Moir, Submission 28, Attachment 1, p. 2, citations omitted.

<sup>75</sup> Dr Hazel Moir, Submission 28, Attachment 1, p. 2, citations omitted.

<sup>76</sup> Australian Workers’ Union, Submission 24, p. 6; Australian Council of Trade Unions, Submission 49, p. 26.

- 6.52 Dumping occurs when products from one country are introduced into another country at less than the normal value of those products.<sup>77</sup> The AWU explained that Australia has the capacity to introduce tariffs to reflect the significant government subsidies that allow overseas manufacturers to charge less than cost for their outputs. It advised that a range of anti-dumping measures are in place to protect products such as aluminium extrusions, ammonium nitrate, steel, wind towers and railway wheels (among others), which would otherwise be forced to compete against subsidised products.<sup>78</sup>
- 6.53 The AWU suggested that Australia should make better use of its rights to enact anti-dumping measures: ‘... to defend Australian jobs and interests from unfair trade.’<sup>79</sup> It also noted that: ‘... while China and other countries have sought to fully exploit anti-dumping measures against world-standard Australian exports like barley and wine, the Australian Anti-Dumping Commission is showing increasing reluctance to intervene to protect the competitiveness of our industries.’<sup>80</sup> As an example, it highlighted the removal of tariffs on steel grinding balls on their expiry in September 2021.<sup>81</sup>
- 6.54 The AWU suggested that a review of existing anti-dumping laws should be established to ensure that they are fit for purpose and that Australia is taking a strong and robust approach to respond to dumping.<sup>82</sup> Both the AWU and the ACTU recommended that the Australian Government ensure that the Anti-Dumping Commission, Anti-Dumping Review Panel, International Trade Remedies Forum, and the Department of Industry are adequately resourced to investigate and enforce anti-dumping measures as well as that relevant agencies have broad industry and union representation to support them in delivering their functions.<sup>83</sup>
- 6.55 The Maritime Union of Australia (MUA) proposed that the Australian anti-dumping system requires reform to clarify that shipping services are within scope for investigation by the Anti-Dumping Commissioner and or by the Minister.<sup>84</sup> It further explained that:
- ... the ‘price’ of foreign registered ships engaged in trade with Australia i.e. the freight rate (the proxy for the price of the ship or shipping service) for Australian importers that involves a sea transportation component is lower than the price (the freight rate) that a domestic user of ships is required to pay in the domestic market of many exporting countries, particularly developed exporting nations, and as such falls within the definition of dumping as specified by the World Trade Organisation (WTO).<sup>85</sup>

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<sup>77</sup> Australian Council of Trade Unions, Submission 49, p. 26, citation omitted.

<sup>78</sup> Australian Workers’ Union, Submission 24, p. 6.

<sup>79</sup> Australian Workers’ Union, Submission 24, p. 6.

<sup>80</sup> Australian Workers’ Union, Submission 24, p. 6.

<sup>81</sup> Australian Workers’ Union, Submission 24, p. 6.

<sup>82</sup> Australian Workers’ Union, Submission 24, p. 6.

<sup>83</sup> Australian Workers’ Union, Submission 24, p. 6; Australian Council of Trade Unions, Submission 49, p. 26.

<sup>84</sup> Maritime Union of Australia, Submission 14, p. 8. See also: Australian Council of Trade Unions, Submission 49, p. 26.

<sup>85</sup> Maritime Union of Australia, Submission 14, p. 8.

## Committee comment

- 6.56 The Committee agrees that market access objectives, including through the removal of tariff and non-tariff barriers should continue to be a priority for Australia. Further, it recognises that these objectives are vital to the continued success of many Australian industries, including agriculture.
- 6.57 The Committee acknowledges the significant effort of both DFAT and Austrade to building awareness and capacity to enable business to utilise opportunities under Australia's existing agreements. There are always improvements that can be made, particularly in regard to the engagement of SMEs with trade.
- 6.58 The Committee is of the view that Australia best interests have been and will continue to be achieved through commitment to a multilateral approach to trade and the rules-based trading system. While multilateral outcomes should be the priority for Australia, plurilateral and bilateral agreements can continue to bring additional benefits and further Australia's trade interests. However, the Committee notes the evidence that bilateral agreements have the potential to divert existing trade and that the benefits of additional bilateral agreements may be marginal. As such, it is vital to determine that further bilateral agreements have a net benefit and are in the national interest.



# 7. Legislated approach

## Overview

- 7.1 This chapter outlines the evidence received in relation to the benefits of enshrining the content of trade agreements in a legislative framework, as well as the suitability of a legislative approach and key considerations and risks. Enshrining elements of the stakeholder consultation and engagement process in a legislative framework was discussed in Chapter 2 of the Interim Report.

## Benefits of a legislative approach

- 7.2 Throughout the inquiry submitters made a wide range of proposals regarding the content of Australia's trade and investment agreements. In doing so, many specified that a legislative framework should be introduced setting out what should and should not be included in Australia's trade and investment agreements.<sup>1</sup> The concept of a legislative framework was variously described as establishing parameters, guardrails, limits, baselines, and minimum standards for the content of agreements.
- 7.3 The Electrical Trades Union (ETU) described why in its view elements of the content of trade and investment agreements should be enshrined in legislation:
- In order to ensure that Australian trade agreements are negotiated in the best interests of workers and the broader public, a set of agreed national priorities needs to apply to guide their development. Introducing legislative guardrails on the content of trade agreements is an essential step to prevent future Governments from dealing away critical labour protections and policy sovereignty at the negotiating table.<sup>2</sup>
- 7.4 Ms Michele O'Neil, President of the Australian Council of Trade Union (ACTU) explained to the Committee how a legislative approach would operate:
- A legislative approach will ensure clarity and democratic oversight of Australia's approach to trade, giving DFAT [Department of Foreign Affairs and Trade] negotiators the ability to determine strategy but within a clear democratically

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<sup>1</sup> See, for example: Australian Fair Trade and Investment Network, Submission 8, pp. 3–6; Electrical Trades Union, Submission 30, pp. 2–3; Australian Workers' Union, Submission 24, p. 1; CPSU-SPSF Group, Submission 38, p. 4; Public Services International, Submission 40, p. 12; Australian Manufacturing Workers' Union, Submission 43, p. 4; Australian Council of Trade Unions, Submission 49, pp. 5–6.

<sup>2</sup> Electrical Trades Union, Submission 30, p. 4.

accountable set of parameters in the public interest. It would also clearly signal to our trading partners Australian values and priorities.<sup>3</sup>

- 7.5 The Australian Manufacturing Workers' Union (AMWU) suggested that legislation would provide assurance that key public interest measures would be maintained:

There is overwhelming support for Australia's public health system, including Medicare and the Pharmaceutical Benefits Scheme, but also laws that support public health, like plain packaging of cigarettes. Governments always assure the public that these are sacrosanct and will not be traded away in FTAs [free trade agreements], but legislation would ensure that the public were not asked to take this on trust.<sup>4</sup>

- 7.6 Several submitters identified the key benefit of a legislative approach is that it can only be changed by further legislation, thereby providing a more robust and enduring framework in comparison to a non-legislative policy approach.<sup>5</sup> Ms Patricia Holmes, Assistant Secretary, Trade and Investment Strategy Branch at DFAT acknowledged that: '... legislation can be used as an option to [p]resent a policy or establish a structure that subsequently can be changed through future legislation only. That would be one rationale to develop legislation.'<sup>6</sup>

## Suitability of a legislative approach

- 7.7 In response to whether certain aspects of the content of trade and investment agreements could be suitably enshrined in legislation, submitters reflected on the nature of trade agreements, whether legislation is the most appropriate way of achieving desired objectives, and considerations and risks of a legislative approach.

### Nature of trade and investment agreements

- 7.8 Some submitters suggested that the nature of trade and investment agreements is not well-suited to a legislative approach, particularly because it could limit flexibility both during negotiations and across different agreements.<sup>7</sup> For example, DFAT noted the fast changing negotiating environment for trade agreements and pointed out that: 'Introducing legislative requirements may imbue the negotiating process with undue

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<sup>3</sup> Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, Melbourne, 3 November 2023, p. 1. See also: pp. 8–9.

<sup>4</sup> Australian Manufacturing Workers' Union, Submission 43, p. 4.

<sup>5</sup> See, for example: Department of Foreign Affairs and Trade, Submission 41, p. 59; Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, Melbourne, 3 November 2023, p. 1; Ms Kate Lappin, Asia Pacific Regional Secretary at Public Services International, *Committee Hansard*, Melbourne, 3 November 2023, p. 18.

<sup>6</sup> Ms Patricia Holmes, Assistant Secretary, Trade and Investment Strategy Branch, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, p. 5.

<sup>7</sup> See, for example: Red Meat Advisory Council, Submission 16, p. 12; Business Council of Australia, Submission 19, p. 4; German Australian Business Council, Submission 25, pp. 9–10; Department of Foreign Affairs and Trade, Submission 41, p. 60; Mr Pat O'Shannassy, Chief Executive Officer, Grain Trade Australia, *Committee Hansard*, Canberra, 20 October 2023, p. 8.

inflexibility, which may have negative implications for the Government being able to negotiate these agreements quickly if required.<sup>8</sup>

7.9 The Red Meat Advisory Council (RMAC), German Australian Business Council (GABC), Grain Trade Australia (GTA) and DFAT emphasised the need to consider how a legislative framework would apply across types of agreements, different trading partners, and a range of negotiating environments.<sup>9</sup> The GABC suggested that legislation is not necessary and reflected that: 'Free trade agreements will always be a product of the international and economic environment in which they are concluded, as well as reflecting the different political priorities of the respective governments.'<sup>10</sup>

7.10 Mr Pat O'Shannassy, Chief Executive Officer at GTA explained the need to consider an approach that is applicable across different agreements and markets:

... legislation has its benefits, but it also has its constraints. If you're looking at particular trade agreements, there are going to be different issues in different markets. As for locking it into a legislative approach, we may be looking at that and end up legislating an approach around the EU FTA [A-EUFTA], then we move to our next market and find that our issues are quite different there. We should be seriously thinking about unintended consequences, if you're going down that track.<sup>11</sup>

7.11 DFAT outlined that it continually seeks to improve the approach to negotiating trade and investment agreements, including in response to changes in the priorities of stakeholders and shifts in the global environment.<sup>12</sup> Mr Tim Yeend, Associate Secretary, Trade and Investment Group at DFAT told the Committee that in relation to a legislative framework:

...you would need to make sure that in legislating you were not constraining the ability of the process to evolve. Legislation, to some extent, locks you in to particular approaches and ways of doing things. That can be a positive step, but you would just need to take account of that evolving sort of process that I mentioned as well and not constrain in a negative way the ability to reflect those changing circumstances as they evolve.<sup>13</sup>

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<sup>8</sup> Department of Foreign Affairs and Trade, Submission 41, p. 60.

<sup>9</sup> Red Meat Advisory Council, Submission 16, p. 12; German Australian Business Council, Submission 25, p. 9; Ms Patricia Holmes, Assistant Secretary, Trade and Investment Strategy Branch, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, p. 5; Mr Pat O'Shannassy, Chief Executive Officer, Grain Trade Australia, *Committee Hansard*, Canberra, 20 October 2023, p. 8.

<sup>10</sup> German Australian Business Council, Submission 25, p. 9.

<sup>11</sup> Mr Pat O'Shannassy, Chief Executive Officer, Grain Trade Australia, *Committee Hansard*, Canberra, 20 October 2023, p. 8.

<sup>12</sup> Ms Patricia Holmes, Assistant Secretary, Trade and Investment Strategy Branch, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, pp. 5–6; Mr Tim Yeend, Associate Secretary, Trade and Investment Group, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, p. 9.

<sup>13</sup> Mr Tim Yeend, Associate Secretary, Trade and Investment Group, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, p. 9.

- 7.12 DFAT also noted that a legislative framework with predetermined constraints on negotiations may send certain signals to trading partners and reduce the capacity to respond to their negotiating positions.<sup>14</sup>
- 7.13 Conversely, the ACTU considered that having a legislated framework would demonstrate clear standards and values to trading partners upfront, which could foster shared understanding and result in more effective and timely negotiations.<sup>15</sup>

## Appropriateness of legislation to achieve objectives

- 7.14 In its evidence to the Committee, DFAT emphasised the need to consider whether legislation is the most appropriate way to achieve desired objectives in relation to Australia's approach to negotiating trade and investment agreements.<sup>16</sup> For example, Ms Holmes explained that:

In relation to the question about legislation, I think it's important to consider what we use legislation for.

...

Would legislation be the most effective and appropriate mechanism to implement change? In particular, is it necessary? At this point, the processes that we've described are not contained in legislation at all and it's not essential for these processes that there is legislation.<sup>17</sup>

- 7.15 DFAT also observed that different elements of the negotiation of agreements may suit different approaches, for example: 'It may be that legislation is deemed appropriate for some key elements of either the mandate and/or the negotiating process, with most elements remaining to be set out in policies.'<sup>18</sup>
- 7.16 RMAC outlined that an alternative to a legislative approach could be to adopt a set of guidelines or best-practice principles for the negotiation of trade and investment agreements.<sup>19</sup> It further explained that: 'Such principles, which would be non-binding, and tailored to each agreement, should be constructed to help guide the negotiation of high-quality, ambitious and trade liberalising agreements... The purpose of a principles-based approach would also be to prompt negotiators on the best practice approach to including certain provisions in an agreement.'<sup>20</sup>
- 7.17 In its submission, DFAT referred to guidance issued by the Attorney-General's Department outlining that there are risks in addressing policy issues with legislation

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<sup>14</sup> Department of Foreign Affairs and Trade, Submission 41, p. 60.

<sup>15</sup> Ms Michele O'Neil, President, Australian Council of Trade Unions, *Committee Hansard*, Melbourne, 3 November 2023, pp. 8–9.

<sup>16</sup> Department of Foreign Affairs and Trade, Submission 41, p. 59.

<sup>17</sup> Ms Patricia Holmes, Assistant Secretary, Trade and Investment Strategy Branch, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, p. 5.

<sup>18</sup> Department of Foreign Affairs and Trade, Submission 41, p. 60.

<sup>19</sup> Red Meat Advisory Council, Submission 16, p. 12.

<sup>20</sup> Red Meat Advisory Council, Submission 16, p. 12.

where legislation is not required to do so, and that legislation should only be introduced if it is essential.<sup>21</sup>

## Considerations and risks of a legislative approach

7.18 DFAT advised of the need to consider the potential legal risks associated with a legislated approach:

The risk of legal challenge in the event of uncertainty regarding whether a mandate, consultation obligation or transparency requirement has been properly followed in accordance with the legislation may lead to uncertainty, both within Australia and for trading partners. This could impact implementation of trade agreements as well as the negotiating process.<sup>22</sup>

7.19 The Business Council of Australia (BCA) stated that it does not support a legislative approach, however it suggested that if legislation is introduced it should be designed to avoid legal challenges that could disrupt and delay the development of trade and investment agreements.<sup>23</sup>

7.20 DFAT noted that to minimise the risk of legal challenge as far as is reasonably practicable, it would be important to ensure officials implementing the legislation have clarity on the intent and understand their obligations as well as where flexibility does or does not exist within the scope of the legislation.<sup>24</sup>

7.21 DFAT also observed that any legislation governing trade and investment agreements would need to carefully consider the definition of trade or investment agreement and what instruments would be within the scope of the legislation.<sup>25</sup>

## Committee Comment

7.22 The Committee believes that there is substantial benefit in elements of the process for negotiating trade and investment agreements being enshrined in a legislative framework, this includes stakeholder consultation and engagement (see Chapter 2 of the Interim Report); publication of negotiating aims and objectives (see Chapter 3 of the Interim Report); National Interest Analysis and economic, social, and environmental impact assessments (see Chapter 3); and post-implementation reviews (see Chapter 5 of the Interim Report).

7.23 With regard to the content of agreements, in general the Committee is of the view that it is not appropriate or necessary for a legislative framework to be highly

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<sup>21</sup> Department of Foreign Affairs and Trade, Submission 41, p. 59; See also: Attorney-General's Department, *Causes of complex legislation and strategies to address these* (16 June 2014). Available at: <https://www.ag.gov.au/legal-system/publications/causes-complex-legislation-and-strategies-address-these>.

<sup>22</sup> Department of Foreign Affairs and Trade, Submission 41, p. 60.

<sup>23</sup> Business Council of Australia, Submission 19, pp. 4–5.

<sup>24</sup> Department of Foreign Affairs and Trade, Submission 41, p. 60.

<sup>25</sup> Ms Patricia Holmes, Assistant Secretary, Trade and Investment Strategy Branch, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 13 September 2023, p. 5.

prescriptive in ruling certain provisions in or out of future trade and investment agreements. Such an approach would likely reduce flexibility and limit the scope for negotiation, with the result being potentially reduced benefits from trade.

- 7.24 However, the Committee does believe that there are certain exceptional commitments that are fundamental to the public interest that could be appropriately enshrined in a legislative framework. Further, broad principles in relation to maintaining consistency with international rights and standards, and retaining the ability to regulate in the public interest across key policy areas could also be appropriately enshrined in a legislative framework. For example, in relation to public health and safety, biosecurity, labour, creative and cultural industries etc. To some extent, this might involve codifying existing practices and safeguards in legislation.
- 7.25 The Committee notes that a legislative approach would provide the Parliament with greater input to and visibility of the parameters for the negotiation of Australia's trade and investment agreements. As previously observed, entering into trade and investment agreements is an executive power (see Chapter 4 of the Interim Report). However, the Committee believes that providing a broad framework for negotiations as a guide is appropriate.
- 7.26 The Committee notes the potential considerations and risks to a legislative approach outlined in the evidence, which must be carefully considered in the design of any legislation.

## Recommendations

### Recommendation 8

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- 7.27 The Committee recommends that the Australian Government establish a legislative framework for the negotiation of Australia's trade and investment agreements.**

**Mr Steve Georganas MP**

**Chair**

29 April 2024



# Additional comments – Australian Greens

- 1.1 The Australian Greens strongly believe that in negotiating any trade agreement, the principles of fair trade, rather than free trade, should be the paramount consideration.
- 1.2 The Australian Greens support a more open and transparent approach to negotiating trade agreements, before and during negotiations. This inquiry showed that a lack of transparency is a core issue with Australia’s approach to negotiations. The Australian Fair Trade and Investment Network (AFTINET) highlighted in their submission the current process, stating that ‘there is no independent assessment of the economic costs and benefits of the agreement, nor of health, environmental, gender or regional impacts, before it is signed.’<sup>1</sup> Further AFTINET highlighted that inquiries similar to this one have occurred in 2003, 2021, 2015, 2021 ‘... all of which recommended increased transparency and accountability.’<sup>2</sup> The Australian Greens believe that the recommendations in this report do not sufficiently address the concerns raised, especially around the need for greater transparency. The Australian Greens continue to call for greater transparency in this process, including public consultations and independent evaluations that are presented to the Parliament before agreements are signed.
- 1.3 Trade agreements must support the rights of First Nations peoples. This includes ensuring that communities benefit from these agreements, obtaining free, prior and informed consent, ensuring First Nations businesses are at meeting or part of trade delegations. The Australian Council of Trade Unions advocated for this in their submission.<sup>3</sup> Mr Godwell from i2i Development Global also highlighted the need for First Nations interests to be considered and the benefits that this can bring. ‘A key part of lifting the value of export earnings derived from Indigenous products and then from Indigenous businesses goes to the extent of the support we extend to those Indigenous export businesses. The annual measurement of the value of foreign direct investment into Indigenous businesses appears to be non-existent.’<sup>4</sup>
- 1.4 Mr Godwell also spoke about the opportunity of inclusion chapters:

Our agreements on trade and investment matters are the enabling architecture that supports Australia’s national interests. The prospects of having those agreements supporting and advancing Indigenous interests actually goes to our Australian national interests. It goes to item f. of the terms of reference of the

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<sup>1</sup> Australian Fair Trade and Investment Network, Submission 8, p. 8.

<sup>2</sup> Australian Fair Trade and Investment Network, Submission 8, p. 9.

<sup>3</sup> Australian Council of Trade Unions, Submission 49, p. 23.

<sup>4</sup> Mr Darren Godwell, Chief Executive Officer, i2i Global, *Proof Hansard*, Canberra, 14 March 2024, p. 1.

committee's current inquiry, which is the agreements and the way they protect and advance Australia's national interest. Honestly, if we are dealing with a portion of the Australian economy and society that has interests in over 50 per cent of the Australian continent, I don't think you could get a better case for Indigenous inclusion and what is in Australia's national interest.<sup>5</sup>

- 1.5 The Australian Greens support this statement and continue to call for any trade agreements to have inclusion chapters for women and gender diverse people, young people, First Nations peoples and small businesses.
- 1.6 Finally, Environmental, Social, Governance Standards (ESG) are becoming increasingly important in global investment practices and trends. It requires the deployment of capital to projects and activities that achieve the United Nations Sustainable Development Goals (SDGs) and by doing so it also attracts capital. The Australian Greens call for a legislated ESG framework, including definitions, to create a truly transformative impact for governance, climate change and in the social and community sphere. Without a framework in Australia to measure claims against, any statements about Australia's ESG credentials are meaningless.

## **Senator Dorinda Cox**

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<sup>5</sup> Mr Darren Godwell, Chief Executive Officer, i2i Global, *Proof Hansard*, Canberra, 14 March 2024, p. 2.



# A. Submissions

- 1 Australian Cotton Shippers Association (ACSA)
- 2 The Grail in Australia
- 3 Australian Organic Limited (AOL)
- 4 The Australian Industry Group (Ai Group)
- 5 The Media, Entertainment & Arts Alliance (MEAA)
  - 5.1 Supplementary to submission 5
- 6 Grain Trade Australia (GTA)
- 7 Australian Nursing and Midwifery Federation (ANMF)
- 8 Australian Fair Trade and Investment Network (AFTINET)
  - 8.1 Supplementary to submission 8
  - 8.2 Supplementary to submission 8
- 9 CropLife Australia
- 10 Department of Home Affairs
- 11 Australian Small Business and Family Enterprise Ombudsman
- 12 GrainGrowers Limited
- 13 Productivity Commission
- 14 Maritime Union of Australia (MUA)
- 15 European Australian Business Council (EABC)
- 16 Red Meat Advisory Council (RMAC)
- 17 Grains Australia
- 18 Medicines Australia
- 19 Business Council of Australia (BCA)
- 20 Melbourne Climate Futures, University of Melbourne (MCF)

- 21** Mr Paul Gretton
- 22** Uniting Church in Australia, Synod of Victoria and Tasmania
- 23** RSPCA Australia
- 24** Australian Workers' Union (AWU)
- 25** German Australian Business Council e.V. (GABC)
- 26** Screen Producers Australia (SPA)
- 26.1 Supplementary to submission 26
- 27** Australian Copyright Council (ACC)
- 28** Dr Hazel Moir
- 29** Australian Alliance for Animals (AAA)
- 29.1 Supplementary to submission 29
- 30** Electrical Trades Union of Australia (ETU)
- 31** Professor Joanna Harrington, University of Alberta
- 31.1 Supplementary to submission 31
- 32** Union Aid Abroad–APHEDA
- 33** New Zealand Ministry of Foreign Affairs and Trade (NZ MFAT)
- 34** APRA AMCOS
- 35** National Farmers' Federation (NFF)
- 36** Public Health Association of Australia (PHAA)
- 37** Catholics in Coalition for Justice and Peace
- 38** CPSU-SPSF Group
- 38.1 Supplementary to submission 38
- 39** Australian Pork Limited (APL)
- 40** Public Services International (PSI)
- 40.1 Supplementary to submission 40
- 41** Department of Foreign Affairs and Trade (DFAT)
- 41.1 Supplementary to submission 41

- 42** Australian Trade and Investment Commission (Austrade)
- 43** Australian Manufacturing Workers' Union (AMWU)
- 44** The Group of Eight (Go8)
- 45** Department of Agriculture, Fisheries and Forestry (DAFF)
- 45.1 Supplementary to submission 45
  - 45.2 Supplementary to submission 45
- 46** Delegation of the European Union to Australia
- 47** Northern Territory Government
- 48** ActionAid Australia
- 49** Australian Council of Trade Unions (ACTU)
- 50** Confidential
- 51** Australian Chamber of Commerce and Industry (ACCI)
- 52** Confidential
- 53** Humane Society International Australia (HIS Australia)
- 54** Voices of Korean-Australian Businesses





## B. Hearings and witnesses

### **Wednesday, 13 September 2023 – Canberra**

#### *Department of Foreign Affairs and Trade*

- Ms Jenny Dee, Assistant Secretary, Stakeholder Engagement and Advocacy Branch
- Ms Patricia Holmes, Assistant Secretary, Trade and Investment Strategy Branch
- Mr Ravi Kewalram, Chief Negotiator and First Assistant Secretary, Free Trade Agreements and Stakeholder Engagement Division
- Ms Amanda O'Brien, Treaties Manager, International Law Branch
- Mr David Woods, Chief Economist and First Assistant Secretary, International Economics and Green Economy Division
- Mr Tim Yeend, Associate Secretary, Trade and Investment Group

### **Friday, 20 October 2023 – Canberra**

#### *National Farmers' Federation*

- Mr Kade Denton, General Manager, Trade and Economics
- Mr Harry Young, Policy Officer, International Affairs

#### *Australian Organic Limited*

- Ms Niki Ford, Chief Executive Officer

#### *GrainGrowers Limited*

- Ms Annabel Mactier, Policy Manager, Trade and Supply Chains

#### *Grain Trade Australia*

- Mr Pat O'Shannassy, Chief Executive Officer

#### *CropLife Australia*

- Mr Justin Crosby, Director, Government and Strategic Relations
- Mr Gregory Sekulic, Director, Agricultural Chemical Policy

#### *RSPCA Australia*

- Ms Joanne Webb, Senior Policy Officer

*Humane Society International Australia*

- Ms Nicola Beynon, Head of Campaigns

*Australian Alliance for Animals*

- Dr Jed Goodfellow, Director, Policy and Government Relations

*APRA AMCOS (by videoconference)*

- Mr Nicholas Pickard, Executive Director, Public Affairs and Government Relations

*Screen Producers Australia (by videoconference)*

- Mr Matthew Deaner, Chief Executive Officer
- Ms Jane Mulligan, Director of Policy

*Australian Copyright Council (by videoconference)*

- Ms Eileen Camilleri, Chief Executive Officer

*Dr Joanna Harrington, Professor of Law, University of Alberta (by videoconference)*

*Delegation of the European Union to Australia*

- His Excellency Mr Gabriele Visentin, Ambassador of the European Union to Australia

*Australian Fair Trade and Investment Network*

- Dr Patricia Randal, Convener

*German Australian Business Council e.V.*

- Dr Robert Harrison, Board Member
- Ms Elisabeth Opie, Deputy Chair
- Dr Sabine Pittrof, Chair

*Department of Agriculture, Fisheries and Forestry*

- Mr David Garner, Assistant Secretary, International Organisations and Negotiations Branch
- Ms Nicola Hinder, Deputy Secretary, Agricultural Trade Group
- Mr Matthew Koval, First Assistant Secretary, Trade and International Division

**Friday, 3 November 2023 – Melbourne**

*Australian Council of Trade Unions*

- Ms Clare Middlemas, Senior International Officer
- Ms Michele O'Neil, President

*Australian Manufacturing Workers' Union*

- Dr Daniel Nicholson, National Research Officer

*Maritime Union of Australia (by teleconference)*

- Mr Rod Pickette, Policy Adviser

*CPSU/SPSF Group*

- Mr Shay Deguara, National Industrial and Research Officer

*Electrical Trades Union*

- Mr James Miranda, National Policy and Research Officer

*Australian Nursing and Midwifery Federation*

- Mr Mark Dunstan, Industrial Officer

*Public Services International*

- Ms Kate Lappin, Asia Pacific Regional Secretary
- Mr Tom Reddington, Oceania Sub-Regional Secretary
- Ms Sanya Smith, Legal Consultant

*Melbourne Climate Futures, University of Melbourne*

- Prof Margaret Young, Professor, Melbourne Law School

*Red Meat Advisory Council (by teleconference)*

- Mr Alastair James, Chief Executive Officer
- Mr John McKillop, Independent Chair

*Australian Livestock Exporters' Council (by teleconference)*

- Mr Mark Harvey-Sutton, Chief Executive Officer

*Australian Lot Feeders' Association (by teleconference)*

- Mr Christian Mulders, Chief Executive Officer

*Australian Meat Industry Council (by teleconference)*

- Mr Sam Munsie, General Manager, Trade and Technical Affairs

*Cattle Australia (by teleconference)*

- Mr David Foote, Chair

*Australian Industry Group*

- Ms Louise McGrath, Head of Industry Development and Policy
- Ms Hnin Nwe Oo, Economic Policy Analyst

*Australian Chamber of Commerce and Industry (by teleconference)*

- Mr Chris Barnes, Head of Business Development and International Affairs
- Mr Lachlan Smith, Policy Adviser, Trade and International Affairs

*Productivity Commission*

- Mr Eric Liu, Assistant Research Economist
- Dr Benjamin Mitra-Kahn, Assistant Commissioner
- Prof Alexander Robson, A/g Chair

**Wednesday 15 November 2023 – Canberra**

*Public Health Association of Australia (by videoconference)*

- Dr Deborah Gleeson, Convenor, Political Economy of Health Special Interest Group

**Friday, 1 December 2023 – Canberra**

*American Federation of Labor and Congress of Industrial Organizations (by videoconference)*

- Mr Eric Gottwald, Trade and Globalisation Policy Specialist

*ActionAid Australia (by videoconference)*

- Ms Sophie Hardefeldt, Policy and Research Manager
- Ms Michelle Higelin, Executive Director

*Union Aid Abroad–APHEDA (by videoconference)*

- Ms Kate Lee, Executive Officer

**Wednesday, 13 December 2023 – Canberra**

*Austrade (by videoconference)*

- Mr Daniel Boyer, Deputy Chief Executive Officer, Trade and Investment
- Mr Sam Guthrie, General Manager, Government and Policy
- Ms Philippa King, Deputy Chief Executive Officer, Policy and Programs

*Medicines Australia (by videoconference)*

- Ms Elizabeth de Somer, Chief Executive Officer
- Ms Gail Morgan, Head of Strategic Engagement and Communications

*Dr Hazel Moir, Private capacity (by videoconference)*

## **Friday, 1 March 2024 – Canberra**

### *Department of Foreign Affairs and Trade*

- Ms Eu-Niz Chan, Acting Assistant Secretary, Indo-Pacific Economic and Supply Chain Branch
- Ms Jenny Dee, Assistant Secretary, Stakeholder Engagement and Advocacy Branch
- Mr Matt Duckworth, Assistant Secretary, Services Competition and Intellectual Property Branch, Office of Global Trade Negotiations; and Deputy Chief Negotiator Australia-EU Free Trade Agreement
- Mr Ravi Kewalram, First Assistant Secretary, Free Trade Agreements and Stakeholder Engagement Division
- Ms Jenni McEwin, Director, FTA Inclusive and Sustainable Trade Section

## **Thursday, 14 March 2024 – By videoconference**

### *i2i Global*

- Mr Darren Godwell, Chief Executive Officer

### *Karratha Districts Chamber of Commerce and Industry Inc*

- Mrs Sarah Whelan, Chief Executive Officer

### *Nagula Jarndu Designs, Yawuru Jarndu Aboriginal Corporation*

- Ms Eunice Yu, Manager
- Ms Lynette Yu-Mackay, Chairperson

### *Aquaculture Council of Western Australia*

- Mr Justin Bellanger, Chief Executive Officer

### *The Media, Entertainment & Arts Alliance*

- Mr Adam Portelli, Deputy Chief Executive Officer