



Australian Government

Department of Foreign Affairs and Trade



Productivity Commission Study into Barriers to Growth in Australian Services Exports

**Further Submission by
Department of Foreign Affairs and Trade (DFAT)
Export Finance and Insurance Corporation (Efic)**

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Table of Contents

A. Introduction	3
B. Free Trade Agreements Address Barriers to Services Trade	4
Barriers to Services Trade	4
Free Trade Agreements Do Address Behind the Border Barriers to Services Trade	4
Free Trade Agreements Bind Parties to the Agreement	5
Domestic Regulation Addressed Through FTAs	6
Progressive Liberalisation	6
Progress in Multilateral Trade Negotiations has Slowed.....	7
C. Bilateral and Regional FTAs	8
D. Contribution of Bilateral and Regional Free Trade Agreements - Assistance to Exporters	9
E. Holistic Approach to Reviewing FTAs Required	10
F. Air Transport	10
G. Responses to Specific Draft Recommendations	11
H. Draft Recommendation 4.8	11
I. Draft Recommendation 4.9	13
J. Draft Recommendation 6.1	13
K. Draft Recommendation 8.1	14
L. Draft Recommendation 8.2	14
M. Draft Recommendation 8.3	15
N. Draft Recommendation 8.4	15
O. Draft Recommendation 9.1	16
P. Draft Recommendation 9.2	18
Q. Draft Recommendation 9.3	19
R. Conclusion	20

A. Introduction

1. The agencies in the Foreign Affairs and Trade portfolio welcome the provision of the draft Report 'Barriers to Growth in Services Exports'. A broader understanding of the value of services exports, and the barriers to growth in services exports serves to support the important work within the portfolio on multilateral, plurilateral and bilateral trade negotiations, trade facilitation and export finance.
2. The draft Report's emphasis on addressing international barriers to service exports is consistent with Australia's work with other governments, and in international forums (such as APEC), to liberalise services trade. Reference to other initiatives, such as the reference to the Harmonisation of Standards (HoSt) project for the Movement of Data Across APEC Economies, is welcomed. Recommendations relating to tourism services are also broadly welcomed, including on infrastructure, aviation access and border processing, and addressing tourism workforce capability issues.
3. This further submission from the Foreign Affairs and Trade portfolio is designed to assist the Productivity Commission to more fulsomely understand the roles its agencies play in relation to services exports.
4. In particular, the draft Report does not appear to sufficiently recognise the considerable direct benefits of free trade agreements (FTAs) - including bilateral and regional FTAs - in enabling such liberalisation to take place. In light of the importance to Australia's economy of services and services exports, the reduction of barriers to services trade through bilateral, regional and plurilateral trade agreements is considerable.
5. The approach the Department of Foreign Affairs and Trade takes to bilateral and regional trade negotiations supports many of the Productivity Commission's key recommendations. The bilateral and regional FTAs already entered into by Australia include provisions which address several of the barriers to services exports identified by the Productivity Commission in its draft Report. These include:
 - a. greater consistency to investment screening thresholds;
 - b. addressing restrictions on establishing commercial presences abroad;
 - c. reducing restrictions imposed by licensing requirements;
 - d. streamlined visa processing;
 - e. commitments to free data flows; and
 - f. addressing behind the border barriers, including through MRAs.

6. Further, the role of agencies such as Efic should be considered in the context of recent changes to its Statement of Expectations and the *Export Finance and Insurance Corporation Act 1991* (Efic Act), as well as its obligations under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).
7. This submission explores some of these aspects in the broad, and then directly addresses several draft recommendations made in the draft Report.

B. Free Trade Agreements address barriers to services trade

Barriers to Services Trade

8. As identified in the previous portfolio submission,¹ there are a number of significant foreign barriers to services exports - including so called ‘behind the border’ barriers. These include:
 - a. foreign equity limitations;
 - b. nationality/citizenship/residency restrictions;
 - c. quantitative restrictions/limitations;
 - d. specifications on mode of supply;
 - e. non-recognition of qualification;
 - f. restrictions on the temporary entry/movement of business persons; and
 - g. lack of transparency/regulatory uncertainty.
9. Specific barriers faced by Australian services suppliers in foreign markets vary depending on the specific country with which exporters are seeking to trade. Comprehensive accounts of relevant market access barriers are available in WTO Trade Policy Reviews for each country.

Free Trade Agreements Address Behind the Border Barriers to Services Trade

10. The draft Report asserts that “*As a general rule, trade agreements are of limited use in directly addressing barriers that are behind the border*”². This is not accurate.
11. Competition Policy, Intellectual Property and Electronic Commerce are key elements of our FTAs with ASEAN and New Zealand, Chile, China, Japan, Korea, Malaysia, Singapore, Thailand and the United States. These chapters help drive domestic reform in partner countries, in competition by establishing access rights to monopoly infrastructure such as telecommunications and gas, in intellectual property by bolstering domestic regimes to support creativity and

¹ Previous portfolio submission at pp25-29.

² Productivity Commission Draft Report, p251.

ideas and in electronic commerce by establishing privacy and consumer protection regimes. In AANZFTA, for example, the competition chapter and its associated implementation committee has been a driver for the establishment of competition measures and authorities in ASEAN itself.

12. There are of course many companies that are successful in offshore markets before any FTA enters into force, and on the other hand, a range of barriers often remain following a FTA. However, the gains for businesses resulting from FTAs can be transformative in some sectors, while incremental gains across a larger group of sectors ensures Australian business retain a level playing field with respect to third party competitors in offshore markets. For example, under KAFTA parties agreed to enhanced transparency around licensing of financial institutions and regulatory decision-making, as well as streamlined licensing procedures for Australian suppliers in Korea. These outcomes will facilitate a greater range of services to Korean companies from Australian services providers, boosting already strong bilateral economic and trade links.
13. As noted in the previous portfolio submission, Australia approaches all of its FTA negotiations with well-developed commercial objectives – based on extensive consultations and input from business and other stakeholders, including Austrade. Services issues are accorded a priority in all trade negotiations to which Australia is a party. As a result, free trade agreements are able to deliver outcomes that are commercially meaningful for Australian business:
 - a. binding (i.e. legal guarantees) existing levels of market openness to the maximum extent;
 - b. negotiating new market access in sectors of priority commercial interest;
 - c. securing disciplines on domestic regulation (which address licensing, qualification requirements (behind-the-border type issues));
 - d. ensuring that Australian service suppliers and investors are treated no less favourably than service suppliers and investors of the negotiating partner country or any other country; and
 - e. pursuing a mechanism to ensure future autonomous liberalisation by trading partners is locked in (i.e. ratchet mechanisms or future work programs).

Free Trade Agreements Bind Parties to the Agreement

14. FTAs are legally binding and have the force of treaty. Key outcomes include market openings for services that promote transparency and regulatory certainty in behind the border measures and institutional provisions that ensure that the legally binding commitments contained in the agreements can be enforced through dispute settlement procedures.

15. The binding nature of free trade agreements provides a certainty of outcome that is often not available through other avenues in reducing services exports barriers. Non-binding initiatives and forums are useful for exchanging views and experience on issues and approaches to tackle behind the border barriers, whereas a legally binding free trade agreement has the force of treaty to constrain trade barriers. For example, the Japan-Australia Economic Partnership Agreement (JAPEPA), which addresses behind the border barriers including domestic regulation³ imposes binding dispute settlement processes upon a party who breaches its obligations or denies a party the benefit of the agreement⁴.

Domestic Regulation addressed through FTAs

16. In addition to the behind the border barriers above, other behind the border measures also affect trade in services (so called ‘domestic regulation’). In particular, measures such as licensing and qualifications procedures and requirements can affect the ability of services exporters to supply a service overseas. In our FTAs, Australia seeks to ensure that domestic regulation is administered in a reasonable, objective and impartial manner.

17. These types of barriers covered in domestic regulation in FTAs include:

- a. barriers, fees and procedures relating to authorization for the supply of a service;
- b. applicable licensing requirements and criteria, and terms and conditions of licences;
- c. timeframes for processing of an applications; and
- d. barriers to appeal or seek review of domestic regulatory decisions.

18. In addition, provisions that either mandate or encourage greater transparency of regulations affecting the supply of services is crucial to encouraging services trade. International research⁵ clearly demonstrates that transparency is one of the key aspects which firms take into account when making a decision to export and establish internationally.

19. Because these barriers relate to regulation, they often require autonomous liberalisation to remove. FTA negotiations can provide momentum to effect regulatory reform. They can also support other bodies’ negotiations, or government support where the responsible party in a negotiating partner country is a government agency. Where administration of relevant qualifications is outside of central government control - for example in the hands of professional

³ Article 9.

⁴ Article 9; Article 20.

⁵ World Economic Forum, World Trade Report 2013

bodies or State and Territory organisations ('competent authorities') - then other mechanisms such as mutual recognition agreements may also be necessary.

Progressive Liberalisation

20. FTAs are living agreements, which recognise FTA partners are at different stages of development and that it is not feasible to eliminate all barriers from day one. Rather, FTAs establish mechanisms for future liberalisation that align with FTA partners' domestic reform processes. These mechanisms include:

- a. 'ratchet' mechanisms, which lock-in future unilateral-liberalisation;
- b. most favoured nation treatment that allows new liberalisation granted to other FTA partners to be extended to Australia;
- c. regular reviews, that ensure that parties build upon their commitments; and
- d. transparency, domestic regulation commitments which deliver benefits in the longer term by improving the overall regulatory environment in-country.

21. 'Ratchet' mechanisms are a feature of many of Australia's recent bilateral and regional FTAs, which often employ a 'negative list' approach⁶ (the majority of multilateral FTAs express commitments in a 'positive list').

22. A 'ratchet' mechanism means that a party to a trade agreement is bound not only by the commitments made therein, but that liberalisation steps that take place following conclusion of the agreement are also not reversible. Because a party to a 'negative list' FTA must liberalise a sector unless it has been expressly exempted in a party's schedule of commitments, a 'ratchet' clause in a negative list FTA can result in a significant and lasting reduction of barriers to services trade.

23. A significant feature of many FTAs is the 'Most Favoured Nation' (MFN) provision. Such a provision states that each party to the FTA will accord treatment no less favourable than that it accords to like services and service providers of any other country. When the second party enters into a further trade liberalisation agreement with a third party, the first party takes the benefit of that liberalisation. Such clauses are of particular benefit to open economies such as Australia's given many FTA partners are at an earlier stage of liberalisation.

24. 'Forward work programs' are an additional element in the further liberalisation (and consequent reduction in service trade barriers) that can be attained through

⁶ See previous submission at pp14-15 for further details.

FTAs. Such programs recognise that services sector liberalisation is an element of domestic economic reform and that, in all countries, this process is ongoing.

25. These may take the form of mechanisms by which Australian companies can have their existing or newly emerging market access concerns addressed on an ongoing basis: 'trade in services committees' or 'financial services committees' may operate, whereby a formal arrangement is put in place to enable concerns of business to be raised by governments.

Progress in Multilateral Trade Negotiations has Slowed

26. Multilateral trade agreements undoubtedly provide an excellent format to progress the liberalisation of service trade. Australia has taken an active role in seeking to liberalise services trade in the WTO through the Doha Round, but so far market access negotiations across the board in the Doha Round have not yielded agreement.
27. This is despite the fact that the scope and magnitude of services trade has increased substantially since GATS was agreed. Services now account for almost three-quarters of Australia's GDP⁷, and represent more than \$100 billion in value-added export earnings in 2013⁸.

C. Bilateral and Regional FTAs

28. While progress in the multilateral trade arena has slowed, Australia has entered into several bilateral, plurilateral and regional FTAs, as indicated in the previous portfolio submission.
29. The benefits of FTAs described in the previous section equally apply to bilateral and regional FTAs. Bilateral, regional and plurilateral FTAs entered into by Australia contain numerous commitments which directly address behind-the-border restrictions on services trade and usually go beyond the commitments made by either party to the FTAs under GATS.
30. Outcomes that accrue from bilateral FTAs which materially improve Australian companies' commercial opportunities with respect to a negotiating partner country include the following:

⁷ ABS catalogue 5206.0 Contribution to GDP (Dec quarter 2014): Services 72%; Mining 15.8%; Other 11.9%; Agriculture, forestry and fishing (1.7%) and Manufacturing (-1.4%).

⁸ 'Australia's Jobs Future, ANZ PwC AsiaLink Business Services Report.

- a. direct market access barriers; for example in scheduled commitments permitting increased foreign equity investment into a sector;⁹
- b. elements peculiar to a negotiating partner country; for example the Chinese Government's process for listing education suppliers on a government website which, due to a blend of cultural and institutional reasons, makes listing a valuable outcome for Australian education suppliers;¹⁰
- c. disciplines on approaches to domestic regulation and decision making; such commitments to enforce good regulatory practices and concepts such as transparency.

31. Bilateral trade negotiations also deal with the range of elements which affect an individual service supplier's ability to provide services to consumers from a negotiating partner country. Such elements include:

- a. explicit prohibitions on foreigners supplying a service;
- b. barriers associated with licensing and recognition of skills and qualifications; and
- c. visa regimes.

32. Visa systems can have a significant impact on exports, for example, changes to Australia's visa system led to a halving (\$1.5 billion fall) in education services exports to India between 2009-10 and 2012-13 (naturally, decisions relating to visas often balance a number of competing priorities in both countries party to a negotiation, only one of which is the efficient functioning of services markets).

D. Contribution of Bilateral and Regional Free Trade Agreements - Assistance to Exporters

33. As a result of the above efforts, bilateral and regional FTAs have provided considerable assistance to exporters. For example:

- a. As a result of the ASEAN Australia New Zealand Free Trade Agreement (AANZFTA), Laos committed to allow Australian (and New Zealand) investors up to 100 per cent equity in retail banking.

This was a significant improvement over Laos' WTO commitments, under which it has only committed to allow up to 51 per cent foreign equity from

⁹ For example, Indonesia substantially opened access to its banking sector as part of its AANZFTA commitments – (AANZFTA Annex 3).

¹⁰ <http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx>

12 February 2018 (five years after accession). ANZ Bank has taken advantage of this win. ANZ Bank (Laos) is now a 100 per cent foreign invested bank, with over 99 per cent of equity held by ANZ (ANZ Bank (Laos)).¹¹

- b. Following the Singapore-Australia Free Trade Agreement (SAFTA) and AANZFTA, Singapore allowed Australian providers full equity participation in adult education courses.

This commitment improved on Singapore's WTO commitments, which do not extend to adult education services. As a result of this commitment, Box Hill Institute (working with the Singapore Government) opened a campus in Singapore – Box Hill Institute Singapore. The campus delivers Continuing Education courses which focus on community and social services.¹²

- 34. The previous Foreign Affairs and Trade submission to the Productivity Commission provides further examples of successful outcomes for exporters as a result of preferential FTAs.

E. Holistic Approach to reviewing FTAs required

- 35. The draft Report notes a number of instances where either:
 - a. commitments vary from one FTA to another (e.g., foreign investment review screening), or
 - b. the Productivity Commission has expressed doubts about the utility of a commitment (e.g., intellectual property rights clauses in bilateral FTAs).
- 36. Variation in bilateral FTAs reflects negotiated outcomes, taking into account varying practices and priorities on the part of negotiating partner countries, both in relation to willingness to enter into trade commitments and level of liberalisation. The way commitments are reflected in a trade agreement (the treaty architecture) also varies depending on the preferences of negotiating partner countries. Australia's preferences and approaches to treaty architecture have evolved over time and with negotiating experience. Differences between FTAs, such as in relation to foreign investment screening, simply reflect the complexity of obtaining a negotiated outcome with different parties at different times, where parties' interests are subject to change. Just as economic policies and approaches to domestic reform evolve, so too do approaches to trade negotiations and reform. Accordingly, a holistic approach is required when

¹¹ ANZ Annual Report 2013.

¹² Box Hill Institute Annual Report 2014.

reviewing differences in commitments made in different FTAs by the same country.

F. Air Transport

37. The draft Report engages in detail with Australia's approach to air service agreements (ASAs). However, it does not directly consider those other services which relate to air transport. While ASAs are excluded from FTAs, Australia has strong interests in services which are auxiliary to air transport, but which do not directly relate to air traffic rights.
38. The air transport sector has evolved since the GATS was negotiated:
- a. Competition has seen the emergence of independent ground handling companies and changes in the ownership and management of airports.
 - b. This liberalisation has improved efficiencies of publicly or privately-owned airports worldwide, reducing costs for consumers and airport owners while applying the highest security standards.
 - c. This is why, through its FTAs, Australia pursues the chance to lock in the benefits of liberalisation in these economically significant sub-sectors.
39. For example, in the China-Australia Free Trade Agreement (ChAFTA), Australia has expanded the scope of the services chapter to include ground handling services, airport operation and specialty air services.
40. In addition, as part of the second review of the WTO Annex on Air Transport, Australia has been working to expand the scope of possible commitments in air transport services not directly related to air traffic rights to include ground handling services and airport operation services.

G. Responses to specific draft recommendations

41. In addition to the above submission regarding FTAs, this submission addresses individual draft recommendations made by the draft Report.

H. Draft Recommendation 4.8

<i>The Minister should amend the Statement of Expectations to confine the commercial role of the Export Finance and Insurance Corporation solely to providing export finance to newly exporting small and medium-sized enterprises. Small and medium-sized enterprises should be defined as entities, including any related entities, with fewer than 100 full-time equivalent employees or annual turnover of less than \$50</i>

million.

The Australian Government should make amendments to the Export Finance and Insurance Corporation Act 1991 (Cth) to this effect.

42. In 2014, the Government issued Efic with a substantially revised Statement of Expectations (SoE) for Efic¹³. This revised SoE requires that Efic explicitly focus on Small-to-Medium Enterprises (SMEs). In line with this focus, in FY2014-15 60% of transactions Efic completed by value and 94% of transactions by number were for SMEs.
43. Efic's 'working' definition of an SME is a company with a turnover of less than A\$150 million. This definition is, however, academic – as the vast majority of Australian exporters are small.
- a. Using data from the Australian Tax Office, Efic estimates that there around 44,000 exporters with a turnover of less than A\$250 million in Australia. Of these exporters, 95% have a turnover of less than A\$40m.
 - b. In FY2014-15, the average turnover of the SMEs Efic supported was around A\$9 million. Only 5% of Efic's 'SME signings' had a turnover over A\$50 million, with one-third having a turnover of less than A\$5 million.
44. Efic's role in assisting SMEs is already narrow. Efic only assists a sub-set of a SMEs overall financing needs, chiefly working with banks to ensure they have sufficient working capital to fulfil a contract, either via a loan or guarantee, or the provision of bond(s)¹⁴. Its inability to provide transactional banking means it cannot become a relationship lender.
45. SMEs (or their banks) approach Efic after they have won a contract and have been unable to secure private sector funding. In Efic's experience, this is chiefly due to lack of tangible security (for the bank to lend against) or perceptions around country risk. By funding against a contract, Efic does not 'pick winners' and its exposures to SME exporters are generally less than 12 months duration and are self-liquidating (i.e. extinguished once the contract is completed).
46. The recent changes to the *Export Finance and Insurance Corporation Act 1991* (Efic Act)¹⁵ and the SoE occurred after a long period of consultation across Government and followed the 2012 Productivity Commission Review of Australia's Export Credit Arrangements (2012 PC Review).

¹³ See: <http://www.efic.gov.au/about-efic/our-organisation/our-board/>.

¹⁴ As a condition of their contracts, exporters are often required to provide financial guarantees, or contract bonds (performance, warranty and advance payment).

¹⁵ *Export Finance and Insurance Corporation Amendment (Direct Lending and Other Measures) Act 2015*.

47. The Recommendation from the 2012 PC Review that Efic solely focus on newly exporting SMEs was not adopted by Government. SME's can face financing gaps at various stages of their export cycle and not just when they are 'newly' exporting. For example, when they attempt to enter new markets and face different country and operational risks, or if they win a large contract relative to their balance sheet and thus lack sufficient collateral (often residential property) which the banks use to determine their lending appetite.
48. However, additional measures have been implemented to ensure that Efic only targets instances where viable export transactions are not receiving the finance they require:
- a. Efic now formally shares its pricing of facilities with the relevant relationship bank of each exporter prior to signing (aggregate pricing on its facilities will now also be published in Efic's Annual Report and on its website).
 - b. To help maintain Efic's demonstration role for private financiers, restrictions have been imposed on providing multiple facilities to the same exporter.
 - c. Competitive neutrality provisions (debt neutrality charge and tax equivalent payments) have been imposed on Efic's operations (including its Treasury operations).
 - d. To help achieve a greater balance in the level of support for large transactions, Efic cannot support domestic resource projects (or related infrastructure). Any support for overseas resource projects must have significant Australian content, including from Australian SMEs.

I. Draft Recommendation 4.9

The Minister should amend the Statement of Expectations to require the Export Finance and Insurance Corporation (EFIC) Board to establish a performance management framework, based on a clearly defined and rigorous objective under the Export Finance and Insurance Corporation Act 1991 (Cth), directed at market failures affecting newly exporting small and medium-sized enterprises. The framework should be developed in consultation with other Australian Government agencies, and use relevant performance benchmarks and indicators for EFIC's business units, including treasury operations.

EFIC should publicly report its performance against this framework in its annual report and corporate plan.

49. As a statutory agency, Efic's performance management framework is already set by its Board and in accordance with the requirements of the enhanced

J. Draft Recommendation 6.1

The Australian Government should continue to progress the Asia Region Funds Passport and, through work in international forums, encourage other jurisdictions to participate in the Passport.

50. The Foreign Affairs and Trade portfolio agencies welcome the support shown by the Productivity Commission for the Asia Region Funds Passport (Passport). The Passport should be understood in context, however. The Passport addresses one part of the financial services sector, namely managed funds. Moreover, the countries involved in this program are already countries with which Australia has an FTA.
51. FTAs approach financial services more holistically. The FTAs entered into by Australia have achieved market access gains for banking, insurance, securities and equities, in addition to managed funds.
52. In this context, it is noted that the draft Report, when listing the drivers of increased financial services exports¹⁶, does not mention the contribution of trade agreements as a result of reducing barriers in financial services.

K. Draft Recommendation 8.1

The Australian, state and territory governments should:

- *undertake an analysis of the costs and benefits to Australia of government provision or funding of destination marketing or major events, both prior to funding or providing a destination marketing program or major event and following the activity's completion. The complexity of this analysis should be commensurate with the value of government funding being provided to the activity*
- *publicly release the analyses of costs and benefits of funding or providing a destination marketing program or major event as soon as practicable*
- *not provide or fund a destination marketing program or major event unless an analysis of the costs and benefits of the activity demonstrates that government funding would provide net benefits to the Australian community.*

53. Compliance with cost-benefit analyses both prior to and following activities would add a significant layer of administrative process to the funding of any marketing program or major event. Accordingly, this recommendation would be appropriate for major events.

¹⁶ Productivity Commission Draft Report, p86.

54. Tourism Australia already evaluates major marketing activities upon their completion. Around 2009, an automated cost benefits analysis tool was developed for use in major events bids by the former Department of Resources, Energy and Tourism.

L. Draft Recommendation 8.2:

As soon as practicable, the Australian Government should provide unrestricted access for foreign airlines flying to and from Brisbane, Melbourne and Perth airports as well as all secondary airports in Australia's major gateway cities. Following this, the Australian Government should provide unrestricted access to Sydney Kingsford Smith Airport unless a published assessment demonstrates that the costs of unrestricted access would outweigh the benefits to the community.

55. The portfolio supports liberalising aviation access. It considers that a practical approach would be to phase the removal of these airports from their gateway status. One approach could be to use international visitor volumes or international aircraft movement volumes as the determining metric for order of removal (this is likely to result in Perth's reclassification first, then Brisbane, followed by Melbourne).
56. Publication of assessments as to the cost or benefit of removing restrictions on access to airports may be restricted due to commercial confidentiality.

M. Draft Recommendation 8.3

When negotiating an air services agreement, the Australian Government should undertake an assessment of all relevant costs and benefits of more open international air services markets, including benefits to the community arising from lower airfares or access to a wider range of outbound travel destinations, as well as any effects on Australian airlines. The Australian Government should publicly release its assessment of the costs and benefits of the negotiated outcome as soon as practicable.

57. The portfolio generally supports the recommendation, noting that a more comprehensive cost/benefit analysis would require additional time to prepare for negotiations. While the Department of Infrastructure's submission to the Productivity Commission confirms a process is already in place to assess the cost of benefits of individual air services agreements on a case-by-case basis, the portfolio supports broadening this assessment to include benefits to the community arising from lower airfares or access to a wider range of outbound travel destinations, in addition to any effects on Australian airlines.
58. The portfolio supports visibility of assessments across the Australian Government. Public release of assessments may be restricted due to commercial confidentiality considerations.

N. Draft Recommendation 8.4:

The Department of Immigration and Border Protection should establish a framework to charge users of differentiated border processing services, in line with the Australian Government's guidelines for cost recovery.

59. The Foreign Affairs and Trade portfolio agencies broadly support this recommendation. The Australian Government announced a number of changes to border fees, charges and taxes as part of the 2015-16 Commonwealth Budget, with a number of other proposals still under consideration.
60. The portfolio understands that price changes proposed to some of the cost recovery charges will be finalised following consultation which will take place in the coming months. The changes will provide critical funding for improvements in trade, travel and migration facilitation, and will support improved security at Australia's border.

O. Draft Recommendation 9.1

The Australian Government should focus on plurilateral or multilateral negotiations when seeking to encourage enforcement of intellectual property rights in export markets. The Australian Government should not include intellectual property provisions in future trade agreements unless a published economic assessment shows that the effects of any provisions, including on Australian consumers, generate overall net benefits to the Australian community.

61. Australia is a trading nation with a strong research tradition and services sector for which intellectual property (IP) is an important enabler. Australian industry and services exporters have real commercial interests in accessible, transparent and effective IP laws that promote appropriate standards of IP protection and enforcement in our major trading partners.
62. The portfolio fully supports plurilateral or multilateral negotiations as a means to encourage protection and enforcement of IP rights in export markets, particularly where there are reasonable prospects for success in doing so. Australia has been proactive in assisting other countries to accede to existing global IP agreements, including to the 161 member World Trade Organization Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement and to relevant agreements in the 188 member state World Intellectual Property Organization.
63. Despite the wide membership of peak global IP agreements, inadequate IP protection and enforcement in export markets remains a problem for Australian services providers:

- a. as identified in the draft Report, in many of Australia's trading partners, counterfeiting and piracy are prevalent and IP enforcement is ineffective; and
 - b. Australian services providers have also raised difficulties relating to application and objections processes for IP rights in a number of our trading partners.
- 64. Consequently, Australia also pursues IP as part of bilateral and regional negotiations. Australia has generally sought standards of IP protection and enforcement in bilateral and regional negotiations that support effective implementation of the existing international standards in TRIPS and WIPO.
- 65. Consideration is also given to the inclusion of improved accessibility and transparency of IP systems; simplification and/or harmonisation of IP rights registration processes; greater certainty of IP rights; and better enforcement of obligations, particularly through economic cooperation, taking into account the balance the interests of Australian rights holders, users and the public.
- 66. The general approach is to include specific IP provisions that protect and promote Australian trade and investment in the context of the particular trading relationship, closely informed by domestic policy settings.
- 67. Outcomes such as these allow Australian businesses to better protect and enforce their IP rights in export markets than had Australia relied only outcomes to be achieved over time through multilateral processes.
- 68. Bilateral and regional negotiations can also provide valuable institutional architecture to promote and support this economic cooperation. For example, AANZFTA provides for cooperation in many areas, including promoting the efficiency and transparency of IP administration and registration systems. It also provides for cooperation on border measures with a view to eliminating trade which infringes IP and cooperation regarding accession to a number of international standard setting treaties which would facilitate further harmonisation of IP systems in the region.
- 69. The portfolio assesses that the IP benefits accrued to third parties from bilateral and regional negotiations involving are marginal at best. As most countries are signatories of TRIPS and WIPO agreements, the extent of any externality is limited to the benefit from accelerating implementation and enforcement of these universal IP commitments. This must be weighed against the benefit of the acceleration to Australian services innovators, creators and exporters.

70. As stated above, the Australia's practice has been to make an economic assessment of trade agreements in their entirety, including for Australian consumers and the Australian community. An economic analysis based solely on IP provisions would be at odds with this analysis, and accordingly the portfolio does not support this draft recommendation.

P. Draft Recommendation 9.2 - Mutual Recognition Agreements

The Australian Government should put in place a framework for developing and implementing mutual recognition arrangements as part of, or following, the inclusion of mutual recognition provisions in trade (or other) agreements. The framework should include clear actions and timeframes, involve relevant regulators and government bodies, and include a process for consulting with industry stakeholders.

71. As a nation that is a significant exporter of professional services, it is in Australia's interests to have effective and structured framework for Mutual Recognition Agreements (MRAs) in its FTAs. However, the structure of that framework will vary from country to country, depending on each agreement and the professional service the subject of the MRA.
72. DFAT routinely liaises with and consults competent authorities during the process of negotiating MRAs. Public invitations for submissions are invited from any interested person. Indeed, in relation to consultation, it is not clear how the PC recommendation differs from current practice.
73. FTAs are negotiated by nation states (parties), rather than industry stakeholders. MRAs that are established following a successful FTA are often negotiated between the competent authorities of a party. The Draft Report identified a risk that '*MRAs will not be effective in addressing barriers to service exports if they are established without input from relevant services industry groups*'. This risk should not materialise where MRAs are established by the relevant services industry competent authorities themselves.
74. A barrier to more comprehensive MRA provisions in FTAs is a structural one: Parties are reluctant to bind themselves to obligations, actions or timeframes that depend on the actions of a non-party. Breaches of an FTA through an act or omission of a competent authority, which under the terms of a treaty remain the responsibility of a party, are still actionable under the enforcement or dispute settlement provisions of the FTA. Accordingly, parties are often careful to negotiate only those terms that relate to their own responsibilities, and not bind

themselves into taking responsibility for the actions of others (including competent authorities).

75. As a result, the inclusion of strengthened oversight mechanisms relating to MRAs in an FTA may be complex to achieve in practice. Further, parties may be reluctant (for political, economic or cultural reasons) to recognise particular services as professions which may be subject to an MRA.

Q. Draft Recommendation 9.3 - Cross-Border Data Flows

The Australian Government should work through trade negotiations and international forums to ensure that:

- *standards and regulations for the movement of data across borders are consistent*
- *measures restricting cross-border data flows are the least restrictive necessary to address privacy or security objectives, and are only applied where other remedies (such as contracts or laws to ensure data stored offshore meets data protection standards) could not achieve the same objective at a lower net cost.*

76. The internet is an essential tool for Australian companies doing business in the global economy, and dynamic marketplace for Australian consumers. To ensure that Australian businesses are able to confidently take advantage of opportunities presented by new technologies, the trade agenda advanced by the Department of Foreign Affairs and Trade and portfolio agencies seeks to address the interests and barriers confronting business in the 21st century. These include the rapid expansion of information-intensive services (such as cloud computing) and the importance of “cross border data flows”.

77. “Cross-border data flows” (also known as the “movement of information”) ensure that a business is able to transfer data in and out of a territory where it is part of a business activity. A longstanding practice in the financial services industry, the rapid growth of information-intensive services delivered via the internet means that trade agreements are now seeking to address cross-border data flows for all types of service suppliers. As the concept of ‘data’ includes personal information, trade commitments on cross-border data flows must balance trade commitments with public policy needs, such as the privacy and security of personal information.

78. Once concluded, the Trans Pacific Partnership (TPP) is expected to include commitments relating to the movement and storage of information. Similar topics are under discussion in the Trade in Service Agreement (TiSA) negotiations and other negotiations, including the Regional Comprehensive Economic Partnership (RCEP). In approaching these new trade issues, the Department of Foreign

Affairs and Trade seeks to strike the right balance – providing appropriate certainty for businesses and ensuring that governments maintain their ability to regulate in the public interest.

79. The Productivity Commission recommends that the Department of Foreign Affairs and Trade use trade negotiations and international forums to ensure that measures which restrict cross-border data flows to meet privacy or security objectives should only be applied where they would meet those objectives at a “lower net cost” than other methods to provide protection.
80. The Department notes that this is beyond the scope of trade agreements. Trade agreements are well placed to tackle measures with a clear impact on intentional trade – for example, where a regulation requiring local data storage is intended to protect a local IT industry and discriminate against international suppliers.
81. Differences between regulatory frameworks, and the evolution of technical standards, create challenges for business, including SMEs, in making the most efficient use of the information-intensive services on a cross-border basis. The Department of Foreign Affairs and Trade participates actively across a number of international forums, such as APEC, to promote best-practice regulatory frameworks in relation to e-commerce. This includes involvement in the APEC SMEWG project mentioned in the Commission’s draft Report. Australia is a strong advocate of appropriate consumer protections and an active e-commerce agenda in the World Trade Organization. Enhanced consumer confidence in online transactions will encourage the continued growth of international trade via the internet.

R. Conclusion

82. As stated in the previous submission, services contribute significantly to the performance of the Australian economy - 41 per cent of Australia’s exports on a value-added basis. Services play a key role in global and regional value chains.
83. The recognition given by the Productivity Commission to new approaches and capacity building forums such as APEC, G20 and OECD is welcomed. These form a significant role for portfolio agencies. Each of the agencies in the Foreign Affairs and Trade portfolio play an active role in providing Australian services suppliers. They provide comprehensive support to Australian business, assisting in export finance, prosecuting the case on behalf of Australian business, advocating Australia’s interests when our trading partners are contemplating regulatory changes, and addressing concerns specifically in trade negotiations.
84. The role of FTAs, including bilateral FTAs, in liberalising of services trade globally and opening new market to Australian services exporters should not be

underestimated. A holistic understanding of the approach taken by Australia in its FTAs will assist in understanding the value these negotiations can bring to Australian services exports.