A The Associate Commissioner's views

There are a number of areas in the Commission's final report where the Associate Commissioner, Andrew L. Stoler, disagrees with the report. His views are outlined below in relation to specific recommendations, findings and some other matters.

A.1 The report's recommendations

Recommendation 1

> The Australian Government should only pursue bilateral and regional trade agreements where they are likely to:
>
> - afford significant net economic benefits; and
> - be more cost-effective than other options for reducing trade and investment barriers, including alternative forms of bilateral and regional action.

The Associate Commissioner (the 'Associate') has indicated that he disagrees with this recommendation for several reasons. First, in his view, it suggests that Australia has a number of alternative options that are always available to it and that the Government chooses a BRTA as an alternative to other approaches. The Associate notes that DFAT has indicated that the Government does not pursue FTAs only as a last resort, when alternatives are not practical. Rather, DFAT has indicated that it is important to keep all policy options in use and to pursue a range of strategies that are complementary.

Second, the Associate believes the goal of successfully testing BRTAs for significant net economic benefit is unattainable, due to current statistical inadequacies and inadequate approaches to measuring the impact of a number of BRTA components. Services account for more than 70 percent of most countries' GDP but, in the Associate's view, statistics on international trade in services are both incomplete and inadequate for the purpose of assessing real flows of services. In addition, the impact of services barriers is far more difficult to quantify than are tariffs or other barriers to trade in merchandise. The Associate considers that similar problems exist for investment and other 'WTO-plus' elements of BRTAs. His view

is that if it is not possible to assess 'significant net economic benefits' with any accuracy, the negotiation of a BRTA cannot be conditioned on such an exercise.

Third, the Associate considers that the second bullet point suggests the possibility of some kind of assessment of the desirability of a trade agreement based on its cost of negotiation – a concept he rejects. In his view, an acceptable re-formulation of this recommendation might read:

> The Australian Government should continue to pursue bilateral and regional trade agreements when they:
>
> - contribute to the realisation of Australian foreign policy objectives;
> - lead to trade liberalisation consistent with WTO principles;
> - provide benefits for Australian importers, exporters and consumers; and
> - supplement and complement other initiatives aimed at reducing trade and investment barriers.

Recommendation 2

> The Australian Government should ensure that any bilateral and regional agreement it negotiates:
>
> - as far as practicable, avoids discriminatory terms and conditions in favour of arrangements based on non-discriminatory (most-favoured-nation) provisions;
> - does not preclude or prejudice similar arrangements with other trading partners; and
> - does not establish treaty obligations that could inhibit or delay unilateral, plurilateral or multilateral reform.

In the Associate's view, although the first bullet point in this recommendation is couched in 'as far as practicable' language, it fails to capture the notion that a reciprocal trade negotiation conducted outside of the WTO and in line with GATT and GATS rules for BRTAs will of necessity be essentially preferential (or 'discriminatory') in nature. The Associate considers that this will be the case with respect to tariff reductions, services liberalization commitments and other important aspects of the trading relationship, such as related mutual recognition agreements addressed to professional qualifications or product standards. He considers that a BRTA could not be based largely on MFN provisions.

The Associate does not object to the second bullet point, except insofar as the wording 'similar arrangements' suggests that they too might realistically be MFN-based agreements.

The Associate considers that the third point is too vaguely expressed to judge its meaning, but that some might use it to argue against the inclusion of IP in trade agreements or that lowered thresholds for United States investors complicate the reform of FIRB review guidelines.

Recommendation 4

The Australian Government should not include matters in bilateral and regional trade agreements that would serve to increase barriers to trade, raise costs or affect established social policies without a comprehensive review of the implications and available options for change. On specific matters, the Australian Government should:

a) adopt a cautious approach to referencing core labour standards in trade agreements; and to exclusions from BRTAs for trade in cultural goods and services;

b) avoid the inclusion of IP matters as an ordinary matter of course in future BRTAs. IP provisions should only be included in cases where a rigorous economic analysis shows that the provisions would likely generate overall net benefits for the agreement partners; and

c) seek to avoid the inclusion of investor-state dispute settlement provisions in BRTAs that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.

The Associate believes that intellectual property rights protection (the subject of point (b) in this recommendation) should be a core concern in Australia's bilateral and regional trade agreements, and that the Australian Government should maintain a flexible position in respect of the possible inclusion in its trade agreements of investor-state dispute settlement (the subject of point (c) in the recommendation).

In the Associate's view, the Commission's position on intellectual property is based mainly on the fact that because Australia is a net importer of materials protected by intellectual property, the Australian economy suffers a net loss by protecting IP and therefore it is not in Australia's interest to pursue IP protection either at home or overseas through BRTAs. The Associate considers this is an overly simplistic way of assessing the relative merits of protecting IP, and argues that it suggests that Australia will forever be an exporter of rocks and an importer of technology and creative works, and that it ignores completely the very significant interests of Australian right holders in economically benefitting from the IP they create. The report also expresses concern that IP protection may be greater than what is necessary to create an incentive to create new works, and refers to a brief (in footnote 1 to chapter 14) that suggests that this is the case with respect to copyright laws in the United States. In the Associate's view, the report's concern is not

supported by any work done in connection with the current study on BRTAs and how various forms of IP are treated in actual agreements negotiated by Australia.

The Associate notes that DFAT pointed out, in its comments on the Commission's draft report, that counterfeiting and piracy are prevalent in many of Australia's important trading partners and that IP is an increasingly valuable component of Australia's exported goods and services. In the view of the Associate, it is indefensible to argue that IP should not be an important element of our trade agreements.

The Associate also considers that the Commission's position ignores the important role of BRTA IP provisions as building blocks contributing to better multilateral protection of IP. The WTO's TRIPS Agreement was negotiated in 1993 and the Associate considers that technological advances since then have created the need to enhance certain forms of IP. In the Associate's view, while post-TRIPS WIPO conventions have tackled the problem, these provisions have not been added to TRIPS so they are only reasonably enforceable if they can be incorporated in bilateral and regional trade agreements.

The Associate also gives weight to the argument that Australia, as a good global citizen, has a responsibility to pursue effective IP protection through BRTAs on rule of law grounds. In the Associate's view, it would not be enough to focus exclusively on whether there might be an economic cost associated with legally protecting creative stakeholders' interests.

The Associate also disagrees with the Commission's recommendation regarding the inclusion of investor-state dispute settlement (ISDS) in future Australian BRTAs. He notes that foreign direct investment is very important in the modern economy and that Australians have significant investments in other economies. He considers that where the Australian Government deems it appropriate to negotiate a BRTA with a partner, that agreement should promote and protect investment and where the legal system of a partner is judged as not sufficiently developed to effectively handle investment disputes, Australian negotiators should preserve the option of including ISDS in the agreement.

The report argues that Australia's investors do not require this added protection and that, by including ISDS, the Australian Government is taking on a risk (of being sued by foreign investors). The Associate notes that the report suggests that the investors are able to protect their overseas interests by accessing a variety of insurance schemes. In the view of the Associate , this is analogous to arguing against the need for a fire department because homeowners can buy property insurance.

The Associate notes that those who oppose ISDS in BRTAs also tend to cite the risk of 'regulatory chill' for Australia — in other words, the Australian Government

might elect not to proceed with certain policies or regulations because it may be afraid of being sued in the ICSID. Opponents of ISDS cite cases such as where governments may back off regulating cigarette packaging due to the threat of a suit by a foreign investor. In the Associate's view, the appropriate response to these concerns is to ensure that the ISDS-related provisions of a BRTA are drafted carefully enough that they preclude challenges to those regulatory areas that Australia wants to ensure are protected (for example, health-related policies). In addition, in the Associate's view, there is reason to believe that a little bit of 'regulatory chill' might be a good thing, even in Australia.

Finally, the Associate considers that it is not realistic to suggest, as in his view part (c) of the recommendation suggests and the report implies, that it might be possible to agree an ISDS provision in a BRTA that does not give foreigners rights not available to nationals, or that a BRTA partner might seek to offer ISDS to Australia without seeking a reciprocal grant of ISDS rights.

Recommendation 5

The Australian Government should improve the scrutiny of potential impacts of prospective trade agreements, and opportunities to reduce barriers to trade and investment more generally.

a) It should prepare a trade policy strategy which identifies impediments to trade and investment and available opportunities for liberalisation, and includes a priority list of trading partners. This trade policy strategy should be reviewed by Cabinet on an annual basis, and be prepared before the pursuit of any further BRTAs. A public version of the Cabinet determined strategy should be released.

b) Before entering negotiations with any particular prospective partner, it should undertake a transparent analysis of potential impacts of the options for advancing trade policy objectives with the partner. All quantitative analysis and modelling should be overseen by an independent body.

c) It should commission and publish an independent and transparent assessment of the final text of the agreement, at the conclusion of negotiations, but before an agreement is signed.

The Associate disagrees with the bulk of the contents of chapter 15 in the Commission's report and thus disagrees with this recommendation. He considers that the multipronged trade policy strategy now being pursued by the Australian Government is both constructive and effective.

In relation to part (a) of the recommendation, the Associate considers that the Commission makes too much of the suggestion from some participants in the process of developing the report that there is a problem in the way BRTA partners are selected by the government. First, he argues that if one accepts that BRTAs are appropriate instruments for furthering our trading relationships and protecting our exporters' interests in overseas markets, few would disagree that Australia should be negotiating BRTAs with its most important trading partners in ASEAN, China, Japan, Korea, the United States and New Zealand. The Associate accepts that the Chilean agreement might be an exception, but considers that is not an agreement that materially threatens interests in either country. Second, the Associate notes that DFAT pointed out in some detail in its submission in reaction to the draft Commission report:

> Decisions to embark upon FTA negotiations are "whole-of-government" decisions made by the Cabinet. The resource implications; potential costs, benefits, risks; and specific issues that may emerge during the course of the negotiations are assessed during the Cabinet process. The Government's practice has been that consideration of whether to embark upon FTA negotiations, and the negotiating mandate, follows wide public consultation associated with the preparation of an FTA feasibility study, including assessment of the economic and broader bilateral relationship with the country in question, and the costs and benefits associated with an FTA. (sub. DR98, p. 16)

In the view of the Associate, the process described by DFAT — with whole-of-government decisions made by the Cabinet — does not support the idea that there is inadequate assessment of prospective agreement partners.

In relation to part (b) of the recommendation, the Associate's view is that, if it is based on past criticisms of the 'feasibility study' process for BRTAs, it begs the questions of who will act as the independent analyst and who will set out the options.

In relation to part (c) of the recommendation, the Associate notes that, in their submissions to the Commission made after the circulation of the draft report, the Attorney General's Department and DFAT made clear that the approach suggested in this recommendation's third bullet point would be problematic. Certain private sector groups also agreed that it would not be a workable proposition to conduct a new analysis at this stage. On the basis that the Commission has heard that the idea is unworkable, the Associate believes it should not form the basis for a recommendation in the report.

Recommendation 7

> To enhance transparency and public accountability and enable better decision making regarding the negotiation of trade agreements, the Department of Foreign Affairs and Trade should publish estimates of the expenditure incurred in negotiating bilateral and regional trade agreements and multilateral trade agreements. These should include estimates for the costs of negotiating recent agreements.

The Associate considers that the Commission's attempt to quantify the cost to the Australian Government of negotiating trade agreements is both outside the scope of the report's terms of reference and inappropriate in any discussion of the process of negotiating trade agreements. In chapter 7, the Commission report includes the following paragraph:

> In considering the overall costs and benefits of BRTAs, the costs of negotiating such agreements need to be taken into account. While in some cases they will small relative to other costs and benefits, they may be important where agreements are more finely balanced (for example, with smaller countries). An understanding of the costs of negotiations is also important for determining the extent to which disciplines should be placed on the negotiating process to bring about swifter outcomes. The provision of estimates of the costs incurred in developing the various trade agreements Australia is or has been pursuing could also help to establish the appropriateness of the balance of government resources directed towards the different negotiations, as well as between trade negotiations and other government priorities. (page 109)

The Associate disagrees with several aspects of what he perceives to be the thinking that underlies the language of the paragraph. First, the Associate does not consider that the cost of negotiating a trade agreement is important as an element of judging its value. Second, in the case of modern trade agreements, he does not believe that it is currently possible to conduct a meaningful assessment of broader 'benefits' to be measured against 'costs'. Finally, he does not consider it realistic to suggest that any government is going to set itself a time limit on how long it would be willing to negotiate a trade agreement in order to ensure that the cost of the negotiation would be kept within some pre-determined limit.

The Associate argues that the cost of negotiating a trade agreement is no measure of whether the agreement is worthwhile, citing WTO negotiations as an example. The Uruguay Round lasted effectively from when it was first mooted in 1982 until the end of 1993. The Associate argues that the round entailed eleven years of flying scores of Australian negotiators half-way across the world to one of the most expensive destinations on the face of the globe, but that most people would say the Uruguay Round was well worth it, no matter what the cost.

When DFAT officials were requested, as a part of this study, to provide estimates of the cost of trade agreement negotiations, they replied that currently they are unable to do so given the policy integration in the Department where trade is mainstreamed across the Department's operations. The Associate considers that the DFAT response to the Commission, which is reproduced in the report, is understandable.

Recommendation 8

> The Australian Government should examine the potential to further reduce existing Australian barriers to trade and investment through unilateral action as a priority over pursuing liberalisation in the context of bilateral and regional trade agreements. The Government should not delay beneficial domestic trade liberalisation and reform in order to retain 'negotiating coin'.

In the Associate's view, unilateral reform might be a sound approach, but there is no reason why it should be given priority status over BRTAs or multilateral trade negotiations, particularly as in his view its unilateral character makes it inherently insecure for the business community. The Associate notes that liberalisation that is unilateral completely preserves the government's policy space and what has been done can readily be undone if the government is not somehow legally bound to maintain a liberal trading environment. He argues that what keeps Australian officials from raising our applied tariffs is not the WTO, where, for example, Australia's bound tariff rate for passenger automobiles is 40 percent *ad valorem*. Rather, in the Associate's view, in most cases it is our BRTAs that legally bind the country to a liberal tariff environment. The Associate considers that the same can also be said about services trade, where the top-down, negative list approach followed in certain BRTAs precludes the introduction of protectionist or discriminatory measures.

The Associate believes that the Commission's focus on unilateral liberalisation also ignores the political economy considerations that often dictate that political support for liberalisation is conditioned on perceptions of reciprocal liberalisation in our trading partners.

The Associate also considers that there is also no need for the second part of this recommendation, as there are no concrete examples of the Australian Government delaying domestic trade liberalisation and reform in order to retain negotiating coin. He further notes that DFAT's second submission categorically denies that this could be the case.

Recommendation 10

> The Australian Government should lend support to initiatives directed at the establishment of domestic institutions in key trading countries to provide transparent information and advice on the community-wide impacts of trade, investment and associated policies.

The Associate does not support the inclusion of this recommendation in the Commission's report because he considers that it is outside the scope of the terms of reference. In addition, because the Associate does not believe it is currently possible for 'transparency agencies' to produce meaningful communitywide impact studies (at least insofar as modern BRTAs are concerned), he also does not accept the recommendation on substantive grounds.

A.2 Findings made in the report

Finding 7.2

> Although a major departmental activity, no useful information is publicly available regarding the staffing and other costs incurred by the Department of Foreign Affairs and Trade in pursuing BRTAs.

The Associate disagrees with this finding on several grounds. First, as noted above, he considers it inappropriate to judge the value of a trade agreement on the basis of what it costs the government to negotiate the deal. He thus questions why information on DFAT negotiating costs would be useful. Second, he considers that the statement is an opinion and that it is incorrect to classify it as a finding. Finally, he considers that the 'cost of negotiation' question is outside the report's terms of reference.

Finding 11.2

> Unilateral reform is the most direct means for reducing Australia's trade and investment barriers. Pursuit of BRTAs can create incentives to delay unilateral reforms as well as entailing administrative and compliance costs.

The Associate objects to this finding on several grounds. First, he considers that it ignores the fact that political economy considerations often require domestic reforms to be couched as reciprocal actions undertaken in response to gains in overseas markets through a trade agreement. Second, as noted above, he considers that purely unilateral reform is inherently insecure from a business perspective, since the government of the day is completely able to reverse the reform if it is not legally bound to maintain it. Finally, he views it is another example of an opinion incorrectly classified as a finding. He argues that it is not a factual finding that pursuit of BRTAs can delay unilateral reforms as concrete evidence of this does not exist.

Findings 14.1 and 14.2

> There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements. Available evidence does not suggest that ISDS provisions have a significant impact on investment flows.
>
> Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions.

The Associate objects to both of these findings and notes that the reasoning behind them underlies the Commission report's recommendation that ISDS provisions should not be included in Australia's BRTAs. The Associate's reasons for arguing in favour of maintaining the option of including ISDS in BRTAs are detailed earlier. In the context of Australian BRTAs with certain developing countries, the Associate believes that the potential benefits to our investors of ISDS clearly exceed the downside risk to the Australian Government.

In the view of the Associate, the possible invocation of fair and equitable treatment provisions in an ISDS case involving alleged indirect expropriation is analogous to the WTO concept of nullification and impairment where a WTO Member's 'reasonable expectations' have been undermined by the policy actions of another Member. An investor might not be able to count on securing his or her government's support for a dispute and, in the Associate's view, should have the right to pursue relief through ISDS. In relation to the finding concerning other countries' experiences with ISDS, as noted earlier, the Associate considers that the appropriate response is to ensure that BRTA provisions are drafted carefully enough to preclude challenges to what might be considered to be 'off limits' regulatory areas.

A.3 Other matters

Trade diversion

In chapter 8, the Commission report maintains that trade diversion from BRTAs potentially remains a practical issue. Other references to possible trade diversion are found elsewhere in the text of the report, including in comments received in submissions made to the Commission. The Associate disagrees that trade diversion is a practical issue, citing the reasons laid out in two submissions made to the Commission in the course of the report's preparation.

The first submission, by Peter Lloyd, which is referred to on page 119 of the report, stated:

> There are two further reasons why trade analysts in Australia need not waste time on attempts to assess trade diversion costs. The first reason is that, as the number of trading preferential partners with whom we trade in the market for any importable expands as the number of agreements expands, the possibilities of (harmful or beneficial) trade diversion diminish. With multiple partners, trade diversion must have diminished considerably since the signing of the first agreement with New Zealand in 1983. If Australia does sign an agreement with the republic of China in the near future that is reasonably comprehensive in terms of commodity coverage and depth of cut, we can forget about trade diversion as China is the least-cost supplier of so many of the imported manufactures subject to border barriers.
>
> The second reason is Australia's MFN barriers to imports of goods have been greatly reduced in the last twenty years. For both goods and services markets, Australia is now one of the most open economies in the world. Apart from the two partners, New Zealand and Singapore, Australia's barriers to imports of goods and services are generally lower than the barriers to goods and services exported from Australia into the markets of the partner countries. To put it another way, our concern with the effects of bilaterals and regions on market access should be primarily with the effects on our export market rather than on our import market. (sub. 3, pp. 3-4)

The second, submitted by the Centre for International Economics in September 2010, following the issuance of the draft Commission report, stated:

> Furthermore, the Commission's quantitative analysis does not appear to take into account policies — such as the presence of other FTAs or unilateral action — that can act to reduce the amount of trade diversion attributable to any one single FTA.
>
> For example, as a country's FTAs increase in number, the effective liberalisation will eventually approach multilateral liberalisation. Hence the quantum of trade diversion will be lower with each additional FTA. By way of example, Australia's existing FTAs, with ASEAN, Chile, New Zealand and the US, sees 30 per cent of Australia's total (import and export) merchandise and service trade in 2008 being subject to preferential trade liberalisation. If Australia concluded FTA negotiations with China, Japan and

> South Korea then a further 32 per cent of total trade would be covered by FTAs. Hence these seven FTAs could see some 62 per cent to total Australian trade being subjected to preferential trade liberalisation; well on the way to achieving multilateral liberalisation. (sub. DR75, p. 12)

BRTAs and regional integration

At the end of chapter 10, the Commission report sums up with the following final paragraph:

> In terms of integration, possible outcomes are mixed. On the one hand, economic integration can occur between members to an agreement. Additionally, bilateral agreements may evolve into larger agreements and, over time, become a means to achieve wider economic integration. For example, the Canada-US bilateral agreement can be seen as a predecessor to the broader NAFTA agreement. On the other hand, as discussed in chapter 13, little use has been made of accession clauses to expand existing agreements. Further, the extent of broader regional integration (as observed in trade flows) and the economic benefits that arise depend on the openness of the agreement in question. In particular, the Commission's econometric analysis suggests that, insofar as they focus trade towards a partner country, preferential agreements can detract from broader regional integration, while agreements based on open regionalism, such as APEC and to a lesser extent the previous ASEAN (CEPT) agreement in the Asia-Pacific, appear to foster economic and regional integration.

The Associate has several comments on this paragraph. First, he notes that, while the original ASEAN CEPT scheme might have been considered by some to be 'preference lite', more recent ASEAN agreements like ATIGA and ASEAN trade in services rules have more in common with other BRTAs in the region than they do with APEC. Second, in his view, APEC is not an 'agreement' that should be compared to what most people would regard as a trade agreement. Finally, the Associate also emphasises that he considers that there are a number of cases where bilateral agreements have served as building blocks for broader regional integration initiatives. In addition to the move from Canada-USA FTA to NAFTA, ASEAN's numerous bilateral agreements with China, Japan, South Korea, India and Australia & New Zealand have created the basis for broader regional integration discussions through CEPEA. Originally bilateral-only agreements between Singapore and the USA, Australia and New Zealand have greatly facilitated the Trans-Pacific Partnership negotiations.

Non-economic BRTAs

At the end of chapter 11, the Commission report includes a paragraph that reads:

> However, were a proposed BRTA not justified on economic grounds, the Commission does not consider it desirable for non-economic interests to be used as the justification to enter an agreement, as there are potentially more appropriate methods for achieving security and strategic objectives available. In such cases, it is preferable to use other arrangements to further the non-economic objectives in question and avoid incurring the net economic cost of entering a BRTA.

The Associate notes that, during the study, a number of submissions and interviewees commented that there are often political motives for choosing to negotiate BRTAs; however, at no point did anyone suggest to the Commission that Australia has negotiated — or would consider negotiating — a BRTA that could not be justified on economic grounds. The Associate recognises that one might disagree with the feasibility study findings or other claims made about a particular agreement, but considers that to be an entirely different matter.