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The Trans-Pacific Partnership Agreement: NSW trade and a snapshot of the key issues

by Andrew Haylen

1. Introduction

After 19 rounds of [negotiations](#) that began in Melbourne in 2010, the [Trans-Pacific Partnership \(TPP\) Agreement](#) – which includes [30 chapters](#) of provisions – was concluded in Atlanta on 5 October 2015. Echoing the views of Federal Trade Minister Andrew Robb, NSW Minister for Trade, Stuart Ayres described the deal “as a landmark opportunity to create new jobs and increase the standard of living for the people of NSW.”¹

The agreement, once ratified, will create a free trade zone among 12 nations, including Australia, the US, Japan and New Zealand. Together, the TPP nations account for 37.5% of global GDP and 24% of the world’s trade in services.²

There are a number of perceived and reported benefits from the proposed TPP Agreement – particularly from improved market access through reductions in tariff-rates on merchandise goods. One study reported that the TPP will increase Australian economic growth by 0.5 per cent by 2025 (that’s equivalent to about \$8 billion).³

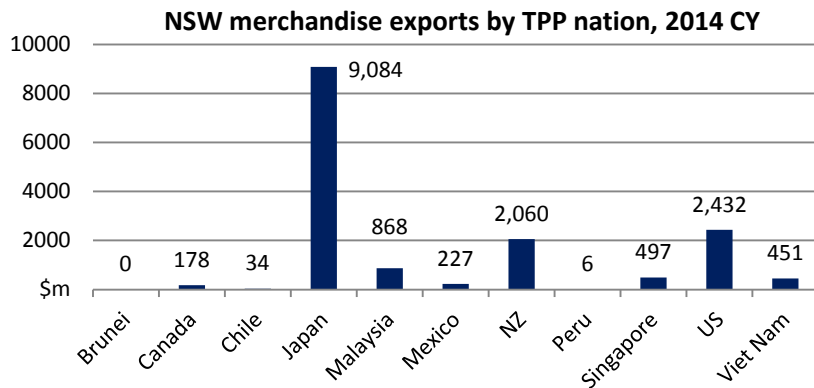
A number of concerns have also been raised – including recently by Legislative Council member [Peter Primrose](#) – around the possibility of new regulatory standards through Investor State Dispute Settlement Clauses, as well as intellectual property rights and pharmaceuticals provisions in the TPP.

While the agreement has been reached in principle, the specific details are not yet publicly available. This e-brief brings together a number of the core issues related to the TPP – the purpose of which is to provide general context ahead of the impending official release of the document. As a prelude to that discussion, NSW trade statistics with TPP member nations are set out, providing an insight into potential trade benefits from tariff reductions from the Agreement.

2. NSW Trade with TPP nations

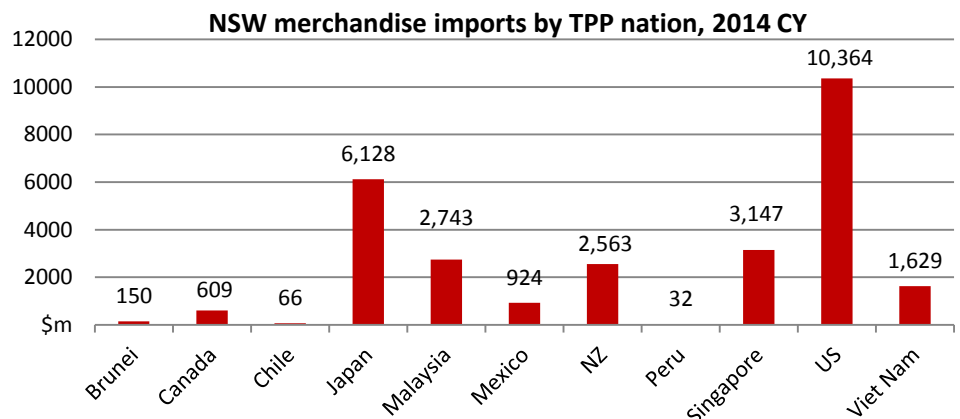
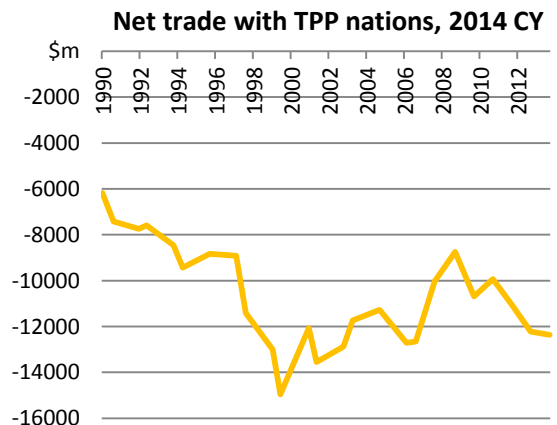
2.1 NSW merchandise trade with TPP nations

Of the TPP member nations, Japan is by far NSW's largest merchandise⁴ export partner, with exports estimated at \$9.1 billion in 2014 – having grown by 81% over the previous decade.⁵ NSW's major exports to Japan include coal (\$6.1 billion in 2013-14), copper ores and concentrates (\$1.2 billion), aluminium (\$342 million) and beef (\$222 million). The United States (\$2.4 billion in 2014) and New Zealand (\$2.05 billion) are NSW's next most significant export partners of the TPP member nations. The main exports to the United States from NSW in 2013-14 were medical instruments (\$333 million), alcoholic beverages (\$249 million) and beef (\$244 million).⁶



Collectively, NSW imports far more from the TPP member nations than it exports. In 2014, imports were estimated at \$28.2 billion while exports were \$15.8 million - equivalent to net imports of \$12.4 billion.

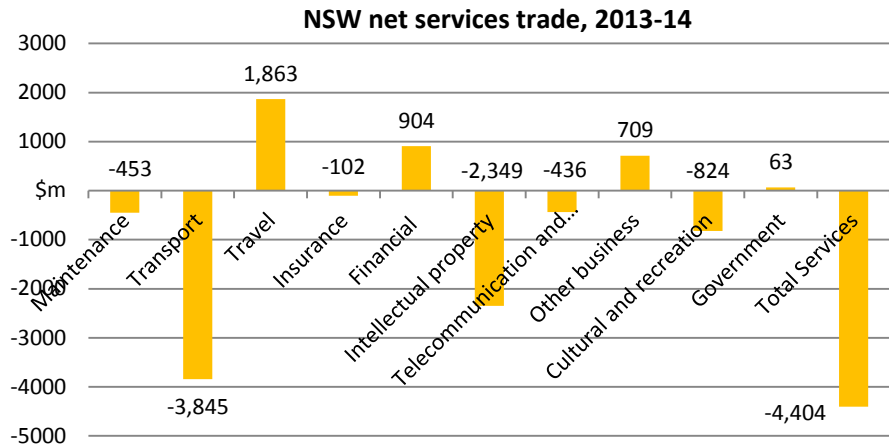
The United States is the NSW's largest import partner, having imported \$10.4 billion worth of merchandise in 2014. The main commodities imported from the US include medicaments (\$866 million in 2013-14), medical instruments (\$750 million) and motor vehicles (\$619 million).



Japan is also a significant import partner for NSW, in 2014 importing \$6.1 billion worth of merchandise. The main commodities imported from Japan included motor vehicles (\$2,039 million in 2013-14), refined petroleum (\$1,516 million) and goods vehicles (\$351 million).⁷

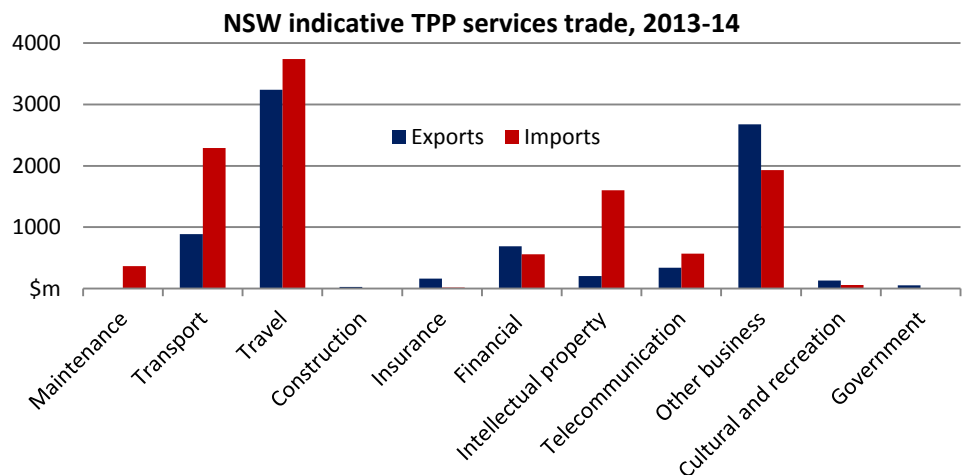
2.2 NSW services trade with TPP nations

During the 2013-14 financial year, NSW accounted for nearly 41% (or \$23.3 billion) of all Australian services exports. Despite this, NSW is still a net importer of services (at \$4.4 billion in 2013-14), accounted for largely by transport and intellectual property services.



Services trade is only publicly available by individual country at a national level through the ABS; as such it was not possible to get precise historical figures related to NSW services trade with TPP member nations. Nevertheless, some useful insights can be drawn from analysing ABS trade data.

By applying NSW trade ratios from the respective services groups above to the national trade with the respective TPP countries, it was estimated that NSW services exports were around \$8.1 billion to TPP member nations in 2013-14; equivalent to around 32% of all NSW services exports. Travel and other business related services accounted for most of these exports. However, NSW had a sizeable services trade deficit with these TPP nations in 2013-14 at \$3.1 billion. A large proportion of this deficit was accounted for by intellectual property services (see figure below).



2.3 Potential trade implications for NSW from the TPP Agreement

Based on merchandise trade statistics and free trade agreements already negotiated with TPP member nations, some general observations can be made about the State's future trade resulting from the TPP Agreement.

With respect to the State's trade with **Japan**, most of NSW's benefits will be realised through potential tariff rate reductions from beef because.⁸

The tariff on both frozen and chilled beef will fall to 9% over 15 years, as opposed to the end point of 19.5% for frozen beef and 23.5% for chilled beef secured under the JAEPA.

As for NSW's other key exports to Japan, the upside appears to be minimal. This is because tariff rates on NSW's three highest exports to Japan - coal (\$6.1 billion in 2013-14), copper ores and concentrates (\$1.2 billion) and aluminium (\$342 million) – were eliminated or will be progressively phased out as part of the Japan Australia Economic Partnership Agreement.⁹

This is also the case with New Zealand. The [Australia – New Zealand Closer Economic Relations Trade Agreement](#), which was agreed to in 1983, means that all tariffs and quantitative import or export restrictions on trade in goods are prohibited.¹⁰ Likewise for the United States, NSW's top exports are exported duty free under the [Australia-United States Free Trade Agreement](#) which came into effect in 2005.

Existing free-trade agreements & NSW trade			
TPP Country	Agreement (In effect from)	NSW Export Value (2014 - \$m)	NSW Import Value (2014 - \$m)
United States	AUSFTA (1 January 2005)	\$2,432	10,364
Japan	Japan Australia Economic Partnership Agreement (15 January 2015)	\$9,084	6,128
New Zealand	ANZCERTA (1983)	\$2,060	2,563
Canada	No	\$34	609
Mexico	No	\$227	924
Peru	No	\$6	32
Vietnam	AANZFTA (1 October 2015)	\$451	1,629
Singapore	AANZFTA (1 October 2015); Singapore-Australia FTA (28 July 2003)	\$497	3,147
Chile	Australia-Chile FTA (6 March 2009)	\$34	66
Brunei	AANZFTA (1 October 2015)	-	150
Malaysia	AANZFTA (1 October 2015); Malaysia-Australia FTA (1 January 2013)	\$868	2,743
TPP Trade Total		15,837	28,205

Sources: Department of Foreign Affairs and Trade; Australian Bureau of Statistics

TPP countries for which there are no existing free-trade agreements, for NSW, represent the equivalent of just \$267 million in merchandise exports

for 2014 (or 1.7% of total trade with TPP nations). Therefore it is unlikely that there will be any significant material growth on NSW export trade with TPP member nations as a result of tariff reductions negotiation under the Agreement. As pointed out by Deardoff (2013) of the University of Michigan:¹¹

The TPP will eliminate Australia's bilateral tariffs with only one of its top trading partners, Japan. Based on that, it seems unlikely to have major effects on Australia's trade, except with Japan. Since Australia already has FTAs with seven of the eleven other TPP countries, it is also not likely to experience significant trade diversion beyond what may already have occurred due to its existing FTAs.

As Ross Gittins (Economics Editor of the Sydney Morning Herald)¹² and Alan Mitchell (Economics Editor of the Australian Financial Review)¹³ point out, the net benefits of free trade agreements occur from both the liberalisation of imports and exports. This is because a country can import goods which other countries produce more efficiently and concentrate its own resources on producing what it can most efficiently. In other words, a trade deal utilises each respective partner's comparative advantage.

From this import gain perspective, TPP countries for which there are no existing free-trade agreements for NSW represents the equivalent of \$1.57 billion in merchandise imports for 2014. However, Australia's import tariff-rates are already relatively low for most commodities and therefore there are unlikely to be any significant gains to trade from import-tariff reductions. On this basis, Alan Mitchell comments that "if the trade deal has cost us very little in terms of reducing our trade barriers, there must be relatively little benefit for the Australian economy."¹⁴

Without having a specific breakdown of services trade by country and product, or specific information about what services provisions may be in the TPP, it is difficult to determine the exact financial implications for NSW.

3. General trade implications for Australia¹⁵

3.1 Agricultural products

Much of the publicity surrounding the TPP in terms of the benefits for Australia have focussed on the gains to trade associated with tariff-rate reductions and specifically that the Agreement will eliminate 98 per cent of tariffs (covering \$8.6 billion worth of exports) in the region.¹⁶

Exporters of agricultural products, as highlighted by the Department of Foreign Affairs and Trade, are likely to be the major beneficiaries of these reductions as the:

TPP will eliminate tariffs on more than \$4.3 billion of Australia's dutiable exports of agricultural goods to TPP countries upon entry into force of the Agreement. A further \$2.1 billion of Australia's dutiable exports will receive significant preferential access through new quotas and tariff reductions.

While these export values are significant, the headline figures highlighted by DFAT must be interpreted with care. This is because tariff-rates on commodities under the "\$4.3 billion" headline figure may be eliminated from a particularly low base. For example, a tariff on a commodity may be

reduced from say 2 per cent - in which case the trade implications are minimal.

Beef exporters appear to be the main agricultural winners from the TPP, with key trade outcomes, as identified by DFAT, including:¹⁷

- Japan's beef tariffs will be reduced to 9 per cent within 15 years of entry into force of the TPP.
- Elimination of Japanese tariffs on processed meat products within 15 years of entry into force of the TPP.
- Elimination of the United States price-based safeguard under the Australia-United States Free Trade Agreement.
- Elimination of Canadian beef tariffs (currently 26.5 per cent) within 10 years of entry into force of the TPP.

Other agricultural exporters (particularly of cotton, wool, wine, fruit and grain) are anticipated to gain significantly from the trade pact.¹⁸

Major gains for Australian food exports include the immediate axing of entry tariffs for lamb and mutton imports to all TPP countries other than Mexico. More wheat and barley can be sold to Japan and all remaining tariffs on Australian raw wool and cotton exports to TPP countries will immediately be axed.

However, gains for dairy and sugar producers appear to be modest and were among the "key issues holding up last-minute signing of the complex negotiations."¹⁹ Specifically, for sugar there is likely to be:

..a doubling of access to the US market for local sugar producers, starting with a base increase of 65,000 tonnes.

There is also the option to increase access for local sugar producers in the event of domestic production shortfalls in the US which could see Australian export volumes reach 300,000-400,000 tonnes by 2019-2020.

For a complete list of the agricultural tariff and market access provisions, see the Department of Foreign Affairs and Trade [website](#).

3.2 Services trade

The Department of Foreign Affairs and Trade have outlined a number of areas where [service provisions](#) will "enhance export opportunities for Australian service providers, enabling them to compete on a more level-playing field in the Asia-Pacific region."²⁰ The aim of such provisions, include:²¹

- promoting mutual recognition of professional qualifications (such as for architects and engineers) and best practice regulations for foreign lawyers;
- reducing restrictions that discriminate against Australian services exporters e.g. limiting the number of suppliers permitted or requiring foreign entities to establish local representative offices;
- ensuring the non-discriminatory treatment of Australian financial service suppliers in TPP markets;

- reducing the barriers Australian exporters of financial services face, such as foreign equity caps and limits on financial service licences; and
- enhancing opportunities for Australian business persons seeking to enter and temporarily stay in other TPP countries e.g provisions on processing immigration documents like visas expeditiously, minimising fees and transparency and a work plan for future cooperation.

The potential upside of such provisions is that they will “help lower costs for Australian services businesses, large and small, seeking to access fast-growing overseas markets.”²² As pointed out by Commonwealth Bank chief Ian Narev, this will be particularly important for services exporters in “education, health and professional services.”²³

3.3 Online trade

In addition to the tariff and services provisions, Chapter 14 of the agreement will create new commitments on electronic commerce “ensuring free flow of the global information and data, subject to legitimate public policy objectives such as personal information protection.”²⁴

As reported in the [Australian Financial Review](#), “global e-commerce giants will be given a much freer hand to sell products to Australian consumers as part of the Trans Pacific Partnership.”²⁵ This is because:²⁶

[the TPP] prohibits the imposition of customs duties on electronic transmissions, and prevents TPP Parties from favouring national producers or suppliers of such products through discriminatory measures or outright blocking.

The TPP also prevents “forced localisation” which is the requirement that certain overseas businesses place their data, servers, research facilities, and other necessities in local markets in order to access those markets. This means that “US technology giants like Uber and Google will be able to sell services to customers around the world without establishing local infrastructure.”²⁷

4. Other issues arising from TPP negotiations

4.1 Investor State Dispute Settlement Clauses

As defined by the DFAT, a [investor-state dispute settlement](#) (ISDS)²⁸ clause “is a mechanism to provide foreign investors with the right to access an international tribunal if they believe actions taken by a host government breach its investment obligations.”²⁹ In other words, it's a mechanism that allows foreign investors to sue governments for policy decisions that harm their investments.

The premise behind the inclusion of such a mechanism is to “protect their investments overseas against expropriation and to ensure that they are afforded a certain minimum standard of treatment, and treated in a non-discriminatory manner.”³⁰ In other words, encouraging foreign investment by ensuring that investments in developing countries were not illegally expropriated by “rogue” governments.

As pointed out by DFAT, “ISDS does not protect an investor from a mere loss of profits following a change in government policy or regulation and does not prevent a government from changing its policies or regulating in the public interest.”³¹ The [Department of Foreign Affairs and Trade](#) elaborate:³²

The TPP will not undermine Australian sovereignty. Should the Australian Government agree to include ISDS in the TPP, then Australia would retain the ability to determine domestic laws and Australian courts will retain their exclusive jurisdiction to determine matters of Australian law. Any ISDS tribunal would consider whether there has been a violation of an investment commitment in the TPP.

It is important to note that in the event of an ISDS a host country’s courts are not responsible for resolving the dispute; rather, it falls within the jurisdiction of an international tribunal.³³ Tribunal awards are enforced through the adoption of [UN laws](#) known as the UNCITRAL model law. This is given force of law in Australia by the Commonwealth [International Arbitration Act 1974](#).³⁴

The Productivity Commission has been particularly critical of ISDS’s, arguing strongly against these clauses since its [2010 review](#) of Australia’s Preferential Trade Deals. In its criticism of such clauses the Productivity Commission observed that:

...experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions.

Toby Landau, a lead arbitration lawyer in the ISDS field, commented that “[previously] ISDS cases used to be rare. [However] the number of cases is skyrocketing, and applying to a broader set of issues than ever before... [covering] all forms of governmental activity, including: packaging, regulation of carbon emissions, nuclear policy and taxation.”³⁵

Australia has only been sued once through an international ISDS tribunal, which occurred following the introduction of plain packaging cigarettes in 2011. Having failed before the High Court of Australia, “Philip Morris was suing the Australian government for what it said was a breach of an ISDS provision in an obscure Australia-Hong Kong investment treaty, signed in 1993.”³⁶

While some stakeholders and commentators have expressed their concern at the use of ISDS, others are less apprehensive – including Paul Kelly of The Australian, who affirms that “history suggests these mechanisms are not the threat they appear on paper.”³⁷ Tomas Fitzgerald of the University of Notre Dame who suggests that “analysis of the actual terms of the TPP, as recently leaked by WikiLeaks, suggests these fears are significantly overblown.”³⁸ Referring to the leaked provisions of the TPP, Fitzgerald refers to the fact that “ISDS provisions only allow an investor to sue a state for expropriation. Expropriation only occurs where the state effectively seizes the assets of a private corporation, without compensation.”

The economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.

Australia's Trade Minister Andrew Robb has been consistent in reaffirming the Government's stance on ISDS clauses, particularly against their imposition on health and environmental policies.³⁹

4.2 Medicines and pharmaceuticals

Of particular interest out of the TPP negotiations was the topic of pharmaceutical drugs – and specifically concerns that the extension of pharmaceutical patents may drive up the cost of Australia's Pharmaceutical Benefits Scheme. According to the report and based on leaked versions of the TPP:⁴⁰

...the US [was] seeking to prevent signatories from refusing to grant patents for minor variations to existing drugs even when there is no evidence of additional benefit.

It [was] also seeking to lengthen the period during which generic manufacturers cannot use clinical trial data produced by a manufacturer to obtain marketing approval. Under the Australia-US Free Trade Agreement, Australia already provides at least five years of protection. The US [was] seeking at least three extra years of protection for new uses of existing drugs and 12 years for so-called biologic drugs and vaccines.

The Centre for Health Equity Training Research and Evaluation at the University of NSW published its report - [*Health Impact Assessment of the Proposed Trans-Pacific Partnership Agreement*](#) – which found that the proposed TPP was likely to push up the price of medicines based on anticipated provisions within the TPP.

However, Minister for Trade Andrew Robb made the following statement with respect to pharmaceuticals:⁴¹

The government has delivered on its promise not to change Australia's existing five years of data protection for biologic medicines or any other part of our health system, including our pharmaceutical benefits scheme. Concerns that the price of medicines would increase have proven to be absolutely unfounded.

Prime Minister Malcom Turnbull also alleviated such concerns following the announcement of the TPP agreement, stating that:⁴²

There are no changes being made to our laws and regulations relating to pharmaceuticals or drugs, there are no changes to the PBS [Pharmaceutical Benefits Scheme], no increase in the costs of medicines in Australia which was a matter of concern.

5. Conclusion

Prime Minister Malcom Turnbull described the TPP as a “a gigantic foundation stone for Australia's future prosperity.”⁴³ Others – including Australian Financial Review economics editor Alan Mitchell – have likened it more to a pebble.⁴⁴

The direct and immediate merchandise trade potential for NSW from tariff reductions under the TPP appear to be limited. This is because Australia already has free trade agreements with NSW's major TPP export partners – including the US, Japan and New Zealand. Of NSW's total exports to

TPP member nations, those for which there are no existing free-trade agreements was equivalent to just \$267 million or 1.7% of total trade with TPP nations.

Given NSW's considerable services trade with TPP member nations, it is more likely that upside from the agreement will be realised through service provisions rather than merchandise trade.

Nevertheless, without having the detailed document – which is still a number of weeks away from being formally drafted and released – it is not possible to draw any further specific trade or financial implications from the TPP for NSW, or Australia more broadly.

While the terms of the agreement have been negotiated between member nations, as Jeffrey Wilson, Lecturer in Politics and International Studies, Murdoch University points out, “negotiating a text for the TPP was only half the political challenge.”⁴⁵

The other half of the challenge Wilson is referring to is the process of “ratification” that involves a country amending its own domestic laws to ensure they comply with the specified treaty commitments. So while it is expected that this process will be unproblematic in most countries, there are likely to be issues domestically in Japan, Canada and the US. In particular, in the US a number of factions within both the Democrats and the Republicans have [voiced considerable opposition](#) to the proposals.⁴⁶

Australia is not immune to such objection in the ratification process, with the possibility of “cross party opposition from National Party members about inadequate farm product access to the US and Labor MPs concerned about intellectual property and investor protection changes.”⁴⁷

So while there are a number of potential arguments for and against the TPP, there is still considerable uncertainty around the final details of a ratified TPP.

¹ The Daily Telegraph, [Trans-Pacific trade deal will be great for our state](#), 9 October 2015

² Department of Foreign Affairs and Trade. (2015) [Trans-Pacific Partnership Agreement](#), p. 5

³ The Australian Financial Review, [The Trans-Pacific Partnership explained](#), 6 October 2015

⁴ This excludes the trade in services.

⁵ Australian Bureau of Statistics, 5368.0 International Trade in Goods and Services, Australia, Table 36A

⁶ Department of Foreign Affairs and Trade. (2015) [Australia's Trade by State and Territory 2013-14](#), p.22

⁷ Department of Foreign Affairs and Trade. (2015) [Australia's Trade by State and Territory 2013-14](#), p.24

⁸ The Guardian, [Australia and the Trans-Pacific Partnership: what we do and don't know](#), 6 October 2015

⁹ Department of Foreign Affairs and Trade, [Outcomes of the Japan Australia Free Trade Agreement](#), June 2015

¹⁰ Department of Foreign Affairs and Trade, [Australia-New Zealand Closer Economic Relations Trade Agreement](#), accessed 9 October 2015

¹¹ Deardorff, A. (2013) [Trade Implications of the Trans-Pacific Partnership for ASEAN and Other Asian Countries](#), Paper presented at the 2nd 2013 Asian Development Review Conference, p.11

¹² Sydney Morning Herald, [Trade pact is no big deal](#), 9 October 2015

- ¹³ Australian Financial Review, [TPP more of a pebble than a 'gigantic foundation stone'](#), 6 October 2015
- ¹⁴ Ibid
- ¹⁵ For more comprehensive details of TPP outcomes for Australia, see the Department of Foreign Affairs and Trade [website](#).
- ¹⁶ Department of Foreign Affairs and Trade, [Outcomes: Goods market access](#), accessed 12 October 2015
- ¹⁷ Department of Foreign Affairs and Trade, [Outcomes at a glance](#), accessed 12 October 2015
- ¹⁸ The Australian, [TPP: Farmers the big winners in trade pact](#), 7 October 2015
- ¹⁹ The Australian, [TPP: Farmers the big winners in trade pact](#), 7 October 2015
- ²⁰ Department of Foreign Affairs and Trade. (2015) [Trans-Pacific Partnership Agreement](#), p. 17
- ²¹ Ibid, p.17-21
- ²² The Australian, [Jury out on benefits of Trans-Pacific Partnership](#), 7 October 2015
- ²³ The Australian, [Jury out on benefits of Trans-Pacific Partnership](#), 7 October 2015
- ²⁴ Office of the United States Trade Representative, [Summary of the Trans-Pacific Partnership Agreement](#), accessed 12 October 2015
- ²⁵ Australian Financial Review, [Trans Pacific Partnership to open e-commerce floodgates](#), 6 October 2015
- ²⁶ Ibid
- ²⁷ Australian Financial Review, [Trans Pacific Partnership to open e-commerce floodgates](#), 6 October 2015
- ²⁸ The Office of the United State Trade Representative published information outlining [Investor-State Dispute Settlements](#).
- ²⁹ Department of Foreign Affairs and Trade, [Investor-State Dispute Settlement](#), accessed 7 October 2015
- ³⁰ Department of Foreign Affairs and Trade, [Trans-Pacific Partnership Agreement – Myths versus Realities](#), access 7 October 2010
- ³¹ Ibid
- ³² Department of Foreign Affairs and Trade, [Trans-Pacific Partnership Agreement – Myths versus Realities](#), access 7 October 2010
- ³³ The Office of the United State Trade Representative, [Investor-State Dispute Settlements](#), accessed 12 October 2015
- ³⁴ The Conversation, [Sovereign risk fears around TPP are overblown](#), 10 April 2010
- ³⁵ ABC, [ISDS: The devil in the trade deal](#), 26 July 2015
- ³⁶ ABC, [ISDS: The devil in the trade deal](#), 26 July 2015
- ³⁷ The Australian, [Rough and smooth waters facing Trans-Pacific Partnership](#), 10 October 2015
- ³⁸ The Conversation, [Sovereign risk fears around TPP are overblown](#), 10 April 2010
- ³⁹ ABC, [Modified version' of investor clause no fix in TPP](#), 31 July 2015
- ⁴⁰ Department of Foreign Affairs and Trade, [Trans-Pacific Partnership Agreement](#), accessed 9 October 2015
- ⁴¹ The Guardian, [Australia and the Trans-Pacific Partnership: what we do and don't know](#), 6 October 2015
- ⁴² Sydney Morning Herald, [Malcolm Turnbull welcomes TPP as 'gigantic foundation stone' for economy](#), 7 October 2015
- ⁴³ The Australian, [TPP: Malcolm Turnbull hails Trans-Pacific Partnership deal](#), 6 October 2015
- ⁴⁴ Australian Financial Review, [TPP more of a pebble than a 'gigantic foundation stone'](#), 6 October 2015
- ⁴⁵ The Conversation, [Five things you need to know about the Trans-Pacific Partnership](#), 6 October 2015
- ⁴⁶ The Conversation, [Explainer: negotiators reach landmark Pacific trade deal, so what's next?](#), 6 October 2015
- ⁴⁷ Australian Financial Review, [The Trans-Pacific Partnership explained](#), 6 October 2015

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