

# Chapter 4

## Australia's trade agreements and the treaty-making process

### Introduction

4.1 While not an explicit part of the terms of reference of the inquiry, many submissions made specific comments on two related subjects—Australia's trade agreements and the treaty-making process.

### Australia's trade agreements

4.2 A key argument made in the NIA for Australia's participation in the TPP was that it would 'protect Australia's competitive position in the markets of the TPP Parties'. The NIA notes that '[m]arket access gains under the TPP will be delivered more quickly than any other current multilateral or plurilateral negotiations underway such as in the World Trade Organization (WTO) or in the Regional Comprehensive Economic Partnership (RCEP)'.<sup>1</sup>

4.3 The Analysis of Regulatory Impact on Australia (RIA), attached to the NIA, included an assessment of alternative means to achieve similar regional trade outcomes for Australia. It notes there has not been a significant global trade agreement since 1994. In particular, the WTO Doha Round negotiations have stalled and would not address Australia's priority trade and investment interests as extensively, or in as timely a way, as is possible under the TPP. While noting that Australia was working closely with all RCEP countries, the RIA considered 'it does not provide an alternative option for delivering the same outcomes':

First, the scope of the TPP is far broader than RCEP, along with its stated ambition of liberalising trade in goods, services and investment. Second, although there is some overlap in membership, there are important differences that make the two regional FTAs complementary. In particular, the TPP brings in the North American market and gives Australia access to supply chains in that region that would not be addressed by RCEP.<sup>2</sup>

4.4 The significance of the TPP in relation to Australia's existing trade agreements and possible future trade agreement was often discussed in submissions. For example, Chatto Creek Advisory observed that the 'WTO's inability to conclude the Doha Agreement has left trade-dependent economies, like Australia, with an important need to seek out practical and achievable alternatives'. It considered that 'a failure of the TPP Agreement to come into force would represent a significant setback to trade liberalisation...a lost opportunity for all economies, including Australia, that would not be easily or promptly recovered'.<sup>3</sup>

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1 NIA, p. 3.

2 RIA, p. 7.

3 *Submission 17*, pp 2- 3.

4.5 The capacity of the TPP to add new participating countries was also considered an important feature. For example the Minerals Council noted:

While the agreement first started as a negotiation between four countries, it expanded to 12 members and has purposeful provision to accept new members...[T]he TPP is one of the most compelling frameworks to encourage China – Australia's largest trading partner and mineral resources client – to deepen its market reforms and sign on to more ambitious liberalisation commitments. The TPP has the potential to create the long suggested Free Trade Area of the Asia-Pacific.<sup>4</sup>

4.6 The importance to Australia of regional trade agreements was highlighted by several submitters. For example, Dr Jeffrey Wilson from Murdoch University urged the committee to focus on the systemic effects the TPP could have 'for the trade architecture of our region'. He explained:

The TPP is more than just a set of market access opportunities that need to be balanced against the costs of domestic policy reforms. It also promises wholesale change in the way the Asia-Pacific trade system is structured...

The proliferation of bilateral FTAs in the Asia-Pacific has led to a phenomenon trade economists call the 'noodle bowl problem'. Rather than having a single, integrated set of trade rules that apply equally to all governments, the region is now criss-crossed by over a hundred bilateral deals. Compounding matters, the bilateral FTAs are often wildly inconsistent. Each contains its own rules for tariff reduction, non-tariff trade policy reforms, and standards for administrative procedures...

An important, but often overlooked, feature of the TPP is that it is an explicit attempt to address the noodle bowl problem. By providing a single, overarching set of trade rules with relatively broad regional coverage, it is one of the first steps in returning Asia-Pacific trade architecture to a multilateral model.<sup>5</sup>

4.7 Dr Aoife O'Donoghue and Dr Ntina Tzouvala noted that failure of the Doha Round of the WTO and the move to regional trade agreements, such as the TPP, has significantly reduced the leverage available to developing states within trade negotiations. They urged that Australia take into account of the implications of regional trade deals for developing states who may be poorly resourced to adapt to rapid tariff elimination, increased patent protection or ISDS provisions.<sup>6</sup>

4.8 The ACCI considered that the 'Australian Government should consider alternate pathways for trade and investment liberalisation under the potential scenarios of both entry into force or not for the TPP'. It noted:

In the end Australia has already negotiated to undertake further liberalisation of our own tariffs and investment regimes plus other areas

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4 *Submission 35*, p. 3.

5 *Submission 6*, pp 1-3.

6 *Submission 22*, p. 2.

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covered by the TPP. Australia is also negotiating a range of other agreements including the Regional Comprehensive Economic Partnership (RCEP) and numerous bilaterals. We imagine that the terms of the TPP will be the basis for "landing zones" for these other negotiations.

4.9 In this context, the ACCI urged the Australian Government to commit to unilaterally removing existing barriers to trade and investment to enable full benefits to flow to the Australian economy.<sup>7</sup>

### **Australia's treaty-making process**

4.10 For Australia, the next key step to ratification of the TPP is for the Parliament to consider and pass any legislation, or amendments to existing legislation, that may be necessary to implement the specifics of the agreement. However, a number of submitters expressed concerns with the manner in which the TPP had been developed and more broadly Australia's treaty-making process. Often these criticisms had been raised during the committee's previous inquiries into trade agreements and were reiterated in relation to the development of the TPP. For example, Dr Matthew Rimmer noted that '[i]n spite of significant criticism of the treaty-making process, there has been a failure to reform the system of treaty-making in Australia'.<sup>8</sup>

### ***Negotiation and consultation***

4.11 The NIA outlines the consultations undertaken for the TPP including with the state and territory governments, Commonwealth government departments and agencies, business, industry and civil society. It noted:

Stakeholder views were actively encouraged and considered throughout negotiations on the TPP, including through an initial call for public submissions. In November 2008, the Australian Government publicly announced that Australia would participate in the TPP negotiations. Australia's decision to participate in the TPP negotiations followed extensive consultations involving a wide range of stakeholders and State and Territory Governments. Overall, there was widespread support for Australia's participation in the TPP.

The Department of Foreign Affairs and Trade (DFAT) engaged in over 1000 TPP stakeholder briefings and consultations over the time period of the negotiations with a wide range of domestic stakeholders, including representatives from peak industry bodies, individual companies, academics, unions, consumer groups, special interest groups and other organisations representing civil society. Many stakeholders were consulted on several occasions and provided more than one written submission.

Senior TPP negotiators provided briefings and information on the progress of negotiations to stakeholders on request during the course of the negotiations. In addition, DFAT held public stakeholder consultations in state capitals, for example on 26 March 2014 in Melbourne and 27 March

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7 *Submission 16*, p. 32.

8 *Submission 84*, Supplementary submission 4, p. 68.

2014 in Sydney. Such consultations were open to businesses, civil society and interested members of the public, and were advertised on the DFAT website. DFAT provided updates on the TPP negotiations via its website, and consulted stakeholders and interested members of the public via group email address...<sup>9</sup>

4.12 However, the lack of transparency in the consultation and negotiation of the TPP was repeatedly criticised by submitters opposed to the TPP. For example Electronic Frontiers Australia (EFA) believed that 'the secrecy surrounding the negotiations of the Trans-Pacific Partnership (TPP) fundamentally undermines the legitimacy of the agreement'. It considered the approach was 'inherently antidemocratic and has led to an outcome that clearly favours the interests of a select group of corporations and industry sectors, who have had privileged access to and input to the negotiating process, at the expense of consumers and society more generally'.<sup>10</sup> Similarly, the Friends of the Earth commented:

That the TPP text remained secret for so long, that negotiations took place behind closed doors, and that independent bodies, the parliament and the community are still unable to alter or vote on the adoption of the deal, is a testament to the undemocratic nature of Australia's treaty process.<sup>11</sup>

4.13 Similarly, Dr Hazel Moir stated:

What 'consultation' does take place with DFAT is very much one-way. Because of the secrecy around trade negotiations, DFAT provides only very high-level general information to participants in such consultations. Its 'consultations' involve DFAT listening but rarely responding. This wastes the time of the many groups and individuals who attempted to participate.<sup>12</sup>

4.14 The ACCI considered that Australia's limited domestic consultation during trade negotiations meant that 'treaties often contain provisions that stakeholders, including business, are only aware of after the treaty negotiations are concluded'. This lack of transparency could lead to misunderstanding and alarmist politicisation of treaty provisions.<sup>13</sup> The ACCI made a number of recommendations to reform the manner in which treaties are negotiated, considered and monitored. It considered these reforms should be implemented even if the TPP does not enter into force.

4.15 These proposed reforms included:

- an independent Government body that is arms-length from negotiations – such as the Productivity Commission – should prepare the trade treaty National Interest Analysis (NIA) and Regulatory Impact Statement (RIS) documents

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9 NIA, p. 33.

10 *Submission 79*, p. 2.

11 *Submission 47*, p. 1.

12 *Submission 25*, p. 4.

13 *Submission 16*, p. 3.

that are provided to the Joint Standing Committee on Treaties and tabled in Parliament;

- the Productivity Commission – or similar independent body at arms-length from negotiations – should be tasked with an objective regular review and report on the agreement;
- performance of all in-force Australian trade treaties, comparing the economic objectives cited at their commencement;
- the direct costs to the Australian Government for the conduct of treaty negotiations should be transparently reported to the Parliament through the annual budget process;
- the Australian Government should examine the merits of retaining current bilateral agreements where they have been superseded by larger and more modern agreements covering the same Parties; and
- the Australian Government should introduce an enhanced consultative procedure for the development of improved trade treaties, which would allow representative bodies to register for access to the draft treaty text within the terms of the relevant confidentiality agreements, in order to provide advice to negotiators throughout the negotiation process.<sup>14</sup>

4.16 A high level of frustration with the current treaty-making process was expressed in a number of submissions. For example, Gene Ethics were 'extremely disappointed and angry that a section on Trade of Products of Modern Biotechnology appears in the TPP':

DFAT officials and the Minister's office advised us that no aspect of [Genetically Manipulated] (GM) techniques or their products were on the table during TPP negotiations. DFAT officials said our concerns about GM provisions were unfounded when we raised them with DFAT, with the Minister...

Their disinformation was reiterated during three TPP briefings that DFAT officials convened in Melbourne. Now the published TPP text contains provisions that intend to permit the 'low level presence' (LLP) at unspecified levels, of unapproved GM contaminants in traded food commodities and the SPS provisions are also unsatisfactory.<sup>15</sup>

4.17 Many submissions argued the current treaty-making process involved insufficient parliamentary oversight, scrutiny and approval. For example, the Friends of the Earth supported 'a transparent, democratic and accountable process, that should include full parliamentary debate and approval before a Minister or Cabinet is able to sign off on a regional or global agreement'.<sup>16</sup> The ETU recommended the 'TPP should

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14 *Submission 16*, pp 4-5.

15 *Submission 53*, p. 2.

16 *Submission 47*, p. 7.

be referred to the full Parliament for an open debate, including aspects that do not require implementing legislation'.<sup>17</sup> AFTINET proposals for reform included:

Prior to commencing negotiations, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement.

Such assessments should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise. The Australian Government should release its proposals and discussion papers during trade negotiations. Draft texts should be also released for public discussion, as occurs in the WTO and is now the practice in some EU negotiations. The final text should be released for public and parliamentary debate before it is authorised for signing.<sup>18</sup>

### *Assessments of trade agreements*

4.18 The NIA for the TPP was also criticised. For example, Dr Hazel Moir unfavourably compared Australia's NIA of the TPP with that produced by New Zealand:

In regard to DFAT's NIA for the [TPP], it is clear that this is not independent. There is a marked contrast between the Australian and New Zealand documents. The New Zealand analysis is far more even-handed, identifying costs very clearly. It also clearly identifies as a negative feature the loss of domestic policy control in a number of areas.<sup>19</sup>

4.19 Several submitters disputed the contents of the NIA for the TPP. For example, Associate Professor Kimberlee Weatherall recommended the committee recognise that 'the National Interest Analysis misrepresents the effect of Chapter 18 by failing to acknowledge the costs imposed by the chapter, and failing to acknowledge that the chapter will not offer tangible benefits to Australian creators or inventors'.<sup>20</sup>

4.20 A number of alternative and additional methods to assess of the TPP and other future trade agreements were advocated. For example, the New South Wales Nurses and Midwives' Association recommended the development of legislation requiring that all free trade agreements undergo a publically transparent health impact assessment prior to signing:

Healthcare policy should not be subject to 'commercial-in-confidence' style negotiations. Rather, all government policies should be assessed as to their healthcare impact and this assessment process should be transparent, evidenced based and accessible to the public. Healthcare matters should not be a part of any Free Trade Agreement that fails the test of transparency. For the TPP healthcare professionals and academics were denied access to

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17 *Submission 5*, p. 4.

18 *Submission 39*, p. 9.

19 *Submission 25*, p. 4.

20 *Submission 82*, p. 1.

the text, were not included in negotiations and had limited access to the trade negotiators and when they were detailed information was not provided. In raising legitimate, evidenced based concerns the Minister for Trades' response was to refer to concerns as being 'shrill'...

[T]he negotiation process and outcomes of the TPP highlight an urgent need to ensure that there is health governance process applied to all free trade agreements and treaties. Such a process must be transparent, independent and involve an 'all-of-government' approach to ensure that agreements in seemingly unrelated areas do not impact on health or healthcare policy.<sup>21</sup>

#### 4.21 Similarly, ActionAid recommended:

To ensure that Australia protects, respects and fulfils human rights in Australia and overseas, the Australian Government must undertake the following with respect to the TPP and other trade agreements:

- Undertake a human rights impact assessment on trade agreements as required under the Universal Declaration of Human Rights and in line with the International Covenants on Civil and Political Rights and the Economic Social and Cultural Rights
- Specifically undertake a gender analysis of the impacts of the TPP Take the lead in ensuring that trade agreements are transparently discussed and shared with the public
- Ensure that civil society in all signatory countries is fully consulted and provided information in a timely manner to ensure that they understand the full implications of trade agreements and can be involved in decisions on the same.<sup>22</sup>

4.22 Other transparency reforms were also raised. Under the TPP, a commission will be established which will review the operation of the TPP three years after entry into force of the agreement and at least every five years thereafter.<sup>23</sup> Dr Rebecca LaForgia proposed that Australia adopt an interpretive declaration 'to ensure that in the practice of Australia, all reports by the 'committees, working groups and any other subsidiary bodies' created under the TPP are open and available to the public'. She stated:

The public like, the [TPP] Commission, in order to comprehend the operation of the TPP also requires access to the reports prepared by the 'committees, working groups and any other subsidiary bodies' established under the TPP. Without such access the agreement is secret, non-democratic and cannot be comprehended by the public...It is a mistake to consider that the only and primary time for openness is in the creation and negotiation stage of the TPP. Of equal importance is the open reporting

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21 *Submission 40*, pp 3, 8.

22 *Submission 57*, p. 2.

23 *Submission 83*, 'TPP – Analysis of Regulatory Impact of Australia', 27 November 2015, pp 35-36.

over the life of the agreement, in order for public to be able to observe and comprehend the operation of international trade...<sup>24</sup>