



## Dissenting Report— Australian Greens

The Australian Greens do not support the recommendation of the majority report. We do not support the *Free Trade Agreement between the Government of Australia and the Government of Korea* in its current form. The process by which trade deals are negotiated in this country doesn't allow changes to be made to the details and texts of trade agreements before they are finalised and signed by Cabinet- rather they must be accepted or rejected in whole by the Parliament.

### **Investor-State Dispute Settlement Clauses**

The Australian Greens are in favour of trade and investment flows between countries that constitute 'fair trade.' However we strongly oppose the inclusion of Investor-State Dispute Settlement (ISDS) clauses in modern trade agreements which allow foreign corporations the right to sue sovereign governments if they feel changes to policy or Parliamentary laws negatively impact on their profits.

Although no explanation was provided by the Department of Foreign Affairs and Trade (DFAT) as to why the Koreans insisted on its inclusion, this agreement contains ISDS clauses.

After so many years of successive governments refusing to allow their inclusion, accepting a trade deal that includes ISDS is a dangerous precedent for Australia going into the finalisation of the multilateral Trans-Pacific Partnership (TPP) agreement.

To put the importance of including the dangers of ISDS clauses in perspective, evidence has been provided by DFAT that the reason the KAFTA deal was finally completed after 4 years of negotiation was because unlike the previous government, this government was willing to include ISDS in the agreement.<sup>1</sup> As outlined in the majority report the beef producers lobbied the current government to compromise on the previous no ISDS policy to allow the deal to be signed and completed.

---

<sup>1</sup> Mr Braddock, Foreign Affairs, Defence and Trade Legislation Committee, Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, *Committee Hansard*, 6 August 2014, p.46.

The Greens believe Minister Robb is prepared to trade away our national sovereignty by allowing ISDS to be used as a negotiating tool in the negotiations of future and current deals.

The Greens also note that Australia is currently being sued by the tobacco company Phillip Morris through an ISDS clause in an investment agreement Australia has with Hong Kong. The Government and DFAT claim that there are safeguards built into the agreement that would ensure ISDS clauses couldn't be used in KAFTA as they are currently being used by Phillip Morris.

The Regulation Impact Statement (RIS) that assesses the agreement states in relation to ISDS concerns:

"Substantive carve-outs and safeguards have been included for key public policy concerns including public welfare, health, culture and the environment."<sup>2</sup>

The committee has accepted this evidence from the RIS without questions despite the advice of experts in submissions and during the hearings such as, Dr Kyla Tienhaara who stated:

"The government has tried to calm concerns about ISDS and KAFTA by pointing to the existence of so-called safeguards or exemptions, as they have been referred to this morning, in the agreement. I would like to stress to this committee the point that dangerous loopholes in the text of KAFTA remain despite the government's efforts to preserve the right to regulate under the agreement."<sup>3</sup>

This Government and particularly the current Minister for Trade and Investment (the Minister) has so far been misleading or demonstrated very little understanding of the issues surrounding ISDS in trade and investment agreements.

Following the signing of the Korea–Australia Free Trade Agreement (KAFTA), the Minister stated regarding ISDS:

In the Korean Free Trade Agreement that I've just concluded, we did insist on explicit safeguards to ensure that regulation or law that's passed in public interest areas, such as health and the environment, cannot be covered by this ISDS... you could not have the plain packaging exercise repeated there because it has been essentially carved out those areas of public policy interests, especially to do with health and the environment."<sup>4</sup>

---

<sup>2</sup> RIS, para 76.

<sup>3</sup> Dr Kyla Tienhaara, *Joint Committee Hansard*, 14 July 2014, p. 8

<sup>4</sup> Andrew Robb, Interview with Linda Mottram, 702 ABC Sydney, February 19 2014.

<<http://www.andrewrobb.com.au/Goldstein/LocalIssues/tabid/123/articleType/ArticleView/articleId/1602/INTERVIEW-WITH-LINDA-MOTTRAM--702-ABC-SYDNEY.aspx>>

This assertion was disputed during hearings convened by the Senate Foreign Affairs, Defence and Trade Legislation Committee on the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014. Professor Luke Nottage, when asked whether the ISDS clause in KAFTA would preclude a Phillip Morris type case occurring again responded:

"The answer is no under the current wording. If that sort of claim by tobacco companies is a particular concern, the obvious way to preclude it completely is to have a carve-out for measures in relation to tobacco."<sup>5</sup>

As outlined in the majority report there are a number of risks inherent in including ISDS clauses. The Australian Greens believe these risks are too great to allow ISDS to be included in KAFTA or future trade deals. Recently the Greens introduced a bill to the Senate to have such clauses banned from all future trade deals.

### **Intellectual Property**

The majority report provides a summary of the opposition to the Intellectual Property provisions in KAFTA between paragraphs 4.23 – 4.36. It appropriately sums up the concerns raised in submissions and by witnesses at the hearings. However it is disappointing that the committee has decided not to engage at all with these criticisms including the potential threat to access to reasonably priced medicines and failure of the agreement to not recognise the broader public interest in access to knowledge and information.

The majority report's recommendations don't assert anything about how the Government should address these concerns and it has not specifically identified which areas of the KAFTA intellectual property (IP) chapter have been identified by witnesses as going against the national interest. Professor Weatherall in her submission makes sensible suggestions for the committee that:

"JSCOT should recommend that DFAT's negotiating stance in IP depend on an assessment of Australia's national interest, based on evidence not assumption, and informed by analysis focused specifically on (a) whether Australian stakeholders are experiencing specific issues in IP in the other negotiating Party or Parties, (b) whether those issues can be (best) addressed through a trade agreement, and (c) the impact of any solutions on Australian interests, including the interests of other stakeholders and the broader public interest in freedom to make innovation policy. "<sup>6</sup>

The majority report fails to recognise or even comment on the the fact that previous Parliamentary committees, the Productivity Commission and IP Australia have all asserted the importance of cost benefit analysis for trade agreements and IP. For example:

---

<sup>5</sup> Professor Luke Nottage, Sydney Law School, University of Sydney, *Committee Hansard*, 6 August 2014, p. 22.

<sup>6</sup> Associate Professor Kimberlee Weatherall, Sydney Law School, *Submission 49*, p. 2

*“The Government should ensure that future trade negotiations are based on a sound and strategic economic understanding of the costs and benefits to Australia and the world and of the impacts of current and proposed IP provisions, both for Australia and other parties to the negotiations.”<sup>7</sup>*

*“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.”<sup>8</sup>*

The Regulation Impact Statement (RIS) and the National Interest Analysis (NIA) provide no comment on the impact of the IP chapter in this trade agreement on the broader public interest in access to knowledge and information.

It is about time JSCOT used its position seriously as an oversight mechanism for trade agreements. If the Parliament is going to be treated seriously by the executive it needs to produce critical recommendations based on both the benefits and negative aspects of agreements.

### **Automotive Industry**

The majority report acknowledges the controversy about the impact of KAFTA on the automotive industry. In February 2014 Toyota announced that from the end of 2017 they would stop producing cars in Australia. They stated that amongst other factors:

*“with one of the most open and fragmented automotive markets in the world and increased competitiveness due to current and future Free Trade Agreements, it is not viable to continue building cars in Australia.”<sup>9</sup>*

In relation to the complete closure of Australia’s automotive industry, public commentary was suggesting that the Korean trade deal would be a game changer before it was signed by this government.<sup>10</sup> It appears from evidence presented to the committee that DFAT and the Government ignored, or were discounting the role played by trade agreements in the decline of the car industry. The Greens were disappointed that only the Australian Manufacturing Workers Union gave evidence on the impacts of this trade deal on the car industry, and what it has cost our country, workers and communities.

---

<sup>7</sup> Harris, T., Nicol, D., Gruen, N., *Pharmaceutical Patents Review Report*, 2013, Recommendation 3.2, p. 58.

<sup>8</sup> Productivity Commission Research Report, *Bilateral and Regional Trade Agreements*, November 2010, Report Recommendation 4 (b), p. 285.

<sup>9</sup> Toyota Australia Announces Future Plan For Local Manufacturing, February 2014.  
<http://m.toyota.com.au/toyota-news/article?articleId=18gd89tfh>

<sup>10</sup> Alan Kohler, ‘Time to decide if we really need a car industry’ October 17 2013.  
<http://www.theaustralian.com.au/business/opinion/time-to-decide-if-we-really-need-a-car-industry/story-fng7vg0p-1226741274219>

---

There is no evidence that the Government assessed the risk to the car industry of signing KAFTA either prior to or after the signing. The majority report makes no comment on the fact that the Government amended the original modelling to reflect costs to the car industry, but only following the Toyota announcement. This amended data, rather than the original modelling, was provided only after an Order for Production of documents motion passed by the Senate. The Greens discovered it wasn't the original modelling done by the Government and then the Senate had to pass another Order for Production of documents to gain access to the original modelling. Clearly potential risks and costs to the car industry by signing the KAFTA were not considered or included in the original analysis by the Government. The Greens were cynical of attempts to "play catch up" in the Government's later analysis.

It is not clear which modelling was used to assess the impact of KAFTA on the automotive industry or was used in the Regulation Impact Statement (RIS) or National Interest Analysis (NIA). The assessment process should not be allowed to be repeated in this way.

It was disappointing that the NIA also made no real attempt to outline the potential and real risks and costs to the Australian automotive sector when signing KAFTA. In answering questions, DFAT seemed to suggest that potential access to lower cost imported cars (under a lowering of tariffs) was an acceptable trade off to the potential loss of our automotive sector. This classical "input-output" approach to both the modelling and ideology that drives our trade deals ignores important value judgements that should be debated in our community and Parliament, not just determined by the Government and politics of the day. The Greens feel more scrutiny and transparency around the decisions that are made during trade negotiations is necessary before we will ever achieve 'fair trade' outcomes in these deals.

### **Side Letters**

The majority report makes very little comment on the side letters to the agreement. Side letters are common place in trade agreements. However one of the side letters in reference to cross border trade in gambling and betting services preserves regulatory space only for Korea.

It is concerning that neither the NIA nor the RIS made a note on what this means for the agreement on this issue.

### **Process**

The Australian Greens support many elements of the KAFTA, however we share the significant concerns of many Australians regarding the ISDS clauses and the IP chapter.

The trade agreement structure for ratification is set up in such a way that the Greens are unable to negotiate with the Government over these concerns.

Parliamentarians can either vote for or against the deal, they cannot attempt to amend it.

This occurs despite the fact that the Government negotiates in secret, seeks approval through Cabinet and then signs the deal with the foreign government. Only then does the Parliament get access to assess the text.

The Greens believe this is unacceptable. On the 11<sup>th</sup> of December 2013 the Senate passed an Order for Production of Documents motion calling on the Government to make available the final draft text of the KAFTA agreement 14 days prior to signing so that important consideration could be given to the agreement including issues outlined in this dissenting report. This was rejected by the Government with the justification that such transparency was “not in the national interest.”

This policy and process around trade deals puts Parliament in a very difficult situation. The Greens agree with previous Parliamentary committees and the Productivity Commission that inadequate research is being presented to Parliament and the public prior to Australia ratifying trade agreements. In 2005 the Select Committee on the Free Trade Agreement between Australia and the United States of America commented that it was:

“alarmed by the lack of adequate research being undertaken prior to Australia committing itself to trade agreements. Balanced and comprehensive research on the economic, social, cultural and policy impacts of any trade treaty Australia proposes to enter into is a vital part of ensuring that there is proper scrutiny of the agreement and would contribute greatly to the quality of the public debate on these issues.”<sup>11</sup>

In 2010 the Productivity Commission stated:

*“[The Government] 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.”<sup>12</sup>*

A more transparent and effective Parliamentary voice would involve these elements:

- JSCOT should produce a fully independent report that outlines the costs and benefits of a trade deal taking into account important factors beyond just possible GDP growth reflected in simple “input -output” models. This will assist the Parliament in properly assessing the impact of trade agreements.
- JSCOT should make recommendations to the Government advocating for the renegotiation of sections of trade agreements that are not in the national interest (such as ISDS).

---

<sup>11</sup> Select Committee on the Free Trade Agreement between Australia and the United States of America. – August 2004, p. 30 para 2.97

<sup>12</sup>Productivity Commission Research Report, *Bilateral and Regional Trade Agreements*, November 2010, Report Recommendation 5 (c), p. 312.

- The National Interest Analysis and Regulatory Impact Statement should be independently produced. The same institution, the Department of Foreign Affairs and Trade that negotiated the agreement on behalf of Government should not then assess it.
- Parliament should have a copy of the final draft agreement before it is signed by Cabinet, with a chance to suggest changes to the final treaty (rather than only be able to accept or reject it as a whole).
- The entire process of trade negotiations needs to be reworked, allowing more transparency and input from all stakeholders. JSCOT should hold a separate inquiry to explore what could be a “model” trade negotiation process.

Senator Peter Whish-Wilson

