

# Chapter 5

## Conclusion and recommendations

### Treaty-making process reform

5.1 The committee recently completed an inquiry into the treaty-making process which made four key findings:

1. All treaties are presented to Parliament and subject to scrutiny after agreements have been signed, leaving the Parliament 'with an all-or-nothing choice' when considering treaty implementation legislation.
2. The Joint Standing Committee on Treaties does not commence inquiries until after agreements are signed, and this 'does not provide an adequate level of oversight and scrutiny'.
3. The Department of Foreign Affairs and Trade's consultation is falling short of expectations and adding to stakeholders' frustrations.
4. There is 'an insufficient amount of publicly available information about agreements under negotiation and independently sourced economic analyses of their likely benefits are not mandatory'.<sup>1</sup>

5.2 The committee made a number of recommendations including: that independent analyses be undertaken prior to the commencement of negotiations (as well as an evaluation of likely costs and benefits after negotiations have concluded); granting confidential access to draft treaty texts; and the creation of a 'model trade agreement' that could cover 'controversial topics'.

5.3 The committee's inquiry into ChAFTA illustrates that these findings and recommendations have continuing relevance. It is worth considering whether the issues with the labour mobility components of ChAFTA would have surfaced if improvements to the treaty-making processes had been made. In the view of the committee, it is possible these issues could have been appropriately resolved before the final treaty text was agreed. In this context, the committee reiterates its recommended reforms to the treaty-making process.

### Labour market testing, skills assessments, protections for wages and conditions, and foreign workers

5.4 Where there are genuine labour shortages, temporary overseas workers and skilled migration can play an important role in economic growth. However, Australians should always have priority in the labour market, and overseas workers should only be recruited when suitably qualified Australian workers are not available. The text of ChAFTA, the Memorandum of Understanding on Investment Facilitation

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1 Senate Foreign Affairs, Defence and Trade References Committee, *Blind agreement: reforming Australia's treaty-making process*, June 2015.

Agreement and the side letter on skills assessment processes raised legitimate concerns that this important principle would be undermined.

5.5 The committee considers that many of these concerns have been mitigated through the agreement reached between the Government and the Australian Labor Party. This agreement will facilitate protections through amendments to the Migration Regulations and through changes to immigration policy.

5.6 The committee acknowledges the work done by the Shadow Minister for Trade and Investment, Senator the Hon Penny Wong, Minister Robb and Minister Dutton, to deliver these important safeguards for Australian jobs, wages and conditions. However, the committee's view is that the scope of these agreed safeguards was limited due to explicit commitments made by the Australian Government in ChAFTA. This is an area worthy of continued scrutiny and, if necessary, further reform.

### **Investor-state dispute settlement mechanism**

5.7 There has been strong and consistent community opposition to the inclusion of ISDS provisions in Australia's trade agreements. This has mirrored the rapid and worrying increase in the number of ISDS claims made against national governments. This committee has previously recommended the Australian Government not include ISDS mechanisms in future trade agreements noting 'fundamental procedural flaws' and 'potential impacts on Australia's justice system'.<sup>2</sup>

5.8 It is worth noting that the Productivity Commission has also recommended that the Australian Government should seek to avoid the inclusion of investor-state dispute settlement provisions in [bilateral and regional trade agreements] that grant investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors'.<sup>3</sup> In relation to Australia's ISDS liabilities, it has recently observed that the 'ongoing costs to Australian taxpayers of funding the preparation and defence of the tobacco plain packaging legislation are likely to be substantial'. The Productivity Commission considered that this 'highlights the need for advance liability provisioning and transparency about the true cost of including ISDS provisions in Australia's trade agreements and investment treaties'.<sup>4</sup>

5.9 In this context, the unfinished nature of the ISDS provisions within ChAFTA is concerning. The committee acknowledges that the ISDS provisions appear to include more safeguards for the Australian Government than those included in previous trade and investment agreements. Nonetheless, the extent of Australia's trade relationship with China means the impact of a flawed ISDS mechanism could be significant.

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2 Senate Foreign Affairs, Defence and Trade References Committee, *Korea-Australia Free Trade Agreement*, 1 October 2014, p. 52.

3 Productivity Commission, *Australia bilateral and regional trade agreements*, 2010, pp xxxvi.

4 Productivity Commission, *Trade and Assistance Review 2013-14*, 2015, p. 147.

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5.10 The committee notes that the ISDS mechanism will be reviewed to potentially broaden its scope. The committee urges the Australian Government to utilise this opportunity to further restrict the potential impact of the ISDS mechanism in ChAFTA on Australia.

### **Recommendation 1**

**5.11 The committee recommends the Australian Government utilise the review of the investor-state dispute settlement provisions to further enhance the safeguards for Australia.**

### **Conclusion**

5.12 The committee continues to have misgivings regarding ChAFTA, including in relation to the sectors which will be affected by inequitable tariff changes, the requirements to conduct labour market testing and the eventual scope of the ISDS mechanism. However, it is clear from the submissions received that Australian businesses will benefit from tariff reductions and improved access to the Chinese market. This in turn will provide modest increases in job opportunities for Australians. For example, Blackmores has outlined that it had employed an additional 100 staff across its Australian operation largely as a result of growth in sales of its products to Chinese consumers.<sup>5</sup>

5.13 Further, in order to take advantage of the tariff reductions, the committee agrees it is preferable for ChAFTA to be ratified this year. Any renegotiation of ChAFTA is not compatible with achieving this objective. Taking these factors into account, the committee has concluded that the ratification of ChAFTA is in the national interest. The committee's view is that binding treaty action should be undertaken as soon as possible to take advantage of the schedule of tariff reductions.

### **Recommendation 2**

**5.14 The committee recommends that binding treaty action be taken in relation to the *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*.**

**Senator Alex Gallacher**  
**Chair**

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5 *Submission 31*, p. 2.

