

Chapter 5

Committee conclusions and recommendations

Introduction

5.1 The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) is an important multi-lateral free trade agreement (FTA) which is expected to deliver benefits to the 11 participating countries. The Department of Foreign Affairs and Trade (DFAT) has described the TPP-11 as 'one of the most ambitious global trade deals concluded since 1994'.¹

5.2 The implementation of the TPP-11 is expected to see an increase in trade opportunities for Australian businesses with the elimination of 98 per cent of tariffs. A number of sectors identified particular benefits for their industry including agriculture, resources and mining. The TPP-11 will provide preferential access for a range of Australian exports into existing and new markets.

5.3 While the committee accepts the importance and potential value of this multi-lateral agreement, this inquiry has highlighted some areas of concern. As the vast majority of the text of the TPP-11 remains unchanged from the original Trans-Pacific Partnership (TPP), the committee was not surprised to receive evidence highlighting many of the same issues raised during its inquiry into the original TPP, including: the availability of independent economic modelling, concerns about the Investor-State Dispute Settlement (ISDS) provisions and the risks to Australia's sovereignty and ability to legislate in key areas, concerns about the labour chapter with particular reference to mobility and labour market testing, and concerns about the consultation process during the treaty negotiation.

5.4 This inquiry has provided another opportunity for stakeholders and the broader community to voice its concerns with the TPP-11. In this context, the committee has made a number of recommendations. The committee notes the Joint Standing Committee on Treaties (JSCOT) has made five recommendations in its report on the TPP-11 tabled on 22 August 2018 where it has again recommended that consideration be given to independent modelling and analysis being undertaken and provided alongside the National Interest Analysis (NIA).

Reform to the treaty making process

5.5 Much of the evidence received for this inquiry highlighted concerns about the treaty making process. Many of these concerns applied not just to the process undertaken to negotiate the TPP-11, but to the treaty making processes more broadly. The committee is familiar with these matters following its 2015 inquiry report *Blind Agreement: reforming Australia's treaty-making process*, its previous inquiry into the original Trans-Pacific Partnership (TPP-12) as well as the parliamentary inquiries undertaken by JSCOT.

1 National Interest Analysis, p. 5.

5.6 In this committee's inquiry into the TPP-12, the committee welcomed and supported the recommendations of the 2016 JSCOT majority report on the TPP-12 which related to broader treaty making processes. In addition, the JSCOT concluded that 'with growing isolationist sentiment internationally, the Australian Government needs to focus on how it engages with the public on free trade agreements if it wishes to maintain support for these agreements'.

5.7 Despite the recommendations made during previous parliamentary inquiries, evidence to this inquiry indicates there is still a high level of ongoing concern on these matters. The committee is of the view that further work is still required to facilitate consultation and participation in the treaty making process as well as increasing transparency. These issues are discussed in more detail below.

Increased transparency

5.8 Evidence emphasised that organisations and the general public are seeking more information to be made publicly available during the treaty negotiation process. Several submissions and witnesses expressed the view that negotiations had been conducted in secret, with details only being published once the treaty negotiations were finalised.

5.9 The committee is cognisant of the range of issues that must be taken into account when negotiating trade agreements including ensuring appropriate safeguards to ensure that draft treaty text is kept confidential. The committee notes evidence from DFAT explaining that parliamentarians were invited to view the text upon signing a confidentiality letter. The committee views this as a positive initiative and one which could be extended to other stakeholders provided that appropriate safeguards were in place to maintain confidentiality.

5.10 It was clear to the committee that organisations and the community are seeking additional opportunities to participate. The committee agrees there is a need to increase the openness and transparency of the trade negotiation process. As noted during the inquiry, consulting with a range of stakeholders early in the process may assist the Australian Government in its negotiations as they can highlight issues and suggest possible remedies early in the process.

Consultation

5.11 The committee received evidence describing different perspectives on DFAT's consultation process. While some witnesses from industry were positive about their level of engagement with DAFT, witnesses from unions and civil society groups noted that information was difficult to obtain and that requests for meetings with departmental officials were not accepted.

5.12 The committee notes evidence from DFAT where they described the extensive consultation process undertaken for TPP-11 (and TPP-12) as unprecedented and detailed the range of stakeholders consulted. It is difficult for the committee to determine exactly what factors are contributing to the range of views from witnesses about the consultation experience.

Recommendation 1

5.13 The committee recommends that the Department of Foreign Affairs and Trade conduct an evaluation of the consultation mechanisms used by the department.

5.14 The committee notes that this committee and the JSCOT have both previously made recommendations suggesting changes to the consultation undertaken during treaty negotiations. While the committee notes that DFAT has undertaken consultation and engaged with a range of stakeholders during the negotiation stages for the TPP-11, the committee is concerned about the range of individuals and organisations who have identified that they have not been engaged in the process. In light of this, the committee is of the view that further consideration should be given to making changes to the treaty consultation process.

Recommendation 2

5.15 The committee recommends that the Australian Government: provide public updates on each round of trade negotiations; release draft texts during negotiations where feasible and with appropriate safeguards; and table the text of proposed agreements in Parliament before they are signed.

5.16 As highlighted in previous reports, the committee is aware of the treaty making processes undertaken in other countries. The model used in the United States was again raised in the current inquiry as a model which allows some flexibility for identified stakeholders to participate in the consultation process and view draft treaty text on a confidential basis. Given the high level of interest from stakeholders and the potential benefits that can be gained from early identification of issues, the committee is of the view that alternate models for consultation should be explored. Furthermore, the committee notes the proposal from the Australian Chamber of Commerce and Industry for an Australian Trade Centre.

Recommendation 3

5.17 The committee recommends the creation by legislation of an Accredited Trade Advisors program where industry, union and civil society groups would provide real time feedback on draft trade agreements during negotiations.

Recommendation 4

5.18 The committee recommends that the Department of Foreign Affairs and Trade review the stakeholder consultation mechanisms used internationally and assess their appropriateness for an Australian context and provide recommendations to government.

Modelling and review of free trade agreements

Independent modelling

5.19 Several submissions and witnesses expressed concern that the TPP-11 has not been subjected to independent economic modelling to assess the impact of the TPP-11 in an Australian context. The objectivity of the NIA was questioned given that this analysis was produced by DFAT, the lead department conducting the treaty

negotiations. It was acknowledged that several international economic studies have been undertaken but that none of these have assessed the impact of the TPP-11 in an Australian context.

5.20 The committee restates its support of the 2016 recommendation of the JSCOT that to increase transparency of the benefits and costs there should be an independent assessment of free trade agreements before the agreements are signed to provide an accurate picture of the impact on jobs and the economy. The committee notes with interest that JSCOT's *Report 181* on the TPP-11, tabled on 22 August 2018, again includes a recommendation that the Australian Government 'consider implementing a process through which independent modelling and analysis of a proposed trade agreement is undertaken by the Productivity Commission, or equivalent organisation, and provided to the Committee alongside the National Interest Assessment (NIA) to improve assessment of the agreement'. It continues to be the view of the committee that the Productivity Commission is best placed to undertake such an assessment.

Recommendation 5

5.21 The committee recommends that before new free trade agreements are signed, the Australian Government commission the Productivity Commission to undertake independent economic modelling and that this modelling be released publicly.

5.22 On a related matter, the committee received evidence suggesting that the TPP-11 should be assessed for its impact on a range of issues, with particular reference to assessing the health and gender impacts of such agreements. It is the view of the committee that undertaking assessments in these specific areas may be beneficial and that these matters could be considered as part of any economic modelling taken on free trade agreements.

Review of existing FTAs

5.23 Some witnesses referred to the 2010 research report published by the Productivity Commission: *Bilateral and Regional Trade Agreements*. This report examined the effects of bilateral and regional trade agreements on a range of matters, including trade and investment barriers, prospects for multilateral reform, regional integration and Australia's economy generally.

5.24 Given that almost a decade has passed since the Productivity Commission conducted its research for the *Bilateral and Regional Trade Agreements* report, and Australia has signed a number of new agreements since that time, the committee agrees it may be beneficial for a follow up review to be undertaken. The committee suggests that consideration be given to expand this review to assess impacts on health, gender and the environment.

Recommendation 6

5.25 The committee recommends that the Australian Government make a reference to the Productivity Commission to conduct a review of Australia's bilateral and regional trade agreements.

Investor-State Dispute Settlement

5.26 As with the committee's inquiry into the TPP-12, the committee received much evidence expressing concerns about ISDS provisions. Many contributors to the inquiry shared the view that ISDS provisions grant legal rights to global corporations that are unavailable to domestic investors and these provisions may affect the Australian Government's ability to legislate in a range of areas because of the threat of legal action.

5.27 Evidence from DFAT emphasised the inclusion of safeguards in the Agreement which will protect the Australian Government from ISDS cases and will ensure that Australia can continue to develop legislation and deliver services in a range of areas without being concerned about being the subject of ISDS cases.

5.28 The committee notes that several witnesses and submissions were not reassured by the current safeguards and continued to have concerns about the ISDS process with particular reference to the regulatory framework and the institutions that facilitate and adjudicate the ISDS process. It was noted that an international conversation is underway about this framework which has included discussions about possible reforms to the key ISDS processes and institutions that may be required.

5.29 On this matter, the committee notes advice from DFAT that Australia is actively involved in the two processes currently looking into possible reforms to the ISDS; one involving the UN Commission on International Trade Law (UNCITRAL) and the other with the International Centre for Settlement of Investment Disputes (ICSID). It was noted that changes of a technical or procedural nature would be unlikely to require a change to the treaty text, however any reform that would require a change to treaty text would require additional consideration by JSCOT.

5.30 Given the current international conversation about ISDS and the actions taken by some countries to no longer include ISDS provisions in their FTAs, the committee is of the view that Australia must continue to take an active role in discussions about reforming the ISDS processes or institutions. As these discussions continue, it will be important that DFAT provide regular public updates and advise the implications for Australia's existing FTAs and any that are under development.

Recommendation 7

5.31 The committee recommends the Australian Government remove ISDS provisions from existing free trade agreements and legislate so that a future Australian government cannot sign an agreement with such provisions.

5.32 The committee recognises that ISDS clauses are in place in existing trade and investment arrangements and that there has been limited ISDS cases taken against Australia to date. Although Australia was ultimately successful in the tobacco plain packaging case, this case was resource intensive, time consuming and potentially damaging to Australian public health and sovereignty. Despite the successful outcome, this does demonstrate the potential impact on Australia, particularly from a sovereignty perspective, should ISDS clauses be invoked. The potential financial impact on the Australian Government is also significant.

5.33 Due to the high level of community concern with ISDS clauses and the potential impact should a case be brought against Australia, the committee is of the view that careful consideration should be given to whether ISDS clauses should be included in future trade agreements. The committee was encouraged to hear evidence from DFAT that the inclusion of ISDS provisions in trade agreements is considered on a case by case basis.

Labour market testing

5.34 Under the TPP-11, Australia will extend the commitment to waive labour market testing in the contractual service supplier category to six TPP-11 countries: Brunei, Canada, Malaysia, Mexico, Peru and Vietnam. Australia has obtained equivalent reciprocal commitments from each of the six countries which DFAT has suggested will result in benefits both for Australian businesses and Australians seeking employment overseas. DFAT emphasised that under the TPP-11, Australia has made commitments to waive labour market testing but there will be sufficient flexibility in the operationalising of this commitment due to the fact that the skilled occupations list administered by the Department of Jobs and Small Business is not bound in the TPP-11.

5.35 Despite the reassurances from DFAT, evidence to the inquiry indicated that concerns remain about the negative impact the commitment to waive labour market testing may have on Australian workers. There was a sense that under the Agreement, Australian workers would be disproportionately affected. Concern was also raised about the high number of professions that could currently be covered by the term 'contractual service supplier'.

Recommendation 8

5.36 The committee recommends that the Department of Foreign Affairs and Trade include the provision of further information on labour market testing in its outreach strategy and seminars.

Recommendation 9

5.37 The committee recommends that the Australian Government reinstates labour market testing for contractual service suppliers where it has been waived and legislate so that a future Australian Government cannot waive labour market testing for contractual service suppliers in new agreements.

Implementing the Agreement

5.38 As stated in the Analysis of Regulatory Impact on Australia (ARIA), once the TPP-11 enters into force, it is intended that DFAT and Austrade will implement an outreach strategy which will include information sessions held throughout Australia. The committee notes that, separate to the TPP-11 process, DFAT and Austrade are already hosting information sessions in states and territories to provide information to businesses about FTAs broadly and the potential opportunities for their business.

5.39 Given the level of community interest in the TPP-11 and the range of sectors that may have an interest in its implementation, it is important that DFAT and Austrade build on the existing information sessions to provide targeted information

about specific matters related to the implementation of the TPP-11. In order for Australian businesses to take advantage of the opportunities that the Agreement is intended to deliver, it is vital that the outreach strategy and a program of TPP-11 information sessions are developed and published in a timely fashion.

5.40 Furthermore, in order to assist a range of stakeholders, it is important that the sessions are promoted widely, held in a variety of locations and targeted to a range of affected sectors. It would be beneficial if information was made available in a range of formats including webinars for people in remote areas. Businesses may also find it useful if a summary of outcomes from information sessions was published on the DFAT website.

Recommendation 10

5.41 The committee recommends that the Department of Foreign Affairs and Trade develop and publish an outreach strategy which includes a schedule of information sessions in a wide variety of locations and considers the most appropriate mechanism for publishing key outcomes from the information sessions on the Department's website.

5.42 In addition to the DFAT and Austrade information sessions, evidence to the inquiry emphasised the value of an education program to ensure that businesses are aware of the opportunities that may be available to them under FTAs. In particular, it was noted that small and medium enterprises (SMEs) may benefit from a targeted training program to assist them to navigate the potential opportunities. It was suggested that such a training program could be developed by government in partnership with the private sector and delivered online.

5.43 The committee supports initiatives that will assist Australian businesses to understand and take advantage of opportunities from the TPP-11 and encourages DFAT and Austrade to develop a range of programs to assist business. In light of the concerns raised with the committee about labour market testing, it is particularly important that the education program provides up to date advice to businesses on those issues.

Recommendation 11

5.44 The committee recommends that the Department of Foreign Affairs and Trade and Austrade consider options, including possible partnerships with the private sector, for providing additional information about the TPP-11 to businesses.

TPP-11 Commission

5.45 The committee notes that a TPP-11 Commission will be established under the Agreement which will be responsible for the operation of the Agreement. As outlined in the ARIA, this Commission will review the operation of the TPP-11 three years after entry into force and at least every five years thereafter.

5.46 The committee is aware that this Commission will comprise representatives from each of the TPP-11 parties at the level of Ministers or senior officials and its purpose is to oversee the implementation of the Agreement and to review its operation

as actions under the Agreement are rolled out. The Commission will consider ways to further enhance trade and investment between the Parties and supervise the work of all committees and working groups established under the Agreement. The Commission is required to meet within one year of the TPP-11 commencing and thereafter as the TPP-11 parties decide.

5.47 As already discussed, evidence to the inquiry highlighted the potential value of ongoing review and evaluation of the TPP-11 as this can provide insight into the implementation of the TPP-11. The work undertaken by the TPP-11 Commission to review the operation of the Agreement could be a valuable contribution to the broader discussion about the implementation and the committee encourages DFAT to consider ways to provide regular updates about the work of the Commission.

Recommendation 12

5.48 The committee recommends that the Department of Foreign Affairs provide regular public updates about matters discussed at the TPP-11 Commission.

Suspended provisions

5.49 The committee notes that 22 provisions included in the original TPP-12 have been suspended for the TPP-11 and these provisions can only be reinstated with the agreement of all TPP-11 parties. Evidence to the committee highlighted that although the suspension of the provisions was welcomed, concern remains about the implications should they be reinstated. The committee notes the reassurance from DFAT to the JSCOT committee that should all TPP-11 parties agree to reinstate the suspended clauses, that would trigger a treaty review process to be undertaken by JSCOT. In effect, the suspended clauses would not be reinstated until they had been considered in further detail by the JSCOT.

5.50 The committee recognises the importance of ongoing parliamentary oversight and scrutiny of free trade agreements and the need to ensure that stakeholders are kept informed throughout the committee inquiry process. In the event that TPP-11 parties do agree to reinstate the suspended provisions, it is important that the Government consider the issues raised through the parliamentary inquiry process about the suspended provisions.

5.51 In this context, the committee supports the recommendation from JSCOT's report into the TPP-11 that in the event that the TPP-11 parties agree to reinstate the suspended provisions, the reinstatement be treated as an amendment to the treaty and be subject to an inquiry by the JSCOT.

Other inquiries

5.52 The committee has conducted this inquiry at the same time as the JSCOT has conducted its inquiry into the TPP-11. Concurrent inquiries were also conducted when the committees inquired into the original Trans-Pacific Partnership.

5.53 In this context, the committee is concerned that in conducting this inquiry it has largely replicated the work of the JSCOT which is established to look into such agreements. Two different committees looking into the same agreement was also

confusing for submitters and witnesses. To the committee this does not appear to be the best use of limited committee resources.

5.54 The committee understands that the resolution of appointment establishing the JSCOT does not include provision for participating membership. The committee notes that the Joint Committee on Electoral Matters has resolved to include participating members for inquiries and that this should also be considered for the JSCOT. Allowing participating members on such committees would enable the Parliament to perform vital review functions while alleviating the need to duplicate inquiries.

Recommendation 13

5.55 The committee recommends that the Joint Standing Committee on Treaties consider a resolution to enable participating membership for inquiries and, if agreed, put the necessary changes to both chambers.

Recommendation 14

5.56 The committee recommends the Australian Government provide the Government's Statement of Objectives for Negotiation to the Joint Standing Committee on Treaties for consideration and feedback; and to provide the Joint Standing Committee on Treaties with a briefing at the end of each round of negotiations.

Senator Alex Gallacher

Chair

