Dissenting Report—Australian Greens

Australia's treaty-making process is broken, and the China-Australia Free-Trade Agreement is a case in point. ChAFTA was negotiated in secret. At no stage was the Australian Parliament, or the people it represents, asked why we would be seeking to negotiate this agreement or what we wanted from it. At no stage was the expertise or insights of businesses, unions, academics or a host of other interest parties called upon to help inform the government on the implications of the deal, at least not in any publicly transparent way. ChAFTA has been initiated and agreed to by the executive, and presented to parliament as a take-it-or-leave-it prospect.

The milieu that follows is familiar. There's the overhyping of benefits — the government has, literally, exponentially inflated the number of jobs. And there's the confected sense of urgency — 'we must sign this now!' is the chant. Free-trade is presented as being inherently good. Those who speak out against are accused of being xenophobic and anti-trade.

Against this backdrop, the committee is meant to provide a calm and reasoned assessment to inform the government of the day. To a large extent, the committee report provides this. However, as is the pattern, the subsequent recommendations are either inadequate or non-existent, and do not reflect the content of the committee report. On free-trade, the committee has unfortunately become a rubber stamp to the executive.

There are serious problems with this agreement. It is lopsided. The projected economics benefits are based on a faulty methodology. On labour mobility, ChAFTA reads like Kafka, and appears to be creating a parallel industrial relations system. On the issue of whether Chinese corporations should be able to sue our government for public policy changes, Australia appears content for the EU and the US to sort that for us out at a later date. And environmental standards don't get a look in.

The Australian Greens believe we should be seeking to consolidate economic relations with China, our largest trading partner and the second largest economy

in the world. Further, open and transparent trade relations helps breed trust between nations, which can, in turn, help bring about a more peaceful and prosperous world. However, in its current form, ChAFTA is not a good deal, is not in our national interest, and should not be supported.

Recommendation: The Committee does not support the Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China and recommends that binding treaty action not be taken.

Advantages

It is notable that the committee report makes no direct reference to the study commissioned by DFAT into the economic benefits of ChAFTA, KAFTA and the Japan-Australia Economic Partnership Agreement (JAEPA) despite stating that ChAFTA is "predicted to generate increased employment". The only reference to the Centre for International Economics (CIE) report on the *Economic benefits of Australia's North Asian FTAs*[1] is provided by Master Builders Australia in respect of their submission.

This is particularly notable given the government has been quoting this report when promoting the employment benefits that would flow from ChAFTA and the other two North Asian FTAs. Trade Minister, Andrew Robb, has said that "many hundreds of thousands of jobs" will flow from these three North Asian FTAs.[2] The Minister representing the Trade Minister in the Senate, Senator Payne, said in response to a question without notice on ChAFTA that:

> …modelling shows that between 2016 and 2035 there will be 178,000 additional jobs as a result of the [North Asian] FTAs, which is almost, on average, 9,000 extra jobs per year.[3]

A number of other members of the government have also quoted in parliament the figure of 178 000 additional jobs between 2016 and 2035.

However, the government has made a fundamental error and this figure is wrong by a large margin. The CIE report provides a table with forecasts yearly impacts on employment out to 2035 *relative to the baseline* of no North Asian FTAs.[4] The government has mistakenly summed these annual relative figures and have compounded the projected employment benefits.

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[1] Centre for International Economics (CIE ChAFTA), *Economic benefits of Australia's North Asian FTAs,* June 2015.

[2] ABC Radio - AM Program, interview with Michael Brissenden, 17 June 2015.

[3] Hansard, The Senate, 17 June 2015, p. 3715.

[4] CIE ChAFTA, p. 35

The CIE's modelling actually forecasts that the employment impacts from the North Asian FTAs will peak at an additional 14 566 jobs in Australia in 2020. After this time, the number of jobs are projected to decline such that by 2035 there are only 5 434 additional jobs relative to the baseline of no North Asian FTAs.[5] CIE does not specify what proportion of these jobs can be attributed to ChAFTA itself. Assuming a split based on the current distribution of trade between these three countries and Australia, of which China accounts for 60%[6], then it is likely to be something in the order of 3 300 additional jobs from ChAFTA in 2035.

Table 1 shows Parliamentary Budget Office projections of the tariff revenue impacts over the forward estimates.[7] Assuming that these impacts stabilise at trend levels once the agreement is bedded in — from 2017-18 — then the impact of ChAFTA will be upwards of $40 billion on the federal budget over the next twenty years. Over the next twenty years that's over $12 million for each of the 3 300 new jobs that ChAFTA will create.

Table 1: Tariff Revenue Impacts — Introducing the China FTA from late 2015 ($ million)

2015–16	2016–17	2017–18	2018–19
610	-1,050	-1,210	-1,280

The fluctuation of the actual forecast changes in employment illustrates why there is, as stated in the committee report, "a distinct sense of urgency" about ChAFTA. CIE's report states that:

> Australia's competitive advantage under ChAFTA would end as China concludes other FTAs.

That is, ChAFTA is only expected to provide a competitive advantage to Australia for the next five years, principally because China is in the process of negotiating bilateral treaties with the EU and the US.

This underscores one of the problems with preferential trade agreements: each agreement becomes a precedent for the next, and any benefits gained are often fleeting. This is in accord with the findings outlined in a recent paper by Shiro

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[5] The mistake was belatedly acknowledged by the Minister for Employment, Michaela Cash, when she corrected an answer she gave to a question on notice after initially quoting the figure of 178 000 new jobs (Hansard, Tuesday, 13 October 2015, Page: 30, Questions without notice: additional answers – Employment). To date, no other members of the government have sought to correct the record.

[6] DFAT, Australia's trade in goods and services 2013-14.

[7] The government is yet to explain how it would make-up the projected shortfall in tariff revenue that will result from the agreement.

Armstrong from the Crawford School of Public Policy at ANU[8]. Mr Armstrong analysed the actual trade figures following the implementation of the 2004 Australia-US free-trade agreement (AUSFTA). The evidence suggested that:

> …Australian and US trade with the rest of the world fell —that there was trade diversion — due to AUSFTA after controlling for country specific factors. Estimates also suggest trade between Australia and the United States fell in association with the implementation of AUSFTA — also after controlling for country-specific factors. The existence of trade diversion suggests that trade between Australia and the United States could well have fallen even further without AUSFTA. These results add to the evidence about whether or not preferential trade agreements increase net trade — with the body of evidence currently suggesting that they do not and if anything lead to a contraction.[9]

The Australian Greens believe that ChAFTA also reflects another shortcoming of preferential trade deals that arises when there is an imbalance of bargaining power, as there is between Australia and China. Australia has increased market access for Chinese producers, but this has not been reciprocated in many areas. Almost all Australian tariffs have been removed, but Australian access to Chinese markets remains much more limited. The government has made more concessions than gains.

For those industries that have been granted increased market access, the benefits are not necessarily immediately available. Australian Pork Limited gave evidence at a public hearing that it could take five to ten years to get Chinese accreditation to sell their produce. [10]

Mr Armstrong's report is also pertinent in demonstrating that CIE have a history of overstating the benefits of free-trade agreements. As with ChAFTA, CIE was commissioned by DFAT to undertake an economic analysis of AUSFTA.[11] As with ChAFTA, CIE projected that AUSFTA would bring economic benefits. And, as with ChAFTA, the projected economic benefits of AUSFTA were treated with

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[8] Armstrong, S., Australia – Japan Research Centre Working Paper No. 1, *The economic impact of the Australia–United States free trade agreement*, 2013.

[9] Mr Armstrong, p. 14.

[10] Official Committee Hansard, Joint Standing Committee On Treaties, Treaty tabled on 17 June 2015, Canberra, Monday, 7 September 2015.

[11] Centre for International Economics (CIE AUSFTA), *Economic Analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, April 2004.

scepticism at the time,[12] a suspicion which has since been justified by Mr Armstrong's findings.

It is for this reason that the government should take up the suggestion of the Productivity Commission for free-trade agreements to be referred to the commission for a rigorous and independent analysis of the impacts on the overall economy.

Recommendation: ChAFTA be referred to the Productivity Commission for for comprehensive economic analysis. Legislation enabling ChAFTA should be delayed until this analysis is completed.

Labour mobility

The committee report is right to note that "there appears to be confusion" over the impact of ChAFTA on labour market testing, particularly with respect to large projects covered by IFAs. This confusion reflects the contradictory and convoluted nature of the agreement, with labour market testing being addressed at different points in the agreement itself, a side letter and a MoU; and with there being little legal guidance or precedence as to the actual interplay between these sections.

As such, it is absurd that the committee report fails to make any recommendation in respect of labour mobility. This is an abrogation of the committee's responsibility.

The confusion around labour market testing reflects the extraordinarily contradictory statements in made in this respect. DFAT proclaims on their website that, through IFAs, Chinese companies will have:

> ...increased access to skilled overseas workers when suitable local workers cannot be found.

Yet the MoU states:

> There will be no requirement for labour market testing to enter into an IFA.

The committee report makes a distinction between the different phases of an IFA, and the different considerations for labour market testing when 'entering' into an IFA as opposed to 'labour agreement' phase of an IFA. This distinction is reflected in the MoU, which states that once an IFA is entered into:

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[12] Ross Garnaut famously said that the CIE AUSFTA modelling does not pass the laugh test. See: *Ross Garnaut says Government's FTA report laughable*, AM - Tuesday, 4 May , 2004, Reporter: Hamish Fitzsimmons.

> A labour agreement will be entered into in a timely manner and will set out the number, occupations and terms and conditions under which temporary skilled workers can be nominated, consistent with the terms of the IFA, and the sponsorship obligations associated with the labour agreement, including any requirements for labour market testing.

But the footnote to this clause reads:

> Where labour market testing is required, employers *may* satisfy this requirement by demonstrating that they have first tested the Australian labour market and not found sufficient suitable workers (emphasis added).

Even so, the DIBP provides assurances that labour marketing will still be undertaken on the basis that it is required in its Project Agreement Guidelines. But these are only guidelines, and the government has the discretion to waive any requirements in them.

To confuse matters even more, the MoU is, supposedly, not legally binding, but is clearly part of the ChAFTA package. Further, as noted by the committee, it is not clear how the provisions in the MoU relate to the temporary entry provisions in the agreement itself, which state that neither party shall:

> require labour market testing, economic needs testing or other procedures of similar effect as a condition for temporary entry.

For the committee to recommend that the Australian Parliament approve a treaty knowing that a fundamental component is so ambiguous is irresponsible and careless.

Recommendation: ChAFTA be referred to the Law Reform Commission for advice on the status and impact of labour mobility clauses in ChAFTA on Australian labour standards. Legislation enabling ChAFTA should be delayed until this advice is provided and acted upon.

Irrespective, the government can ensure domestic requirements for labour market testing to the extent that ChAFTA—or any other trade agreement—is subservient to Australian law. Former Australian Trade Minister, Craig Emerson, has outlined how migration regulations could be amended to make it mandatory (rather than discretionary) to undertake labour testing for low-skilled occupations.[13]

Recommendation: That the Migration Regulations 1994 are amended to make it mandatory for the government to undertake labour market testing for ANZSCO skill levels 1-4.

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[13] Craig Emerson Economics: *Economic Note No. 19: A way through the China-Australia FTA*.

However, there are other labour components of ChAFTA that are clearly inherent to the agreement, and that cannot be safeguarded against without renegotiating the agreement. With respect to temporary entrants to the labour market, Chapter 10 of the agreement states that no cap may be applied; and removes the requirements for labour market testing for a wide class of workers over certain visa periods, including "contractual service providers" for up to four years.

Imported labour would be required to be paid the amounts set by the Temporary Skilled Migration Income Threshold, currently set at $53 900. However, in many cases, this threshold is below the award rates for trades where the requirement for labour market testing has been removed.

Chapter 10 alone should be enough for the parliament to reject the enabling legislation. It opens up the possibility for the wages and conditions of workers on Australian soil to be undercut — including the right to collectively bargain— by a trade deal; and for these wages and conditions not to subject to oversight by domestic courts or the domestic industrial relations system.

Other issues

Labour and environmental standards

As is noted in the committee report, ChAFTA does not include chapters on labour right or environmental standards, unlike the recently negotiated KAFTA. The committee report states that:

> DFAT told the committee that the chapters and issues included in each individual FTA are determined by the two countries negotiating the agreement and therefore vary from agreement to agreement.

The conclusion to be drawn is that the Australian Government did not see fit to try to commit to the maintenance of current labour and environmental standards, or the advancement of future standards, through ChAFTA. As has been noted above, the erosion of Australian labour standards is inherent to the labour mobility clauses of the agreement, in accord with China's poor labour standards. China also has a poor record in environmental standards. Yet the Australian government is prepared to give preferential access to Chinese labour and products without seeking to defend our domestic values.

Investor-state dispute settlement mechanism

For all of the urgency surrounding ChAFTA, and the supposed need for Australia to act quickly to gain a competitive advantage, the government appears to have foregone any first mover advantage with respect to ISDS. The investment chapter

is clearly unfinished. This is explained by DFAT on the basis that China will know what it wants in ISDS clauses once it has completed bilateral negotiations with the EU and the US. A review of the ISDS provisions in three years' time will establish the details. In other words, Australia will wait to see what China works out with the EU and the US, and then follow suit. Presumably, this will include policy regarding indirect expropriation, which leaves open the prospect that provisions will be included that would allow Chinese companies to sue the Australian Government for the impact that any environmental or public health laws might have on their profits.

As it stands, the existing investment chapter is unusually uneven. Chinese investors have been provided full market access in Australia, but this privilege has not been reciprocated, and Australian investors will not be afforded protection in China in respect of the "establishment or acquisition of a new, separate investment". On discriminatory measures—domestic laws limiting the scope of foreign companies—Australia has listed specific exclusions, whereas China has applied a blanket exclusion. In other words, ChAFTA removes some of regulatory barriers for Chinese companies investing in Australia, but does not remove any for Australian companies investing in China.

The ISDS chapter also makes a regressive step on transparency. Hearings and documentation in relation to any ISDS proceedings initiated under ChAFTA can be kept secret at the request of either party. This is in contrast to the ISDS provisions in other recently agreed to treaties, including KAFTA.

ChAFTA provides a peculiar inversion of the historical origins of ISDS. As noted in the committee report, ISDS clauses originated to protect investors — usually from liberal democracies — from expropriation in developing countries with less well-established legal systems. Yet the investment chapter of ChAFTA is strongly weighted in favour of China, and reflects the more autocratic and secretive nature of its government.

Again, the committee has failed to make any recommendation with respect to the investment provisions in ChAFTA, despite the problems that are evident. For the Australian Greens, the investment chapter is also grounds enough for Australia not to enact the treaty. It does little to further the interests of Australian companies, and does nothing to further the interests of open and transparent public policy.

Senator Peter Whish-Wilson