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Trade, Labor and EU Law Perspectives

What happens next for pending FTAs and our trade agenda after the election?

Andrew Hudson (Rigby Cooke Lawyers) · Wednesday, May 15th, 2019



I write this article on 12 April 2019, shortly after the announcement of the Federal Budget and the announcement of the date for the Federal election. As expected, this period encompassed the usual claim and counter – claim between the major political parties and the usual cynicism that even after the election, the political landscape may not change significantly.

Given recent political history there is also a level of interest (and concern) as to what our preferential voting procedure will deliver from the smaller political parties or independents. This is especially the case with our Senate where the inability of a major party to secure a majority means that the game of persuasion and compromise will continue to secure passage of legislation. That usually delivers some unlikely alliances.

This article is likely to be published shortly before the next election takes place and in those circumstances I thought it may be useful to consider a few of the trade – related issues which may be affected by the election (or not).

Trade is good

Unlike many countries (Brexit anyone?), both major political parties share many of the same views regarding the trade agenda. There certainly seems to be bi – partisan support to advance the trade agenda in a way to ensure growth in exports and GDP and deliver benefits to a wider class of members of society.

These views include support for the World Trade Organisation and its dispute settlement arrangements as the best means to address global trade tensions, albeit with some changes to those arrangements to address a number of legitimate concerns raised about the existing regime.

The bi – partisan approach extends to support of Free Trade Agreements (FTA) being negotiated such as RCEP, the Pacific Alliance, the EU and the UK. The Federal opposition seems to have expanded that agenda to include one deal across all APEC countries.

Improving the position of SMEs

Recent research and reports by Parliamentary inquiries have confirmed that only a relatively small section of society has engaged with the trade agenda and secured benefits while many SMEs have yet to secure the same benefits. Indeed, the engagement of SMEs seems to have “flat lined” with little use of FTAs. Both of the major parties share the same interest in supporting SMEs getting into exports and securing benefits from the trade agenda and both have worked together to advance that agenda – and both have advanced ideas to assist in that process.

For example in the recent Federal Budget, the Federal government announced a significant increase in funding for the Export Market Development Grant scheme as well as more funding for the Trade Start programme and continued funding for work against Non – Tariff Barriers (NTBs). The recent Parliamentary inquiries have endorsed the ongoing work of Austrade and other agencies to assist industry to understand and use FTAs as well as enlisting the assistance of groups such as licensed customs brokers and freight forwarders to similarly improve understanding and use of FTAs

In a recent speech the Shadow Trade Minister made a number of announcements of initiatives aimed at improving SME engagement including creating a category of “cleared advisors” from business, trade unions and other bodies (hopefully industry associations). In a process similar to that existing in the US, those cleared advisors would have “real time” access to negotiations for FTAs including the versions of the text of the FTAs and provide informed feedback to negotiators. Presumably this will not go as far as the full US experience but it may create an additional level of transparency to encourage the interest in the FTAs as they are negotiated in the hope of “ownership” of the FTAs. The Shadow Trade Minister also addressed the issue of NTBs through the proposal to establish a joint team made up of officers from DFAT, Austrade, the Department of Agriculture and the Department of Industry to work collaboratively to address NTBs.

So far so good – but what about current and future FTAs

The main point of difference now seems to reside with what should actually be in FTAs. For some time there has been resistance to certain aspects of FTAs, including Investor – State Dispute Settlement (ISDS) provisions which potentially enable the private sector to pursue disputes directly with sovereign governments. Other concerns include the suspension of labour – market testing for skilled migrants and compromises to existing regimes for biosecurity, trade remedies, environment protection and direct foreign investment in crucial industry sectors. Those concerns are seen to have contributed to a sense of distrust on FTAs which had contributed to a lack of use as well as

active opposition from some groups.

For the Federal opposition these concerns led to the change of policy position on FTAs during 2018 so that it would not endorse FTAs without an independent economic assessment of benefits of those FTAs. Further, the opposition policy is now to oppose any FTAs which would include ISDS provisions or remove or reduce labour – market testing requirements for skilled migration. Not only would that policy require rejection of future FTAs including such provisions but would also require Australia to approach existing FTA partners seeking to remove such provisions in existing FTAs. What is not clear is the level of commitment to such policy positions, namely will proposed FTAs be opposed based on those provisions in all cases or whether it would lead to withdrawal from existing FTAs.

It is not that these positions are necessarily new – they have informed active debates here and overseas for a number of years. Parties in opposing positions have extensive research and arguments about these issues. However the opposing positions have not been quite so clear until now and the unresolved question is whether they will be tested or register on the interests of the voters.

The issue will return after the election as there are three main FTAs which have been negotiated and signed by the Federal government but which have yet to be cleared by the Parliamentary process including review by the Joint Standing Committee on Treaties (**JSCOT**) and the passage of enabling legislation mainly relating to customs procedures. That process became heated relating to ChAFTA and TPP11 but they were eventually ratified and implemented. In the case of the Peru – Australia FTA, the deal has been before JSCOT (twice) to general endorsement but enabling legislation has yet to be passed. In the case of the Indonesia – Australia Closer Economic Partnership Agreement and the Australia – Hong Kong Free Trade Agreement, while both have been signed, both need to pass through the JSCOT process as well as securing the passage of relevant customs legislation. Whether there is a change in Federal government or there remains a lack of a majority in the Senate, then there is likely to be an ongoing contested process for these FTAs especially as the Shadow Trade Minister was only prepared to say that he looked forward to those FTAs being subjected to Parliamentary scrutiny.

In the absence of a clear majority for either major party following the Federal election, our ongoing FTA agenda is less clear than has previously been the case. It may well depend on the level of conviction of both major parties or the position of any smaller parties or independents who control the Parliamentary process to advance the FTAs. If the Federal opposition takes clear control of the Parliament then there does exist the real risk that completion of proposed future FTAs which are still being negotiated such as the EU and UK FTAs, (let alone the current deals or other future deals) may be more difficult than is presently the case. Ultimately however, the theories of political position are often overcome by sensible compromise.

It won't quite be Brexit but it will be interesting!

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