

TRANS-PACIFIC PARTNERSHIP AGREEMENT

CHAPTER SUMMARY: STATE-OWNED ENTERPRISES AND DESIGNATED MONOPOLIES

The State-Owned Enterprises (SOEs) and Designated Monopolies Chapter includes ground-breaking rules aimed at ensuring these entities make decisions on a commercial basis and compete with private enterprises on a level playing field, without receiving unfair advantages from the governments that own them.

SOEs can be used to deliver critical public services, but some also operate in the commercial space and compete with private businesses. The TPP disciplines help to ensure that commercial SOEs operate in a transparent manner and in a way that does not put Australian companies at a disadvantage.

Australian exporters and investors will benefit from this Chapter in a number of ways. The Chapter will help to ensure SOEs of another TPP Party do not unjustifiably discriminate against Australian suppliers of goods and services, or make sales and purchasing decisions that are not based on standard commercial considerations such as price, quality and availability of inputs and outputs.

The Chapter also builds on Parties' existing WTO commitments aimed at ensuring, for example, that financial support provided by a TPP government to its SOE does not have an adverse impact on Australian businesses that are competing in, or are seeking to enter, the relevant market. Such support can include subsidies, grants, debt forgiveness, below market-rate loans, and government-backed guarantees. These disciplines help to level the playing field between SOEs and Australian businesses exporting or investing in TPP Parties.

Australian businesses will also benefit from provisions of the Chapter that ensure more information is publicly available on SOEs and designated monopolies.

Importantly, the Chapter provides flexibilities for Australia to continue to use SOEs to deliver public services. The SOEs and Designated Monopolies Chapter provisions are consistent with Australia's policy on competitive neutrality. That policy requires federal, state and local governments to ensure that they do not provide competitive advantages to any SOEs in their commercial activities simply because they are government owned. This policy facilitates competition between SOEs and private enterprises in Australia (whether foreign or domestic owned).

MORE INFORMATION ON THE CHAPTER

Coverage

For an enterprise to be considered an SOE and be subject to the TPP rules, it must be an enterprise that is principally engaged in commercial activities; and in which a TPP Party directly owns more than 50 per cent of the share capital, controls the exercise of more than 50 per cent of the voting rights, or holds the



power to appoint a majority of members of the board of directors or any other equivalent management body.

A designated monopoly means a privately owned monopoly that is designated after the date the TPP enters into force, and any government monopoly that a Party designates or has designated.

The scope provisions clarify the situations where the Chapter, or certain provisions, do not apply, including the following:

- independent pension funds and certain activities of sovereign wealth funds;
- government procurement; and
- regulatory or supervisory activities of central banks and financial regulatory bodies, and non-government bodies exercising authority over financial service suppliers.

The key disciplines of the Chapter also do not apply to:

- SOEs with an annual revenue of less than SDR 200 million (currently around A\$389 million); or
- services supplied in the exercise of governmental authority.

Delegated authority and Courts and administrative bodies

In cases where a TPP Party delegates authority to SOEs or designated monopolies, the Chapter requires that the Party ensure these entities do not act in a manner inconsistent with obligations under the TPP when exercising that authority.

Under the Chapter, TPP Parties are required to ensure their courts have jurisdiction over civil claims against foreign-owned SOEs for commercial activities carried on in their territory. TPP Parties must also ensure their administrative bodies that regulate SOEs do so in an impartial manner.

Commercial considerations and non-discriminatory treatment

TPP Parties must ensure:

- their SOEs act in accordance with commercial considerations when buying or selling goods and services; and
- their designated monopolies act in accordance with commercial considerations in their purchase or sales of the monopoly good or service in the relevant market.

These entities must base their purchasing and sales on price, availability, marketability, transportation and other factors that would normally be taken into account by privately-held enterprises in the relevant industry. This obligation does not apply to SOEs that are acting pursuant to a government mandate to make services available to the general public or monopolies in fulfilment of the terms of their designation, provided the purchases and sales are done so on a non-discriminatory basis.

The provisions of the Chapter also require a TPP Party's SOEs and designated monopolies to accord non-discriminatory treatment in their purchases and sales of goods and services. This means, for example, an SOE from a TPP Party purchasing mining equipment must provide no less favourable

treatment to mining equipment suppliers from Australia than it provides to domestic or other foreign suppliers of mining equipment.

Non-commercial assistance

Nothing in the Chapter prevents TPP Parties from providing funding or other support to their SOEs, including when establishing new SOEs. However, the Chapter specifies that no TPP Party shall cause 'adverse effects' to another Party's interests through the use of non-commercial assistance provided directly or indirectly to its SOEs.

'Adverse effects' is defined in the Chapter and includes the situation in which the non-commercial assistance provided by a TPP Party displaces or impedes from the market, or significantly undercuts the price of, imports of a like good or service from another TPP Party or sales of a like good or service produced by an enterprise that is a covered investment. A service supplied by an SOE in a Party's own territory is deemed not to cause adverse effects.

The Chapter provisions prevent a TPP Party from providing non-commercial assistance to an SOE that produces and sells goods and is established in the territory of another Party to the extent that the SOE causes injury to the domestic industry of the other Party. 'Injury' is defined and means material injury or threat of material injury to a domestic industry, or material retardation of the establishment of such an industry.

Exceptions

The Chapter permits TPP Parties to list their specific exceptions to certain provisions of this Chapter. In the listing of these exceptions, information is provided – where possible - on the relevant SOE or designated monopoly, the nature of its activities that do not or will not conform to provisions of the Chapter, and any relevant government measures.

A number of Parties, including Australia, have taken an exception against certain obligations in the Chapter for SOEs that are owned or controlled, and monopolies that are designated, at the sub-central (state and territory) level of government. TPP Parties have agreed to enter into further negotiations five years after the Agreement has entered into force on the possible extension of the application of this Chapter, including to SOEs and designated monopolies operating at the state, territory or local levels of government.

The Chapter permits TPP Parties to rely on general exceptions in specific circumstances, including where:

- TPP Parties are responding to national or global economic emergencies; and
- in the case of an SOE supplying financial services, if that supply supports exports or imports or private investment overseas, provided those services are supplied on comparable terms to those obtainable in the commercial market.

Transparency and cooperation

Under the transparency provisions of the SOEs and Designated Monopolies Chapter TPP Parties are required:

- to provide information on their SOEs within six months of entry into force of the TPP, and update this information on an annual basis;
- to promptly notify other TPP Parties or otherwise make public the designation of a monopoly or the expansion of the scope of an existing monopoly and the terms of its designation; and
- to respond promptly another TPP Party's written requests for certain information regarding an SOE or government monopoly.

The transparency provisions of the Chapter ensure that any confidential information provided by a TPP Party is not disclosed without the prior informed consent of the Party concerned.

Outcomes on cooperation and the establishment of a committee provide opportunities for the TPP Parties to exchange information and views on improving the governance and operation of SOEs, and promote the principles underlying the Chapter in relevant regional and multilateral institutions.