

The Senate

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Foreign Affairs, Defence and Trade  
References Committee

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Blind agreement: reforming Australia's  
treaty-making process

June 2015

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## Foreword

As this report on Australia's treaty-making process was being finalised the China-Australia Free Trade Agreement—a major trade deal some ten years in the making and negotiated in secret—was signed, tabled in the Australian Parliament and referred to the Joint Standing Committee on Treaties (JSCOT) for inquiry and report within 20 joint-sitting days, consistent with the process that has been in place for two decades. The Trans-Pacific Partnership (TPP) is also entering its final stages of negotiation with parliamentarians told recently they can access the draft text, but only after signing confidentiality agreements.

The committee's inquiry has been timely if for no other reason that it throws into sharp relief compelling evidence from industry bodies, the union movement, academic experts and other stakeholders that the treaty-making process is in need of reform. During the committee's hearing the Department of Foreign Affairs and Trade (DFAT), which is responsible for negotiating, consulting and finalising free trade agreements, was a lone voice in supporting the status quo. This immediately raised a suspicion that not is all right with the current process.

The committee heard consistent evidence that the current process falls short on a number of counts. First and foremost, all treaties, including complex free trade agreements, are only presented to the parliament and subject to scrutiny after they are signed by the government. That parliament is faced with an all-or-nothing choice when considering legislation to bring an agreement into force prevents it from pursuing a key scrutiny and accountability responsibility. It is no longer satisfactory for parliamentarians and other stakeholders to be kept in the dark during negotiations when Australia's trading partners, including their industry stakeholders, have access under long-established and sensible arrangements.

Second, it is pointless for JSCOT inquiries to begin after agreements are signed. This does not provide an adequate level of oversight and scrutiny. Parliament should play a constructive role during negotiations and not merely rubber-stamp agreements that have been negotiated behind closed doors. Third, the department's process of consultation is not working. Meetings and briefings with stakeholders are plentiful, but they are not as effective as they could be and fall short of expectations, adding to stakeholders' frustration. Finally, 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. This fuels media speculation on the content of draft treaty text when certainty based on fact is required. It seems only the government holds the view that the current National Interest Analysis adds value to the process.

It is counter-intuitive for complex trade agreements which are years in the making to be negotiated in secret, subject to stakeholder and parliamentary scrutiny for a few short months with no realistic capacity for text to be changed, and then for implementing legislation to be rushed through parliament unamended. This comes very close to making a mockery of the process and of parliament's involvement.

In addressing these problems, this report steers a middle course between doing nothing, which is the entrenched position of the Coalition Government, and recommending that treaties be subject to parliamentary approval, which is unlikely to garner political support any time soon. The Opposition favours incremental change building on the package of sensible reforms introduced by government in 1996. This is why the report makes practical recommendations aimed at improving the level of transparency in negotiating treaties and the quality of consultations between DFAT and stakeholders, and making parliament a real player in treaty-making.

Specifically, the report's key recommendations are that JSCOT engage more in the oversight of trade agreements under negotiation and not wait until the end of the process; that parliamentarians and stakeholders be given access to treaty text on a confidential basis during negotiations and not a token look at the end as with the TPP; that trade agreements be subject to an independent cost-benefit analysis prepared up front at the commencement of negotiations; and that a model agreement be developed as a template for all future agreements that deal with complex issues such as investor-state dispute settlement, intellectual property and copyright.

These are all practical measures that improve stakeholder engagement during treaty negotiations and entrench democratic accountability through effective parliamentary scrutiny using existing committee processes. The measures also better serve Australia's national interest by providing a more strategic and less reactive approach to treaty-making.

The report's recommendations are consistent with the bi-partisan approach of successive Australian governments to trade liberalisation including pursuit of free trade agreements. They do not question the constitutional parameters of treaty-making, undermine the executive's authority to sign treaties or hinder the ability of the Australian Government to implement free trade agreements in a timely fashion. The recommendations can be introduced quickly and without the need for legislation. Put bluntly, the government has nothing to fear in supporting these measures. This report will lead to a better treaty-making process and ultimately better treaty outcomes for Australia in the future.

Doing nothing is no longer an option. Treaty-making in Australia faces a number of challenges which cannot be met by continuing with the existing process unchanged. These challenges include the changing nature of Australia's international obligations and their intrusion into domestic law and regulation; new methods of consultation and negotiation adopted in overseas jurisdictions resulting in less secrecy; and ensuring that DFAT is adequately resourced with the knowledge and skills to negotiate, conclude and review complex free trade agreements.

The committee majority commends this report to the Senate and urges the adoption of its recommendations.

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

# Abbreviations

ACCI	Australian Chamber of Commerce and Industry
ADA	Australian Digital Alliance
ADF	Australian Defence Force
AFTINET	Australian Fair Trade and Investment Network
ALCC	Australian Libraries Copyright Committee
AUSFTA	Australia-United States Free Trade Agreement
ChAFTA	China-Australia Free Trade Agreement
DFAT	Department of Foreign Affairs and Trade
EU	European Union
FADT	Foreign Affairs, Defence and Trade Senate Standing Committee
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
HRIA	Human rights impact assessment
IP	Intellectual property
ISDS	Investor-state dispute settlement
JAIPA	Japan-Australia Economic Partnership Agreement
JSCOT	Joint Standing Committee on Treaties
KAFTA	Korea-Australia Free Trade Agreement
NIA	National Interest Analysis
NTEU	National Tertiary Education Union
PJCHR	Parliamentary Joint Committee on Human Rights
SNCRM	standing national reporting and coordination mechanism

TPA	Trade Promotion Authority
TPP	Trans-Pacific Partnership
UN	United Nations
WIPO	World Intellectual Property Organization
WTO	World Trade Organisation

# Recommendations

## Recommendation 1

**3.60** The committee recommends that parliamentarians and their principal advisers be granted access to draft treaty text upon request and under conditions of confidentiality throughout the period of treaty negotiations. The committee recommends that the government provides an access framework and supporting administrative arrangements.

## Recommendation 2

**3.88** The committee recommends that the Joint Standing Committee on Treaties adopt a process of ongoing oversight of trade agreements under negotiation. This process is to include:

- private briefings from the Minister for Trade and Investment and the Department of Foreign Affairs and Trade under conditions of confidentiality at key points during negotiations;
- consultation with stakeholders with confidential access to negotiating texts, to enable JSCOT to form an evidence-base for its oversight work;
- writing to the minister and inviting the minister to respond to its concerns; and
- a summary of its ongoing oversight role, including relevant correspondence with the minister, as an annex to its public report on the agreement.

## Recommendation 3

**3.90** The committee recommends that the Parliamentary Joint Committee on Human Rights consider the human rights implications of all proposed treaties prior to ratification and report its findings to parliament.

## Recommendation 4

**4.63** The committee recommends that on entering treaty negotiations, Australia seeks agreement from the negotiating partner(s) for the final draft text of the agreement to be tabled in parliament prior to authorisation for signature. In the absence of agreement, the government should table a document outlining why it is in the national interest for Australia to enter negotiations.

## Recommendation 5

**4.66** The committee recommends that, subject to the agreement of negotiating countries, the Department of Foreign Affairs and Trade publish additional supporting information on treaties under negotiation, such as plain English explanatory documents and draft treaty text.

## **Recommendation 6**

**4.72** The committee recommends that stakeholders with relevant expertise be given access to draft treaty text under conditions of confidentiality during negotiations. The committee recommends that the government develop access arrangements for stakeholders representing a range of views from industry, civil society, unions, consumer groups, academia and non-government organisations.

## **Recommendation 7**

**5.28** The committee recommends that the government, prior to commencing negotiations for trade agreements, tables in parliament a detailed explanatory statement setting out the priorities, objectives and reasons for entering negotiations. The statement should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.

## **Recommendation 8**

**5.31** The committee recommends that a cost-benefit analysis of trade agreements be undertaken by an independent body, such as the Productivity Commission, and tabled in parliament prior to the commencement of negotiations or as soon as is practicable afterwards. The cost-benefit analysis should inform the government's approach to negotiations.

**5.32** The committee further recommends that:

- treaties negotiated over many years be the subject of a supplementary cost-benefit analysis towards the end of negotiations; and
- statements of priorities and objectives and cost-benefit analyses stand automatically referred to the Joint Standing Committee on Treaties for inquiry and report upon their presentation to parliament.

## **Recommendation 9**

**5.35** The committee recommends that the government develop a model trade agreement that is to be used as a template for future negotiations. The model agreement should cover controversial topics such as investor-state dispute settlement, intellectual property, copyright, and labour and environmental standards and be developed through extensive public and stakeholder consultation.

## **Recommendation 10**

**5.57** The committee recommends that National Interest Analyses (NIAs) be prepared by an independent body such as the Productivity Commission and, wherever possible, presented to the government before an agreement is authorised by cabinet for signature. NIAs should be comprehensive and address specifically the foreseeable environmental, health and human rights effects of a treaty.

# Chapter 1

## Introduction

### Referral

1.1 On 2 December 2014, the Senate referred an inquiry into the Commonwealth's treaty-making process to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 18 June 2015. On 15 June 2015 the Senate agreed to extend the reporting date to 25 June 2015.

1.2 The terms of reference for this inquiry are as follows:

The Commonwealth's treaty-making process, particularly in light of the growing number of bilateral and multilateral trade agreements Australian governments have entered into or are currently negotiating, including:

- a. the role of the Parliament and the Executive in negotiating, approving and reviewing treaties;
- b. the role of parliamentary committees in reviewing and reporting on proposed treaty action and implementation;
- c. the role of other consultative bodies including the Commonwealth-State-Territory Standing Committee on Treaties and the Treaties Council;
- d. development of the national interest analysis and related materials currently presented to Parliament;
- e. development of the national interest analysis and related materials not currently presented to parliament, such as the inclusion of environmental impact statements;
- f. the scope for independent assessment and analysis of treaties before ratification;
- g. the scope for government, stakeholder and independent review of treaties after implementation;
- h. the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties;
- i. a comparison of the consultation procedures and benchmarks included by our trading partners in their trade agreements;
- j. exploration of what an agreement which incorporates fair trade principles would look like, such as the role of environmental and labour standard chapters; and
- k. related matters.

### Purpose of the inquiry

1.3 The committee's intention in establishing an inquiry into the treaty-making process was not to cover the same ground as the Legal and Constitutional Affairs References Committee's 1995 landmark inquiry on this subject,<sup>1</sup> or duplicate the work of the Joint Standing Committee on Treaties (JSCOT) in subjecting trade agreements

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1 Legal and Constitutional Affairs References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995.

to scrutiny. The committee has not revisited the underlying constitutional issues and debates surrounding the executive power to enter into treaties (section 61) versus the legislative power to implement treaties (section 51). It is now widely accepted that treaty-making is the formal responsibility of the executive while parliament's role is to examine proposed treaties (via JSCOT) and consider legislation giving effect to them.

1.4 The wide-ranging reforms introduced by the Howard Government in 1996, including establishment of JSCOT, were designed to make the treaty-making process more open, transparent and systematic, and create a greater level of parliamentary involvement in the process. While the reforms made significant improvements to the treaty-making process, the current inquiry examines whether further refinements are required.

1.5 This inquiry has enabled the committee to examine a number of issues including whether:

- there is scope for the parliament and parliamentary committees to play a greater and more meaningful role in negotiating, approving and reviewing treaties *before* they are signed;
- the current mechanisms for consultation with stakeholders are adequate and whether there is room for improvement;
- there is scope for independent assessment, analysis and review of treaties both before *and* after implementation; and
- the current process of public and stakeholder consultation provides an adequate level of openness, transparency and accountability.

1.6 It is nearly 20 years since a Senate committee has examined the negotiation and consultation process surrounding treaty-making and parliamentary oversight of treaties, from the perspective of the process *before* treaties are finalised and signed by the executive. Although the Terms of Reference for this inquiry refer to treaty-making in general, the committee's attention focused on the large and complex free trade agreements that are of major political, economic and social significance for Australia.<sup>2</sup> Examples include free trade agreements with Korea and Japan which were concluded in 2014 and other major agreements in the final stages of negotiation, including with China and the Trans-Pacific Partnership. These major agreements form an important political backdrop to the current inquiry and are referred to in most of the evidence received by the committee.

1.7 The issues covered in this report and the committee's recommendations focus on the process surrounding the negotiation of the major trade agreements which has generated significant interest and debate in the community, as distinct from other minor treaties which do not attract the same level of public attention or controversy. While a number of issues specific to individual trade agreements, such as inclusion of

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2 The issues raised in evidence in relation to the negotiation and consultation process and parliamentary oversight do not in general apply to identifiably minor treaty actions which do not impact significantly on the national interest.

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investor-state dispute settlement (ISDS) clauses and intellectual property (IP) and copyright chapters, are controversial and the subject of public debate, they are only considered in this report to the extent that they shed light on the treaty-making process.

1.8 The purpose of the current inquiry is to revisit the treaty-making reforms introduced by the Howard Government to identify opportunities for more openness, transparency and accountability in the way Australia negotiates treaties. This includes practical avenues for increasing stakeholder and community consultation and parliamentary scrutiny of proposed treaties, in particular *before* they are signed by the executive.

### **Structure of the report**

1.9 The report consists of six chapters including this brief introduction. Chapter 2 provides background on the treaty-making process in Australia including the reform package introduced in 2006 and the changing nature of treaties. Chapter 3 explores the role of parliament in the treaty-making process, including the issue of parliamentary approval of treaties and proposals to engage parliament and its committees earlier in negotiations. Chapter 4 discusses concerns around the level of consultation and transparency in treaty-making and proposals to reform the current process. Chapter 5 assesses issues relating to agenda-setting and the post-implementation of treaties. Chapter 6, the conclusion, pulls together the main threads of the report.

### **Conduct of the inquiry**

1.10 The committee advertised the inquiry on its website and in the media. The committee also wrote to individuals and organisations likely to have an interest in the inquiry inviting them to make written submissions by 27 February 2015.

1.11 The committee received 94 submissions. A large number of these were from individuals concerned about the secrecy surrounding the negotiations of bilateral and regional free trade agreements, in particular the Trans-Pacific Partnership. The submissions are listed at Appendix 1 and are available on the committee's website.

### **Acknowledgments**

1.12 The committee would like to thank all the organisations and individuals committed to improving the treaty-making process for making submissions, providing additional information or appearing at public hearings in Canberra on 4 and 5 May 2015.



# Chapter 2

## Background

### Development of the treaty-making process

2.1 A treaty is an agreement between states that is binding under international law. The power to enter into treaties is an executive power granted under section 61 of the Constitution. The power to implement treaties is a legislative power granted by section 51(xxix). Under this constitutional framework, decisions about negotiating, signing or becoming party to a treaty are taken by the executive. The decision to pass implementing legislation—which is necessary because treaty commitments are not automatically incorporated into Australian law—is made by the parliament. The Department of Foreign Affairs and Trade (DFAT) is the lead commonwealth agency on treaty-making processes.

2.2 In the years after Federation, the parliament was involved in the approval of treaties before their ratification and, in some cases, the actual treaty itself as negotiated by the British Government (for example, the Anglo–French Treaty of 1919) required this form of approval. According to Professor Anne Twomey, up until the mid-1970s, it was still common practice for governments to seek parliamentary approval of treaties where commonwealth legislation was needed to implement them:

Approval was normally included in the statute which gave effect to the treaty, and the treaty would be ratified after the statute was enacted but before it came into effect. However, this practice began to lapse in the late 1970s.<sup>1</sup>

2.3 In 1961, Prime Minister Menzies announced measures to keep parliament informed about treaty matters. This would involve tabling in both houses the text of treaties at least 12 sitting days before the government was to commit itself to the treaty by ratifying it. However, this practice soon fell into disuse and by the late 1970s treaties were being tabled in bulk every six months. While little attention was initially paid to the abrogation of the Menzies rule, by the early 1990s further initiatives were implemented to improve the flow of information about treaties to the parliament. The Minister for Foreign Affairs and Trade, Senator Evans and the Attorney-General, Mr Lavarch, announced that the government would supplement the flow of information '...by now tabling, wherever possible, all treaties, other than sensitive bilateral ones, before action is taken to adhere to them'. Notwithstanding this initiative, the government continued the practice of tabling treaties in large batches every six months, preventing any opportunity for detailed examination and scrutiny by the parliament.<sup>2</sup>

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1 Department of the Parliamentary Library, *Federal Parliament's Changing Role in Treaty Making and External Affairs*, Research Paper No. 15 1999–2000, p. 23.

2 Department of the Parliamentary Library, *Federal Parliament's Changing Role in Treaty Making and External Affairs*, Research Paper No. 15 1999–2000, pp 29-30.

### ***Treaty-making reform package of 1996***

2.4 The Legal and Constitutional Affairs References Committee's 1995 inquiry into the Commonwealth's treaty-making power and external affairs power was the most comprehensive and detailed examination of these issues undertaken by a parliamentary committee. It was the culmination of mounting pressure to reform the treaty-making process in Australia. There had been growing concern about:

- a perceived loss of national sovereignty;
- a democratic deficit through lack of parliamentary scrutiny of treaty-making;
- absence of accountability and insufficient information for the public to assess the merits of particular treaties; and
- the impact of treaties and the use of the external affairs power on the federation.

2.5 The committee's report, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, included ground-breaking recommendations most of which were accepted by government.<sup>3</sup> The government's response acknowledged that the report: '...provides a sound basis for the reform of aspects of the treaty-making process as it affects Australia, particularly as the Committee was able to reach unanimity on the recommendations put forward'. As a number of recommendations envisaged legislation to bring them into force, the response noted that it was important for the government: '...to move quickly to put the new processes in place and that this is best done through non-legislative means'.

2.6 The reforms introduced by government in June 1996 consisted of five main pillars:

- tabling of treaties in parliament at least 15 joint sitting days before binding treaty action is taken by the government;
- preparation of a National Interest Analysis (NIA) and associated material for each proposed treaty action;
- establishment of the Joint Standing Committee on Treaties (JSCOT) whose mandate is to inquire into and report on matters arising from treaties. Other than in exceptional circumstances, the government does not take binding treaty action until JSCOT has reviewed and reported on the treaty. Other parliamentary committees may also consider specific proposed treaties;
- establishment of the Treaties Council as an adjunct to the Council of Australian Government; and
- establishment on the internet of the online Australian Treaties Library.

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3 Legal and Constitutional Affairs References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995.

2.7 The government gave an undertaking to review the reforms after they had been in place for two years. The review process commenced by DFAT in July 1998 was completed in August 1999. The review report found that while overall the reforms are 'working well' there was scope for building on improvements already made to the NIAs and for enhancement of the internet Australian Treaties Library. The report claimed that the reforms have greatly improved scrutiny, transparency and consultation in the treaty-making process, and community awareness of treaties.<sup>4</sup>

### *State and territory issues*

2.8 At the time the 1996 reforms were introduced, there was considerable interest from state and territory parliaments about their respective roles in the treaty-making process. The Federal-State Committee of the Victorian parliament, which was established in May 1996, presented its first and landmark report, *International Treaty Making and the Role of the States*, arising from its inquiry into overlap and duplication of roles and responsibilities between the Commonwealth and the states.<sup>5</sup> The main purpose of the inquiry was to seek evidence on the effectiveness of the 1996 reform package from a states' perspective, and the broader issue of the role of the states in the treaty process. The report's introduction made two main observations:

...if the States do not become more directly involved in Australia's negotiation of international obligations, they will be unable to influence matters which have a potentially enormous impact on their traditional jurisdiction.

Treaty making in Australia is a process dominated by the executive. Although Australia's entry into treaties can have a huge consequence for the scope of State Parliamentary activity, there is currently no State Parliamentary involvement in Australian treaty making. Current Commonwealth-State consultation on treaty issues takes place entirely through bureaucratic arrangements.<sup>6</sup>

2.9 It was the committee's view that this absence of parliamentary involvement constituted '...a lack of democratic participation in the generation of international legal obligations for Australia'. Moreover, it argued that the interests of democracy and federalism were best served if state parliaments sought an enhanced role in the process of treaty-making and treaty implementation.

2.10 The report recommended that the Victorian parliament establish and adequately resource a treaties review committee with responsibility to advise the parliament on all matters concerning international treaty-making in Australia. The committee's functions would be:

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4 Commonwealth of Australia, *Review of the Treaty-Making Process*, August 1999.

5 Federal-State relations Committee, *International Treaty Making and the Role of the States*, Parliament of Victoria, October 1997.

6 Federal-State relations Committee, *International Treaty Making and the Role of the States*, Parliament of Victoria, October 1997, p. xvi.

- to acquire and bring together documentation and information relevant to Australian treaty-making, from all sources, as soon as it becomes available;
- to table in parliament, and on a regular basis, the schedule of Australia's treaty negotiations;
- to scrutinise NIAs;
- to prepare State Interest Analyses for those treaties of particular concern to Victoria;
- to monitor the work of other bodies and organisations dealing with treaty matters; and
- to commission research into the effects of international treaty making on the states, and on the Australian federal system.<sup>7</sup>

2.11 The committee further recommended that the tabling arrangements and process of scrutiny to be carried out by the new treaties review committee be instituted across all Australian state parliaments. The government's formal response stated that while it strongly supported the report's central theme that states have a greater involvement in Australia's treaty-making processes, it did not support the introduction of legislation to prescribe a single committee as a counterpart to JSCOT: 'The Parliament itself should determine how to deal with treaty matters in general and with particular treaties'.<sup>8</sup> Nor did the government support the recommendation that such a review committee be established across all state parliaments, on the grounds that the constitutional arrangements of each state are a matter for the state and it would be inappropriate to propose amendments to other states' constitutions.

2.12 In June 1999, JSCOT, in association with the Australasian Study of Parliament Group, convened a seminar on the role of parliaments in treaty-making to coincide with the government's own review process. The then Chair of JSCOT, Mr Andrew Thomson MP, described the seminar as a historic event:

It was the first occasion on which representatives from the Commonwealth and State legislatures (and other interested organisations and individuals) gathered to consider how best to contend with an important and evolving issue—the role that parliaments can and should play in scrutinising the making of international law.<sup>9</sup>

2.13 The purpose of the seminar was to explore opportunities for Australian parliaments to become more aware of and involved in the process of treaty-making. Building on the work of Victoria's newly created Federal–State Committee in this

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7 Federal–State relations Committee, *International Treaty Making and the Role of the States*, Parliament of Victoria, October 1997, pp 77-78.

8 Government Response, Report of the Federal–State relations Committee on *International Treaty Making and the Role of the States*, April 1998.

9 Joint Standing Committee on Treaties, Report 24, *A Seminar on the Role of Parliaments in Treaty Making*, August 1999, Forward.

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area, the seminar generated a number of proposals for greater parliamentary involvement in treaty-making that would see more information about treaty proposals provided to state parliaments, more effective community consultations on treaty-making, and better cooperation between the Commonwealth and state and territory parliaments.

2.14 Two proposals stand out. First, a proposal by the Western Australian parliamentary participants (which sought to encapsulate the recommendations of the Victorian Federal–State Committee) included that all state and territory governments establish standing committees to review all matters concerning treaties; that protocols be established to enable such committees to be provided with all relevant information relating to each treaty; and that the Commonwealth only take binding action on any treaty after JSCOT has received representations on the matter from state and territory parliaments.

2.15 The second proposal, also triggered by the 1996 report of the Victorian Federal–State Relations Committee, was that all Australian parliaments contribute to the establishment of an inter-parliamentary working group on treaties. This was designed to give effect to the recommendation of the Federal–State Relations Committee that the Treaties Committee should liaise with state parliaments in conducting its treaty reviews. It was recommended that the inter-parliamentary working group on treaties:

- consist of members from all the parliamentary committees represented at the seminar;
- act as a forum for promoting public awareness of proposed treaty actions and encouraging wider parliamentary scrutiny of treaty making;
- meet every six months to review upcoming treaty actions; and
- be supported by secretariats of the states' respective committees on a rotational basis.<sup>10</sup>

2.16 Recognising the expression of support for the intent behind the proposal and its specific content, the seminar organisers noted that the proposal would stand in the seminar's records for the further consideration of seminar participants and all other interested parties. The seminar acknowledged that state and territory parliaments have a right to be involved in aspects of treaty-making; the valuable role that state and territory parliaments can play in improving public awareness of proposed treaties; and the need for state and territory parliaments to provide sufficient resources to allow parliamentarians to monitor treaty events.

2.17 There is no evidence to suggest that any of the practical proposals arising from the Victorian parliament committee report (1997) or the JSCOT seminar (1999) to enhance the role of parliaments in treaty-making ever gained traction or have been revisited by state or territory parliaments. State and territory involvement in the treaty-

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10 Joint Standing Committee on Treaties, Report 24, *A Seminar on the Role of Parliaments in Treaty Making*, August 1999, p. 16.

making process may no longer be the burning issue that it once was in the mid-1990s (further evidence on this issue is considered in Chapter 4).

### ***Further change***

2.18 During the launch of an enhanced Treaties Database in August 2002, the Minister for Foreign Affairs, the Hon Alexander Downer MP, announced two significant changes to the treaty-making process:

- the tabling period for treaty texts and NIAs was increased from 15 to 20 joint siting days for a subset of treaties—specifically, those of major political, economic and social significance; and
- the NIAs were required to be accompanied by additional background reports.

2.19 Further refinements to the process since 2008 included the introduction of a mechanism by which minor treaty actions would be referred to JSCOT without a requirement for tabling (unless the committee deemed tabling necessary), and with an Explanatory Statement rather than a NIA. The purpose of this change was to prevent JSCOT devoting time and resources to the examination of minor treaty action. There was also a requirement for each NIA to include an attachment on consultation and for a Regulation Impact Statement to be tabled in parliament together with the treaty text and NIA.<sup>11</sup>

### ***Current process***

2.20 The process created from the 1996 reforms, including additional changes introduced in 2002 and since 2008, remains in place today. During the inquiry, DFAT advised the committee that while the department plays a role in every treaty negotiation, it does not always play the lead role. However:

Where we do not [play the lead role] we are always involved in finalising the text, and we also always have a role in ensuring that the Australian treaty making requirements are met. Our key priority when we do that is to ensure that we are receiving the best possible outcome for the national interest.<sup>12</sup>

2.21 In terms of how DFAT approaches and manages the treaty-making process, the committee was told that once a mandate to start negotiations has been sought from the cabinet and the foreign minister in consultation with other ministers:

Consultations with industry, civil society and other interested parties are almost invariably undertaken at an early stage in the process, depending on the complexity of negotiations, and they will continue, usually, throughout the negotiations...DFAT's general approach is to consult early so that the negotiating strategies are informed by a broad range of interests and

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11 Department of Foreign Affairs and Trade (DFAT), *Submission 74*, p. 9.

12 Ms Cooper, Senior Legal Adviser, *Committee Hansard*, 4 May 2015, p. 28.

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priorities. The consultation process may include media releases, calls for public submissions and multiple rounds of face-to-face consultations.<sup>13</sup>

2.22 DFAT advised that, in relation to all agreements, officials from the relevant departments are involved in negotiations, attend negotiation sessions and are part of a working group which includes the Health, Attorney-General's and Agriculture departments:

A lot of departments are involved...There is no restriction. It is not as if the Department of Foreign Affairs and Trade would tell a department, who considered that their interests were affected, that they could not attend.<sup>14</sup>

2.23 DFAT's supplementary submission provided further details, especially in relation to the process of negotiating an agreement. Negotiations on trade agreements involve extensive consultation throughout the entire negotiating process with a wide range of stakeholders. This generally includes:

- calls for written submissions from stakeholders and the public;
- formal stakeholder consultation meetings, which are advertised and open to the public, and involve community groups, NGOs, trade unions, academics, peak industry bodies and business;
- meetings and other communication with interested groups, by DFAT and other departments, throughout the negotiations; and
- consultation with state and territory governments through regular meetings of the Commonwealth-State-Territory Standing Committee on Treaties (SCOT) and the Senior Officials' Trade and Investment Group (SOTIG).<sup>15</sup>

2.24 According to the DFAT submission:

Views expressed in consultations and written submissions are considered carefully by Australian Government negotiators. Consultations allow negotiators to understand the broad range of interests and views across the community, help identify commercially significant impediments to increasing Australia's economic links with our trading partners and guide Australia's negotiating position throughout the negotiations.<sup>16</sup>

2.25 For large and complex trade agreements such as the Trans-Pacific Partnership (TPP), the department involves up to 30 negotiators from within the Office of Trade Negotiations during the process. The Office of Trade Negotiations also includes the Trade Law Branch which is responsible for the overall legal elements of trade negotiations. In relation to the TPP negotiations, DFAT described Australia's negotiation process in the following terms:

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13 Ms Cooper, Senior Legal Adviser, *Committee Hansard*, 4 May 2015, p. 29.

14 Ms Holmes, Assistant Secretary, *Committee Hansard*, 4 May 2015, p. 32.

15 DFAT, *Supplementary Submission 74.1*, p. 1.

16 DFAT, *Supplementary Submission 74.1*, p. 1.

DFAT has convened over 1000 stakeholder briefing sessions on TPP negotiations since May 2011, including with State and Territory Governments, peak industry bodies, companies, academics, individuals, trade unions, consumer and other special interest groups and other organisations representing civil society. In these consultations, DFAT officials have updated stakeholders on the progress in the negotiations, discussed Australia's approach to the negotiation of issues of interest and received views and comments.<sup>17</sup>

2.26 In addition, DFAT advised that it held public stakeholder consultations in state capitals, most recently on 26 March 2014 in Melbourne and 27 March 2014 in Sydney. Such consultations are open to businesses, civil society and interested members of the public, and were advertised on the DFAT website. Since March 2014, consultations have been more specific and issue based. Invitations were sent to DFAT's regularly updated TPP stakeholder contact list, which includes over 450 individuals and organisations that have indicated interest in the TPP. Senior TPP negotiators have attended the briefings and provided information on the progress of negotiations. Negotiators are also available to answer follow-up questions after the briefing session via email, teleconference or in person.<sup>18</sup>

### **The changing face of treaties**

2.27 The committee heard compelling evidence that the scope and reach of bilateral and multilateral trade agreements is significantly different today from just a few decades ago. This is due to the complexity and subject matter of trade agreements, which extend well beyond traditional issues of trade and tariffs; reaching into areas of domestic policy, law and regulation, and the changing environment in which agreements are negotiated. The issue was captured by Professor Moir's submission:

Because our trade agreements now cover so many aspects of our regulatory system, they need [to] be far more cautious and careful in their analysis than they are currently getting. These regulatory systems affect important areas of not only our economy but also our society. Some, including patents, potentially affect our core competitive capabilities into the future. These issues are far too important to be negotiated in secret in close association with the interests of very large firms.<sup>19</sup>

2.28 Until 2001, Australia had an international trade policy focused on the World Trade Organisation and, apart from concluding a free trade agreement with Papua New Guinea, was a proponent of non-discrimination in international trade. According to the Law Council of Australia: 'Australia moved away from that position in 2001, when it negotiated a free trade agreement with Singapore, and has been negotiating as many FTAs as it can ever since'.<sup>20</sup>

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17 DFAT, *Supplementary Submission 74.1*, p. 2.

18 DFAT, *Supplementary Submission 74.1*, p. 2.

19 *Submission 68*, p. 19.

20 Dr Williams, Law Council of Australia, *Committee Hansard*, 5 May 2015, p. 25.

2.29 Historically, multilateral treaties were primarily designed to ensure peace and manage conflict between sovereign states. As early as the 14<sup>th</sup> and 15<sup>th</sup> centuries most bilateral agreements provided for trade and the safe passage of ambassadors. According to the Australian Human Rights Commission:

The law of diplomacy and the law of the sea were the formative treaties of the Middle Ages and moving into trade treaties in the 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> centuries. It has been a very long process developing the content. I think the point that is really made is that post the Second World War there was a huge development of international human rights law, but equally many thousands of committees negotiated bilaterally, regionally and multilaterally to cope with trade.<sup>21</sup>

2.30 However, in recent decades the focus of trade agreements has shifted from tariff setting to issues affecting domestic regulation, law and policy. Trade agreements now typically deal with a broad range of issues directly affecting people's lives including copyright, intellectual property rights, medicines and health care, patents and food labelling and access to good and services. The Public Health Association of Australia voiced its concern about the new and emerging breed of trade agreements that go well beyond traditional trade issues into areas that have previously been matters for domestic policy-making.<sup>22</sup>

2.31 The issue was captured in evidence by the Australian Fair Trade and Investment Network (AFTINET), using the TPP as an example:

...the TPP deals with a very wide range of domestic law and policy. We have heard already that pharmaceutical companies want stronger patents on medicines, which would delay the availability of cheaper generic medicines. Media companies want larger copyright payments and restrictions on internet use and so on...Food, alcohol and tobacco companies want to influence government regulation in all of those areas, and in the TPP, the US is very much driving the negotiations on behalf of their major export industries, which these companies are active in.<sup>23</sup>

2.32 The main point stressed by witnesses was that trade agreements deal with a range of matters normally the subject of public debate and domestic legislation, and affect a state's ability to regulate in many areas. An example raised in evidence by the Australian Council of Trade Unions (ACTU) was the provision in free trade agreements of immigration rights to nationals from other countries, including for the first time unskilled labour in the case of the free trade agreement with China:

...we understand that within the China free trade agreement, should it be ratified, if there is a project worth \$150 million or more—and that would be a fairly medium-level CBD building—the Chinese company that is the

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21 Professor Triggs, *Committee Hansard*, 5 May 2015, p. 14.

22 Dr Gleeson, *Committee Hansard*, 4 May 2015, p. 21.

23 Dr Ranald, *Committee Hansard*, 4 May 2015, p. 15.

proponent or owner of that project can then bring its Chinese nationals here to work on it.<sup>24</sup>

2.33 The increasing complexity of international trade agreements can sometimes have unintended consequences, especially with regard to intellectual property provisions negotiated in the context of bilateral or regional trade deals.<sup>25</sup> Evidence from the Australian Digital Alliance and Australia Library and Information Association pointed to the interplay between intellectual property and investment chapters in complex trade agreements such as the TPP. Ms Hepworth, Australian Digital Alliance, told the committee:

One of the things that we are particularly concerned about is the interplay between the intellectual property chapter and the investment chapter, for example. At the moment, in the Trans-Pacific Partnership, all we know, of course, is that there is an IP chapter and that there is an investment chapter. Looking at some of the investment chapters and IP chapters that have been in recent published agreements such as KAFTA, there is a very clear interplay between them. In KAFTA, for example, we had an ISDS provision that has a very wide definition of expropriation that definitely covers intellectual property but then seeks to sort of carve out an exception for intellectual property as long as it is implemented in accordance with the IP chapter. The practical effect of that is to make the IP chapter subject to ISDS.<sup>26</sup>

2.34 The Australian Digital Alliance advised the committee of changes in the way copyright treaties have been negotiated over the years:

Traditionally, copyright was decided in very open, transparent multilateral fora. It is a very complex, very involved subject matter; it was originally done in bodies such as WIPO and then the WTO, where all of these issues were very thoroughly and openly explored and thrashed out; and the eventual agreements were very easy to see as a cohesive whole. The inclusion of a very complex subject matter such as copyright—and, I believe, from experts in other areas, increasing complexity in their subject matter as well—in trade agreements has definitely changed the focus of trade agreements and their impacts on Australia. I think that is one very important reason why these things have changed.<sup>27</sup>

2.35 It was also pointed out that the communications environment in which trade agreements are negotiated today is significantly different from 20 or 30 years ago. It may have been possible in the mid-1980s for treaty negotiators to operate mostly in a confidential environment. However, with the arrival of the internet, the explosion of social media and the way ideas are communicated instantly and on a global scale,

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24 Mr Dettmer, ACTU, *Committee Hansard*, 5 May 2015, p. 8.

25 Ms Hepworth, Australian Digital Alliance, *Committee Hansard*, 4 May 2015, p. 1.

26 Ms Hepworth, Australian Digital Alliance, *Committee Hansard*, 4 May 2015, p. 5.

27 Ms Hepworth, Australian Digital Alliance, *Committee Hansard*, 4 May 2015, p. 2.

confidentiality in the context of negotiating free trade agreements has become unenforceable.

2.36 A number of submitters expressed concern that rigid adherence to the principle of confidentiality by successive Australian governments may fuel media speculation on the draft text of trade agreements, and contribute to the politicisation of debate surrounding trade agreements and claims of scaremongering by those raising legitimate concerns. Ultimately it may result in less than optimum trade outcomes for Australia's exporters, especially when other countries adhere to more open and transparent trade negotiation practices. The competing arguments around the issue of confidentiality with respect to negotiating trade deals are considered in more detail in chapter 4.



# Chapter 3

## The role of parliament in treaty making

3.1 As outlined in Chapter 2, the executive government has the power to enter into treaties under the Constitution. Parliament's main role in the treaty-making process is to implement treaties once they have been signed by passing implementing legislation.

3.2 The role of the parliament in the treaty-making process has long been the subject of discussion in Australia. The issue continues to attract the attention of the community and of stakeholders interested in the negotiation of large and complex trade agreements. This chapter provides background on previous reform attempts and practices in other jurisdictions, and analyses proposals aimed at strengthening parliament's role in the treaty-making process.

### Introduction

3.3 The role of parliament in the treaty-making process has been the subject of debate in Australia for several decades. In 1985 the Constitutional Convention was established to undertake a fundamental review of the Australian Constitution. The Constitutional Convention, and the Advisory Committee on the Distribution of Powers that reported to it, both recommended that the status quo with regard to the role of parliament in treaty making be retained.<sup>1</sup> However, dissenting reports were submitted to the Advisory Committee by Mr Geoff Lindell,<sup>2</sup> and the Constitutional Commission by Professor Leslie Zines.<sup>3</sup> Both reports concluded that the arguments in favour of greater parliamentary participation in the treaty-making process were sufficiently persuasive to justify adoption of a system of parliamentary approval on a trial basis.

3.4 There have been several initiatives for parliamentary scrutiny of treaty-making, including attempts to legislate for parliamentary approval of treaty action. In 1994, the Australian Democrats introduced the Parliamentary Approval of Treaties Bill 1994 and re-introduced it in a revised form in 1995, but the bill lapsed due to the calling of the 1996 election. The bill established a mechanism similar to the disallowance of regulations, so that a treaty would be deemed to be approved without a notice of motion being moved to oppose it 15 sitting days after its tabling in each house. The important point is that the bill was not designed to force the executive to

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1 Constitutional Commission, *Advisory Committee on the Distribution of Powers Report*, June 1987, pp84-85; Constitutional Commission, *Final Report of the Constitutional Commission*, 1988, Volume Two p. 731.

2 Constitutional Commission, *Advisory Committee on the Distribution of Powers Report*, June 1987, p. 233.

3 Constitutional Commission, *Final Report of the Constitutional Commission*, 1988, Volume Two, p. 745.

enter into a treaty or to give parliament the power to enter into treaties. It would only have enabled parliament to prohibit the executive from entering into a treaty.<sup>4</sup>

3.5 The introduction of the 1996 reform package and the Department of Foreign Affairs and Trade's (DFAT's) 1999 review, which concluded that the reforms were operating well and there was no need for further change, put the issue of parliamentary approval of treaties on the political back-burner for the better part of ten years.

3.6 In 2003, the Foreign Affairs, Defence and Trade References Committee's inquiry into the General Agreement on Trade in Services and the proposed Australia-United States Free Trade Agreement revisited the issue of parliament's involvement in the process of negotiating bilateral and multilateral trade agreements. Chapter 3 of the 2003 report, 'Treaties and the parliamentary process', included an overview of the Constitution and the treaty-making process, a summary of the *Trick or Treaty?* report and the 1996 reforms, the work of Joint Standing Committee on Treaties (JSCOT) and a discussion of the process of stakeholder consultation and the level of parliamentary scrutiny of treaties.<sup>5</sup>

3.7 In light of the evidence received from submitters, the committee recommended that the government introduce legislation to implement a process for parliamentary scrutiny and endorsement of trade treaties. The process was to include parliament voting on a treaty and any implementing legislation in an 'up or down' vote (either accepting or rejecting the package in its entirety).

3.8 The government rejected the committee's recommendation in a lengthy response, arguing:

...the report's recommendation on trade treaties and the Parliamentary process would be unworkable. It would circumscribe the capacity of the Government to secure the best possible trade outcomes from trade negotiations. It would undermine the Executive's constitutional authority to sign treaties.<sup>6</sup>

3.9 The response concluded that it was the government's view that the twin objectives of promoting trade growth and ensuring that appropriate consultation is undertaken with the broader community '...are best met by current Parliamentary and consultation processes and practices'.<sup>7</sup>

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4 Department of the Parliamentary Library, *Federal Parliament's Changing Role in Treaty Making and External Affairs*, Research Paper No. 15 1999–2000, pp 35–36.

5 Foreign Affairs, Defence and Trade References Committee, *Voting on Trade: the general Agreement on Trade in Services and an Australia-US Free Trade Agreement*, November 2003

6 Government Response to the report of the Senate Foreign Affairs, Defence and Trade References Committee— *Voting on Trade: the general Agreement on Trade in Services and an Australia-US Free Trade Agreement*

7 Government Response to the report of the Senate Foreign Affairs, Defence and Trade References Committee— *Voting on Trade: the general Agreement on Trade in Services and an Australia-US Free Trade Agreement*

3.10 In February 2012, the Hon Bob Katter MP introduced the Treaties Ratification Bill 2012 which contained only one substantive provision: that the Governor-General must not ratify a treaty unless both houses of parliament have, by resolution, approved the treaty.

3.11 On 16 February 2012, the House Selection Committee referred the bill to JSCOT for inquiry. JSCOT found that the bill, if passed, would create problems for both parliament and the executive:

The sheer number of treaties along with the political nature of the Senate has the potential to overwhelm the Parliamentary process. This, and the Bill's lack of a provision for short-term emergency treaties, makes the Bill unworkable.<sup>8</sup>

3.12 Not surprisingly, JSCOT recommended that the bill not be passed by the House or the Senate. It is interesting that as part of its inquiry into the bill, JSCOT took the opportunity to summarise previous parliamentary initiatives to scrutinise the treaty-making process. As a result of its overview, JSCOT noted that it had previously called for greater transparency in trade agreement negotiations, particularly in the context of concerns expressed by witnesses to its 2008 inquiry into the Australia-Chile Free-Trade Agreement. At that time it had recommended that:

...prior to commencing negotiations for bilateral or regional trade agreements, the Government table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the costs and benefits. Such assessments should consider the economic regional, social, cultural, regulatory and environment impacts which are expected to arise.<sup>9</sup>

3.13 The JSCOT report on the Treaties Ratification Bill 2012 expressed disappointment that the process for greater transparency recommended in its 2008 report had not been taken up by the government. Accordingly, the committee repeated its recommendation in a slightly abbreviated form:

Prior to commencing negotiations for a new agreement, the Government table in Parliament a document setting out its priorities and objectives including the anticipated costs and benefits of the agreement.<sup>10</sup>

3.14 JSCOT concluded its report by noting that notwithstanding its activities and numerous previous inquiries:

...there appears to remain a conviction in parts of the community that true Parliamentary approval can only consist of direct approval by both

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8 Joint Standing Committee on Treaties, Report 128, *Inquiry into the Treaties Ratification Bill 2012*, August 2012, p. 15.

9 Joint Standing Committee on Treaties, Report 95, *Australia-Chile Free Trade Agreement*, October 2008, p. 35.

10 Joint Standing Committee on Treaties, Report 128, *Inquiry into the Treaties Ratification Bill 2012*, August 2012, p. 15.

chambers as has been advocated by the reform attempts described [in this report].<sup>11</sup>

3.15 The issue of parliamentary approval of treaties continues to attract the community's attention and that of stakeholders involved in the negotiation of large and complex trade agreements.

### **Practices in other jurisdictions**

3.16 Direct comparison of the Australian treaty-making process and the processes in other jurisdictions is difficult, as Australia has a different constitutional structure in place. However, it is useful to consider how other jurisdictions balance the respective roles of their executive and legislative branches of government in respect of treaty-making.<sup>12</sup>

#### ***United Kingdom***

3.17 Traditionally, the treaty-making power in the United Kingdom is a power of the Crown, exercised by the Secretary of State for Foreign and Commonwealth Affairs. The role of parliament in the negotiation and conclusion of treaties is limited, although as in Australia, parliament has a role in passing implementing legislation to give effect to treaties in domestic law.<sup>13</sup>

3.18 From 1924, the United Kingdom had a requirement known as the 'Ponsonby Rule' that certain treaties subject to ratification be laid before parliament, with a short explanatory memorandum, for 21 sitting days. It was then open to the House of Commons to debate the treaty.<sup>14</sup>

3.19 In 2010, the United Kingdom significantly reformed its system of parliamentary scrutiny of treaties, enacting the *Constitutional Reform and Governance Act 2010*. Under this act, the Ponsonby Rule was replaced by a statutory process laid out in section 20. In short, these statutory changes make it unlawful for the government to ratify a treaty if the House of Commons repeatedly disallowed ratification. The House of Lords does not have the power to disallow treaty ratification, but can require the government to produce further explanatory information.<sup>15</sup>

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11 Joint Standing Committee on Treaties, Report 128, *Inquiry into the Treaties Ratification Bill 2012*, August 2012, p. 15.

12 The *Trick or Treaty?* report contains an overview of treaty-making practices in other federations which details the process in some countries not discussed here.

13 Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2013, p. 168.

14 The Ponsonby Rule was said to apply where a treaty 'places continuing obligations' on the United Kingdom, where a further formal act to signify commitment is required after signature and where the matter is not one of "urgency". C. Saunders, 'Articles of Faith or Lucky Breaks', 17 *Sydney Law Review* 150, p. 170.

15 *Constitutional Reform and Governance Act 2010* (UK), s. 20

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### ***European Union***

3.20 The 28 European Union (EU) members still largely control their own foreign relations. However, on some topics the EU endeavours to speak with one voice as it holds more weight as a single negotiating bloc. Trade policy is an exclusive power of the EU—only the EU and not individual member states can legislate on trade matters and conclude international trade agreements.

3.21 The European Commission negotiates with a trading partner on behalf of the EU. The Commission requests authorisation to negotiate a trade agreement with a trading partner from the Council, which sets out the general objectives to be achieved. While negotiations are ongoing, the Commission reports regularly to the Council and the European Parliament.

3.22 Once negotiations are complete, the Commission presents the deal to the Council to decide on signature and conclusion of the agreement. After signature, the agreement is sent to the European Parliament, which has the power to vote either for or against the agreement ahead of ratification. Where the agreement contains provisions that relate to areas of member state responsibility, the agreement must also be ratified by member states in accordance with their ratification procedures.

3.23 The committee received evidence in relation to the EU's new policy around transparency of trade negotiations which was published by the College of Commissioners in November 2014. Under the new approach, all 751 members of the European Parliament, and in some cases their staff, will be granted access to texts currently made available to a select group of law makers (members may inspect restricted text in a reading room). The Commission is also seeking to classify fewer documents as 'restricted' to make them more accessible outside the confines of a reading room.<sup>16</sup>

### ***United States***

3.24 Unlike in many other countries, including Australia, when the United States ratifies a treaty it immediately becomes part of the 'supreme law of the land'. This means that a treaty provision that is sufficiently clear and precise to be applied as if it is a statute will be considered 'self-executing', and treated as equal to an Act of Congress. As such, there is considerable uncertainty around which treaty provisions are self-executing, and which require legislation to implement.<sup>17</sup>

3.25 There are several ways for the President to secure the authority to enter a treaty:

- Under Article II of the Constitution, the president can ratify a treaty with the 'advice and consent' of two thirds of the Senate. The Senate can vote not only on whether to accept or reject the treaty in its entirety, but can

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16 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 5.

17 Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2013, p. 175.

also amend the treaty. By taking this approach, there is no requirement to consult with the House of Representatives.<sup>18</sup>

- The President can also enter into 'executive agreements', which can be ratified without the consent of the Senate. While considered treaties under international law, these generally relate to foreign relations or military issues rather than those impacting on the rights and obligations of citizens.<sup>19</sup>
- Under the Trade Promotion Authority (or 'fast-track negotiating authority'), Congress can grant the President temporary power to negotiate trade agreements. In this situation, Congress has the power to approve or disapprove the final treaty, but cannot amend it. This approach does not require a two thirds majority in the Senate.

### *Trade Promotion Authority*

3.26 The Trade Promotion Authority (TPA) was last in effect from 2002 to 2007. Legislation to re-authorise TPA was introduced in the Senate and the House as the *Bipartisan Congressional Trade Priorities and Accountability Act of 2015* in April 2015. This could allow for an up or down vote on the TPP and any other trade negotiations concluded by 2018 when the current version of the bill expires.<sup>20</sup> At the time of writing, the bill had passed both the US Senate and House of Representatives.

3.27 As transparency arrangements under the Trade Promotion Authority differ from other treaty-making processes in the US, they are worth considering in more detail. According to Associate Professor Weatherall:

The Congress enacts TPA legislation that defines negotiating objectives (including specific provisions that limit the President's authority to liberalise trade in the US) and prioritises for trade agreements, and establishes consultation processes.

The various notification and consultation requirements of TPA in the US are designed to achieve greater transparency in trade negotiations, and maintain some role for Congress in shaping trade policy.<sup>21</sup>

3.28 Under the US' general treaty-making process, negotiating texts are not made available to members of Congress. The Obama administration has developed a practice of allowing members of Congress to see draft negotiating texts. However:

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18 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth power to make and implement treaties*, November 1995, p. 168.

19 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth power to make and implement treaties*, November 1995, p. 168.

20 Stefan A. Riesenfeld and Frederick M. Abbott, *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study*, Martinus Nijhoff Publishers, Dordrecht, 1994, p. 302.

21 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 2.

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The process is highly controlled. Texts may be viewed but there is no capacity to take notes or retain copies of text. Staff with security clearance may view texts with Members but may not view texts unless the member of Congress is present.<sup>22</sup>

3.29 The bill in its current form would formalise the existing practice of the Obama administration with respect to access for members of Congress to draft treaty text by requiring that the United States Trade Representative provide members of Congress and their cleared staff (in the presence of the member), as well as appropriate committee staff, access to pertinent documents relating to trade negotiations, including draft texts and classified materials.<sup>23</sup> Access to text is still provided in a manner that is restricted through the use of confidentiality agreements and dedicated reading rooms.<sup>24</sup> The guidelines would also require the President to consult with congressional advisory groups (CAG), in both chambers, made up of members of Congress.<sup>25</sup>

### *Canada*

3.30 The treaty-making process in Canada bears strong resemblance to the process in Australia. As in Australia, the executive branch of government has the power to negotiate, sign and ratify international conventions and treaties.<sup>26</sup> Parliament is responsible for implementation of the treaty through domestic legislation (if required).<sup>27</sup> While implementing legislation is usually passed by parliament, in 1988 the Senate refused to pass the proposed Canada–United States Free Trade Agreement Implementation Act, thereby triggering an election.<sup>28</sup>

3.31 While the executive is responsible for ratification of the treaty, parliament has long had some involvement in the process. In 2008, the federal government implemented a policy of ensuring treaty texts are tabled in the House of Commons 21 sitting days prior to the treaty coming into effect. The House of Commons can debate the treaty and pass a motion recommending the action to be taken; however, such a vote has no legal force and is a courtesy on the part of the executive.<sup>29</sup>

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22 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 4.

23 This information is sourced from a May 2015 Congressional Research Service Research Report, quoted by Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 2.

24 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 1.

25 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 4.

26 Library of Parliament, *Canada's Approach to the Treaty-Making Process*, November 2012, p. 1.

27 Library of Parliament, *Canada's Approach to the Treaty-Making Process*, November 2012, p. 3.

28 Library of Parliament, *Canada's Approach to the Treaty-Making Process*, November 2012, p. 4.

29 Library of Parliament, *Canada's Approach to the Treaty-Making Process*, November 2012, p. 3.

## *New Zealand*

3.32 New Zealand's treaty-making process also closely resembles that in Australia. As in Australia, entry into treaties is a power of the executive government, while the parliament has responsibility for implementing legislation. Under New Zealand's parliamentary treaty examination process, all multilateral treaties and major bilateral treaties of particular significance are presented to the House of Representatives before binding treaty action is taken. Once presented, the treaty stands referred to the House Foreign Affairs, Defence and Trade Committee, which may inquire into the treaty (or refer it to a more relevant committee). The government does not take binding treaty action until a committee report is handed down or 15 sitting days have elapsed (except in urgent cases), and if implementing legislation is necessary, binding treaty action will not be taken until the required legislation is passed.<sup>30</sup>

### **A strengthened role for parliament**

3.33 A majority of submitters argued that parliament needs a strengthened role in the treaty-making process, though not all were convinced it was necessary to implement a system of parliamentary approval of treaties.

3.34 DFAT argued that reform of parliament's role in treaty-making was not required. DFAT's submission stated:

DFAT respects the balance that has been secured in the treaty-making process between the respective roles of the Executive, which has formal responsibility under the Constitution for treaty-making, and the Parliament, which plays a significant role in relation to scrutiny and implementation of treaties.<sup>31</sup>

3.35 Mr Andrew Hudson from the Export Council of Australia agreed that the current system achieved a balance between the executive and parliament. He told the committee:

We would think that there could be improvements to how society and industry can engage inside the confidential ring... but we think broadly, procedurally we have got a pretty good system.<sup>32</sup>

3.36 The perspective of DFAT and the Export Council of Australia was at odds with the majority of submitters that did not consider the respective roles of the executive and parliament to be well-balanced. Dr Patricia Ranald from the Australian Fair Trade and Investment Network (AFTINET) argued that parliamentary scrutiny of treaties needs strengthening as trade agreements now include detailed treatment of topics that would previously have been subject to government legislation. As she explained to the Committee:

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30 New Zealand Ministry of Foreign Affairs and Trade, *The Treaty making process in New Zealand*, updated 12 January 2015, <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/index.php>.

31 *Submission 74*, p. 1.

32 Mr Clark, *Committee Hansard*, 5 May 2015, p. 48.

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Our argument is that since trade agreements are now dealing with all these issues that would normally be decided through an open democratic process domestically involving public discussion and parliamentary legislation, then the trade agreement process needs to be a lot more open...there is a whole lot in the text that is very important that Parliament does not get to vote on.<sup>33</sup>

3.37 This point was also made by union representatives. As Ms Kearney, Australian Council of Trade Unions (ACTU), stated:

We have seen over recent decades the significant expansion of trade agreements beyond reduction in tariffs or taxes on imports, and so the demand for a more open and democratic process for trade agreements has grown, because they are increasingly dealing with an expanding range of other regulatory issues which would normally be debated and legislated through the democratic parliamentary process and which have deep impacts on Australians' lives.<sup>34</sup>

3.38 Associate Professor Weatherall pointed out that it is not just that trade agreements are covering topics not previously included in international agreements, but also that the agreements themselves are highly prescriptive. She told the Committee:

The nub of the issue now is that IP chapters look like legislation, and they are at that level of detail. Traditionally, power to make legislation and to specify domestic policy at that level of detail has lain with parliament. If we are going to make agreements at that sort of level we need the same sort of parliamentary input and public input that we would have into legislation, because that is the level we are talking about...<sup>35</sup>

More generally it is about the change in the topics that the trade agreements are now covering. The focus has shifted from tariff setting to behind the border domestic regulation issues. Once you are really impacting in detail on all sorts of domestic regulation issues, then I think you need much more public and parliamentary input.<sup>36</sup>

3.39 Several submissions suggested that, in a number of key fora, transparency had decreased and this justified strengthening the role of parliament. As Ms Hepworth explained:

Traditionally, copyright was decided in very open, transparent multilateral fora... The inclusion of a very complex subject matter such as copyright—and, I believe, from experts in other areas, increasing complexity in their subject matter as well—in trade agreements has definitely changed the focus of trade agreements and their impacts on Australia.<sup>37</sup>

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33 Dr Ranald, *Committee Hansard*, 4 May 2015, p. 15.

34 Ms Kearney, *Committee Hansard*, 5 May 2015, p. 1.

35 Associate Professor Weatherall, *Committee Hansard*, 4 May 2015, p. 8.

36 Associate Professor Weatherall, *Committee Hansard*, 4 May 2015, p. 9.

37 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 2.

### *Parliamentary approval of treaties*

3.40 As outlined above, there have been several attempts to legislate for parliamentary approval of treaties, none of which have been successful. However, support for parliament to have the power to approve or disapprove proposed treaty action remains firm in some parts of the community.

3.41 Many submissions captured a level of public discomfort with parliament's current role. As Ms Alanna Hardman explained:

I have very real concerns that such treaties can become law without having to be put to the Parliament of Australia for debate and approval, prior to agreement. International trade treaties have ramifications for many Australian citizens (and citizens of foreign nations) and it is important for there to be public discussion on the merits or otherwise of aspects of trade treaties that may have the potential to conflict with our rights...<sup>38</sup>

3.42 Professor Lindell's submission supported adoption on a trial basis of a statutory system of parliamentary approval, as outlined in his dissenting report to the Advisory Committee on the Distribution of Powers in 1987.<sup>39</sup> A number of organisations also endorsed a system of parliamentary approval. Dr Ranald from AFTINET explained:

We want more involvement by parliament. That means that we believe the parliament should vote on the whole text, not just the implementing legislation. We have consulted, and various constitutional experts have made submissions...They agree that there is no constitutional barrier to cabinet referring its ability to sign trade agreements to parliament so that parliament can vote on the whole agreement, and then having it go back to cabinet, if it is approved, for them to do the technical signing process.<sup>40</sup>

3.43 Mr Dettmer, ACTU, agreed that a system of parliamentary approval was necessary due to a 'democratic deficit' that exists in the current system, in which executive governments can enter treaties without the consent of parliament. He told the committee:

What we now have...is, of course, a process of any number of issues, which really are the sovereign responsibility of the parliament, being the subject of treaties with foreign governments, which then somehow preclude the democratic process from having any oversight or involvement...[T]his democratic deficit is something which we believe is a signal failure on the part of successive governments...<sup>41</sup>

3.44 Dr Rimmer also favoured a system of parliamentary approval of treaties suggesting that trade agreements could be used to 'fast track' policy changes without parliamentary scrutiny:

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38 *Submission 11*, p. 1.

39 *Submission 1*, p. 1.

40 Dr Ranald, *Committee Hansard*, 4 May 2015, p. 15.

41 Mr Dettmer, *Committee Hansard*, 5 May 2015, p. 3.

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Both in Australia and elsewhere, like the United States, there is some concern that if you do not get your way through normal processes and if you stick something into a trade agreement, that might be a means to fast track something that might be otherwise politically unpalatable or unpalatable to the public.<sup>42</sup>

3.45 Submissions from Dr Rimmer, the ACTU and the National Tertiary Education Union (NTEU) referred to the views of constitutional experts Professor George Williams, Professor Hilary Charlesworth and Professor Ann Twomey, published in other contexts, to argue that a greater role for parliament is consistent with the Constitution. For example, according to the ACTU submission:

Based on the historical development of treaty-making in Australia, Professor Twomey argues that it would be constitutional for the treaty-making power of the Executive to be limited by a provision of the approval of both Houses of Parliament.

Professor Twomey notes that there are several examples in the Westminster system in which the decisions of the Executive on international agreements are subject to Parliamentary approval.<sup>43</sup>

### **Committee view**

3.46 The committee was persuaded by evidence that the context of treaty making—particularly in relation to trade treaties—had changed dramatically in recent decades and that a review of parliament's role in treaty-making is necessary.

3.47 The committee acknowledges evidence from submitters in support of a process of parliamentary approval of treaties, including a mechanism similar to that which is used to disallow legislative instruments. Balancing the power of the executive to act unilaterally and decisively in the national interest with the need for democratic deliberation through parliamentary oversight is a recurring theme in the debate on this issue.

3.48 A question that the committee has attempted to resolve is: how far should parliament's role in treaty-making go, and should it be underpinned by legislation similar to the bills introduced by the Australian Democrats in the 1990s and by the Hon Bob Katter MP in 2012. While the committee believes it is necessary to strengthen the role of parliament, it is not convinced that a dramatic recasting of the respective roles of parliament and the executive is desirable or necessary at this point in time. None of the evidence before the committee made a compelling case for change of this nature.

3.49 The committee acknowledges the view of some legal experts referred to in evidence that limiting the power of the executive by making treaty action conditional upon approval of both houses of parliament may be consistent with the Constitution. However, the fact that underlying constitutional authority for such a course of action may exist is not, by itself, an argument for proceeding down the path of parliamentary

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42 Dr Rimmer, *Committee Hansard*, 5 May 2015, p. 60.

43 *Submission 36*, p. 12.

approval. This is not the only way for parliament to play a meaningful role in the treaty-making process.

3.50 Alternatives exist that are more achievable and reflect a practical balancing of executive authority and parliamentary oversight. In arriving at this view the committee notes that there have been previous attempts to introduce a system of parliamentary approval, none of which have gained significant political traction to date. The committee considers it unlikely that renewed efforts down this path would prove successful in the short to medium term. The remainder of this chapter outlines other proposals to strengthen parliament's role in the treaty-making process that were raised in evidence.

### **Parliamentary access to treaty text**

3.51 A proposal raised by submitters to strengthen parliamentary oversight was that parliamentarians be given access to draft treaty text during negotiations, on a confidential basis. Currently, the level of access to draft treaty text varies between agreements. However, in the case of major trade agreements with confidential negotiations, the practice of successive governments appears to have been for access to texts to be restricted to cabinet ministers and public servants from the relevant departments.

3.52 A number of submitters were in favour of parliamentarians being able to access draft negotiating text or other information about the progress of negotiations before an agreement is signed by cabinet. The Australian Digital Alliance (ADA) and Australian Libraries Copyright Committee (ALCC) described allowing parliamentarians and other stakeholders access to negotiating texts as a 'bare minimum',<sup>44</sup> citing the US example and arguing that Australian parliamentarians should receive at least as much access to draft text as their foreign counterparts.<sup>45</sup>

3.53 Associate Professor Weatherall's submission stated:

One of my concerns at present is that Australian members of Parliament and Australian stakeholders are at a distinct disadvantage compared to their counterparts overseas...In terms of members of Parliament, my understanding is that in both Europe and the US, at least some parliamentary representatives have access to detailed ongoing briefings into the progress of agreements. There seems to me to be little reason why JSCOT, or a subcommittee of JSCOT, could not have similar opportunities for ongoing review and discussion during important negotiations.<sup>46</sup>

3.54 At the committee's public hearing on 4 May 2015, AFTINET argued that it should be mandatory for the text of agreements to be released for public and parliamentary discussion before the decision to sign is made or recommended by cabinet. While it is difficult to establish a clear picture of how many of Australia's

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44 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 2.

45 *Submission 78*, p. 15.

46 Associate Professor Weatherall, *Committee Hansard*, 5 May 2015, p. 6.

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negotiating partners share draft treaty text with parliamentarians that are not members of cabinet, this practice at least occurs in the United States.

3.55 The committee understands that Australian parliamentarians were advised during a briefing by DFAT officials on 1 June 2015 that they would be given an opportunity to view the negotiating text of the TPP, subject to signing a confidentiality agreement preventing disclosure for up to four years after entry into force or, if no agreement enters into force, four years after the last round of negotiations. The confidentiality agreement required members of parliament and their staff not to divulge text or information obtained in the briefing, or to copy, transcribe or remove the negotiating text.

### **Committee view**

3.56 The committee can see no good reason why parliamentarians and their advisers—at the very least, members of JSCOT—should not be able to access information on treaty-making, especially draft negotiating text, on a confidential basis throughout key stages of the treaty negotiation process. This would be consistent with contemporary developments in the US and the EU and with the secrecy provisions around the TPP negotiations.<sup>47</sup>

3.57 The fact that access was recently granted to parliamentarians to view the draft treaty text for the TPP is evidence that such a system is consistent with Australia's international obligations and can be administratively workable. This reform would improve treaty transparency and put Australian parliamentarians on a level playing field with their international counterparts.

3.58 Access could come in one of two ways. First, members of parliament and their staff could gain access during negotiations and sign a confidentiality agreement not to disclose draft text until negotiations are concluded and the final agreement is tabled in parliament, and therefore in the public domain. Second, access could be restricted to dedicated reading rooms for one or two days and at intervals following the conclusion of each major round of negotiations. Under this arrangement there would be no capacity to take notes or make copies of text.

3.59 The current system, under which parliamentarians may only see draft text after an agreement has been authorised for signature and it is too late for the agreement to be changed, does not allow for meaningful parliamentary scrutiny. The committee considers allowing parliamentarians access to draft negotiating texts—as was done recently for the TPP—to be a sensible reform that is overdue.

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47 The committee's understanding is that the confidentiality agreement that Australia entered into for the TPP negotiations (detailed in Chapter 4) should not prevent parliamentarians from viewing draft text as (1) the agreement specifically mentions that 'government officials' are allowed to view draft texts; and (2) it has been the Obama administration's practice to allow members of Congress to see draft texts.

## **Recommendation 1**

**3.60 The committee recommends that parliamentarians and their principal advisers be granted access to draft treaty text upon request and under conditions of confidentiality throughout the period of treaty negotiations. The committee recommends that the government provides an access framework and supporting administrative arrangements.**

3.61 The issue of access to the negotiating texts for stakeholders other than parliamentarians is explored in Chapter 4.

### **Parliamentary committees**

3.62 As discussed in Chapter 2, after trade agreements have been authorised for signing by cabinet, the text is tabled in parliament for up to 20 sitting days and reviewed by JSCOT. Currently, there are three categories of treaties:

- Category 1 major treaties which JSCOT is required to report on within 20 joint sitting days;
- Category 2 treaties which JSCOT is required to report on within 15 joint sitting days; and
- Category 3 treaties which are considered to be minor treaty actions and which JSCOT generally approves without a full inquiry.

3.63 The following sections provide a brief overview of JSCOT and the Parliamentary Joint Committee on Human Rights and examine proposals to strengthen their respective roles in the treaty-making process.

### ***Joint Standing Committee on Treaties***

3.64 A central element of the government's 1996 reforms was the creation of JSCOT. A joint committee of the federal parliament, JSCOT reviews treaties during the tabling period and issues a report containing recommendations as to whether, and under what circumstances, a treaty should be ratified. JSCOT was appointed to inquire into and report on:

- a. matters arising from treaties and related National Interest Analyses (NIAs) and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the parliament;
- b. any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - i. either house of the parliament, or
  - ii. a minister; and

- iii. such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the minister may prescribe.<sup>48</sup>

3.65 JSCOT is seen as one of the key elements of parliament's scrutiny over treaties. Professor Gillian Triggs, Head of the Human Rights Commission, told the Committee: 'I think that the JSCOT national interest analysis process that emerged from the "Trick or Treaty" report has been extremely valuable.'<sup>49</sup> DFAT's Senior Legal Advisor advised the committee that JSCOT has issued reports addressing 134 different treaty actions:

I wanted to highlight the diverse range of subject matters. It is interesting that three topics alone accounted for almost 40 per cent of those treaty actions. They were tax, civil aviation and the environment. There were 12 treaty actions concerning trade, which amounts to around nine per cent of total treaty actions. There were of course many other subject matters which were covered by JSCOT in that period, including treaties on defence, fisheries, human rights, development assistance, extradition, social security and arms control.<sup>50</sup>

#### *Criticisms of current role*

3.66 Three main criticisms of JSCOT's current role were raised in evidence: it comes too late in the treaty-making process; it rubber-stamps agreements already signed by the government; and it is not adequately resourced to undertake the scrutiny which is required for large and complex agreements. These are examined in more detail below.

3.67 The main criticism of the current process is that the review JSCOT conducts occurs after an agreement is signed, when it is generally not possible to reopen negotiations to adopt proposed changes. This, according to Dr Moir, while welcome for getting some issues into the public realm: '...makes a mockery of the role of parliament in a democracy...[w]hen JSCOT raises concerns, the government simply ignores them'.<sup>51</sup> This point was made by Ms McGrath, Australian Industry Group, who told the Committee:

The current model of signing and then going to JSCOT does not really make any sense. There seems little value in reviewing it after it has been signed. On any issue that we do have, we are always told, 'It has been negotiated. We cannot open that again.' It really makes a mockery of the whole point of a review.<sup>52</sup>

3.68 Associate Professor Weatherall's experience supported this criticism:

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48 Parliament of Australia, *Joint Standing Committee on Treaties*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties)

49 Professor Triggs, *Committee Hansard*, 5 May 2015, p. 16.

50 Ms Cooper, *Committee Hansard*, 4 May 2015, p. 28.

51 *Submission 68*, p. 9.

52 Ms McGrath, *Committee Hansard*, 5 May 2015, p. 20.

Under current processes the evidence I might have given on [KAFTA] comes too late. By the time JSCOT or this committee looked at the Korea FTA it could not be changed; it was take it or leave it.<sup>53</sup>

3.69 Dr Ranald from AFTINET agreed that this is a major problem, telling the committee: 'JSCOT is handicapped by the fact that it cannot actually change the text. The text has already been signed.'<sup>54</sup>

3.70 The Law Council submission drew attention to the fact that JSCOT's resolution of appointment provides the means to undertake reviews of treaties during the negotiation process and before they are concluded and signed by the government. Specifically, it authorises JSCOT to inquire and report on any questions relating to a treaty whether or not negotiated to completion or referred to it by a minister or either house of parliament. Notwithstanding this power, the submission stated:

It is our understanding that there has never been an instance in which the Minister for Foreign Affairs has referred a treaty to the Committee during the negotiation stage to assist the Government in determining its position in relation to the treaty negotiation or its response to the position of other countries.<sup>55</sup>

3.71 Another criticism of JSCOT that emerged from the inquiry was the committee's tendency to recommend that the implementing legislation be passed.<sup>56</sup> As Dr Ranald told the committee:

The main problem with the JSCOT process is that they only get to look at the agreement after it has been signed, and they cannot change it. JSCOT have frequently made assessments which are quite critical of trade agreements. So, in that sense, they have taken an independently critical position...

Because JSCOT is a joint committee and the majority of members are government members, they usually recommend that the agreement go forward, that the legislation be passed through parliament.<sup>57</sup>

3.72 Dr Moir told the committee that even when JSCOT does issue recommendations, the government is not compelled to follow them. She told the Committee:

My main interaction with JSCOT was on the Anti-Counterfeiting Trade Agreement. I thought JSCOT put forward an excellent report on that, which was very grounded in the evidence. I thought the government's response to that was grossly

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53 Ms Weatherall, *Committee Hansard*, 4 May 2015, p. 8.

54 Dr Ranald, *Committee Hansard*, 4 May 2015, p. 17.

55 *Submission 89*, p. 2.

56 The one exception is the committee's 2012 report on the Anti-Counterfeiting Trade Agreement which the committee recommended a delay in implementation following the agreement's rejection by the European Union.

57 Dr Ranald, *Committee Hansard*, 4 May 2015, p. 17.

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disrespectful of parliament. From that, I conclude that the JSCOT process simply has no effect, whatsoever.<sup>58</sup>

3.73 Several witnesses considered that JSCOT is too under-resourced to cope with an increasing number of large and complex agreements. Ms Kearney, President of the ACTU, explained: 'JSCOT can hardly scrutinise massive and complex documents with the diligence necessary in the time it has, and the committee is hard pressed by its large workloads.'<sup>59</sup> This view was echoed by AFTINET which argued:

Because the JSCOT has the task of reviewing all treaties, it has a very heavy work schedule and has to review several treaties at the same time. This means that in many cases it receives very few submissions and holds only one hearing in Canberra. It can only justify holding public hearings outside Canberra if it receives many submissions and there is evident public interest in the agreement.

The committee is therefore hard pressed to thoroughly analyse trade agreements, which are highly technical documents of 1000 to 2000 pages each.<sup>60</sup>

#### *Strengthening the role of JSCOT*

3.74 Evidence before the committee supported the view that JSCOT's oversight role could be significantly improved depending on the nature of the treaty and the required level of transparency. One suggestion was that the JSCOT process should mirror the Joint Parliamentary Committee on Intelligence and Security process where the government and opposition members of that committee are able to receive private briefings on a secure and confidential basis.

3.75 Another suggestion raised in evidence by the NTEU, AFTINET and the ACTU was that a subcommittee of JSCOT be created which would be dedicated to reviewing trade agreements with a second subcommittee examining all other non-trade agreements. The ACTU submission put the suggestion in the following terms:

Given the complexity and the differences between trade agreements and other treaties...it would be more practical for the Joint Committee to have two subcommittees, one dealing with trade agreements and the other dealing with all other treaties. The trade sub-committee would have more time and capacity to play a greater role in the parliamentary process.<sup>61</sup>

3.76 Other submitters argued that JSCOT should be involved earlier in the treaty-making process. Ms Hepworth from the ADA together with the ALCC suggested that JSCOT could play a role in reviewing and approving a government's negotiating mandate at the time Australia decides to enter negotiations, telling the committee: 'The negotiation mandate and conditions of negotiation should be approved by JSCOT prior to negotiations commencing...'<sup>62</sup>

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58 Dr Moir, *Committee Hansard*, 5 May 2015, pp 53-54.

59 Ms Kearney, *Committee Hansard*, 5 May 2015, p. 2.

60 AFTINET, *Submission 52*, p. 9.

61 *Submission 36*, p. 9.

62 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 2.

3.77 Other witnesses suggested that JSCOT could have some direct input into the treaty negotiation process. In fact, nothing in JSCOT's terms of reference prevents this from occurring, but in practice it has not occurred. Associate Professor Weatherall noted:

I certainly think one option would be for JSCOT to have a more expanded role, including during negotiations...In theory, JSCOT could do it now but they do not.<sup>63</sup>

3.78 The Australian Human Rights Commission suggested that in the future JSCOT should play a role in relation to the coordination of Australia's obligation to provide a periodic report to the relevant United Nations treaty monitoring body. Currently the reporting process is delegated to three government departments consulting with relevant federal, state and territory bodies, civil organisations and other stakeholders. The Commission believed that there is scope to develop a more consolidated mechanism, in line with the UN's treaty body strengthening process, for the development of periodic reports to better meet human rights treaty obligations. An Australian standing national reporting and coordination mechanism, or SNCRM: '...might involve formalising an inter-departmental committee approach, with clear terms of reference of how it operates across all of Australia's human rights obligations, with a resources secretariat coordinated by one department'.<sup>64</sup>

3.79 The Commission told the committee that an Australian SNCRM that reported to JSCOT is preferable to current arrangements:

It would certainly be a much more efficient way of coordinating and reporting and partly because, although...different departmental bodies are dealing with different treaties, the substantive Australian provisions in relation to them overlap. They are simply duplicated, and it becomes an extremely cumbersome process to do it the way we are doing it at the moment. We suggest that it does not have to be particularly complex in legal terms but could be simply the creation of the interdepartmental committee and perhaps some minor amendments...to the scrutiny committee provisions to engage them in the process.<sup>65</sup>

### ***Parliamentary Joint Committee on Human Rights***

3.80 The Parliamentary Joint Committee on Human Rights (PJCHR) was established by the *Human Rights (Parliamentary Scrutiny) Act 2011* to perform an important scrutiny role in relation to bills and acts of parliament. Specifically, the committee has three core functions:

- examine bills and legislative instruments that come before parliament for compatibility with human rights and report to parliament on that issue;
- examine acts for compatibility with human rights and report to parliament on that issue; and

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63 Ms Weatherall, *Committee Hansard*, 4 May 2015, p. 12.

64 *Submission 94*, p. 8.

65 Professor Triggs, *Committee Hansard*, 5 May 2015, p. 15.

- inquire into any matter relating to human rights which is referred to it by the Attorney-General and report to parliament on that matter.<sup>66</sup>

3.81 According to information published on its website, the committee considers the core human rights and freedoms contained in the seven human rights treaties to which Australia is a party.<sup>67</sup> In relation to how it approaches human rights scrutiny:

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.<sup>68</sup>

3.82 Under the parliament's current legislative process, any bill required to implement treaties must be accompanied by a statement of compatibility with human rights. The committee views the statements of compatibility as:

...essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.<sup>69</sup>

3.83 The Australian Human Rights Commission submission noted that while there is significant scope for JSCOT to include a review of the human rights implications of treaties within their reports on their own initiative, currently it does not undertake inquiries of this nature. It was not considered the best option as it would involve drawing expertise from other committees or sources. The Commission was of the opinion that the most appropriate parliamentary committee for this purpose is the PJCHR:

The PJCHR reports on bills and legislative instruments that are introduced to the parliament for compatibility with human rights. The PJCHR has the human rights expertise to properly consider the human rights implications of bills and other instruments. It would, subject to resources, be able to extend this expertise to

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66 Parliament of Australia, *Role of the Committee*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Role\\_of\\_the\\_Committee](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Role_of_the_Committee)

67 The seven treaties include International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Violence against Women; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

68 Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting statements of compatibility*, December 2014, p. 3.

69 Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting statements of compatibility*, December 2014, p. 3.

consider human rights implications of treaties prior to Parliamentary debate on ratification.<sup>70</sup>

3.84 The Australian Human Rights Commission submission argued that the PJCHR can play a constructive role at the 'primary stage' of the treaty-making process. Specifically, it recommended that a human rights analysis be incorporated into the NIA for category 1 and 2 treaties to promote joint committee consideration of the human rights implications of treaties prior to ratification.<sup>71</sup> President of the Commission, Professor Triggs, told the committee:

The reason is that...that body has been operating now for the last three years. It has really been...increasingly effective in the sense that it has become more familiar with the treaty processes and the implications of the seven human rights treaties that they deal with. We feel that they have a growing competence, along with the support from their secretariat.<sup>72</sup>

### **Committee view**

3.85 The committee considers it unfortunate that JSCOT's recommendations on changes to treaties are often not accepted as they are received too late in the process to negotiate changes to the treaty. To provide meaningful review, it is essential that JSCOT engage in treaty-making action early enough in the process for its recommendations to be taken into consideration by the government while negotiations are still ongoing.

3.86 As Associate Professor Weatherall pointed out, nothing in JSCOT's terms of reference prevents it from reporting on treaties during the negotiations phase.<sup>73</sup> The relevant question for the committee is how this would best work in practice. The committee's recommendation attempts to lay out workable arrangements for ongoing JSCOT oversight of the treaty-making process. While some take issue with JSCOT's advice not being public, the committee is of the view that this is unavoidable in the case of confidential negotiations. The recommendation should be seen as an effort to create a more meaningful role for JSCOT in holding the government accountable, in a manner that is as transparent as practical given the circumstances.

3.87 The committee was not convinced by the proposal to establish a sub-committee of JSCOT to deal exclusively with trade agreements. Establishing a sub-committee in the absence of additional resourcing would not in itself overcome the perceived issues with the current process, and may actually reduce flexibility and create duplication.

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70 *Submission 94*, p. 7.

71 *Submission 94*, p. 7.

72 Professor Triggs, *Committee Hansard*, 5 May 2015, p. 14.

73 Associate Professor Weatherall, *Committee Hansard*, 4 May 2015, p. 12.

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## **Recommendation 2**

**3.88** The committee recommends that the Joint Standing Committee on Treaties adopt a process of ongoing oversight of trade agreements under negotiation. This process is to include:

- private briefings from the Minister for Trade and Investment and the Department of Foreign Affairs and Trade under conditions of confidentiality at key points during negotiations;
- consultation with stakeholders with confidential access to negotiating texts, to enable JSCOT to form an evidence-base for its oversight work;
- writing to the minister and inviting the minister to respond to its concerns; and
- a summary of its ongoing oversight role, including relevant correspondence with the minister, as an annex to its public report on the agreement.

3.89 The committee is also of the view that the Australian Human Rights Commission's recommendation with regard to the work of the PJCHR would be a sensible reform. As all bills are currently subject to human rights analysis, there seems little reason to not adopt a similar approach for treaties, especially as the mechanisms are already in place. This relatively new committee has an opportunity to play a greater role in the treaty-making review process and align its existing mandate to the scrutiny of proposed treaties against the backdrop of Australia's international human rights obligations.

## **Recommendation 3**

**3.90** The committee recommends that the Parliamentary Joint Committee on Human Rights consider the human rights implications of all proposed treaties prior to ratification and report its finding to parliament.



# Chapter 4

## Consultation and transparency

4.1 An issue at the heart of this inquiry was the perceived lack of transparency and poor quality of consultation surrounding the negotiation of free trade agreements. This chapter will explore current treaty-making processes, including models of transparency in other countries; analyse the arguments for and against greater transparency in the Australian context; and look at proposals to increase transparency and improve stakeholder consultation.

### Introduction

4.2 Australia's approach to transparency in the treaty-making process is informed by the approach taken by other countries. Internationally, there is no standard process for treaty-making, as the submission from the Department of Foreign Affairs and Trade (DFAT) explained:

International treaty negotiations, whether multilateral, plurilateral or bilateral are complex, and will differ from treaty to treaty...Negotiations of different treaties involve widely varying timeframes, and reflect the differing demands and circumstances of one or more negotiating partners or negotiating contexts.<sup>1</sup>

4.3 The level of transparency in negotiations also varies between treaties. The DFAT website, under the sub-heading 'Isn't there something undemocratic about treaty making being in the hands of the Executive?', stated:

Since negotiations for major multilateral treaties are generally lengthy and quite public, parliamentary debate often takes place as the issues become publically known. For example, as the Climate Change Convention was negotiated over a period of years, issues associated with the draft convention were the subject of questions without notice, questions on notice, and debate.<sup>2</sup>

4.4 Whatever practice surrounds or has previously surrounded major multilateral treaties, it is now common practice for trade agreements and other treaties to be negotiated confidentially. As DFAT's submission to this inquiry noted, 'standard international practice is for the negotiating texts of bilateral and plurilateral treaties to be kept confidential between the parties prior to signature'.<sup>3</sup>

4.5 The Trans-Pacific Partnership—the treaty of most concern to stakeholders throughout this inquiry—is an example of a treaty being negotiated under strict conditions of confidentiality. The DFAT website states: 'At the start of the TPP process it was agreed that [negotiating] papers would be treated in confidence in order

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1 *Submission 74*, p. 1.

2 Department of Foreign Affairs and Trade, 'Treaty making process', <http://dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/treaty-making-process.aspx>

3 *Submission 74*, p. 4.

to facilitate candid and productive negotiations. This treatment is in line with normal negotiating practice.' The model letter that confirms the approach, which is also available on DFAT's website, reads:

First, all participants agree that the negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, is provided and will be held in confidence, unless each participant involved in a communication subsequently agrees to its release. This means that the documents may be provided only to (1) government officials or (2) persons outside government who participate in that government's domestic consultation process and who have a need to review or be advised of the information in these documents. Anyone given access to the documents will be alerted that they cannot share the documents with people not authorized to see them.<sup>4</sup>

4.6 During the hearing to this inquiry, DFAT explained how Australia manages confidentiality requirements in negotiating an agreement such as the TPP:

Obviously, all the cabinet ministers agree on the negotiating mandate. Officials from all relevant departments are then involved in the negotiations, attend the negotiating sessions and are part of the working group...They, in turn, are briefing their respective ministers. The negotiating process is a whole-of-government process... they brief up through their respective normal briefing mechanisms to their ministers. That would include, where appropriate, specific text, where they consider that it is important that the minister sees specific text.<sup>5</sup>

4.7 The explanation confirmed the committee's understanding that in the case of confidential negotiations, texts are only able to be seen by cabinet ministers and public servants from DFAT and other relevant departments negotiating the agreement. Parliamentarians that are not ministers, stakeholders and the general public are not able to access draft negotiating texts or to know the content of agreements.

### **Models of transparency**

4.8 Although the committee accepts that confidential treaty negotiations are relatively common, submitters gave evidence of models for improved transparency and stakeholder engagement currently emerging in other countries.

#### ***European Union—Transatlantic Trade and Investment Partnership***

4.9 A number of submissions suggested the process adopted by the European Union for the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the United States (US) and the European Union (EU) could be a suitable model for Australia.

4.10 TTIP is a comprehensive trade agreement between the US and the EU, which the US sees as complementary to the TTP. Agreement to negotiate a TTIP was reached in 2013. In response to public concerns about the lack of transparency around

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4 Department of Foreign Affairs and Trade, 'Release of Confidentiality Letter', <http://dfat.gov.au/trade/agreements/tpp/news/Pages/release-of-confidentiality-letter.aspx>

5 Ms Holmes, *Committee Hansard*, 4 May 2015, p.

the agreement, in November 2014 the European Commission committed to a range of enhanced transparency measures. These included:

- (a) making more EU negotiating texts public;
- (b) providing TTIP texts to all members of the European Parliament, rather than a select few; and
- (c) publishing on a regular basis a public list of TTIP documents shared with the European Parliament and the European Council.<sup>6</sup>

4.11 Despite increasing the number of documents disclosed, the EU does not publish any US or common negotiating documents without the explicit agreement of the US.<sup>7</sup>

### *EU–Japan FTA Negotiations*

4.12 The EU has also developed an innovative transparency model in relation to negotiations for the EU–Japan Free Trade Agreement. To improve stakeholder engagement, the European Commission engaged the London School of Economics Enterprises (LSEE) to undertake a Trade Sustainability and Impact Assessment (Trade SIA) as part of the FTA negotiations.<sup>8</sup>

4.13 In undertaking the Trade SIA, LSEE will complete an independent economic, social and human rights, environment and sectoral analysis; produce policy recommendations; and manage ongoing stakeholder consultations. Its aim is not only to improve understanding and awareness of stakeholders of the agreement, but to increase transparency and accountability.<sup>9</sup>

### *United States' advisory committee system*

4.14 Since 1974, the US has had an advisory committee system which aims to ensure that US trade policy captures US public and private sector interests. There are 28 advisory committees covering a range of topics and sectors, with a total membership of around 700 advisors.<sup>10</sup>

4.15 Advisors, who hold security clearances, are able to access draft negotiating text and other documents through a secure website under strict conditions of

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6 European Commission, 'Opening the windows: Commission commits to enhanced transparency in TTIP', <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1205&title=Opening-the-windows-Commission-commits-to-enhanced-transparency-in-TTIP>

7 European Commission, 'Communication to the commission concerning transparency in TTIP negotiations', [http://ec.europa.eu/news/2014/docs/c\\_2014\\_9052\\_en.pdf](http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf) p. 2.

8 London School of Economics, 'Trade Sustainability Impact Assessment of the EU-Japan Free Trade Agreement', 8 December 2014, <http://www.lse.ac.uk/businessAndConsultancy/LSEConsulting/currentProjects/tsia.aspx>

9 EU-Japan FTA: Trade Sustainability Impact Assessment, 'Approach', <http://www.tsia-eujapantrade.com/approach.html>

10 Office of the United States Trade Representative, 'Advisory Committees', <https://ustr.gov/about-us/advisory-committees>

confidentiality. While advisors generally represent industry interests, other interests are also represented. For example, the Trade and Environment Policy Advisory Committee includes representatives from environmental non-governmental organisations, consumers' unions and academia.<sup>11</sup>

### ***Other US transparency measures under the TPA bill***

4.16 The purpose of the 2015 Trade Promotion Authority (TPA) bill was to introduce a range of measures aimed at increasing the level of transparency in trade-related negotiations. In addition to provisions allowing members of Congress access to draft text and requiring the executive to consult with congressional committees (as discussed in Chapter 3), the bill also includes:

- appointment of a Chief Transparency Officer at the office of the United States Trade Representative (USTR) to consult with Congress on transparency issues, engage and assist the public and advise the US Trade Representative on transparency policy;
- a requirement that the USTR make publicly available, before initiating FTA negotiations with a new country, a detailed and comprehensive summary of the specific objectives, with respect to the negotiations, and a description of how the agreement will further those objectives and benefit the United States;
- a requirement that the President publicly release the assessment by the US International Trade Commission of the potential impact of the trade agreement; and
- release of the negotiating text to the public prior to the agreement being signed by the administration.<sup>12</sup>

### ***Regional Comprehensive Economic Partnership***

4.17 Australian Industry Group's submission suggested that the emerging process being adopted in negotiations for the Regional Comprehensive Economic Partnership (RCEP) agreement could serve as a useful model. In order to ensure RCEP is informed by the perspective of industry, a Working Group of business representatives was developed. The Working Group consists largely of peak industry bodies, and aims to feed business priorities and concerns into the negotiations.<sup>13</sup>

### **Lack of transparency in the Australian context**

4.18 Lack of access to information about confidential negotiations, and the impact of such a lack of information on the quality of stakeholder consultation, was of concern to the majority of submitters.

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11 Office of the United States Trade Representative, 'Trade and Environment Policy Advisory Committee', <https://ustr.gov/about-us/advisory-committees/trade-and-environment-policy-advisory-committee-tepac>

12 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 5.

13 *Submission 66*, pp 7-8.

4.19 DFAT was the only witness appearing before the committee to argue strongly in favour of the status quo. Its submission argued: 'disclosure of Australia's negotiating positions could adversely affect the capacity of the government to pursue the national interest by negotiating the best attainable outcomes'.<sup>14</sup> During the hearing, Ms Holmes, Assistant Secretary, expanded upon this rationale for confidentiality in negotiations, telling the committee:

Essentially, it is a negotiation. The fundamental rationale for that is, if you start releasing your bottom line, your negotiating strategy, and everyone can see it, then you are not going to get the best outcome. That is fundamentally the rationale for the restrictions.<sup>15</sup>

4.20 Almost all other submissions called for greater transparency, with a number of stakeholders rejecting DFAT's premise that such strict conditions of confidentiality were in Australia's national interest. This was argued to be the case for a number of reasons which are considered below.

### ***Lack of public trust***

4.21 A number of submitters argued that the perceived secrecy of trade negotiations leads to a lack of public trust in the process. Associate Professor Weatherall stated:

The secrecy surrounding negotiations brings the negotiations, and any resulting agreement, into disrepute. The secrecy surrounding the Anti-Counterfeiting Trade Agreement, for example, caused significant public concern and in some countries protests sufficient, in the end, to cause the collapse of the agreement. It is hard to convince people to comply with the law when they are convinced it has been negotiated in secret to their disadvantage.<sup>16</sup>

4.22 This concern was also shared by the Australian Chamber of Commerce and Industry (ACCI), who referred to the 'alarmist politicisation of particular provisions of treaty negotiations, frustrating the objectives of negotiators on all sides',<sup>17</sup> and CHOICE, whose submission argued:

Improving transparency and public access to documents will assist in providing the negotiation process and final agreement with greater legitimacy and public trust. Documents negotiated in secrecy without meaningful consultation or opportunity for robust public debate may be mistrusted by the public and their perceived legitimacy will suffer.<sup>18</sup>

4.23 This argument was certainly borne out by the evidence received by the committee. The majority of submissions were from members of the public who were gravely concerned about the perceived secrecy of trade agreements—in particular, the

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14 *Submission 74*, p. 4.

15 Ms Holmes, *Committee Hansard*, 4 May 2015, p. 32.

16 *Submission 79*, p. 6.

17 *Submission 71*, p. 2.

18 *Submission 69*, p. 3.

TPP—and for whom the confidentiality around the agreement has led to distrust of its content. As one submitter put it:

Such an agreement with such far reaching ramifications warrants a complete and open disclosure of its content, together with a genuine opportunity for appropriate bipartisan discussions and a full analysis of the effects that the adoption of such an agreement would have on all stakeholders, including the general public...

To conduct discussions in-camera...can only be seen as undemocratic and does nothing to allay quite rightful fears that, because the process is deliberately shielded from public scrutiny, the TTP [*sic*] proposal must contain elements that are by nature unacceptable to the general public.<sup>19</sup>

4.24 Similar sentiments were expressed in other submissions. Whether or not they are justified, it is undeniable that certain sections of the population are genuinely concerned about the secrecy surrounding trade negotiations, and that for many, this leads to distrust of the content of agreements.

### ***Identification of relevant stakeholders***

4.25 Witnesses were quick to point out that if the content of trade agreements is opaque, identification of relevant stakeholders is extremely problematic. Under current arrangements, the approach to consultation is ad hoc and many stakeholders with an interest in a proposed treaty have to self-identify in order to be engaged in the process.<sup>20</sup> As Ms Hepworth explained to the committee during the hearing:

Our concern, on a broader scale, is that there may be stakeholders out there that are not even aware that their interests will be caught. Most people, when they hear there is a trade agreement, will not necessarily have thought to themselves, for example, 'Oh my goodness—I run a library; there is a trade agreement; this is going to mean I cannot digitise newspapers past 1955 anymore.' And I tell you: the libraries did not think that that was going to happen, when we knew that we were in negotiations for the Australia-US Free Trade Agreement. So, without a certain level of transparency, it is very difficult to know whether you do have interests that are going to be impacted upon.<sup>21</sup>

4.26 Associate Professor Weatherall showed this to be anecdotally correct when she told the committee:

Trade negotiators cannot possibly know every priority of every stakeholder. They cannot guess that. Nor is it possible for all stakeholders to guess where they need to get involved and make submissions. I have to confess that, if I had any idea what was likely to be in the Korean agreement on IP, I would have been much more involved.<sup>22</sup>

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19 *Submission 35*, p. 1

20 *Submission 78*, p. 43

21 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 7

22 Ms Weatherall, *Committee Hansard*, 4 May 2015, p. 13

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### *Poor quality of consultation*

4.27 A point raised during the inquiry was that high quality consultation cannot be achieved if stakeholders have no knowledge of the content of agreements. Poor quality consultation means stakeholders are not well informed, in comparison with their international counterparts, and have to scrutinise the government's actions on the unreliable basis of leaked text. It also means that negotiators miss out on the expertise of stakeholders, and the agreements that result may not be as beneficial as could be hoped.

4.28 DFAT acknowledged the benefits of stakeholder consultation, but considered its current processes adequate. DFAT's submission stated:

The aims of the consultation process are to give decision-makers, ultimately Ministers, access to a wide range of information and to provide interested persons and groups with the opportunity to present their views to the government—including during the course of treaty negotiations...

Australian experience has been that broad consultation results in better-informed final decisions and Australian negotiating positions, reflecting consideration of a wide range of perspectives including expert or sectoral knowledge. Such consultation also promotes community understanding of treaties and their potential value or impact.<sup>23</sup>

4.29 Among other witnesses, only the Export Council of Australia was satisfied with the current consultation process. Mr Hudson told the committee:

I know there are many different views about the extent to which the Australian government communicates with affected parties... Our view on that is that we understand that DFAT and the like are limited as to the text of the agreements and what they can engage with...

We have attended a number of the DFAT consultation sessions and we are firmly of the view that they do communicate as extensively as they can and they do take into account commentary which is made.<sup>24</sup>

4.30 That DFAT undertakes extensive consultation when concluding an FTA is not in dispute. DFAT claimed to have provided over 1000 stakeholder briefings on the TPP alone since 2011,<sup>25</sup> which is certainly a remarkable investment of time, effort and resources. The crux of the issue for stakeholders is that, with DFAT unable to impart knowledge about the content of agreements, the consultations are of limited value.

4.31 A number of witnesses explained that the quality of consultations is compromised by the lack of access stakeholders have to information. Mr Kirkland from CHOICE articulated his concerns to the committee:

We would like to see the meetings continue, but we would like to see them involve much higher quality engagement. They are somewhat farcical at the moment. We

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23 *Submission 74*, p. 7.

24 Mr Hudson, *Committee Hansard*, 5 May 2015, p. 40.

25 *Submission 74*, p. 8.

have sent representatives to domestic briefings and we have also had staff present in overseas locations while some of the negotiations have been happening. In each of those cases meetings are held, but the discussion would be something like DFAT saying: 'Tell us your views on the treaty', and we would say: 'What can we comment on?' And they would say: 'Just tell us your views.' It is nice to have the conversation, but it is not a very high value engagement at the moment.<sup>26</sup>

4.32 Ms McGrath from the Australian Industry Group agreed, telling the committee that 'there are a lot of public forums so that people can come and voice their concerns, but the problem is that we are voicing our concerns blindfolded.'<sup>27</sup>

4.33 Stakeholders argued that, as they are not granted access to information on negotiations, their ability to advocate is severely compromised. Mr Melville from ACCI told the committee that 'Industry has not been in a well-informed enough situation to be able to influence the outcomes', providing an example of the copper industry:

DFAT said that it will not have any impact on the industry. There were two big manufacturers and now there is one. One has gone. The first one is surviving in collaboration with a Korean partner. It had an enormous impact on that industry yet we did not know about it and were not informed about it until after the agreement was signed.<sup>28</sup>

4.34 Professor Moore from the Public Health Association of Australia (PHAA) voiced a similar concern, telling the committee:

It is actually extraordinarily difficult to get information on specifics about the issues being discussed in trade negotiations...Therefore, it severely limits our ability to raise issues with those people in the Department of Foreign Affairs and Trade...it severely limits our ability to raise issues with members of parliament and with ministers and so forth—the normal processes that we go through in many, many other areas.<sup>29</sup>

4.35 This is the case for PHAA's advocacy on issues such as data protection, which they outlined to the committee:

The pharmaceutical industry in the US is lobbying very hard for an extension on the data protection period, which is the period where manufacturers of follow-on drugs, competing products, cannot use the clinical trial data that is used to register the initial version of the product. Their argument is that they need a longer monopoly period in order to be able to stimulate research and development...A patent can be challenged in court and can be revoked, but data protection cannot be revoked. That starts at the date of marketing approval, and it means that another company cannot use the clinical trial data that the originator has used to register its product to prove that it is safe and effective so that it can be sold in Australia. So, even if a patent is

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26 Mr Kirkland, *Committee Hansard*, 5 May 2015, pp 34-35.

27 Ms McGrath, *Committee Hansard*, 5 May 2015, p. 18.

28 Mr Melville, *Committee Hansard*, 5 May 2015, p. 20.

29 Professor Moore, *Committee Hansard*, 4 May 2015, p. 22.

revoked, we still may not be able to see biosimilar drugs, which are like generic drugs.<sup>30</sup>

4.36 Ms Hepworth referred to the 'sudden great outcry' that occurs when texts become public due to 'very controversial things... that might have serious unintended consequences and that, sometimes, seem to have been overlooked by the DFAT negotiators themselves', citing KAFTA as an example:

When the national interest analysis and the regulatory impact statement were tabled, there was no indication that we had picked up or increased our international-level obligations in intellectual property. In fact, before a committee, DFAT said that they were not aware of any increased international obligations. In response to a question on notice, DFAT actually admitted that, yes, there had been an increase in a substantial number of international commitments, especially in the area of broadcasting. Now, I am not entirely sure of the processes there, but from an outsider's perspective it rather looks like there may have just been a mistake that would have been picked up if there were greater transparency in the process.<sup>31</sup>

4.37 In the absence of information from official sources, stakeholders either have to speculate on the possible contents of an agreement or rely on leaked text, where available, to inform their positions on key issues. As Mr Kirkland explained:

We have never said what is in the TPP, because we do not know. All we have been able to do is comment on rumours, because that is the only source of information we have had to go upon. I think it would be of benefit to everybody involved in the process, including the government, if there was a greater level of transparency, because we would be having that debate on a much more open, factual basis.<sup>32</sup>

4.38 Professor Moore noted that working off the basis of leaked draft text, as many stakeholders currently do, is no substitute for having genuine knowledge of the content of an agreement. He told the committee:

When we are using leaked documents to try and establish an evidence base, it is something we are quite uncomfortable with. If we actually have the document that we are talking about... then we know what we are talking about, and perhaps even better, if a parliamentary committee is also examining it at the same time, then we are feeding through what we would consider a proper process.<sup>33</sup>

4.39 Poor quality consultation is not only a problem for stakeholders—it also precludes DFAT from achieving the best outcomes for Australia. Multiple submitters told the committee that without the expert input that comes from high quality stakeholder consultation, DFAT cannot achieve the best possible negotiating outcomes. As Associate Professor Weatherall's submission explained:

However experienced, DFAT negotiators are not subject matter experts who are in touch with the latest cases and legislative developments in Australia and other key

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30 Dr Gleeson, *Committee Hansard*, 4 May 2015, pp 24-25.

31 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 3.

32 Mr Kirkland, *Committee Hansard*, 5 May 2015, p. 35.

33 Professor Moore, *Committee Hansard*, 4 May 2015, p. 27.

jurisdictions. As agreements (especially trade agreements) become more legally complex, there is an urgent need to engage experts where possible to ensure that treaty text does not come with unintended impacts.<sup>34</sup>

4.40 Indeed, the evidence before the committee showed that treaties to which Australia has become a party have on some occasions had unintended consequences that were only picked up after the treaty had been signed. Ms Hepworth provided an example of a practical change brought about, perhaps unintentionally, due to a free-trade agreement:

The current situation where teachers in Australian schools face the choice between criminal liability or being able to caption DVDs for the hearing-impaired students is a direct result of the technological protection measure provisions in the Australia-US free trade agreement.<sup>35</sup>

4.41 This view is shared by ACCI, who highlight the necessity of high-quality engagement with industry in order to secure the best negotiating outcomes. The ACCI submission stated:

We observe that due to presently limited domestic consultation processes during trade negotiations, Australian trade treaties often contain misunderstood provisions that are only available for consideration by business and broader civil society after the agreed treaty text is concluded.<sup>36</sup>

4.42 The Australian Industry Group agreed that DFAT needs external assistance to secure outcomes in the national interest:

It is Australian industry which will implement the advantages of freeing up trade. But it is also industry which will bear the brunt of rapid erosion of domestic markets. And it is industry which has the expertise to advise on the effect of proposed measures and to highlight some of the unintended outcomes.<sup>37</sup>

## **Proposals for reform**

### ***Publication of treaty text prior to signature***

4.43 The committee heard a range of different views about how to address the lack of transparency outlined above. Among these were persistent calls for treaty text to be made public prior to cabinet authorising the agreement for signature. Proponents argued that such a process would avoid the major issue with the current treaty-making process: that by the time parliament, stakeholders and the general public see the negotiated text it is too late for it to be changed.

4.44 As Dr Ranald from AFTINET put it to the committee:

Our argument is that since trade agreements are now dealing with all these issues that would normally be decided through an open democratic process domestically

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34 *Submission 79*, p. 6.

35 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 1.

36 *Submission 71*, p. 2.

37 *Submission 66*, p. 1.

involving public discussion and parliamentary legislation, then the trade agreement process needs to be a lot more open...

The first thing that we are asking for—and this is very important, I think—is that at the end of the negotiating process the text should be released for public and parliamentary discussion before the decision to sign it is made or recommended by cabinet. We want the text to be released before it is signed, or before cabinet decides to sign it.<sup>38</sup>

4.45 This approach was supported by a number of stakeholders, including the National Tertiary Education Union, ACTU, Dr Rimmer and individuals from whom the committee received submissions. Other submitters argued that Australia should not agree to enter future negotiations conducted under conditions of confidentiality. The Law Council of Australia submitted:

The Law Council does not see any justification for negotiating such treaties in secret. We submit that generally Australia should not in future enter into agreements to keep draft texts and other negotiating documents secret.<sup>39</sup>

#### *Senate orders*

4.46 The committee notes that on three separate occasions between 2013 and 2015 the Senate agreed to orders requiring the text of free trade agreements to be tabled in parliament before signing. On 4 December 2013 a motion was moved by the Australian Greens ordering the Minister representing the Minister for Trade to table the final text of the TPP 'well before it is signed'.<sup>40</sup> In response to the order, the Minister for Finance, Senator the Hon Mathias Cormann, tabled a statement claiming public interest immunity in relation to the documents covered by the order. The statement reiterated Australia's normal treaty-making process and drew attention to the 590 stakeholder briefings conducted by DFAT since May 2011. It continued:

Unilateral disclosure of the information sought before negotiations have been finally concluded and settled in the usual way would be prejudicial to Australia's international relations.

Specifically, disclosure of this information would be in breach of relevant commitments made to Australia's partners in this negotiation. The twelve TPP partners have agreed to keep negotiating documents, including the text, confidential.

Pre-emptive and unilateral release of such confidential information would damage Australia's standing as negotiating partner, both in respect of this process and potential future processes.<sup>41</sup>

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38 Dr Ranald, *Committee Hansard*, 4 May 2015, p. 15.

39 *Submission 89*, p. 12.

40 *Journals of the Senate*, 4 December 2013, p. 231.

41 *Trade Trans-Pacific Partnership plurilateral free trade agreement Letter to the President from the Minister for Finance (Senator Cormann) responding to the order of the Senate of 4 December 2013 and raising a public interest immunity claim, dated 5 December 2013*, tabled 5 December 2013, p. 254

4.47 Soon afterwards, on 11 December 2013, the Senate agreed to a similar motion moved by the Leader of the Opposition in the Senate, Senator the Hon Penny Wong, ordering the Minister representing the Minister for Trade to table the full text of the Korea-Australia Free Trade Agreement, the TPP and other bilateral and plurilateral trade agreements 'at least 14 days before signing'. The motion noted that the US Trade Representative had undertaken to publish the full text of all free trade agreements before signing, and resolved that '...the Australian Senate and the people of Australia are entitled to scrutinise proposed agreements before signing...'<sup>42</sup> The response tabled by the Minister for Finance on 12 December 2013 provided essentially the same reasons as to why the order would not be complied with.<sup>43</sup>

4.48 A further motion agreed to by the Senate on 26 March 2015, and moved by the Australian Greens, reiterated the order of the Senate of 11 December 2013. In doing so it noted that the Malaysian Government had decided to undertake a cost-benefit analysis of the impact of the TPP and called on the Australian Government to request that the Productivity Commission undertake a comprehensive socio-economic cost-benefit inquiry into the impact of the agreement.<sup>44</sup> The government has not responded to the order.

#### ***Disclosure of additional information relating to treaties under negotiation***

4.49 A number of submitters called for DFAT to make additional information, other than draft treaty text, public. CHOICE called for the release of additional explanatory documents on treaties under negotiation such as redacted text, issue and policy papers, explaining:

CHOICE strongly supports the release of the entire negotiating text associated with each round of negotiations at the earliest opportunity to facilitate ongoing feedback and consultation with stakeholders. However, we accept that incremental steps to improve transparency are far preferable to the status quo, even if these steps fall short of complete and ongoing disclosure.<sup>45</sup>

4.50 In the absence of the release of negotiating text, the Australian Digital Alliance (ADA) argued that 'DFAT should make an informed decision as to what could be released with a presumption towards transparency'. Their submission argued:

Even if the full text cannot be released, there may be portions of text, or broad outlines, or negotiation mandates that would be of use that can be released.<sup>46</sup>

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42 *Journals of the Senate*, 11 December 2013, p. 343.

43 *Trade Free trade agreements Letter to the President of the Senate from the Minister for Finance (Senator Cormann) responding to the order of the Senate of 11 December 2013, dated 11 December 2013*, tabled 12 December 2013, p. 391.

44 *Journals of the Senate*, 26 March 2015, pp 2471-2472.

45 *Submission 69*, p. 7.

46 *Submission 78*, p. 13.

4.51 Similarly, the AFTINET submission proposed that 'the Australian government should follow the example of the European Union and release proposals and discussion papers during trade negotiations'.<sup>47</sup>

4.52 These arguments are based on the assumption that there are documents relating to treaty negotiations other than the negotiating text that could be informative for stakeholders or the general public that Australia could make public without breaching the terms of a confidentiality agreement or otherwise disadvantaging Australia's national interest. However, this assumption may not be correct: the excerpt from the confidentiality agreement for the TPP above specifically lists government proposals and explanatory materials as documents which cannot be released.

### ***Disclosure of treaty texts to stakeholders***

4.53 A proposal to allow key stakeholders confidential access to draft text during negotiations was put forward by witnesses. ACCI's submission proposed:

All representative bodies from civil society that are impacted by trade treaties—particularly independent economic research bodies—should be allowed to register for access to the draft treaty text within the terms of the relevant confidentiality agreements...

Negotiators are to disclose draft treaty texts in unfinished form to registered bodies in a secure forum, in which questions can confidentially be asked of negotiators and bodies could privately put their viewpoint on the basis of seeing the whole draft treaty text (less draft tariff lines).<sup>48</sup>

4.54 The ADA also called for stakeholders to have access to draft text, submitting:

In such a complex area [IP], the insights of subject-matter experts, industry and civil society are undoubtedly of benefit, as those groups are able to point out connections and conflicts that may not be obvious even to experienced negotiators. The secrecy surrounding agreements such as the TPP reduce the ability of these groups to provide detailed assistance.<sup>49</sup>

4.55 Telstra's submission also called for access to negotiating text for stakeholders, arguing:

Formally enshrining access to treaty text at an early stage allows industry and civil society to provide useful feedback to improve the ultimate operation of treaties... Adopting this type of approach to formalising access to treaty text subject to confidentiality requirements enables the government to better reflect economic and community interests, leading to higher quality treaty outcomes.<sup>50</sup>

4.56 These proposals all appear to envisage a system similar to the US Trade Advisory Committees.

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47 *Submission 52*, p. 8.

48 *Submission 71*, p. 6.

49 *Submission 78*, p. 2.

50 *Submission 61*, p. 1.

### **Committee view**

4.57 The committee recognises that Australia does not negotiate treaties in a vacuum; our processes will necessarily be informed by the approaches taken by our trading partners. The evidence before the committee showed that, while some of our partners notably the US and the EU have taken steps to improve transparency in their own processes, Australia's system is not dissimilar to many of our partners.

4.58 That said, the committee is convinced by the evidence from witnesses that Australia's approach to treaty transparency requires reform. While the committee is persuaded by arguments that the lack of transparency around treaty-making leads to public distrust of the process, its main concern is the negative impact such practices have on stakeholder consultations.

4.59 The committee understands that it is not possible to negotiate an agreement to the satisfaction of every stakeholder. However, the committee does not believe that criticism from stakeholders was merely due to disappointment with particular negotiating outcomes. Compelling evidence from a number of major players gives a consistent impression that DFAT's system of stakeholder consultation requires reform.

4.60 The committee considers that, while it would be desirable for draft treaty text to be tabled in parliament (and thus made public) prior to cabinet authorising the agreement for signature, this may not be within Australia's control. In the case of the TPP, Australia has entered the negotiations on the condition of confidentiality. To make the text of the agreement public prior to signature would require the agreement of the other negotiating parties. There are calls for greater transparency among our negotiating partners, especially the US, and such an agreement may in fact be reached in the case of the TPP—but the committee understands that, while Australia should argue strongly to be able to table treaty text prior to cabinet authorisation for signature, such agreement may prove elusive.

4.61 In the absence of agreement from the other parties, publication of negotiating text by Australia prior to signature would be exceedingly reckless, as it would put Australia in breach of its commitment to maintain confidentiality. To do so would impact negatively on Australia's relationships with negotiating partners and jeopardise Australia's ability to engage in international trade agreements in future.

4.62 The committee does not consider it practical for Australia to adopt a blanket rule to not sign up to confidential negotiations in future. However, Australia should always endeavour to table the text of treaties prior to cabinet authorisation for signature. The committee takes DFAT's point that complete openness in the negotiation process may not always be practical to achieve negotiating outcomes. Furthermore, refusal to enter negotiations conducted confidentially could see Australia left out of future trade agreements that are in the national interest.

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#### **Recommendation 4**

**4.63 The committee recommends that on entering treaty negotiations, Australia seeks agreement from the negotiating partner(s) for the final draft text of the agreement to be tabled in parliament prior to authorisation for signature. In the absence of agreement, the government should table a document outlining why it is in the national interest for Australia to enter negotiations.**

4.64 While the committee considers that it would be extremely valuable for additional information relating to treaties under negotiation to be made public, this must be done within confidentiality agreements that Australia has signed up to. Whether or not there are documents useful to stakeholders that could be released without breaching our confidentiality obligations is a question that should be resolved by DFAT.

4.65 At the very least, DFAT should work with industry stakeholders to develop a communications strategy that addresses all matters connected with the treaty-making process to extend the reach of its engagement with stakeholders and the general public.

#### **Recommendation 5**

**4.66 The committee recommends that subject to the agreement of negotiating countries, the Department of Foreign Affairs and Trade publish additional supporting information on treaties under negotiation, such as plain English explanatory documents and draft treaty text.**

4.67 The committee accepts the argument for moving toward a system where stakeholders are granted confidential access to draft negotiating text. For stakeholders, the lack of access to negotiating text and other detailed information inhibits their ability to influence and scrutinise decisions being made in the trade context in the way they would in a domestic context. Stakeholders are also at a disadvantage in comparison to their counterparts in partner countries—at least in the US—who are allowed confidential access to draft texts as outlined above.

4.68 Moreover, providing key stakeholders with access to draft text will enable DFAT to engage additional expertise, leading to better negotiated outcomes. As noted in Associate Professor Weatherall's submission, DFAT negotiators are not subject matter experts. It is the committee's hope that by providing stakeholders with access to draft text, DFAT will draw on additional expertise during negotiations and avoid negotiating treaties that contain the 'unintended consequences' outlined above.

4.69 As the committee understands it, allowing stakeholders confidential access is consistent with Australia's confidentiality obligations. For example, the model letter on confidentiality in TPP negotiations specifically allows for the sharing of documents with 'persons outside government who participate in that government's domestic consultation process and who have a need to review or be advised of the information in these documents' as long as these people are 'alerted that they cannot share the

documents with people not authorized to see them'.<sup>51</sup> Based on these requirements, there seems to be no restriction on Australia allowing stakeholders to view texts on a confidential basis.

4.70 The committee heard evidence that the equivalent process in the US, while allowing participation from civil society and academia, is heavily weighted toward the views of industry. In establishing a stakeholder engagement system for Australia, effort will need to be made to ensure that access is granted to a representative range of voices in the community—including industry bodies, academics, unions, and civil society organisations representing the full range of community interests.

4.71 In the committee's view, it would be useful if DFAT monitored the negotiation process and benchmarks included by Australia's trading partners in their trade agreements to identify alternative negotiation models that may be applicable to Australia in the future.

### **Recommendation 6**

**4.72 The committee recommends that stakeholders with relevant expertise be given access to draft treaty text under conditions of confidentiality during negotiations. The committee recommends that the government develop access arrangements for stakeholders representing a range of views from industry, civil society, unions, consumer groups, academia and non-government organisations.**

### **States and territories**

4.73 State and territory governments were invited to make written submissions to the inquiry, drawing attention to term of reference (c) on the role of consultative bodies such as the Commonwealth–State–Territory Standing Committee on Treaties (SCOT) and the Treaties Council.

4.74 According to the DFAT submission, state and territory governments are a key focus of the consultation process undertaken during treaty negotiations and in the course of decision-making on proposed treaty actions. The principal avenue for consultation between the Commonwealth Government and the states and territories on treaty-making is the Standing Committee on Treaties (SCOT). Established in 1982 and convened twice-yearly by the Department of Prime Minister and Cabinet, it consists of officers representing the Premier's and Chief Minister's Departments and officers from the Departments of Prime Minister and Cabinet, Foreign Affairs and Trade and Attorney-General's.

SCOT is a key forum for monitoring and reporting on the negotiation and implementation of particular treaties. SCOT operates to provide a central coordination consultative mechanism between the Commonwealth Government and State and Territory Governments, and to decide whether there is any need for further

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51 Department of Foreign Affairs and Trade, 'Release of Confidentiality Letter', <http://dfat.gov.au/trade/agreements/tpp/news/Pages/release-of-confidentiality-letter.aspx>

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consideration by the Treaties Council, a Ministerial Council, a separate intergovernmental body or other consultative arrangements.<sup>52</sup>

4.75 Through SCOT, states and territories receive twice-yearly schedules listing all international treaties that Australia is currently negotiating or that are under review. State and territory representatives have the opportunity to seek further details, offer views and comments, flag those matters on which they wish to be consulted, or improve the consultative mechanism.<sup>53</sup>

4.76 The SCOT also plays an important coordinating role for the Treaties Council—itsself an adjunct to the Council of Australian Governments (COAG) and established in June 1996—which consists of the Prime Minister, Premiers and Chief Ministers. The Treaties Council has an advisory function to consider treaties and other international instruments of particular sensitivity and importance to the states and territories. However, it has only met once, in November 1997.<sup>54</sup>

4.77 During the inquiry, the committee received brief submissions from the Queensland and ACT governments which provided differing perspective on the effectiveness of existing mechanisms for Commonwealth and state/territory consultation on treaty matters. While the Queensland Government submission described the SCOT as a highly valuable forum for discussing treaty matters and praised the Commonwealth for advocating on behalf of states and territories during the treaty negotiation phase,<sup>55</sup> the ACT Government submission was more critical of existing arrangements and provided some practical measures to enhance the process:

Currently, engagement with the States and Territories on proposed treaties is conducted within constrained and often insufficient timeframes, which can prohibit quality collaboration and outcomes. This can lead to individual jurisdictions developing differing approaches to meet requirements and even duplication of effort. The consequent lack of uniformity or standardisation can result in future effort to harmonise arrangements. This effort could be reduced if greater consideration was given to the initial implementation approaches prior to a treaty being signed.<sup>56</sup>

4.78 The submission also pointed to a lack of a single mechanism or means of coordinating information with DFAT. Given the large number of people involved in formulating treaties:

...it can at times be difficult to identify the best point of contact for a particular treaty, and for a general update on a set of treaties. Developing a mechanism for simpler and quicker access to coordinated and current information for State and Territory Governments would be a welcome initiative.<sup>57</sup>

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52 *Submission 74*, p. 6.

53 *Australia International Treaty Making Information Kit*, Department of Foreign Affairs and Trade, July 2000, p. 8.

54 *Submission 74*, p. 6.

55 *Submission 75*, p. 1.

56 *Submission 93*, pp 1-2.

57 *Submission 93*, p. 2.

4.79 The submission suggested practical ways to improve engagement and information sharing with states and territories, and to streamline the negotiation and planning process, including:

- increasing the frequency of the SCOT's inter-jurisdictional meetings to four times a year;
- utilising ministerial councils as a platform for cross-collaboration about treaties between jurisdictions; and
- establishing an online information hub, accessible by all Australian governments, that includes reporting information, timelines, linkages and interactions with other treaties, as well as information relevant to policy and program analysis, evaluations and community feedback.<sup>58</sup>

4.80 The committee also received evidence from ACCI in relation to state and territory obligations in the implementation of treaties and the role of COAG. ACCI stressed that many international treaties are negotiated in a manner that is agnostic as to the administrative division of responsibilities between the signatory states. An example is the Minamata Convention on Mercury which was signed by the federal government on 10 October 2013 but is yet to be ratified:

Provisions within the Convention designed to limit and monitor the transnational trade in mercury are clearly within the purview of the Australian Government; however, other provisions with the Convention dealing with the domestic waste management of products containing mercury are matters for state/territory governments.<sup>59</sup>

4.81 ACCI recommended that during the negotiation stage and later through the implementation and monitoring stage, treaties that require action on the part of state and territory governments should be reviewed within the context of the COAG process.<sup>60</sup>

### **Committee view**

4.82 While the committee took note of the proposals put forward to improve consultation with the states and territories, it does not consider that it received enough evidence in this regard to make recommendations. Although all Australian state and territory governments were invited to submit, only the ACT government suggested changes to the current system. The committee is hopeful that the adoption of other recommendations in this report—such as placing a greater emphasis on strategy up front (as detailed in Chapter 5)—will ameliorate some of the concerns raised in the ACT government's submission.

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58 *Submission 93.*

59 *Submission 71*, pp 27-28.

60 *Submission 71*, p. 28.

# Chapter 5

## Agenda setting and post-implementation issues

5.1 This chapter examines the evidence around issues relating to Australia's approach to agenda setting and post-implementation of trade agreements. These include the lack of a strategic framework at the start of negotiations, shortcomings with national interest analyses (NIAs) and associated documents, a lack of analysis of treaties in force, and inconsistency between trade agreements.

### Lack of a trade strategy

5.2 An issue of concern raised in evidence was the lack of a coherent strategy surrounding trade negotiations due to the 'agreement-by-agreement' approach taken by Australia. The lack of an overarching trade strategy has been the subject of previous reviews. For example, in its 2010 report into bilateral and regional trade agreements, the Productivity Commission expressed concern that:

While substantial information on the progress of agreements is currently publicly available for each agreement through agreement home pages on DFAT's website, their 'agreement-by-agreement' nature inherently lacks an overall strategic perspective.<sup>1</sup>

5.3 Associate Professor Weatherall agreed with the Productivity Commission's criticism. Her submission argued that 'Australia needs a more strategic, and less reactive approach to the negotiation of international obligations, and one that is informed by Australia's national interest'.<sup>2</sup>

5.4 Submitters brought to the committee's attention several concerns relating to Australia's failure to approach trade agreements strategically, which are explored below.

### *Explanation of entry into negotiations*

5.5 By the time parliament plays a role in scrutinising an agreement after it has been tabled, it is too late for it to be renegotiated, even though technically Australia is not yet bound by the treaty. Picking up on this issue, a number of submitters argued that information about Australia's strategic approach to the negotiations needs to be tabled in parliament—and thus made public—when negotiations commence.

5.6 Associate Professor Weatherall was strongly in favour of introducing measures for parliamentary engagement before the signing of agreements, to improve the process:

In short, while the introduction of processes for tabling and Parliamentary scrutiny of treaties *ex post* has been helpful, it is time to develop better processes for the

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1 Productivity Commission Research Report, *Bilateral and Regional Trade Agreements*, November 2010, p. 302.

2 *Submission 79*, p. 4.

*ex ante* setting of negotiating mandates and frameworks and for stakeholder and Parliamentary engagement *during* negotiations. Better *ex ante* processes in particular could improve democratic accountability *and* better serve Australia's national interest by facilitating a more strategic and less reactive approach to treaty actions.<sup>3</sup>

5.7 The committee received a number of proposals that would see information tabled in parliament earlier in the treaty-making process. The Australian Fair Trade and Investment Network (AFTINET) submission, picking up on a previous JSCOT recommendation, proposed that:

Prior to commencing negotiations for bilateral or regional trade agreements, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.<sup>4</sup>

5.8 The Australian Digital Alliance (ADA) and Australian Library and Information Association (ALCC) submission went further and argued that the negotiating mandate and conditions of negotiation should be approved by JSCOT prior to negotiations commencing: 'Following JSCOT approval of the negotiation mandate, the priorities, objectives and anticipated costs and/benefits of the treaty should be tabled in Parliament'.<sup>5</sup> The submission reasoned as follows:

Tabling the priorities, objectives and anticipated costs and benefits of the treaty in parliament would give DFAT clarity over their mandate, and ensure that they are working from the same base assumptions as the parliament and the population. It would also assist stakeholders in knowing what may be of benefit or concern to their interests.<sup>6</sup>

5.9 In evidence before the committee, a representative from the ADA stated that a negotiating mandate was particularly important for complex and sensitive issues such as intellectual property to establish the benefits to Australia from including them in free trade agreements (FTAs):

The decision to enter into a negotiation should be made only after identifying Australia's strategic goals and risks. We would like to draw the committee's attention to the recent recommendation in the competition policy review, also known as the Harper review, for an independent review to assess the processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

5.10 In a similar vein, the National Tertiary Education Union (NTEU) called for tabling of an 'initial "public interest" document...explaining the objectives, rationale

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3 *Submission 79*, p. 2.

4 *Submission 52*, p. 8.

5 *Submission 78*, p. 2.

6 *Submission 78*, p. 7.

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and priorities of the intended agreement. This document should outline an initial position about the economic, social and regulatory impacts'.<sup>7</sup>

### ***Prospective cost-benefit analysis***

5.11 Another issue of concern to submitters was that cost-benefit analyses are not mandatory at the commencement of negotiations. Witnesses argued that to carry out an analysis after an agreement has been negotiated is to put the cart before the horse. Instead, an analysis should be carried out and made public up front in order to inform better negotiating outcomes.

5.12 That a cost-benefit analysis should be done early enough to inform the negotiations was supported by CHOICE. Mr Kirkland told the committee:

We think there is value in cost-benefit analysis being done in a very public kind of way during the negotiation process. In our discussions with DFAT they have told us that that is something they would only do after the negotiations have concluded. That seems like an unusual way to approach that questioning because it is hard to know how Australia, in the negotiation process, can assess what is an appropriate landing point for Australia without having done any cost-benefit analysis.<sup>8</sup>

5.13 The Australian Council of Trade Unions (ACTU) submission drew attention to a 2008 study by the National Institute of Economic and Industry Research which found that FTAs had resulted in net production losses by Australian manufacturing industries between \$2.6 and \$2.9 billion:

Based on these experiences, the ACTU strongly supports more balanced studies of the likely employment, social and environmental impacts of trade agreements before governments make the decision to enter into negotiation. We also support the publication of comprehensive studies of the employment, social and environmental impacts of the text of the agreement at the end of the negotiations before the agreement is signed.<sup>9</sup>

### ***Inconsistency between agreements***

5.14 Evidence before the committee gave the strong impression that there is a lack of consistency between agreements, as they are negotiated by different teams within DFAT. As Ms Hepworth explained to the committee:

One of the other issues that we are particularly worried about is the way that the different chapters of, say, trade agreements interlock and relate to each other. We talk to DFAT quite a lot about our concerns and our member interests in relation to copyright...However, each of the chapters is negotiated separately by different negotiating people, with one person overseeing them. But the relationships are so complex that, to be honest—with the absolutely greatest respect to the foreign affairs negotiating team—I am not sure that you would be able to catch all of the

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7 *Submission 51*, p. 2.

8 Mr Kirkland, *Committee Hansard*, 5 May 2015, p. 34.

9 *Submission 36*, p. 4.

interrelations and the consistency issues between those different, incredibly complex chapters.<sup>10</sup>

5.15 The fact that agreements are negotiated independently creates problems for stakeholders attempting to identify a relevant point of contact (as noted by the ACT Government submission in chapter 4). The lack of consistency is also problematic for businesses attempting to make use of trade agreements. As Mr Clark from the Australian Chamber of Commerce and Industry (ACCI) explained:

It also seems that Australia's trade treaties are negotiated independently from one another and so are built up vertically, with very little horizontal cohesion. As a result, our trade survey shows time and time again that businesses have difficulty understanding regulatory divergence between the multiple Australian trade agreements.

For example, an Australian wine exporter exporting wine produced in Australia using bottles from outside Australia might qualify for a tariff concession under the Korean agreement by using a certain mathematical formula, but the same wine needs to undergo a totally different formula when going through the [AANZFTA] Agreement.<sup>11</sup>

5.16 Mr Willcocks further expanded on this point:

What we increasingly find is that, unfortunately, our negotiators allow for a multitude of procedures in a unique agreement, which then results in a multitude of ways that you can access the agreement, which then results in business confusion.<sup>12</sup>

5.17 The lack of cohesion between agreements is also a missed opportunity for using lessons learned in past agreements to negotiate better outcomes. Associate Professor Weatherall's submission explained:

In theory, Parliamentary scrutiny, whether by JSCOT or by a Senate Committee... could inform future treaty actions... Thus the Parliamentary scrutiny of AUSFTA, and the numerous criticisms and concerns raised by the Senate Standing Committee... or JSCOT relating to AUSFTA's IP chapter should have informed Australia's negotiating stance in subsequent bilaterals.

This however has not happened... DFAT appears to have subsequently adopted the same approach... in its future trade negotiations, despite this Parliamentary criticism and subsequent criticism by the Productivity Commission...<sup>13</sup>

5.18 This apparent lack of consistency between agreements contributes to the impression of stakeholders that trade negotiations are not subject to a coherent strategy.

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10 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 3.

11 Mr Clark, *Committee Hansard*, 5 May 2015, p. 45.

12 Mr Willcocks, *Committee Hansard*, 5 May 2015, p. 52.

13 *Submission 79*, p. 3.

### *Model investment treaty*

5.19 One proposal put to the committee that seeks to address inconsistency between agreements, while at the same time facilitating public and stakeholder consultation, was that Australia develop a model investment treaty or model treaty text.

5.20 In a submission to the committee's 2014 inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, Professor Luke Nottage proposed that Australia develop a 'model investment treaty' to address the public's concern over the inclusion of investor-state dispute settlement (ISDS) clauses in treaties.<sup>14</sup> The committee's report to that inquiry noted that such an approach could be a valuable way of managing the controversial issue of ISDS.<sup>15</sup>

5.21 In the hearing for this inquiry, Professor Nottage restated his support for a model investment treaty:

Australia should consider developing a model investment treaty or particular provisions on matters of public interest for the parliament and Australian citizens and, indeed, other parts of trade and investment agreements that are also of broader public interest—so, for example, intellectual property chapters or separate IP treaties.<sup>16</sup>

5.22 Professor Nottage told the committee that it was unusual that Australia does not have draft text in relation to investment:

In relation to investment, nowadays it is quite unusual, in the sense that dozens of economies, including all the major ones, both developed and developing, have a template that they start with, and which they elaborate, and sometimes update quite regularly, based on public consultation.<sup>17</sup>

5.23 According to Professor Nottage, putting in place a procedure for developing model text on controversial treaty provisions 'could be a useful compromise mechanism to enhance public understanding and input into subsequent treaty negotiations'.<sup>18</sup>

5.24 The proposal that Australia develop model text on controversial areas such as ISDS and intellectual property (IP) was also supported by Associate Professor Weatherall. Along similar lines, the ADA proposed that an 'overarching framework'

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14 *Submission 21* to Foreign Affairs Defence and Trade Legislation Committee, *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, pp 1-2.

15 Foreign Affairs, Defence and Trade Legislation Committee, *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, August 2014, p. 17.

16 Professor Nottage, *Committee Hansard*, 5 May 2015, p. 64.

17 Professor Nottage, *Committee Hansard*, 5 May 2015, p. 64.

18 *Submission 44*, p. 2.

be developed in the area of IP.<sup>19</sup> ACCI, due to concerns that every agreement 'starts with a blank sheet of paper',<sup>20</sup> favoured developing a model trade agreement:

...based on international standards that is fully transparent to Australian Industry and to international Governments, so that all stakeholders are aware of what Australia sees as the ideal procedural outcome from a trade treaty...this template would be used as a basis for all future negotiations, and will drive a level of consistency and improved confidence as to what is included in the negotiations.<sup>21</sup>

5.25 Witnesses agreed that, although actual agreements would be expected to depart from the model treaty text, having a template as a starting point could be useful for both consistency between agreements and transparency.

### **Committee view**

5.26 The committee strongly supports the principle that the parliament should have greater access to information about proposed treaties at the commencement of negotiations, throughout the negotiation process and after treaties have entered into force. Although the proposals summarised above are worded differently, there was significant convergence on this topic between submissions and from stakeholders.

5.27 The committee agrees that a statement setting out the government's objectives and priorities in entering negotiations would be a useful tool to facilitate a more strategic approach to negotiations and strengthen parliamentary oversight. It would also be consistent with recommendations made by JSCOT in 2008 and 2012.<sup>22</sup> The committee believes this document should be prepared by DFAT on behalf of the Minister for Trade and Investment.

### **Recommendation 7**

**5.28 The committee recommends that the government, prior to commencing negotiations for trade agreements, tables in parliament a detailed explanatory statement setting out the priorities, objectives and reasons for entering negotiations. The statement should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.**

5.29 Like CHOICE, the committee is perplexed that a thorough cost-benefit analysis of proposed treaty action is only undertaken when treaty negotiations have concluded. The committee is of the view that an independent cost-benefit analysis of proposed FTAs carried out by an independent body such as the Productivity Commission around the time of the commencement of negotiations would have benefits not just for transparency, but for informing the negotiations themselves. Where negotiations span a number of years, as in the case of the Trans-Pacific

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19 *Submission 78*, p. 7.

20 Mr Clark, *Committee Hansard*, 5 May 2015, p. 46.

21 *Submission 71*, p. 5.

22 Joint Standing Committee on Treaties, Report 95, *Australia-Chile Free Trade Agreement*, October 2008, p. 35; Joint Standing Committee on Treaties, Report 128, *Inquiry into the Treaties Ratification Bill 2012*, August 2012, p. 15.

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Partnership (TPP) and the China-Australia Free Trade Agreement (ChAFTA), the cost-benefit analysis may need to be periodically updated to ensure it remains relevant.

5.30 As discussed earlier, the committee accepts the argument that the ability of JSCOT to provide meaningful scrutiny of treaty action and to influence treaty text is severely constrained because under current practice it has access to the National Interest Analysis (NIA) and associated documents only after an agreement has been signed by the executive and tabled in parliament. It would be far more meaningful and useful for JSCOT to conduct a public inquiry into both the government's negotiating mandate statement and an independent cost-benefit analysis at the commencement of negotiations. This would greatly enhance parliamentary oversight of proposed treaty action and instil public confidence in the treaty-making process. The committee believes that this new process is consistent with a principled and strategic approach to negotiating agreements.

### **Recommendation 8**

**5.31 The committee recommends that a cost-benefit analysis of trade agreements be undertaken by an independent body, such as the Productivity Commission, and tabled in parliament prior to the commencement of negotiations or as soon as is practicable afterwards. The cost-benefit analysis should inform the government's approach to negotiations.**

**5.32 The committee further recommends that:**

- **treaties negotiated over many years be the subject of a supplementary cost-benefit analysis towards the end of negotiations; and**
- **statements of priorities and objectives and cost-benefit analyses stand automatically referred to Joint Standing Committee on Treaties for inquiry and report upon their presentation to parliament.**

5.33 The committee was also surprised to learn that, despite the number of trade agreements entered into in recent years, negotiations still start with a blank sheet of paper. Examples shared with the committee by stakeholders about inconsistencies between agreements demonstrated a need to take a more consistent approach to negotiations.

5.34 The committee considers that the proposal to develop a model or template agreement, at the very least covering controversial issues such as ISDS, IP, and labour and environmental standards, should be considered a priority. Developing a model agreement will also engage stakeholders and the public, and have a positive impact on treaty transparency.

## Recommendation 9

**5.35 The committee recommends that the government develop a model trade agreement that is to be used as a template for future negotiations. The model agreement should cover controversial topics such as investor state dispute settlement, intellectual property, copyright, and labour and environmental standards and be developed through extensive public and stakeholder consultation.**

### National Interest Analyses and other tabled documents

5.36 The 1996 reform package brought in a requirement that an NIA be tabled in parliament with each proposed treaty. The following documents are tabled in parliament with the draft treaty text:

- NIA, which is drafted by DFAT in consultation with other departments, sets out why it is in Australia's national interest for binding treaty action to be taken. It includes discussion of:
  - reasons for Australia to take the proposed treaty action;
  - foreseeable economic, environmental, social and cultural effects of the treaty;
  - obligations imposed by the treaty;
  - the treaty's direct financial cost to Australia;
  - how the treaty will be implemented domestically;
  - procedures for amendment of and withdrawal from the treaty; and
  - what consultation has occurred in relation to the treaty;
- for bilateral treaties, a list of countries with which Australia has similar treaties and a list of Australia's other treaties with the country in question;
- for multilateral treaties, a current status list (setting out details of which states are party to or signatory to the treaty in question); and
- where applicable, a Regulation Impact Statement (required for treaties involving domestic regulation affecting business, community organisations or individuals).<sup>23</sup>

5.37 The committee heard concerns from submitters about the independence, quality and comprehensiveness of NIAs and associated documents. Some witnesses took issue with the quality of NIAs, arguing that they were not sufficiently comprehensive. Ms Hepworth from the ADA and ALCC told the committee about her experiences with the KAFTA NIA:

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23 *Submission 74*, p. 5.

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In the area of copyright, the national interest analysis and regulatory impact statements did not give any economic impact statement as to what they thought the value of the IP chapter was. They gave no indication of the economic impact of changes to either our domestic or our international commitments. They gave no detailed assessment of cultural or innovative impact or any impact on freedom of access to information or freedom of speech. None of that was included in those statements. They also put in there that we would have to change our domestic legislation and in that statement gave no indication as to costs or benefits of what that change is—and, in fact, gave no actual detail as to how we were going to have to change our legislation. So our experience on recent NIAs and RISs is that, even though they say they will give an economic, cultural and everything else overview, in reality the details of those are very sketchy and not at all adequate.<sup>24</sup>

5.38 A number of witnesses did not consider the NIA process to be independent on the basis that documents are produced by DFAT, which in most cases also negotiates the agreements. As Ms Kearney from the ACTU told the committee, 'The national interest analysis is prepared by DFAT, who, quite frankly, are not likely to criticise their own document.'<sup>25</sup>

5.39 A number of witnesses suggested that the NIA and associated documents should be produced by the Productivity Commission. ACCI, for example, argued that:

Rather than it falling to the Department of Foreign Affairs and Trade (DFAT) to conduct the National Interest Analysis and the Regulatory Impact statement for a given treaty on the basis of optimal assumptions, this task should instead be given to an independent government body at arms-length to the negotiations, such as the Productivity Commission, on the basis of expected optimal, likely and minimum outcomes.<sup>26</sup>

5.40 Dr Rimmer agreed that DFAT was not the right organisation to prepare the NIA, and told the committee:

At the moment DFAT is in the peculiar position of both engaging in the negotiations and then engaging in the assessment of those negotiations. There is really a need for an independent evaluation and assessment of the costs and benefits of international agreements by some other body, such as the Productivity Commission, the Department of Finance or Treasury.<sup>27</sup>

5.41 Dr Ranald from AFTINET also argued that DFAT's lack of independence was problematic:

I think the NIA process is inadequate because it is not independent. What we are recommending, as the Productivity Commission recommended and as a number of other parliamentary committees and so on have recommended, is that, at the end of

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24 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 5.

25 Ms Kearney, *Committee Hansard*, 5 May 2015, p. 2.

26 *Submission 71*, p. 3.

27 Dr Rimmer, *Committee Hansard*, 5 May 2015, p. 57.

the trade agreement, there be an assessment by an independent body of the text of the trade agreement, and we are arguing it should be released publically.<sup>28</sup>

5.42 A number of witnesses called for additional information to be included in the NIA. The ACTU argued that: 'balanced studies of the likely employment, social and environmental impacts of trade agreements before government make the decision to enter into negotiations are necessary'.<sup>29</sup>

5.43 The Australian Human Rights Commission submission went further in arguing that the human rights implications of FTAs should also be considered before ratification because trade agreements can have significant human rights implications. However, there is generally no consideration of human rights implications prior to a treaty being ratified. The Commission concluded that a human rights analysis, analogous to statements of compatibility, should be included in the NIA:

The human rights analysis within the NIA would be completed by [DFAT] when drafting the NIA. If guidance on the compatibility of the treaty with human rights obligations is required, this could be obtained from various sources, for example, the Attorney-General's Department. Subject to resources, guidance could also be obtained from the Parliamentary Joint Committee on Human Rights...or the Australian Human Rights Commission.<sup>30</sup>

5.44 The Australian Network of Environmental Defenders Offices called for inclusion of Environmental Impact Statements in the NIA process. Their submission stated:

Broadly the NIA is to set out the reasons why Australia should enter into the treaty, including advantages and disadvantages, and 'the foreseeable economic, environmental, social and cultural effects of a treaty action'. We could not find a more specific explanation or guidance as to how environmental impacts are considered. Our brief review of several NIAs indicates that environmental information is minimal and general. At times this contrasts with extensive trade and industry analysis and consultation outlined in NIAs. This suggests a need for a more specific and consistent procedures to assess environmental impacts, compatibility with existing treaty obligations, and ways to best achieve multiple objectives.<sup>31</sup>

5.45 The Public Health Association of Australia proposed that health impact assessments be carried out 'during negotiation, after release of the final agreement and after implementation'. Although not specified in their submission, this idea is consistent with a health impact assessment being undertaken as part of the NIA process.<sup>32</sup>

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28 Dr Ranald, *Committee Hansard*, 4 May 2015, p. 16.

29 Ms Kearney, *Committee Hansard*, 5 May 2015, p. 1.

30 *Submission 94*, p. 6.

31 *Submission 58*, p. 2.

32 *Submission 50*, p. 10.

## Post-implementation analysis and review

5.46 Witnesses also expressed concern that, once in force, treaties are not subject to monitoring or analysis to determine whether they are having the intended economic impact.

5.47 DFAT's submission stated that 'many mechanisms exist for the review of specific treaties after their entry into force', including JSCOT scrutiny, scrutiny by other parliamentary committees, agency reporting to parliament, regular activity by lead agencies, and required reporting under domestic implementing legislation, among others.<sup>33</sup>

5.48 A number of submitters, however, did not consider existing mechanisms to be sufficient. According to ACCI:

...it is crucial for trade treaties to be monitored continuously during their operation to ensure their key economic and social objectives continue to be met...

Taking into account the high expectations surrounding trade treaties on the basis of DFAT's promises made to JSCOT and the Government, it is a natural expectation of the business community that the economic benefits of these treaties should be monitored on an ongoing basis by an independent body such as the Productivity Commission.<sup>34</sup>

5.49 Associate Professor Weatherall drew the committee's attention to the Australia-US Free Trade Agreement (AUSFTA) to argue that a cost-benefit analysis should be conducted on a *post facto* basis when the effects of an agreement over time become clearer. She told the committee:

I do think...that the ex-post analysis is important. We are now 10 years on from the Australia-US Free Trade Agreement. You can do a cost-benefit analysis. There was some cost-benefit analysis done by the Productivity Commission in the context of its consideration of bilateral agreements, and some of those analyses did not come out all that well. They suggested that a lot of the benefits of some of those agreements were far less than had been touted. I think that sort of analysis and feeding that into future positions is really important, because if we do not learn from our mistakes then we are going to keep repeating them.<sup>35</sup>

5.50 The ADA submission was also in favour of review of treaties already in force for this reason, stating:

Periodic parliamentary reviews into the effects of AUSFTA and other major treaties may help identify areas that could be adjusted to achieve maximum benefit to Australia. The analysis and evidence collected in such a review could then feed back into the negotiating mandates and cost/benefit analyses for future agreements.<sup>36</sup>

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33 *Submission 74*, p. 8.

34 *Submission 71*, p. 17.

35 Associate Professor Weatherall, *Committee Hansard*, 4 May 2015, p. 10.

36 *Submission 78*, p. 18.

5.51 Some submitters were also concerned that no analysis is regularly undertaken to identify treaties that are no longer in use. Mr Clark told the committee:

Clearly we do not have a system of removal of treaties once they become obsolete or overrun in some ways by newer agreements as they are agreed to. We would like to see some sort of process of analysis of those agreements which are still relevant, and perhaps in the vein that we are dealing with some other parts of legislation in Australia removing parts of it. One in, one out is a useful sort of approach, perhaps.<sup>37</sup>

5.52 The ADA submission supported the argument that review of treaties already in force would be useful for greater harmonisation of treaties, stating:

The review process is also an opportunity to review Australia's international commitments and consider renegotiation of existing agreements that either overlap or come into conflict with the new agreements. As we continue to increase our number of international agreements, the necessity of consolidating our commitments will increase.<sup>38</sup>

### **Committee view**

5.53 The committee's view in relation to the NIA has not changed since concluding its inquiry into the Korea-Australia Free Trade Agreement (KAFTA) in October 2014. In its report the committee referred in passing to evidence from expert academics, unions and ACCI which used KAFTA to illustrate a continuing level of dissatisfaction with the current process to negotiate, assess and approve trade agreements in Australia.<sup>39</sup> Drawing upon evidence from ACCI and recommendations included in a 2010 Productivity Commission report, the committee recommended that the Australian Government examine reforms to increase stakeholder consultation in the preparation of NIA documents and consider having NIA documents (or parts thereof) prepared by an independent body.<sup>40</sup>

5.54 Given that NIAs are produced by the same department that negotiates the majority of treaties, it is hardly surprising that they paint an overly positive picture of completed agreements. The committee still considers it sensible to have an independent body prepare the NIAs and associated documents in future. As suggested by witnesses, the Productivity Commission may be best-placed to carry out this function.

5.55 The committee is also concerned that NIAs, as currently produced, are not sufficiently detailed and comprehensive to be of use to stakeholders. For major treaties with significant implications, it is entirely appropriate for detailed analysis of health, environment and human rights implications be included. However, as outlined

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37 Mr Clark, *Committee Hansard*, 5 May 2015, p. 46.

38 *Submission 78*, p. 18.

39 Foreign Affairs, Defence and Trade References Committee, *Korea–Australia Free Trade Agreement*, October 2004.

40 Foreign Affairs, Defence and Trade References Committee, *Korea–Australia Free Trade Agreement*, October 2004, p. 56.

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above, NIAs are already supposed to include analysis of 'economic, environmental, social and cultural effects of the treaty'—but the evidence before the committee suggests that this is not done in sufficient detail to be useful.

5.56 The committee considers that detailed analysis of environmental, health and human rights issues are already within the scope of NIAs. Its intention is that, by recommending that NIAs be produced by an independent body, these areas will be addressed in a more comprehensive manner in the future.

### **Recommendation 10**

**5.57 The committee recommends that National Interest Analyses (NIAs) be prepared by an independent body such as the Productivity Commission and, wherever possible, presented to the government before an agreement is authorised by cabinet for signature. NIAs should be comprehensive and address specifically the foreseeable environmental, health and human rights effects of a treaty.**

5.58 In respect of post-implementation issues, the committee agrees with the view that more could be done to assess whether agreements are having the desired economic impact, and to ensure that this information is fed into the negotiation of future agreements. The committee notes that a range of perspectives on the appropriate timing and form of post-implementation analysis and review exists. ACCI, for example, proposed a regular analysis of the performance of all treaties, which would be akin to ongoing monitoring. Others, such as Associate Professor Weatherall, envisaged a more detailed periodic analysis. The committee, however, is of the view that involving JSCOT earlier in the treaty-making process, as the committee has recommended, will provide a solid platform for JSCOT to become more actively involved in the post-implementation review of agreements.



# Chapter 6

## Conclusion

6.1 The committee is left in no doubt that in respect of the Commonwealth treaty-making process there is a groundswell for change backed by compelling evidence and practical suggestions for improvement. The committee received evidence from leading industry bodies, the union movement, academic experts and other stakeholders voicing frustration with the lack of effective consultation and parliamentary engagement during treaty negotiations.

6.2 Much was made 20 years ago of a so-called 'democratic deficit' surrounding treaty-making. The reforms introduced in the mid-1990s, following the landmark *Trick or Treaty?* report, strengthened the treaty-making process and gave parliament a greater say through the establishment of the Joint Standing Committee on Treaties (JSCOT) and the mandatory tabling of treaties in both houses of parliament. However, a 'democratic deficit' has remained a feature of the process, albeit with a different complexion today as the scope and reach of trade agreements into domestic law is unlike anything previously seen. While the 1996 reform package was undoubtedly ground-breaking at the time, twenty years on the global environment in which trade agreements are negotiated and community expectations of transparency and accountability have changed to such an extent that the case for review and further reform is compelling.

6.3 Debate on treaty-making no longer revolves around the underlying issue of the role of the executive versus parliament and the use of the external affairs power. The committee chose not to address parliament's constitutional reach into treaty-making, other than to note that there may be no constitutional barriers to parliament playing a greater role in the treaty-making process.

6.4 In recent years the debate has shifted direction—to consider the way that large and complex free trade agreements such as those with Korea, Japan and China and the Trans-Pacific Partnership (TPP), are encroaching on the Australian domestic sphere without an adequate level of stakeholder engagement, public consultation, parliamentary oversight and executive accountability. The committee agrees with Associate Professor Weatherall's contention that balancing transparency and accountability in treaty-making with the need for government to negotiate and secure outcomes that further Australia's national interests is a conundrum that does not lend itself to easy resolution.

6.5 The committee found it significant that nearly all witnesses challenged two major claims by the Department of Foreign Affairs and Trade (DFAT): that Australia's current treaty-making process is effective, workable and reflects a careful balancing of competing interests; and that the parliament plays a significant role in relation to the scrutiny of treaties. The evidence was overwhelmingly critical, and occasionally scathing, of these claims. Three key points were raised in evidence to the inquiry. First, that there needs to be a significantly higher level of consultation in treaty-making *before* agreements are signed and that more information should be

communicated to stakeholders and the public about how agreements will affect them. Second, that parliament should have opportunities to play a constructive role during negotiations that goes beyond rubber-stamping agreements after they are signed. Third, that proposed treaty action should be subject to independent assessment at the commencement of negotiations and monitoring and evaluation after implementation, to ensure that mistakes and unintended consequences are not repeated.

6.6 This is precisely the space where the committee has sought to add value. The package of recommendations in this report address the following issues around the treaty-making process:

- **transparency:** ensuring a higher level of transparency through parliamentary and stakeholder access to draft treaty text on a confidential basis during negotiations;
- **consultation:** improving the effectiveness of parliamentary and stakeholder consultation during negotiations; and
- **independence:** ensuring independent analysis of treaties at the commencement of negotiations and, if required, post-implementation.

## Transparency

6.7 A major sticking point for stakeholders was being kept in the dark about the text of draft treaties during negotiations and having to voice concerns 'blindfolded', as one industry group put it. The committee heard a range of evidence on this issue, most of which was critical of the negotiation process in one way or another. The committee does not accept that the process is as 'open' as DFAT makes out, or agree with the department's inference that a large number of stakeholders who have been consulted, possibly in the hundreds of thousands, had no reason to make a submission to the inquiry because they were satisfied with the process.<sup>1</sup> Openness implies access to information and this is not occurring during the negotiation of free trade agreements as the committee heard from stakeholders. The committee is unable to speculate on the views of stakeholders that did not present evidence.

6.8 While the committee accepts that absolute transparency in treaty making is an unrealistic expectation, absolute secrecy in the current globalised environment of treaty-making is equally unrealistic and therefore in need of changing. The argument that it is in Australia's national interest for texts of bilateral and plurilateral treaties to be kept confidential prior to signature is increasingly under challenge. The committee acknowledges that the practice of keeping aspects of trade negotiations secret has a long history going back to the original General Agreement on Tariffs and Trade negotiations in 1946–47, but it has not always been so and international best-practice appears to be heading in the opposite direction. Criticism from academic experts and consideration of contemporary international practice demonstrates that absolute secrecy in trade negotiations is a relatively recent development reflecting the

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1 Ms Cooper, Senior Legal Adviser, *Committee Hansard* 4 May 2015, p. 34.

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proliferation and complexity of agreements where significant and long-term commercial interest are at stake.

6.9 The committee believes that the benefits of increased transparency during free trade negotiations outweigh a perceived risk to the national interest from public disclosure. However, the committee has not recommended publication of draft text before negotiations are completed as there are other ways of sharing information short of publication. Divulging draft text may be detrimental to achieving the best outcome possible and may breach confidentiality agreements signed when negotiations begin. Other more sensible and practical suggestions were raised in evidence that could be implemented during future trade agreement negotiations.

6.10 The committee accepts that transparency is not an all or nothing proposition and may apply at different levels in treaty negotiations. A more flexible approach to transparency may be preferable to mandating the public release of every draft treaty, depending on the nature of the agreement. This is consistent with the negotiation process followed by some of Australia's trading partners which vary to a significant degree. The committee believes that this report's careful approach balances confidentiality with the desirability for transparency and is in tune with emerging international practice.

6.11 An additional concern for the committee is that community confidence in the negotiation of FTAs is probably at its lowest ebb in Australia, fuelled in part by excessive secrecy around TPP negotiations, the content of leaked draft chapters and the politicisation of debate. Accusations of scaremongering against those asking reasonable questions and voicing their concerns are not helpful either.

## Consultation

6.12 That DFAT consults widely and uses the resources available to pursue the best outcome is not in dispute. The committee accepts that gaining access to DFAT negotiators for private briefings was not a major problem for stakeholders, but the effectiveness and usefulness of the briefings was called into question by many. In consulting with stakeholders, quantity was a poor substitute for quality. One witness valued the opportunity for occasional meaningful engagement with DFAT negotiators, but observed that discussions with DFAT around their negotiations '...have only convinced me that we can do better'.<sup>2</sup> In a similar vein, another witness recalled: 'It is nice to have the conversation but it is not a very high-value engagement at the moment'.<sup>3</sup> And still another expert lamented that DFAT consultations are very much 'one way' with negotiators 'listening but rarely responding'.<sup>4</sup>

6.13 At issue for the committee is the lack of meaningful and effective two-way communication. Stakeholders are at a distinct disadvantage in not having access to treaty text, negotiating positions and policy frameworks during negotiations. A challenge for DFAT is that its negotiators are not subject matter experts across the

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2 Associate Professor Weatherall, *Committee Hansard*, 4 May 2015, p. 8.

3 Mr Kirkland, CHOICE, *Committee Hansard*, 5 May 2015, p. 35.

4 Professor Moir, *Submission 68*, p. 11.

latest developments in Australia and other jurisdictions. The committee is concerned that the size and reach of modern FTAs and the interplay of chapters dealing with complex issues such as copyright and intellectual property (IP) is creating policy and administrative challenges which DFAT does not yet fully understand.

6.14 The committee believes there is an urgent need for DFAT to rethink and review its negotiation strategy from the perspective of stakeholder expectations and internal departmental resourcing priorities. This is why the committee recommended that DFAT put in place a process for sourcing expert advice and assistance in areas that may be beyond the technical competency of its negotiating team.

### **Access for members of parliament**

6.15 The committee is concerned that Australian federal parliamentarians are not generally able to access treaty text at any stage before an agreement is signed and tabled in parliament. This is unacceptable given that the negotiators and elected officials (and their staff) of Australia's trading partners have long had varying degrees of access under strict conditions of confidentiality. The trend in trade negotiations on both sides of the Atlantic has seen a gradual move away from secrecy towards transparency and controlled access to treaty text by parliamentarians and industry stakeholders. In this context, it is significant that the Obama administration has recently endeavoured to entrench practical access arrangement into domestic law through its 2015 TPA bill.

6.16 While the committee welcomes reports of belated access for Australian parliamentarians to the draft negotiating text of the TPP, this development has definitely come too late in the process, given that negotiations are nearing completion and have taken place in secret since 2008.

6.17 The committee heard no evidence that access arrangements for parliamentarians are in any way preventing governments from negotiating agreements in the national interest. Yet this continues to be Australia's official line of resistance to change. There is an opportunity for Australia to follow the European Union (EU) and the United States in making the negotiation process more inclusive, less secretive and, ultimately, more accountable to parliament.

6.18 At the other end of the policy spectrum, the committee was not convinced by renewed calls to legislate for parliamentary approval of treaties. Evidence to the inquiry relied on the view of some legal experts that limiting the power of the executive by making treaty action conditional upon approval by both houses of parliament would be consistent with the Constitution. Interesting as this may be, it is not an argument for why Australia should proceed down the path of parliamentary approval. The committee is of the view that the arguments add nothing new to the current inquiry, ignore the political reality of their likely rejection by government and provide an easy target for those opposed to change of any kind. Now is not the time to be distracted by the issue of parliamentary approval, which has not been able to gain political traction in Australia, as demonstrated by parliament's rejection of a private member's bill mandating parliamentary approval as recently as 2012.

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## **A role for parliamentary committees**

6.19 There are other practical and incremental ways to improve parliament's engagement in treaty-making. This report has pointed out the way of the future, building on the work of existing parliamentary committees and their expertise accumulated over many years. Most importantly, there is more that JSCOT can do as a specialised and expert committee to scrutinise and review proposed treaties during the negotiation process. It is not lost on the committee that JSCOT already has the means within its resolution of appointment to undertake inquiries into agreements at any stage during their negotiation, but only if matters are referred by either house of parliament or by a minister. It would appear that a lack of political will may have prevented JSCOT from realising its full potential in this regard.

6.20 Evidence to the committee confirmed that JSCOT is a respected committee with a significant body of work and precedent behind it. However, the committee sensed that, over time, confidence in JSCOT's role may be eroding as the scrutiny work it performs on behalf of the parliament is increasingly seen as 'too little, too late' and 'rubber-stamping' agreements already signed by the executive. With regard to the work of the Parliamentary Joint Committee on Human Rights (PJCHR), this relatively new committee has an opportunity to extend its reach into treaty-making and align its existing mandate to the scrutiny of proposed treaties against the backdrop of Australia's international human rights obligations.

6.21 The committee has made recommendations for how JSCOT and the PJCHR can play more constructive roles in shining a spotlight on treaties, including issues and documents pertinent to them, during their negotiation and before they are signed. There is also scope for the two committees to work more closely together in the treaty-making space and benefit from sharing each other's experiences and expertise.

## **Independent analysis and monitoring**

6.22 Executive responsibility for treaty-making should not prevent independent assessment and monitoring of treaties, especially large and complex FTAs. Equally, it should mandate that government be more up-front with parliament and the public about the national interest reasons for pursuing an agreement. Parliament and the executive should not be seen as mutually exclusive players in treaty-making—a greater role for one does not automatically diminish the authority of the other. The executive should not continue to use its constitutional power over treaty-making as an excuse for rejecting further change.

6.23 The committee recommended that government prepare and table in parliament two documents at the commencement of negotiations: a detailed explanatory statement setting out the government's priorities, objectives and reasons for entering into negotiations; and a cost-benefit analysis prepared by an independent body such as the Productivity Commission. Both documents should stand referred to JSCOT for inquiry and report.

6.24 These documents and their referral to JSCOT will significantly improve the level of information available at the commencement of negotiations and go some way to restoring public and stakeholder confidence in the process. The cost-benefit

analysis should be reviewed when an agreement is finalised, but before it is tabled in parliament, and a supplementary analysis undertaken if circumstances warrant it. This is especially important for free trade agreements which are many years in the making and where the economic and social forecasts underpinning an agreement change significantly over time.

6.25 The committee did not hear one positive word about the National Interest Analysis (NIA) and regulatory impact statement which accompanies each treaty. They do not appear to add much value to the process and, in the absence of a cost-benefit analysis, bring to the table an insufficient level of detail. During the inquiry, stakeholders drew the committee's attention to the negative effects of agreements such as the AUSFTA and KAFTA and the fact that these negative outcomes were not even included as a possibility in the NIAs which accompanied them.

6.26 It is not surprising that NIAs paint a favourable picture of a trade agreement's potential benefits—that they are prepared by the department responsible for negotiating, consulting and finalising FTAs was singled out for criticism by witnesses. The committee believes that NIAs should be prepared by an independent body such as the Productivity Commission and their scope considerably expanded to include human rights, environmental and health impact assessments (consistent with the domestic reach of current international agreements). The committee believes that its recommendation in relation to the NIA should allay the concerns of stakeholders on this particular issue. A more comprehensive NIA, prepared at arms-length from government and accompanied by an independent cost-benefit analysis, would represent a significant improvement on the current process.

6.27 The committee was somewhat dismayed to learn that, given the high volume of treaties Australia has negotiated since 1901, of which 1800 remain in force, DFAT negotiators commence each new free trade agreement with a 'blank piece of paper', as described by one witness. The end result is the accumulation of vertical isolated agreements which must be horizontally navigated by business. To address this phenomenon, the committee recommended that the government create what was referred to in evidence as a template or framework agreement developed by a consensus of industry bodies and other stakeholders through a negotiated process. The point of template agreements is to create loose frameworks and the necessary parameters to enable parties to debate the merits of particular treaty proposals without having to speculate in the dark on the fundamental policy parameters set by the government.

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

## **Dissenting report by Coalition Senators**

1.1 Coalition members of the committee disagree with all of the findings and recommendations of the majority report. We do not believe that the evidence received by the committee during the inquiry leads to the argument that Australia's treaty-making process is in need of reform.

1.2 Australia's treaty-making system works well. Coalition senators are disappointed that a system that has been honoured by both major parties for nearly two decades is now being politicised by the Opposition as it struggles to find a coherent and united policy position on the pursuit of free trade agreements. Since its introduction by the Coalition government in 1996, Australia's treaty-making process has been subject to only minor alterations. Governments of either persuasion have made use of the system, accepting the balance between the respective role of parliament and the executive which is mandated by the Australian Constitution. Australia's recent success in concluding major free trade agreements with Korea, Japan and China shows that the system is robust and working well to support Australia's entry into high quality international agreements that will serve the national economic interest for many decades to come.

1.3 The majority report's suggestion that other countries have moved ahead of Australia in terms of parliamentary oversight and transparency is unconvincing and unsupported by the evidence. The report puts too much weight on events currently taking place in the United States despite the fact that a direct comparison between the two systems is unhelpful due to differences between our respective political systems. The process in place in Australia closely resembles that operating in countries with comparable political systems, such as Canada and New Zealand. There is nothing unusual or out of character in the way Australia enters in to and negotiates free trade agreements.

1.4 The insinuation that Australia subjects international agreements to less parliamentary scrutiny is incorrect. The Joint Standing Committee on Treaties (JSCOT) performs excellent work in carrying out exhaustive public inquiries into all major agreements. This report's recommendations in respect of JSCOT, quite frankly, would add little value to the scrutiny work it currently performs and risk overloading an already demanding work schedule.

1.5 Moreover, the government's recent decision to allow parliamentarians access to the draft text of the TPP on a confidential basis is consistent with the process followed in the United States where members of Congress seeking to examine draft treaty text must also sign confidentiality agreements. This demonstrates that the current system in Australia already contains sufficient flexibility to allow access when it is desirable to do so.

1.6 The majority report also downplays the extent to which confidentiality is almost always a precondition which is binding on all the negotiating parties. As the Department of Foreign Affairs and Trade (DFAT) told the committee, confidentiality is necessary to achieve the best possible negotiated outcomes in the national interest. It would be irresponsible for Australia to unilaterally walk away from an accepted

international practice. Calls from stakeholders to make the texts of agreements publicly available prior to signature are impractical and do not take into account the realities of negotiating international agreements.

1.7 The Coalition agrees that effective consultation is essential to getting the best outcomes from negotiations, but considers that Opposition criticism of DFAT's consultation process is overblown and borderline insulting. DFAT has convened over 1000 briefing sessions with stakeholders on the Trans-Pacific Partnership (TPP) alone since May 2011. Of the hundreds of stakeholders consulted by DFAT on the TPP and other trade agreements over the past few decades, the committee heard from only a small proportion. Opposition senators have made the mistake of concluding from the evidence that the process is not working. It was not surprising that stakeholders with grievances made submissions to an inquiry such as this one; but it is unhelpful to suggest that the consultation process is not working, as the majority report does. This is dismissive of the tireless effort put into stakeholder consultations by Australia's highly-skilled and hard-working treaty negotiators.

1.8 In short, the Coalition members of the committee see no reason to proceed with an extensive reform agenda when the current treaty-making system is working well. On this basis, Coalition senators do not support the majority report's recommendations.

**Senator Chris Back**  
**Deputy Chair**

# Dissenting Report by the Australian Greens

## Introduction

1.1 The Greens acknowledge the insightful analysis the committee has made about the state of Australia's treaty making process and the need for change. The committee correctly identifies that the scope and complexity of 'modern trade' or 'partnership' agreements—such as the Trans Pacific Partnership (TPP) Agreement—makes the case for reform compelling. The Greens agree with the committee's identification of three major areas for urgent reform: transparency, consultation and independence.

1.2 However, the Greens are disappointed that the sense of urgency—so strongly reflected in the report's conclusion—has not been translated into a set of recommendations that will achieve this. The incursion of modern trade or partnership negotiations into matters of domestic policy and public interest is such that they now function as a '*de facto* level of government'. Accordingly, Australia's treaty-making process should be founded on the same principles of transparency that apply to the making of legislation and the conduct of parliament. The Greens believe that the recommendations of the committee—whilst an improvement on the current process—will fail to stem the anti-democratic nature for modern trade or partnership negotiations and the lack of public trust in them.

1.3 A number of important recommendations include release clauses—'opt outs'—that would allow the government of the day to maintain the *status quo*. These recommendations seek to better balance the executive power of governments with more parliamentary scrutiny and participation. Although this principle may appear reasonable *prima facie*, without legislated change to the fundamental nature of Australia's treaty making process the default position will always favour executive power over parliamentary and democratic participation. In turn, this encourages more secrecy, which is a hallmark of the current treaty making process, and which is not in the national interest.

1.4 Unfortunately, the committee has failed to analyse and justify the need for *any* secrecy or 'commitments to confidentiality' in Australia's treaty-making process. Why do negotiations around deals such as the TPP require secrecy? The only justification provided by DFAT is that this is required due to 'commercial-in-confidence'. Whose interests are being favoured or prioritised in this instance: those of large corporations or those of the general public? It is little wonder critics of modern trade agreements see them as a self-interested takeover of democratic institutions by corporations. The treaty negotiation process as it stands is set up to feed these suspicions and justify these criticisms.

1.5 It is disappointing that no examples were provided by the committee as to how a fully open and transparent process could and does work. For example, the report does not raise the example of the World Intellectual Property Organisation which successfully completes complex multilateral agreements while making the negotiating sessions open to the public and draft texts immediately available.

1.6 Instead, the committee has simply accepted and assumed that secrecy is justified and necessary at some level. For example:

4.62: The committee takes DFAT's point that complete openness in the negotiation process may not always be practical to achieve negotiating outcomes. Furthermore, refusal to enter negotiations conducted confidentially could see Australia left out of future trade agreements that are in the national interest.

1.7 Ignoring the fundamental principle of commitment to full transparency—which the Productivity Commission says should be in our DNA—leaves the treaty-making process open to abuse by the government of the day and undermines the “balance” which this report purports to aspire to.

1.8 The Greens believe that, ultimately, the major parties don't want to relinquish any executive power to negotiate trade deals. This report is a missed opportunity to establish a realistic set of recommendations that tackle this key issue which is synonymous with Australia's broken treaty process.

### **Comments on specific recommendations**

#### ***Transparency***

1.9 The intent of Recommendation 4, being to require treaties to be tabled in parliament prior to authorisation for signature, is supported. However, the second sentence in Recommendation 4 provides a release clause from this requirement in the “absence of agreement” with other negotiating countries. In the absence of an incentive to do otherwise, this clause will almost certainly be exercised by negotiating parties whose “commercial-in-confidence” interests are served by secrecy.

1.10 Likewise, the primary intent of Recommendation 5 is supported. But, again, the inclusion of the release clause “subject to the agreement of negotiating countries” undermines this intention.

1.11 The Greens believe the Australian government should not enter into any treaty processes that are not fully transparent and democratic, and that Australia should show strong leadership on this issue.

#### ***Consultation***

1.12 Recommendations 1, 2 and 6 fall well short of the Greens preferred approach to consultation. While an improvement on the current process, these recommendations continue to constrain the scrutiny of treaties by restricting parliamentarians and stakeholders privy to draft texts from seeking non-government assistance to interpret highly complex agreements.

1.13 At a minimum, Recommendations 1 and 6 would be more palatable to many stakeholders if the final agreement of a treaty was tabled in parliament for a minimum period of time (e.g. 20 sitting days) prior to any final agreement being signed by cabinet, to enable open public scrutiny of the agreement. This leaves open the opportunity for stakeholders' participation and input prior to the document becoming highly politicised with an “all or nothing” vote in parliament on a treaty's enabling legislation.

1.14 Recommendations 1, 2 and 6 would also be improved by establishing a council of parliamentarians and stakeholders privy to the draft text to enable discussion between these parties during the proposed consultation phase.

1.15 Accordingly, Recommendation 2 should be amended so that JSCOT facilitates this collaborative process, rather just disjointed briefings with DFAT and stakeholders. Recommendation 2 should also be amended to clearly detail how JSCOT interacts with the parliament during this process.

### ***Independence***

1.16 The Greens believe that economic, environmental and social impacts should be examined and presented to parliament prior to the commencement of treaty negotiations and prior to final agreement. The primary responsibility for this analysis should sit with independent statutory bodies.

1.17 The intent of Recommendation 3 to introduce a specific examination of the human rights impacts of treaties is welcomed. However, Recommendation 3 should be amended to make it clear that this human rights assessment should be done in two phases, being both prior the commencement of negotiations and prior to final agreement. Recommendation 3 should also be amended so that the Australian Human Rights Commission is the primary power to consider human rights implications of all proposed treaties.

1.18 The intent of Recommendation 8 to introduce a cost-benefit analysis of treaties by an independent body is also welcomed. However, Recommendation 8 should be amended such that all treaties—not just bilateral and regional trade agreements—are subject to cost-benefit analysis. Further, the release clause “or as soon as is practicable afterwards” should be deleted.

1.19 Similarly, Recommendation 10 should be amended to delete the release clause “wherever possible”.

1.20 Consideration should also be given to the interaction and overlap between Recommendations 3, 8 and 10. The National Interest Analysis (NIA) is likely to be largely drawn from the cost-benefit analysis.

1.21 In concert with the scope of the NIA, the scope of cost-benefit analyses should also include an assessment of human rights impacts and other social considerations, as well as environmental considerations. Input on matters related to human rights and environmental impacts should be provided by those independent statutory bodies empowered to undertake assessments of these impacts.

1.22 To that end, and noting the absence of a statutory Commonwealth body empowered to oversee environmental sustainability impacts, a further recommendation should be included to ensure an independent assessment of the environmental impacts both prior to the commencement of treaty negotiations and prior to final agreement.

### ***Strategy and scope***

1.23 Recommendations 7 and 10 are broadly supported. The development of both a model trade agreement, and priorities and objectives associated with a proposed

treaty, should be integrated with the criteria for evaluating and assessing draft treaties, and should be founded on the principle of transparency.

1.24 The Greens believe that the scope of international agreements should include controls that are commensurate with the impact of any externalities that arise from related trade activities. This is the fundamental basis for achieving “fair trade” not “free trade”. Modern trade and partnership deals should include binding measures designed to protect and improve human rights and labour standards, and to mitigate and prevent environmental degradation. It is not fair that corporate profits are protected in binding agreements through state-to-state and investor-state settlement clauses, while important matters of public interest, such as labour, environmental and ethical standards, are not.

1.25 Any deviation from a model trade agreement should be subject to a debate and decision of parliament that specifies the particular components of a treaty that should be subject to less transparency, the reductions in the level of transparency, and the justification for these reductions.

**Senator Peter Whish-Wilson**  
**Australian Greens**

# Appendix 1

## Public submissions

- 1 Professor Geoffrey Lindell
- 2 The Foundation for National Renewal/Restore Australia
- 3 Communist Party of Australia
- 4 Anne and Bill Byrne
- 5 Vanessa and Robert Howe
- 6 Mr Jared Hardy
- 7 Ms Anne Jackson
- 8 Mr David Blackadder
- 9 Mr Michael Scott
- 10 Dr Clem Stanyon
- 11 Ms Alanna Hardman
- 12 Ms Judy Smith
- 13 Mr Marc Brunet
- 14 Mr Vince Moore
- 15 Ms Jacinta Carolan
- 16 Dr Romaine Rutnam
- 17 Mr. Andrew Buckley
- 18 Dr Ken Sievers
- 19 Mr Adam Steer
- 20 Dr Valerie Lewis
- 21 Ms Jeanette Mills
- 22 Ms Tracey Beale
- 23 New South Wales Retired Teachers' Association
- 24 Ms Genevieve Ryan
- 25 Ms Rachel Poole
- 26 Mr Bernard Jean
- 27 Garry and Lesley Goodge
- 28 Ms Annette Bristow

- 29 Quaker Peace and Justice Committee
- 30 Ms Nathalie Haymann
- 31 Mrs Tania Lancaster
- 32 Australian Services Union
- 33 Civil Liberties Australia
- 34 Ms Emma Lawrie
- 35 Mr Stephen Warren
- 36 Australian Council of Trade Unions
- 37 Universities Australia
- 38 Humane Society International
- 39 Mr Mark Twigden
- 40 Mr Marc Matthews
- 41 Mr Warren Whelan
- 42 Ms Penelope Moody
- 43 Ms Jane Touzeau
- 44 Dr Luke Nottage
- 45 Miss C Price
- 46 Ms Robyn Bishop
- 47 Mr Brian Bowtell
- 48 Mr Brian Cameron
- 49 Mr Richard Sanders
- 50 Public Health Association of Australia
- 51 National Tertiary Education Union
- 52 Australian Fair Trade and Investment Network
- 53 Mrs Christina Attwell
- 54 Dr Margaret Beavis
- 55 Mr Mark Cottman-Fields
- 56 Australian Copyright Council
- 57 Mr Noel Matthews
- 58 Australian Network of Environmental Defender's Offices Inc
- 59 Ms Brenda Matthews
- 60 Dr Darren O'Donovan

- 61 Telstra
- 62 Mr Gregor Ptok
- 63 Name Withheld
- 64 Australian Manufacturing Workers' Union
- 65 Dr Rebecca La Forgia
- 66 Australian Industry Group
- 67 Friends of the Earth
- 68 Dr Hazel Moir
- 69 Choice
- 70 Ms Sheila Davis
- 71 Australian Chamber of Commerce and Industry
- 72 Mr Glenn Sant
- 73 Ms Kitty Michelmore
- 74 Department of Foreign Affairs and Trade
- 75 Queensland Government
- 76 Mr Mark Gambera
- 77 Professor Andrew Byrnes
- 78 Australian Digital Alliance and the Australian Libraries Copyright Committee
- 79 Associate Professor Kimberlee Weatherall
- 80 Ms Ruth Gledhill
- 81 Mr David Henry
- 82 Mr Peter Couch
- 83 Mr Laurence Balshaw-Blake
- 84 Mr Don Jordan
- 85 Mr Michael Johnstone
- 86 Sutherland Shire Environment Centre
- 87 Media, Entertainment & Arts Alliance
- 88 Mr James Wight
- 89 Law Council of Australia
- 90 Dr Matthew Rimmer
- 91 Export Council of Australia
- 92 Consumers' Federation of Australia

- 93 ACT Government
- 94 Australian Human Rights Commission
- 95 Australian Dental Industry Association

## **Appendix 2**

### **Tabled documents, answers to questions on notice and additional information**

#### **Tabled documents**

1. Canberra Times article 4 May 2015, tabled by Australian Fair Trade and Investment Network, Public Hearing, 4 May 2015.
2. ANU Centre for European Studies, Policy Notes, Issue 1, 2015, Tabled by Dr Hazel Moir, Public Hearing, 5 May 2015.
3. 2011 Letter to Australian Fair Trade and Investment Network from Minister for Trade, tabled by Senator Back, Public Hearing, 5 May 2015.

#### **Additional information**

1. Letter on investor-state dispute settlement signed by international law professors, provided by Dr Luke Nottage, 7 May 2015.
2. Press release, 8 April 2015, regarding ISDS letter, provided by Dr Luke Nottage, 7 May 2015.
3. Journal article on Intellectual property and cost of medicine in Jordan, provided by Dr Deborah Gleeson, Public Health Association of Australia, 14 May 2015.
4. Oxfam briefing on cost of medicine in Jordan, provided by Dr Deborah Gleeson, Public Health Association of Australia, 14 May 2015.
5. Information on the United States Bipartisan Congressional Trade Priorities and Accountability Bill of 2015, provided by Mr Brett Williams of the Law Council of Australia, 18 May 2015.
6. Further papers on investor-state dispute settlement, provided by Dr Luke Nottage, 28 May 2015.

**Answers to questions on notice**

1. Department of Foreign Affairs and Trade response to a question regarding copyright to a question taken at the public hearing on 4 May 2015, received 15 May 2015.
2. Department of Foreign Affairs and Trade response to a question regarding briefing senators at the public hearing on 4 May 2015, received 22 May 2015
3. Article on Free Trade Agreements provided by Mr Hudson representing the Export Council of Australia, in response to a question at the public hearing on 5 May 2015, received 25 May 2015.
4. Associate Professor Weatherall response to questions regarding cleared advisers taken at the public hearing on 4 May 2015, received 27 May 2015.

# **Appendix 3**

## **Public hearings and witnesses**

**Monday 4 May 2015, Canberra**

**Australian Digital Alliance and the Australian Libraries Copyright Committee**

Ms Sue McKerracher, CEO Australian Library and Information Association

Ms Trish Hepworth, Executive Officer/Policy Adviser

**Associate Professor Kimberlee Weatherall, University of Sydney Law School**

**Australian Fair Trade and Investment Network**

Dr Patricia Ranald, Coordinator

**Public Health Association of Australia**

Mr Michael Moore, Chief Executive Officer

Dr Deborah Gleeson, Lecturer La Trobe University

**Department of Foreign Affairs and Trade**

Ms Frances Lisson, First Assistant Secretary, Free Trade Agreement Division

Ms Patricia Holmes, Assistant Secretary, Trade Law Branch, Office of Trade Negotiations

Mr Lloyd Brodrick, Acting Assistant Secretary, FTA Legal Issues and Advocacy Branch, Free Trade Agreement Division

Ms Katrina Cooper, Senior Legal Advisor

**Tuesday 5 May 2015, Canberra**

**Australian Council of Trade Unions**

Ms Ged Kearney, President

Mr Andrew Dettmer, National President, Australian Manufacturing Workers' Union

**National Tertiary Education Union**

Ms Jeannie Rea, National President

Dr Jen Tsen Kwok, Policy and Research Officer

**Australian Human Rights Commission**

Professor Gillian Triggs, President

Dr Helen Potts, Manager Human Rights Scrutiny Team

**Australian Industry Group**

Mr Anthony Melville, Head of Communications

Ms Louise McGrath, National Manager, Business and International Advisory Services

**Law Council of Australia**

Dr Brett Williams, Deputy Chair, International Law Section

Mr Peter Thomson, Senior Policy Lawyer, International Division

**Environmental Defender's Offices of Australia**

Ms Rachel Walmsley, Policy and Law Reform Director, EDO NSW

Mr Nariman Sahukar, Senior Policy and Law Reform Solicitor, EDO NSW

**Choice**

Mr Alan Kirkland, Chief Executive Officer

Ms Sarah Agar, Campaigns and Policy Advisor

**Export Council of Australia**

Mr Andrew Hudson, Director

**Australian Chamber of Commerce and Industry**

Mr Bryan Clark, Director of Trade and International Affairs

Mr Andrew Willcocks, Certificate of Origin Compliance Officer

**Dr Hazel Moir, Adjunct Associate Professor, Centre for European Studies,  
Australian National University**

**Dr Matthew Rimmer, Associate Professor, College of Law, Australian National  
University**

**Dr Luke Nottage, Professor of Comparative and Transnational Business Law,  
Sydney University**