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.[1]

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.[2]

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'.[3]

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.[4]

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.[5]

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.[6]

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.[7]

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.[8]

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.[9]

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.[10]

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 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.[11]

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.[12]

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.[13]

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'.[14] 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.[15]

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.[16]

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',[17] 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.[18]

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

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.[19]

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.[20] 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.[21]

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.[22]

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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

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.[23]

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.[24]

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,[25] 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

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.[26]

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.'[27]

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.[28]

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.[29]

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.[30]

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.[31]

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.[32]

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.[33]

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

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.[34]

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.[35]

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.[36]

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.[37]

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

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.[38]

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.[39]

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'.[40] 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.
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> 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.[41]

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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…'[42] 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.[43]

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.[44] 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.[45]

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.[46]

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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'.[47]

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).[48]

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.[49]

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.[50]

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.

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'.[51] 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

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

> consideration by the Treaties Council, a Ministerial Council, a separate intergovernmental body or other consultative arrangements.[52]

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.[53]

4.76 The SCOT also plays an important coordinating role for the Treaties Council—itself 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.[54]

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,[55] 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.[56]

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.[57]

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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.[58]

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.[59]

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.[60]

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.