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.[1] 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

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

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'.[2] 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'.[3] And still another expert lamented that DFAT consultations are very much 'one way' with negotiators 'listening but rarely responding'.[4]

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

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.

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.

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