Chapter 2

Trade treaty-making: getting the process right

2.1 During the course of the Select Committee's inquiry into the AUSFTA it became painfully obvious that a major deficiency in the negotiating of such an agreement, and in its subsequent implementation, is the inadequacy of the process by which the entire affair is handled.

2.2 At the core of the inadequacy lies the inability of the parliament, as representative of the public and steward of the national interest, to contribute to and scrutinise the making of the Agreement. As a result, it is only after the Agreement has been signed that the parliament becomes a player to the extent that it must pass the relevant domestic legislation that gives effect to what has been negotiated.

2.3 This after-the-fact involvement of the parliament not only impedes sound public policy and law-making. It denies the parliament an opportunity to inform itself, and to guide public opinion, about the complex considerations at play. It encourages an adversarial approach to the Agreement rather than an analytical approach. The national interest is splintered, wedged and variously assaulted as the Agreement's nits are picked, and important complex issues are given short shrift.

2.4 Economic modellers, commissioned to assess the merits of the Agreement, are forced into the role of policy gladiators, pitted against each other in a rather unseemly political tussle. The legislature, in attempting to assess the overall benefits of the Agreement, and to pass laws which will sustain the national interest and avoid a future haunted by unknowable or unanticipated consequences, incurs the wrath of the executive which currently has the right and the responsibility to negotiate the Agreement. A more fraught and unhelpful process could hardly be imagined.

2.5 There is a more detailed discussion below of the standard role of the Joint Committee on Treaties in assessing treaties and international agreements, but it is worth noting here some unusual features of the process as it applied to the AUSFTA.

2.6 In the case of the AUSFTA, the Joint Committee 'stepped a little beyond its usual role'[1] and pursued a rather more in-depth examination of the Agreement than is normally undertaken. The AUSFTA had already been agreed to by the Australian and American governments on 8 February 2004.

2.7 The JSCOT received its first official briefing on the Agreement on 2 April 2004, and concluded its public hearings on 14 May 2004. Four days later, with no considered advice being tendered by JSCOT, the AUSFTA was officially signed in Washington.

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1 JSCOT *Report No.61 : The Australia-US Free Trade Agreement* June 2004, p. 2

2.8 The JSCOT report on the AUSFTA was finally tabled in the Australian parliament on 23 June 2004, and a few hours later the implementing legislation for the AUSFTA was introduced to the House. It was passed by the House of Representatives the following day.

2.9 Thus it was that before parliament's own JSCOT processes for examining treaties and agreements had been completed the AUSFTA had been officially signed. Within hours of the introduction of the JSCOT report's final presentation to the parliament, and without any debate or consideration of the report's contents, the implementing legislation had been introduced and passed.

2.10 Such a sequence of events is self-evidently a mockery of the process that was set up by the parliament ostensibly to ensure that a proper examination of international treaties and agreements took place.

2.11 The issue of process was discussed at some length in the 2003 Senate report *Voting on Trade*, and the Select Committee can only regret that the advice of that report seems not to have been heard. It must therefore be repeated.

Treaties and the parliamentary process

2.12 The structure of the political system in Australia means that it is the role of the executive government to negotiate international treaties. The parliament's role is confined to the passing of legislation which is necessary domestically to give effect to the provisions of the treaty. A parliamentary committee examines and reports to the parliament on the treaty, but cannot amend it.

The Constitution and the treaty–making process

2.13 Under the Australian Constitution, there are two different powers relevant to the treaty-making process. The power to enter into treaties is an executive power, conferred by section 61 of the Constitution. The power to implement treaties however is a legislative power, contained in section 51(xxix) of the Constitution.[2]

2.14 Section 61 of the Constitution states as follows:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor–General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

2.15 Section 51(xxix) of the Constitution confers on the Commonwealth parliament the power to legislate with regard to 'external affairs'. This has been

2 See Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995, pp:45. Chapter 4 of this report discusses in some detail the constitutional power to enter into and implement treaties, as well as the history of the executive power to make treaties.

interpreted by the High Court to mean that the Commonwealth parliament may legislate under this section to implement in domestic law a treaty which has been entered into by the Executive pursuant to its power in section 61 of the Constitution.[3]

2.16 As indicated above, the decision to enter into a treaty is one which is made by the Executive, rather than the parliament. Decisions about the negotiation of bilateral agreements or multilateral conventions, including determination of objectives, negotiating positions, parameters within which the Australian negotiators can operate and the final decision about whether to sign and ratify are taken at ministerial level, and in many cases, Cabinet.[4]

2.17 Although there is no formal role set out in the Constitution for parliament in the treaty–making process, the Joint Standing Committee on Treaties (outlined below) involves tabling treaties in parliament for at least 15 sitting days, prior to binding treaty action being taken. However, a treaty is generally tabled *after* it has been signed for Australia but before any action is taken which would bind Australia under international law.

2.18 Negotiations for major multilateral treaties are often lengthy and quite public, which means there are opportunities for parliamentary debate, questions on notice and questions without notice as the issues become publicly known. In addition, it is argued, there is the opportunity for further debate on any implementing legislation which is required as a result of the treaty.[5]

2.19 The government's determination with regard to whether to become a party to a treaty or not is based on an assessment of what is in Australia's national interest. What is in the national interest is decided on the basis of information obtained in consultations with relevant sections of the community. The practice is to provide public information about the treaty being considered, and if possible, develop a consensus within the community before taking definitive treaty action. This inevitably involves balancing a range of competing interests.[6]

2.20 Generally speaking, included in the consultations are State and Territory governments, which are a primary focus, and industry and other interest groups, including non-government organisations (NGOs). There is a range of formal and informal consultation processes involved, which are outlined in a general way below.

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3 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties,* November 1995, pp:46. Chapter 5 of this report discusses the evolution of the High Court's interpretation of the 'external affairs' power.

4 DFAT, *Australia and International Treaty Making Information Kit* (2002), p.4

5 DFAT, *Australia and International Treaty Making Information Kit* (2002), p.5

6 DFAT, *Australia and International Treaty Making Information Kit* (2002), p.5

The 1996 reforms

2.21 In recognition of the need for greater openness and transparency in the treaty-making process, the government implemented a number of reforms to the existing processes in mid–1996. These reforms included the establishment of the Treaties Council, the formation of the parliamentary Joint Standing Committee on Treaties (JSCOT) and the establishment of the Australian Treaties Library. The Commonwealth–State–Territory Standing Committee on Treaties (SCOT) is another important consultation mechanism.[7]

2.22 The peak consultative body is the Treaties Council, the members of which are the Prime Minister, the Premiers of the States and the Chief Ministers of the Territories. The aim of the Council is to facilitate high-level consultation between the States and Territories and the Commonwealth, and allow States and Territories to draw to the Commonwealth's attention treaties of particular sensitivity and importance to them. The Council meets as agreed by the Commonwealth and the States and Territories.

2.23 The Select Committee notes that the Treaties Council has met only once, in 1997, and did not meet to consider the AUSFTA. This is discussed further below.

Joint Standing Committee on Treaties

2.24 The parliamentary Joint Standing Committee on Treaties (JSCOT) was established in 1996, its role being to review and report on all treaty actions proposed by the government before action is taken which binds Australia to the terms of the treaty.[8]

2.25 The Committee's resolution of appointment empowers it to inquire into and report on:

(a) matters arising from treaties and related National Interest Analyses and proposed treaty actions 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 parliament; or
(ii) a Minister; and

(c) such other matters as may be referred to the committee by the Minster for Foreign Affairs on such conditions as the Minister may prescribe.

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7 See DFAT, *Australia and International Treaty Making Information Kit* (2002), pp.21–34 for a detailed discussion and evaluation of the reforms undertaken in 1996.

8 This section on the role of JSCOT is drawn from the Joint Standing Committee on Treaties web page detailing the establishment, role and history of the Committee, at http://www.aph.gov.au/house/committee/jsct/ppgrole.htm, accessed 29 October 2003.

2.26 The current treaty-making process requires that all treaty actions proposed by the government are tabled in parliament for a period of at least 15 sitting days before action is taken that will bind Australia at international law to the terms of the treaty.

2.27 When tabled in parliament, the text of a proposed treaty action is accompanied by a National Interest Analysis (NIA) which explains why the government considers it appropriate to enter into the treaty. An NIA includes information about:

- the economic, social and cultural effects of the proposed treaty;
- the obligations imposed by the treaty;
- how the treaty will be implemented domestically;
- the financial costs associated with implementing and complying with the terms of the treaty; and
- the consultation that has occurred with State and Territory governments, industry and community groups and other interested parties.

2.28 The text and the NIA for each proposed treaty are automatically referred to the JSCOT for review. When its inquiries have been completed, the JSCOT presents a report to parliament containing advice on whether Australia should take binding treaty action and on other related issues that have emerged during its review.

Consultation and parliamentary scrutiny of treaties

2.29 In the main, the reforms undertaken since 1996 have been successful in enhancing the level of public awareness of Australia's participation in the treaty–making process and improving the accessibility of information to the general public about treaties through the development of the Treaties Library.

2.30 Notwithstanding these successful reforms, the Select Committee remains concerned that, particularly with regard to trade agreements, there is insufficient consultation and community involvement in the treaty–making process and inadequate opportunities for parliamentary scrutiny of proposed treaties *prior* to signature by Australia – as opposed to *following* signature but *prior* to any action which binds Australia in international law (i.e., ratification).

2.31 The Select Committee believes that trade agreements, because of their potentially broad ranging impacts, are in a different category to other types of international treaties Trade agreements are not, for example, like treaties that might be ratification of international standards that have gone through numerous processes of discussion. They are significantly about the shape of Australia's economic and social future.

2.32 The Select Committee also makes the point that trade agreements now cover a wide range of issues, and are not just about trade in goods and lowering of tariffs. Trade agreements can have wide ranging impacts in areas such as social policy, health

and environmental policy and legislation, intellectual property rights, sanitary and phytosanitary measures, trade related investment and government procurement.

2.33 Bilateral and regional trade agreements cover a potentially wider range of issues, and usually adopt a 'negative list' approach rather than the 'positive list' approach. These types of agreement have the potential to impact on any area of government regulation which is not specifically excluded from the agreement.

2.34 Once signed, trade agreements effectively bind future governments and are difficult to change. Amending Australia's commitments could involve long lead times, loss of trade access or payment of compensation. Because of this limiting effect on the ability of future parliaments to legislate, it is essential that parliament is fully aware of the content of trade agreements and has the opportunity to debate such agreements, prior to Australia being bound to comply with the agreement in question.

2.35 The Select Committee believes that trade agreements can and should be distinguished from treaties such as United Nations human rights treaties, international labour conventions and international environmental agreements. Unlike labour, human rights and environmental agreements, trade treaties incorporate dispute settlement processes and binding enforcement mechanisms, including sanctions and compensation, making them more analogous to private law or contract law than traditional human rights treaties.

2.36 A key distinction between conventional treaties and trade treaties is that states can choose to 'selectively exit' conventional treaties with relative impunity. Trade treaties impose penalties for serious breaches. Although governments are obliged to adhere to their responsibilities under conventional treaties, in reality, these treaties often have ineffectual enforcement mechanisms. As a consequence, states that choose to ignore their obligations may face diplomatic pressures or possibly sanctions. In contrast, trade agreements impose binding justiciable constraints on governments regarding the conduct of fiscal, monetary, trade and investment policies

2.37 In the United States, international trade agreements cannot be ratified until they are approved by both houses of the Congress. This process can be time consuming and cumbersome, the difficulties of which have been overcome by the introduction of legislation providing for a Trade Promotion Authority. The legislation in the US ensures that other factors, such as the effects on workers, the broader community and the environment cannot be ignored in the ratification process. (The process in the US is discussed elsewhere in this Report.).

2.38 In the absence of a similar process in Australia, it seems even more important that parliamentary approval of trade agreements should be a necessary precondition of ratification. After negotiation and signature, a treaty should not become legally binding until there has been sufficient parliamentary scrutiny, and after sufficient debate, parliament and not the executive should have responsibility for ratification.

Senate Legal and Constitutional Committee Report—Trick or Treaty?

2.39 The Select Committee notes that the Senate Legal and Constitutional References Committee considered the issue of parliamentary involvement in the treaty-making process in its comprehensive report *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*.[9] This report gave detailed consideration to a range of issues including accountability and sovereignty and whether there is a need for greater parliamentary involvement in the treaty–making process.[10]

2.40 That Committee was of the view that a range of arguments could be made for increased parliamentary involvement in the treaty-making process, and that there was strong support for this proposition in the evidence before it. The key point in favour of greater involvement was the increasing number and wide range of subjects covered by treaties. The Committee reasoned that the more important the subject matter, the greater the need for parliamentary involvement.[11]

2.41 With regard to the democracy or otherwise of the treaty-making process, the Legal and Constitutional Committee concluded that the act of entering into a treaty is a free decision of Australia as a sovereign nation, entered into by a democratically elected government. Further, parliament must pass any legislation necessary to implement the treaty in domestic law. The process itself was regarded as democratic, but in need of some enhancement, for example, by improving consultation mechanisms.[12]

2.42 In *Trick or Treaty*, the Committee acknowledged that, by incurring international obligations under treaties, the government exerts influence on the Commonwealth parliament and/or the States and Territories to fulfil those obligations. For this reason, the Committee advocated greater involvement by the parliament prior to ratification of a treaty, so that it can 'make a free choice without the pressure of a potential breach of treaty obligations'.[13]

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9 The report was tabled in November 1995 and is available at http://www.aph.gov.au/Senate/committee/legcon_ctte/treaty/report/index.htm

10 See Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties,* November 1995, chapter 14. This Chapter also considers whether there could be said to be a 'democratic deficit' in the current processes, coming to a conclusion that there probably wasn't sufficient evidence to indicate that this was the case.

11 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, p. 239

12 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, p. 246

13 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* p. 247

Joint Standing Committee on Treaties Report—Who's afraid of the WTO?

2.43 The JSCOT considered a range of issues relating to Australia's relationship with the WTO in its report *Who's Afraid of the WTO? Australia and the World Trade Organisation*[14], including community education and consultation and parliamentary scrutiny of WTO agreements.

2.44 The JSCOT's view was that, while the government had made considerable improvements in the level of consultation undertaken with interested parties during the development of WTO negotiating positions, there are few opportunities for parliamentary involvement in these debates. The JSCOT acknowledged that beyond the work of the Trade sub–committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, parliament's role in reviewing trade policy is limited to *ad hoc* scrutiny through Senate Estimates and occasional debate and questions.[15]

2.45 The JSCOT pointed out that, given the impact that global trade has on the lives of Australians, parliament should take a more prominent role in debating the many trade related issues which are of concern to the general community. The JSCOT recommended the establishment of a Joint Standing Committee on Trade Liberalisation, to allow parliament to play a more active role in reviewing Australia's engagement in the multilateral trading system. Further, it was recommended that this committee undertake an annual review of Australia's WTO policy, including negotiating positions, dispute cases, compliance and structural adjustment.[16]

2.46 It was envisaged that this proposed committee could comment on Australia's negotiating proposals, before WTO negotiations commence, and could undertake extensive community consultations on trade policy and WTO matters. The JSCOT noted that a Canadian parliamentary committee did just this prior to the 1999 Seattle WTO meeting.[17]

2.47 Further, the JSCOT noted that much of the focus of Australia's engagement with the WTO seemed to be on the opportunities for Australian exporters, rather than the domestic impacts of trade liberalisation. The JSCOT saw that the proposed joint committee dedicated solely to international trade matters could help redress this balance, allowing parliament to examine and report on the domestic impact of the government's trade policies and proposed outcomes.

2.48 In response to the recommendations regarding greater parliamentary scrutiny of Australia's trade policies and relationship with the WTO, the government

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14 Joint Standing Committee on Treaties (JSCOT), Report 42: *Who's Afraid of the WTO? Australia and the World Trade Organisation*, September 2001. Available at http://www.aph.gov.au/house/committee/jsct/wto/index.htm, accessed 31 October 2003

15 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, p.68

16 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, pp:68, 69

17 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, p.68

acknowledged that it is a matter for parliament to determine what committees it wishes to establish, but indicated that it thought the establishment of a separate committee dealing with trade liberalisation was not necessary. The government noted that the Joint Standing Committee on Foreign Affairs, Defence and Trade and its Trade Sub–committee already has a mandate to review and examine developments in the international trade environment and Australia's trade priorities, including the WTO.[18]

Consultations with the States and Territories about the AUSFTA

2.49 Any international treaty – and especially a trade agreement with comprehensive coverage of matters that cut across various jurisdictions – will necessarily be of considerable interest and significance to state, territory and local governments.

2.50 The fact that a national government can enter binding undertakings with an international trading partner means that such treaties can effectively extend the constitutional reach of the Commonwealth.

2.51 Given that many aspects of the AUSFTA have important implications for the States and Territories, the Select Committee sought advice from them about the AUSFTA and in particular about their involvement in its development. The Select Committee has discerned several weaknesses in the process.

2.52 A major weakness in process was the failure to convene the Treaties Council of first ministers which was established specifically for the purpose of such consultation and advice.

> COAG agreed that (taken from the 1996 revised Principles and Procedures for Commonwealth-State Consultation on Treaties):
>
> > 5.1 There will be a Treaties Council consisting of the Prime Minister, Premiers and Chief Ministers. The Treaties Council will have an advisory function.
> >
> > 5.2 The role of the Treaties Council is to consider treaties and other international instruments of particular sensitivity and importance to the States and Territories either of its own motion, or where a treaty is referred to it by any jurisdiction, a Ministerial Council, an intergovernmental committee of COAG or by SCOT [Standing Committee on Treaties]. Senior Officials will co-ordinate and prepare the agenda for the Treaties Council. The Treaties Council will also be able to refer treaties to Ministerial Councils for consideration.

18 Government Response to Report 42 of the Joint Standing Committee on Treaties, 29 August 2002, available at http://www.aph.gov.au/house/committee/jsct/governmentresponses/42nd.pdf at 31 October 2003.

> 5.3 The Treaties Council will meet at least once a year. The Prime Minister will chair the meetings, with the Minister for Foreign Affairs in attendance when appropriate. Meetings of the Treaties Council will normally take place at the same time and place as COAG.

2.53 Despite 5.3 above, the Treaties Council has met only once, in 1997. It did not meet to consider AUSFTA. The Select Committee considers that, in the light of the Treaties Council's terms of reference, there could scarcely have been, in the case of the AUSFTA, an agreement that would be of 'particular sensitivity and importance to the States and Territories'.

2.54 The Victorian Government's July 2003 request for the Treaties Council to consider the AUSFTA was not agreed to. The Queensland government advised that, while it did not request that course of action, the Attorney General (Hon Rod Welford MP), in an address to a seminar in March 2002 entitled *Treaties in a Global Environment,* had 'reiterated Queensland's concern regarding the apparent reluctance of the Commonwealth to convene a Treaties Council meeting'.[19]

2.55 Queensland also referred to the existence, under COAG, of an officials-level Standing Committee on Treaties, which was to advise the Treaties Council on relevant matters, monitor treaties, and coordinate State and Territory representation on delegations where appropriate. While the Committee has met regularly, in the view of the Queensland government 'it has not met the original expectations of its role'.[20]

2.56 States and Territories have raised concerns about the effectiveness of current measures used by the Commonwealth Government to consult on treaties. At its meeting on 28 May 2004, the COAG Senior Officials Meeting (SOM) established a review of the procedures. For Queensland, areas which should be considered in that review include:

> … the Treaties Council, timely consultation with States and Territories regarding National Interest Analyses, a more systemic approach to consultation which currently does not follow a standard or reliable path and consideration of when negotiations should be elevated to Ministerial level. In addition, because of the significant increase in negotiation of bilateral agreements, we propose that the review should consider mechanisms to ensure that current legislation/regulation across all jurisdictions, conforms and continues to conform to treaties.[21]

2.57 In late 2002, the Commonwealth Minister for Trade wrote to the State and Territory Minsters with trade portfolios encouraging State and Territory submissions outlining any issues and priorities they would like to see pursued in the negotiations

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19 Queensland Government, *Answers to Questions on Notice,* 19 July 2004

20 Queensland Government, *Answers to Questions on Notice,* 19 July 2004

21 Queensland Government, *Answers to Questions on Notice,* 19 July 2004

with United States. There were no formal arrangements whereby State and Territory leaders discussed the AUSFTA, although there appears to have been contact between the States and Territories at officials' level.

2.58 Consultation by the Commonwealth appears to have been ' really a matter of the States and Territories being provided with information, unless the Commonwealth specifically needed the input of the States and Territories, such as in the government procurement chapter'.[22] Briefings were also provided at some national level meetings such as the National Trade Consultations and the Primary Industries Ministerial Council.

2.59 According to the WA government, at least, the information obtained was, for the most part, not adequate to brief ministers for cabinet level discussion or to enable departments to analyse the AUSFTA properly.

> While some information was provided, there was insufficient detail to allow analysis of the impact of the proposed AUSFTA on Western Australia.[23]

2.60 As well, just before the third round of negotiations when a State and Territory member was to have attended negotiations for the first time, permission for that person to attend was withdrawn because ' the USA had some issues with a State and Territory representative attending'[24] For the last round of negotiations in Canberra, however, a Queensland trade official attended as an observer.

2.61 There have been no formal arrangements agreed on for State and Territory participation in ongoing consultations or negotiations associated with the various working groups established under the AUSFTA. DFAT officials advised states that 'a lack of a formal arrangement does not imply that State and Territory input would not be sought'.[25]

Conclusions

2.62 The Select Committee concurs with the analysis and assessment of the Senate Legal and Constitutional Committee discussed above with regard to parliamentary involvement in the treaty-making process, and the democracy of the process. The more important the subject matter of the treaty, the greater the level of scrutiny is required. The Legal and Constitutional Committee's assessment was made in 1995 and there are now even stronger reasons for greater parliamentary scrutiny given the proliferation of trade agreements, and, in particular, the trend towards bilateral agreements. These developments have occurred largely since the Legal and Constitutional Committee's report was tabled.

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22 WA Government, *Answers to Questions on Notice,* 14 July 2004

23 WA Government, *Answers to Questions on Notice,* 14 July 2004

24 WA Government, *Answers to Questions on Notice,* 14 July 2004

25 Queensland Government, *Answers to Questions on Notice,* 19 July 2004

2.63 The crux of the issue regarding treaty-making processes is that there is a valid distinction to be made between human rights type treaties (which have no enforceable dispute resolution mechanisms and no financial penalties for withdrawal) and trade treaties (in particular, bilateral agreements such as AUSFTA and WTO agreements including GATS). Trade agreements, including AUSFTA, have binding dispute resolution processes and parties are exposed to potentially significant financial penalties or 'compensatory adjustment' if they withdraw from commitments made.

2.64 This means that future governments and future parliaments are bound to comply with Australia's current AUSFTA commitments.

2.65 In the Select Committee's view, the argument that the treaty-making process is sufficiently democratic because governments are elected and because legislation is required to be passed to implement treaties into domestic law does not have a great deal of force with regard to trade treaties which bind future governments and parliaments. Moreover, governments seldom, if ever, could be said to have a mandate to enter into trade agreements given that such agreements are rarely referred to or given coverage prior to elections.[26]

2.66 Problems will always arise when citizens feel that the government is not apprising them adequately of the matters being placed on the negotiating table, or when they sense that a veil of secrecy is being drawn over agreements that may have far-reaching consequences for their economic, social, environmental or cultural futures.

2.67 While the Select Committee appreciates that negotiating tough trade deals requires the parties to observe a considerable degree of discretion, and that to reveal one's hand is rarely an appropriate strategy, the Select Committee is also strongly of the view that the process by which major trade deals are initiated, developed and prosecuted must be as transparent as possible.

2.68 The Select Committee also regards as very inadequate the manner in which the States and Territories were enabled to participate in the development of the AUSFTA. The States and Territories ministers seemed not to have been in any position to make an informed assessment of the impact of the AUSFTA on their areas of responsibility, and the lack of involvement of state officials during the negotiating rounds was a major shortcoming.

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26 The Senate Legal and Constitutional Committee Report *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* at pages 232-233 refers to evidence from Professor de Q Walker of the University of Queensland, who argues that even the most important treaties lack anything resembling a mandate from the electorate, giving the example of the Closer Economic Relations (CER) treaty with New Zealand. The CER had a major impact on the economy but was not mentioned in any party's campaign during the federal election prior to its ratification.

2.69 The collective commitment of Australian governments to advance the wellbeing of all Australians relies to a considerable degree on trust and confidence. The Select Committee is persuaded that the translation of that sentiment and principle into a standard practice by which Australia progressed its trade deals would overcome much of the public anxiety and suspicion. It would also encourage the public to engage more fully in the debate, enable citizens to be better informed, and most importantly assist both state and federal governments towards a full appreciation of the views of its electors. In short, the public interest would be served.

The practicalities of parliamentary involvement

2.70 The Select Committee believes that a strong case can be made for greater parliamentary involvement in setting the negotiating priorities and monitoring the impacts of trade treaties, in addition to the kind of scrutiny undertaken by the JSCOT.

2.71 The Select Committee accepts in part the view of the JSCOT in its report on Australia's relationship with the WTO, discussed earlier, that the focus of Australia's trade policy and trade consultations has been, and perhaps continues to be, too much on the opportunities for Australian businesses seeking to export globally and too little on the domestic impacts of trade liberalisation in general, and of the proposed AUSFTA in particular.

2.72 Any trade liberalisation is likely to disrupt some existing industries and promote the development of others. This has implications for patterns of employment and raises complex domestic policy questions centred on managing the impact of change which in the aggregate benefits the economy but has negative impacts on certain sub–groups. The challenge for governments is to ensure that there are appropriate structural adjustment mechanisms in place to minimise the negative impacts.

2.73 The Select Committee notes that the Joint Standing Committee on Foreign Affairs, Defence and Trade's (JSCFADT) Resolution of Appointment empowers it to consider and report on such matters relating to foreign affairs, defence and trade as may be referred to it by either House of parliament, the Minister for Foreign Affairs, the Minister for Defence, or the Minister for Trade.[27]

2.74 The JSCFADT resolved in August 2001 to 'undertake continuous and cumulative parliamentary scrutiny of the World Trade Organisation.' However, there is no similar initiative for the scrutiny and discussion of proposed free trade agreements, in particular the AUSFTA. The JSCOT's role in this process (at least in the vast majority of cases) is limited to scrutinising the proposed agreement once it has been signed for Australia, but before it is ratified.

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27 Joint Standing Committee on Foreign Affairs, Defence and Trade Resolution of Appointment. See http://www.aph.gov.au/house/committee/jfadt/resoltn.htm, accessed 31 October 2003.

2.75 The crucial point for trade agreements is 'prior to signature', because once a treaty has been signed it would be extremely unlikely for the government to refuse to ratify a treaty on the basis of, say, any JSCOT recommendations, or indeed for any other reasons.

2.76 The Select Committee's view is that parliament needs to be more involved in the process prior to signature of treaties. The focus of parliament's involvement should be more balanced, not just on the opportunities and benefits of increased export opportunities for Australian businesses, but also on the domestic impacts of trade liberalisation in general, including social, cultural and environmental impacts, including measures to offset or manage adverse adjustment impacts.

2.77 There seems to be scope under the terms of reference for the JSCFADT and of the JSCOT to allow for greater involvement in scrutiny of proposed trade treaties than is currently the case. The Trade Sub–committee of the JSCFADT for example, could fulfil the role of the proposed new committee on trade liberalisation recommended by the JSCOT in its report on Australia and the WTO, discussed earlier. This could involve monitoring the impacts of trade agreements on Australia, opportunities for trade expansion and trade negotiating positions developed by the government.[28]

2.78 The government is currently required to table a National Interest Analysis along with each treaty tabled. The NIA includes information about the economic, social and cultural effects of the proposed treaty, and the obligations imposed by it. However, the NIA is a cursory statement of impacts that the Select Committee regards as 'too little too late'. Information in a more comprehensive form is required at a much earlier stage in the process, and prior to the government committing Australia to be bound by multilateral obligations or by a proposed free trade agreement.

2.79 The Select Committee has referred above to the process by which trade negotiations are initiated by US administrations. In brief, the Congress must approve a Trade Promotion Authority which sets out the objectives of the negotiations, and any conditions which must be met. The US government can then negotiate with its trading partner(s) to settle a proposed agreement. This proposed agreement is then tabled in the US Congress, where it must remain for a fixed period of time to enable sufficient scrutiny by members before being put to a vote by which the agreement will be either rejected or accepted—but not modified.

2.80 As discussed earlier, the potentially dramatic impact that trade treaties in particular can have on the lives of citizens and on the shape of a country's economy means that there is significant justification for parliament exercising careful scrutiny of the whole process. The process that operates in the United States facilitates a level of congressional/parliamentary scrutiny that is worth emulating. It provides for

28 See JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, Recommendation 6, p.69

executive authority to negotiate trade agreements while also allowing proper congressional monitoring and approval.

2.81 Trade Promotion Authority is nothing more than a kind of agreement between Congress and the President about how trade negotiations will be handled. It is an attempt to achieve cooperation and coordination between the executive and legislative branches of government.

2.82 Under Trade Promotion Authority, Congress usually spells out specific negotiations and objectives that it would like to see achieved. Congress also outlines how the chief executive will keep them apprised and briefed on developments in trade negotiations. Finally, Trade Promotion Authority always includes an agreement from Congress that once a trade negotiation is finished, the legislation implementing it will be handled on the floor of the House and the Senate without amendments. Members of Congress are given only the chance to vote the agreement up or down, but not to "nit pick" it until it unravels as a balance of trade concessions.[29]

2.83 There appears to be no formal impediment, constitutional or otherwise, to the Australian parliament adopting a similar arrangement to that operating in the US Congress. Not only will such an arrangement provide for transparency and accountability in the negotiation and execution of trade agreements, but it will also give considerable comfort to the government in terms of securing the implementation of the agreement.

2.84 In any event, current procedures require the parliament to pass relevant implementing legislation before any agreement can properly come into effect. Until all the relevant domestic legislation is passed, Australia is not able to go to the United States and say, 'We have fulfilled the obligations under article X, Y or Z and we are now in a position to have the agreement enter into force on such and such a date'.

2.85 Under the existing state of affairs, the government can sign off on an agreement, but find itself confronted with, say, amendments by the Senate of some elements of the domestic legislation necessary to implement the agreement. If the prospect of such amendments was known in advance, the trade negotiators could take them into account.

2.86 The issue of implementing legislation for the AUSFTA has emerged as a significant consideration for the Select Committee. Indeed, it was not until the implementing legislation was introduced to the parliament that the Select Committee was in a position to examine whether, or to what extent, that legislation might address many of the concerns that had been raised by witnesses in the course of its inquiry.

2.87 Moreover, it may be the case – as indeed it seems here – that the implementing legislation may not necessarily go to all the areas of concern. Where

29 Description provided at http://www.cwt.org/learn/whitepapers/tradepro.html, accessed 29 October 2003

implementing legislation *does* relate to contentious issues, it is proper for the Senate to require that those aspects receive adequate scrutiny. As well, there is the question of any delegated legislation that may flow from the need to amend regulations – an area in which the Senate has traditionally taken a keen interest, and where it has shown itself quite willing to disallow regulatory instruments, especially when they remove the opportunity for adequate parliamentary oversight.

2.88 In the case of the current AUSFTA, where cultural protection, intellectual property and the Pharmaceutical Benefits Scheme have been contentious issues, the Senate may choose to vote down some of the relevant domestic legislative instruments. It is extremely unlikely that such a situation would arise under conditions where both houses of the Australian parliament have been closely involved throughout the treaty-making process.

2.89 With a formal parliamentary arrangement in place the trade agreement would progress on the basis of 'no surprises'. This can only benefit all parties to the agreement, and will ensure that Australia is able to negotiate with authority internationally.

2.90 Because of the domestic significance of international trade treaties it is imperative that they be predicated on what is in Australia's national interest. The parliament and the government share that interest. However, the government has the authority to make treaties, so it is essential that the roles of parliament (as watchdog) and the government (as executive) be reconciled where such a major undertaking is at stake.

2.91 The Select Committee therefore sees considerable merit in the establishment of a formal arrangement, with a proper legislative basis, whereby the government can embark on trade negotiations with the parliament's endorsement of the trade objectives and any conditions that must apply.

2.92 The Select Committee proposes the following process for parliamentary scrutiny and endorsement of proposed trade treaties:

(a) Prior to making offers for further market liberalisation under any WTO Agreements, or commencing negotiations for bilateral or regional free trade agreements, the government shall table in both Houses of parliament a document setting out its priorities and objectives, including comprehensive information about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.

(b) These documents shall be referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for examination by public hearing and report to the parliament within 90 days.

(c) Both Houses of parliament will then consider the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, and vote on whether to endorse the government's proposal or not.

(d) Once parliament has endorsed the proposal, negotiations may begin.

(e) Once the negotiation process is complete, the government shall then table in parliament a package including the proposed treaty together with any legislation required to implement the treaty domestically.

(f) The treaty and the implementing legislation are then voted on as a package, in an 'up or down' vote, that is, on the basis that the package is either accepted or rejected in its entirety.

2.93 This process should be set out in legislation and complemented by appropriate procedures in each House of parliament. The legislation should specify the form in which the government should present its proposal to parliament and require the proposal to set out clearly the objectives of the treaty and the proposed timeline for negotiations.

2.94 A vote in favour of a proposed set of objectives at the initial stage would be an 'in principle' endorsement of the treaty and would give the government a greater democratic mandate in negotiations. A concluded trade agreement that conformed to already agreed objectives would be more likely to receive final parliamentary approval.

2.95 The Select Committee recognises that, as with the current JSCOT processes, there will occasionally be a need to 'fast track' a proposed treaty for security or other reasons. Implementing this type of process recommended by the Committee for proposed trade agreements may mean that the negotiating process takes longer. However, given the potential impact of trade agreements such as the AUSFTA on all areas of Australian society, and the binding effects of these agreements on future parliaments, any possible delays are more than justified by the benefits of having comprehensive parliamentary debate on the pros and cons of proposed trade agreements.

2.96 The Committee hopes that a focus on the provision of more comprehensive information at an earlier stage in the process will ensure that through the mechanism of early parliamentary involvement, the Australian public will be better informed about the impacts of trade agreements, the consequences of services trade liberalisation and of bilateral free (preferential/discriminatory) trade agreements.

Transparency and independent analysis

> The road back must begin with the restoration of the integrity of the policy making process. The Treaties Committee and the Senate Committee can assist that process by insisting that prior to final consideration of the FTA by the parliament the Productivity Commission prepares an independent, transparent report on the costs and benefits of the agreement.
>
> We've had all sorts of reports that have been prepared by people who are selling a case for and against, but that's a very different thing from having a

> careful report properly resourced by an independent group that then becomes the basis of transparent public discussions. [30]

2.97 The Select Committee is alarmed by the lack of adequate research being undertaken prior to Australia committing itself to trade agreements. Balanced and comprehensive research on the economic, social, cultural and policy impacts of any trade treaty Australia proposes to enter into is a vital part of ensuring that there is proper scrutiny of the agreement and would contribute greatly to the quality of the public debate on these issues.

2.98 Elsewhere in this Report, the Select Committee has discussed the various economic assessments of the AUSFTA and noted that these assessments have tended to generate more heat than light in enabling the parliament and the public to discern the impact of the Agreement on Australia's national interest. Similar controversy had been generated before the negotiation of the Agreement with reports that delivered contrary conclusions about the likely economic benefits of the (proposed) AUSFTA.

2.99 In the 2003 report *Voting on trade*, the Senate Foreign Affairs and Trade Committee noted the emergence of a common thread of concern among public witnesses (both in relation to GATS and the AUSFTA) about the perceived shortcomings of DFAT in the coverage and balance of its published information and advice. The perceived lack of serious attention to any negative impacts of these agreements seems to have made many people suspicious. They sense that they are not being told the full story - that the government is being insufficiently frank, that it seems only to present information that is favourable to its case, and that the government is exaggerating the benefits.

2.100 The Select Committee appreciates that DFAT's task is to communicate, promote and implement government policy. However, it is problematic if that communication is perceived by many to be at best insufficiently nuanced, or at worst, brute propaganda. This situation is compounded by a subsequent adversarial approach to the consideration of contrary opinions and assessments - especially economic modelling outcomes.

2.101 The Select Committee does not question the professional competence of any of the agencies or individuals that produce the various assessments. However, it understands how perceptions have arisen among some members of the public that DFAT attends almost exclusively to those reports and assessments that are favourable to its policy objectives and that DFAT either disregards or denigrates alternative assessments.

2.102 The Select Committee notes that the JSCOT in its report on Australia's relationship with the WTO recommended that the government commission multi-disciplinary research to evaluate the socio-economic impact of trade liberalisation in

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30 Garnaut, R. *Vital Issues Seminar,* Parliamentary Library, 17 June 2004

Australia since the conclusion of the Uruguay Round in 1994.[31] The JSCOT further recommended that in evaluating whether Australia should enter into any future WTO Agreements, the government should assess the likely socio–economic impacts on industry sectors and surrounding communities.[32]

2.103 The Select Committee further notes that the government to date has not commissioned multidisciplinary research as recommended by the JSCOT, in particular before commencing negotiations for the AUSFTA. The Select Committee also notes that in its June 2004 report on the proposed AUSFTA, the JSCOT recommended that the Productivity Commission produce a report on the impact of the AUSFTA five years after its implementation.

2.104 The Select Committee believes that it would be highly desirable if the services of the respected and independent Productivity Commission were drawn upon by the government to provide analysis and advice concerning proposed trading agreements. Not only would this add significantly to the pool of information available to government for decision-making and policy development, but it would also militate strongly against the perception that the government was relying on advice that was highly coloured by its particular view.

2.105 Transparency is vital not only during the negotiation of any agreement, but during its implementation. The AUSFTA provides for a range of committees and working groups to address various aspects of the Agreement. The role of these prescribed committees is not fully discernible in the text of the Agreement, and their effectiveness and influence can only be fully appreciated once they are in operation.

2.106 The Select Committee regards it as imperative that the operation of these groups is open to scrutiny, and that their contribution to the effectiveness and evolution of the Agreement is fully understood. To that end, it should be a requirement that these committees and working groups report annually to the government, and that these reports are tabled in parliament.

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31 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, Recommendation 1, p.26

32 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, Recommendation 2, p.33