

Foreword

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

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

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

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

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

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

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

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

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

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

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

Senator Alex Gallacher
Chair