

# Chapter 1

## Introduction

### Referral

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

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

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

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

### Purpose of the inquiry

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

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

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

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

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

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

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

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

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

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

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

### **Structure of the report**

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

### **Conduct of the inquiry**

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

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

### **Acknowledgments**

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

