Dissenting Report by the Australian Greens

Introduction

1.1 The Greens acknowledge the insightful analysis the committee has made about the state of Australia's treaty making process and the need for change. The committee correctly identifies that the scope and complexity of 'modern trade' or 'partnership' agreements—such as the Trans Pacific Partnership (TPP) Agreement—makes the case for reform compelling. The Greens agree with the committee's identification of three major areas for urgent reform: transparency, consultation and independence.

1.2 However, the Greens are disappointed that the sense of urgency—so strongly reflected in the report's conclusion—has not been translated into a set of recommendations that will achieve this. The incursion of modern trade or partnership negotiations into matters of domestic policy and public interest is such that they now function as a '*de facto* level of government'. Accordingly, Australia's treaty-making process should be founded on the same principles of transparency that apply to the making of legislation and the conduct of parliament. The Greens believe that the recommendations of the committee—whilst an improvement on the current process—will fail to stem the anti-democratic nature for modern trade or partnership negotiations and the lack of public trust in them.

1.3 A number of important recommendations include release clauses—'opt outs'—that would allow the government of the day to maintain the *status quo*. These recommendations seek to better balance the executive power of governments with more parliamentary scrutiny and participation. Although this principle may appear reasonable *prima facie*, without legislated change to the fundamental nature of Australia's treaty making process the default position will always favour executive power over parliamentary and democratic participation. In turn, this encourages more secrecy, which is a hallmark of the current treaty making process, and which is not in the national interest.

1.4 Unfortunately, the committee has failed to analyse and justify the need for *any* secrecy or 'commitments to confidentiality' in Australia's treaty-making process. Why do negotiations around deals such as the TPP require secrecy? The only justification provided by DFAT is that this is required due to 'commercial-in-confidence'. Whose interests are being favoured or prioritised in this instance: those of large corporations or those of the general public? It is little wonder critics of modern trade agreements see them as a self-interested takeover of democratic institutions by corporations. The treaty negotiation process as it stands is set up to feed these suspicions and justify these criticisms.

1.5 It is disappointing that no examples were provided by the committee as to how a fully open and transparent process could and does work. For example, the report does not raise the example of the World Intellectual Property Organisation which successfully completes complex multilateral agreements while making the negotiating sessions open to the public and draft texts immediately available.

1.6 Instead, the committee has simply accepted and assumed that secrecy is justified and necessary at some level. For example:

> 4.62: 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.

1.7 Ignoring the fundamental principle of commitment to full transparency—which the Productivity Commission says should be in our DNA—leaves the treaty-making process open to abuse by the government of the day and undermines the "balance" which this report purports to aspire to.

1.8 The Greens believe that, ultimately, the major parties don't want to relinquish any executive power to negotiate trade deals. This report is a missed opportunity to establish a realistic set of recommendations that tackle this key issue which is synonymous with Australia's broken treaty process.

Comments on specific recommendations

Transparency

1.9 The intent of Recommendation 4, being to require treaties to be tabled in parliament prior to authorisation for signature, is supported. However, the second sentence in Recommendation 4 provides a release clause from this requirement in the "absence of agreement" with other negotiating countries. In the absence of an incentive to do otherwise, this clause will almost certainly be exercised by negotiating parties whose "commercial-in-confidence" interests are served by secrecy.

1.10 Likewise, the primary intent of Recommendation 5 is supported. But, again, the inclusion of the release clause "subject to the agreement of negotiating countries" undermines this intention.

1.11 The Greens believe the Australian government should not enter into any treaty processes that are not fully transparent and democratic, and that Australia should show strong leadership on this issue.

Consultation

1.12 Recommendations 1, 2 and 6 fall well short of the Greens preferred approach to consultation. While an improvement on the current process, these recommendations continue to constrain the scrutiny of treaties by restricting parliamentarians and stakeholders privy to draft texts from seeking non-government assistance to interpret highly complex agreements.

1.13 At a minimum, Recommendations 1 and 6 would be more palatable to many stakeholders if the final agreement of a treaty was tabled in parliament for a minimum period of time (e.g. 20 sitting days) prior to any final agreement being signed by cabinet, to enable open public scrutiny of the agreement. This leaves open the opportunity for stakeholders' participation and input prior to the document becoming highly politicised with an "all or nothing" vote in parliament on a treaty's enabling legislation.

1.14 Recommendations 1, 2 and 6 would also be improved by establishing a council of parliamentarians and stakeholders privy to the draft text to enable discussion between these parties during the proposed consultation phase.

1.15 Accordingly, Recommendation 2 should be amended so that JSCOT facilitates this collaborative process, rather just disjointed briefings with DFAT and stakeholders. Recommendation 2 should also be amended to clearly detail how JSCOT interacts with the parliament during this process.

Independence

1.16 The Greens believe that economic, environmental and social impacts should be examined and presented to parliament prior to the commencement of treaty negotiations and prior to final agreement. The primary responsibility for this analysis should sit with independent statutory bodies.

1.17 The intent of Recommendation 3 to introduce a specific examination of the human rights impacts of treaties is welcomed. However, Recommendation 3 should be amended to make it clear that this human rights assessment should be done in two phases, being both prior the commencement of negotiations and prior to final agreement. Recommendation 3 should also be amended so that the Australian Human Rights Commission is the primary power to consider human rights implications of all proposed treaties.

1.18 The intent of Recommendation 8 to introduce a cost-benefit analysis of treaties by an independent body is also welcomed. However, Recommendation 8 should be amended such that all treaties—not just bilateral and regional trade agreements—are subject to cost-benefit analysis. Further, the release clause "or as soon as is practicable afterwards" should be deleted.

1.19 Similarly, Recommendation 10 should be amended to delete the release clause "wherever possible".

1.20 Consideration should also be given to the interaction and overlap between Recommendations 3, 8 and 10. The National Interest Analysis (NIA) is likely to be largely drawn from the cost-benefit analysis.

1.21 In concert with the scope of the NIA, the scope of cost-benefit analyses should also include an assessment of human rights impacts and other social considerations, as well as environmental considerations. Input on matters related to human rights and environmental impacts should be provided by those independent statutory bodies empowered to undertake assessments of these impacts.

1.22 To that end, and noting the absence of a statutory Commonwealth body empowered to oversee environmental sustainability impacts, a further recommendation should be included to ensure an independent assessment of the environmental impacts both prior to the commencement of treaty negotiations and prior to final agreement.

Strategy and scope

1.23 Recommendations 7 and 10 are broadly supported. The development of both a model trade agreement, and priorities and objectives associated with a proposed

treaty, should be integrated with the criteria for evaluating and assessing draft treaties, and should be founded on the principle of transparency.

1.24 The Greens believe that the scope of international agreements should include controls that are commensurate with the impact of any externalities that arise from related trade activities. This is the fundamental basis for achieving “fair trade” not “free trade”. Modern trade and partnership deals should include binding measures designed to protect and improve human rights and labour standards, and to mitigate and prevent environmental degradation. It is not fair that corporate profits are protected in binding agreements through state-to-state and investor-state settlement clauses, while important matters of public interest, such as labour, environmental and ethical standards, are not.

1.25 Any deviation from a model trade agreement should be subject to a debate and decision of parliament that specifies the particular components of a treaty that should be subject to less transparency, the reductions in the level of transparency, and the justification for these reductions.

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