

# Chapter 3

## Treaty making process

### Introduction

3.1 Submissions to the inquiry highlighted a series of concerns about the treaty making process, with particular reference to the consultation undertaken during the negotiation of the TPP-11 and consultation about free trade agreements (FTAs) more broadly. Another area of concern highlighted in evidence related to the availability of independent modelling of the impact of the Agreement. This chapter will summarise the issues raised on these matters.

### Consultation on the TPP-11

3.2 The National Interest Analysis (NIA) noted:

The process for engaging stakeholders in relation to the Agreement was an extension of the Government's efforts to bring the original TPP into force. Stakeholders' views were actively encouraged and considered during consultations undertaken in relation to the original TPP, which commenced in 2008. This consultation process culminated in two parliamentary enquiries. The Government continued to consult stakeholders, State and Territory Governments, interested members of the public throughout the TPP-11 negotiation process from February 2017.<sup>1</sup>

3.3 Part 7 of the Analysis of Regulatory Impact on Australia (ARIA) notes that 'stakeholder views were actively encouraged and considered throughout negotiations on the original TPP and the TPP-11'.<sup>2</sup> It also noted that the original TPP process was followed by two parliamentary inquiries, one by the Joint Standing Committee on Treaties (JSCOT) and the second by this committee.<sup>3</sup>

3.4 The ARIA details the consultation undertaken specifically in relation to TPP-11 and advised that DFAT continued to consult stakeholders and to make information publically available on its website and responded to emails. In addition:

In relation to the TPP-11, it is estimated that there were 50 meetings, consultations and contacts undertaken over the period February 2017 - January 2018.<sup>4</sup>

3.5 At the public hearing on 30 July 2018, DFAT outlined the consultation undertaken during the development of the TPP-11:

I also recall the extraordinary efforts made to consult stakeholders and seek the views of interested individuals and organisations, both in relation to the

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1 National Interest Analysis (NIA), p. 21.

2 Analysis of Regulatory Impact on Australia (ARIA), p. 39.

3 ARIA, p. 38.

4 ARIA, p. 40.

original TPP and the revised TPP-11 Agreement. During the negotiating process for the original TPP alone, we engaged in over 1000 briefings with 485 stakeholders, consulting a wide range of groups including peak industry bodies, companies, academics, unions, and consumer and civil society groups. Including today's proceedings, the TPP process as a whole has been the subject of four separate parliamentary inquiries, which have received over 450 public submissions.<sup>5</sup>

3.6 The committee sought information on what evaluation DFAT had conducted about its consultation process. DFAT stated that:

Individuals and organisations consulted throughout the TPP negotiations were able to provide feedback on the adequacy of the process either to officials in person or through correspondence. The Department of Foreign Affairs and Trade did not implement any additional formal feedback or evaluation mechanisms in respect of TPP stakeholder consultations.<sup>6</sup>

3.7 DFAT provided information about its engagement with parliamentarians, including an initiative towards the end of negotiations 'whereby parliamentarians were invited to view the text upon signing of a confidentiality letter'.<sup>7</sup> DFAT also provided private briefings to the JSCOT and the Joint Standing Committee on Foreign Affairs, Defence and Trade to 'facilitate their better understanding of the negotiations and the text'.<sup>8</sup>

### ***Stakeholder perspectives on consultation***

3.8 The committee received evidence from stakeholders detailing different experiences with DFAT consultation processes. Industry bodies including Australian Pork Limited, GrainGrowers, Meat & Livestock Australia, Red Meat Advisory Council and Australian Sugar Industry Alliance told the committee about their experience with the consultation process. Each organisation was able to make representations at the National Farmers' Federation trade committee as well as bringing particular concerns from their industry directly to the attention of the negotiating team in DFAT.<sup>9</sup>

3.9 Mr Andrew McCallum, Global Manager, Trade and Market Access, Meat & Livestock Australia explained their participation during the negotiation stages:

The negotiations, particularly on the TPP, we felt were very valuable, because they involved a number of broader stakeholder forums. A number of us travelled there and participated in the margins of the negotiating rounds. We had access to the negotiators, to our counterparts in the other TPP member countries and to the trade minister, and that's all invaluable in

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5 Mr George Mina, *Opening statement*, 30 July 2018, p. 2 (tabled 30 July 2018).

6 DFAT, answer to question on notice, 20 August 2018 (received 10 September 2018), [p. 4].

7 Mr Mina, *Proof Committee Hansard*, 30 July 2018, p. 65.

8 Mr Mina, *Proof Committee Hansard*, 30 July 2018, p. 65.

9 *Proof Committee Hansard*, 30 July 2018, pp. 29–30.

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understanding the process and understanding what the pitfalls might be and in trying to help overcome any roadblocks.<sup>10</sup>

3.10 Other witnesses expressed concern about the lack of opportunities to participate in the process. For example, a representative from the Australian Council of Trade Unions (ACTU) explained her experience in the following way:

I'd like to note that it is with some interest that I listened to the answers from our colleagues from the National Farmers' Federation about their access to government and DFAT when it comes to trade deals, because I can tell you that we do not have the resources to follow them around the world when they are negotiating the agreements. My experience has been that, the one time that I actually asked a DFAT TPP negotiator to come and meet with the affiliates of the ACTU working on trade, I was told that that was not possible.<sup>11</sup>

3.11 In its submission, GetUp expressed their concerns about the negotiation process:

Beyond the text of the deal itself, we also hold deep concerns about the process of negotiation for the Trans-Pacific Partnership -- a process which we saw to have far more accessibility for large corporations than everyday people, and minimal transparency around process. We are troubled by the text of the agreement not being made public until after our Trade Minister had signed the deal, and given in-principle agreement on behalf of the country.<sup>12</sup>

3.12 Dr Patricia Ranald, Convenor, Australian Fair Trade and Investment Network (AFTINET) explained:

DFAT is right to say that they held meetings with business and civil society groups and talked about the agreement. But because we were never able to see the text—business groups have complained about this too—we didn't have sufficiently detailed information for us to actually discuss what was in the text. There were many of these consultations, but the form that they generally took were us presenting our views to DFAT and then asking questions and DFAT saying, 'Well, at a certain point we can't answer that question, because the negotiations are commercial-in-confidence. We can't go into that level of detail.'<sup>13</sup>

#### *Concerns about transparency*

3.13 Many of the concerns raised about the consultation suggested a lack of transparency. Several submissions suggested that the Government conducted the

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10 *Proof Committee Hansard*, 30 July 2018, pp. 29–30.

11 Ms Andrea Maksimovic, Associate Director International, Australian Council of Trade Unions, *Proof Committee Hansard*, 30 July 2018, p. 36.

12 *Submission 60*, p. 2.

13 *Proof Committee Hansard*, 30 July 2018, p. 15.

negotiations in secret and that the Agreement has been entered into without genuine public input.<sup>14</sup>

3.14 AFTINET submitted that the current Australian trade agreement process is:

...secretive and undemocratic, with the text not made public until after the decision to sign it. The decision to sign agreements is made by Cabinet before they are tabled in Parliament and only then examined by the Joint Standing Committee on Treaties.<sup>15</sup>

3.15 AFTINET also highlighted that '[p]arliament has no ability to change the agreement and can only vote on the implementing legislation'.<sup>16</sup>

### ***Suggested changes to the consultation process***

3.16 In light of the concerns raised about the consultation process, several submissions and witnesses advocated for change.

3.17 Instead of the current process, AFTINET indicated that they support:

...publication of negotiating texts, and publication and independent evaluation of the economic, health and environmental impacts of agreements before the decision is made to sign them. Parliament should vote on the whole text of the agreement.<sup>17</sup>

3.18 The committee received evidence suggesting there may be a role for industry associations and other bodies to play during treaty negotiations. In its submission, the Australian Chamber of Commerce and Industry (ACCI) noted that they 'have consistently raised concerns about aspects of Australia's treaty making processes and have monitored the response of government to recommendations from recent treaty inquiries'.<sup>18</sup> These concerns include: permitting security cleared representatives from business and civil society to see the government position being put forward as part of treaty negotiations and the provision of independent modelling and analysis of proposed trade agreements by the Productivity Commission, or equivalent organisation, and provided to the relevant parliamentary committee alongside NIA.<sup>19</sup> ACCI stated that processes are yet to be reformed in a way that meets concerns from the business community.<sup>20</sup>

3.19 When highlighting concerns with the drafting of particular clauses, Open Source Industry Australia (OSIA) suggested that if the TPP-11 parties had involved

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14 See for example, AFTINET, *Submission 14*, p. 3; AMWU, *Submission 12*, p. 2; Public Services International, *Submission 5*, p. 2; Open Source Industry Australia, *Submission 47*, pp. 3, 14.

15 *Submission 14*, p. 3.

16 *Submission 14*, p. 3.

17 *Submission 14*, p. 3.

18 *Submission 53*, p. 7.

19 *Submission 53*, pp. 8–10.

20 *Submission 53*, p. 7.

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industry bodies throughout the negotiating and drafting process, issues would have been raised earlier and alternate drafting options offered.<sup>21</sup>

3.20 The ACCI advocated for a:

...national think tank to assist to provide thought leadership and analysis to our negotiators in order to ensure the best deal is in fact the outcome from the negotiations...

[The think tank would] recognise that there is expertise in academia, industry and society...that can be brought together and harnessed so that we are all pointed in the same direction.<sup>22</sup>

3.21 As outlined in the prospectus, the Australian Trade Centre (ATC) would be established as a public-private partnership and supported by national and international networks to employ a multidisciplinary approach:

The ATC will employ a multidisciplinary approach. Trade practitioners, policy-makers and regulators will collaborate across areas such as international law, political science, criminology, economics and business management. These teams will be located at research hubs positioned across Australia and organised according to four specific work programs: goods, services, investment and society. The work programs will be hosted by partner universities in major cities including Brisbane, Melbourne, Adelaide and Perth. They will be directed by the ATC Executive based at ANU in Canberra, with oversight by a high-level Board.<sup>23</sup>

#### *Consultation used in other jurisdictions*

3.22 Witnesses drew attention to the consultation processes used by other jurisdictions. Ms Andrea Maksimovic provided some detail about some processes in the European Union (EU) whereby the European Commission publishes all proposals for new negotiating mandates. Ms Maksimovic continued:

They have an advisory group on EU trade agreements, which includes trade unions and other civil society groups, particularly consumer groups. They publish all the EU proposals in the negotiations as soon as those negotiations have happened, so every round they publish everything. They make sure that the negotiated agreement is published as quickly as possible so the public have access to it.<sup>24</sup>

3.23 Ms Maksimovic argued that Australia should be working towards implementing a model similar to that in the EU. It was further noted that the United Kingdom has an advisory group which involves trade unions.<sup>25</sup>

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21 *Submission 47*, p. 11.

22 Mr Bryan Clark, Director, Trade and Investment Affairs, ACCI, *Proof Committee Hansard*, 30 July 2018, pp. 49, 54.

23 ACCI, answer to question on notice, 30 July 2018 (received 2 August 2018), p. iii.

24 *Proof Committee Hansard*, 30 July 2018, p. 38.

25 *Proof Committee Hansard*, 30 July 2018, pp. 38–39.

3.24 When discussing consultation, ACCI reminded the committee that they have previously suggested an improved process 'might be modelled on the US model for approved accredited advisers to be able to get closer to the text as it is being negotiated'.<sup>26</sup>

3.25 Dr Ranald also provided some detail about the US system:

The US has a system of committees based on industry or interest groups. Selected people can be on those committees. I don't know that they're actually allowed to take copies of the text away. They can sometimes view bits of the text or discuss bits of the text, but it's still very limited because they're not allowed to tell anyone else what's in it. It's a kind of behind closed doors process with selected people.<sup>27</sup>

3.26 The committee discussed with DFAT the feasibility of DFAT adopting some of the consultation mechanisms used in other jurisdictions, with particular reference to whether other TPP-11 parties have a system of accredited and/or declared advisers who participate in consultation during the negotiation process. Mr Mina noted that he was 'not aware of current TPP-11 member states' using such a process although Mr Mina confirmed that the United States does accredit advisers in that way.<sup>28</sup>

3.27 When asked whether DFAT could facilitate a mechanism whereby advisers are cleared and accredited, Mr Mina advised:

All I'll say on this is what I was about to say earlier, which is that we have had elements of that practice in our experience, even in respect of the TPP-11, where we shared the text of the agreement with members and senators in Canberra on a confidential basis. That was part of our practice. To that extent, we have already got practice that gives effect to your request.<sup>29</sup>

3.28 DFAT further noted that it:

...has an extensive program of outreach on its free trade agreement (FTA) agenda, including broad and regular consultation with all interested stakeholders. The US' system of cleared advisers is long-standing and reflects the particular circumstances of the US. This process provides some stakeholders a greater level of access than other stakeholders. Australia's practice has been to maintain an open, inclusive and flexible approach to consultation, to ensure all stakeholders who want to contribute views can do so.<sup>30</sup>

#### *Recommendations from previous inquiries about the treaty negotiation process*

3.29 The committee notes that previous parliamentary inquiries have recommended changes to the treaty negotiation process with particular reference to consultation

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26 Mr Bryan Clark, *Proof Committee Hansard*, 30 July 2018, p. 52.

27 *Proof Committee Hansard*, 30 July 2018, p. 15.

28 *Proof Committee Hansard*, 20 August 2018, p. 9.

29 *Proof Committee Hansard*, 20 August 2018, p. 9.

30 DFAT, answer to question on notice, 20 August 2018 (received 10 September 2018), [p. 7].

mechanisms and facilitating stakeholder contribution during the negotiation stages.<sup>31</sup> Many of these recommendations have not been supported by government.<sup>32</sup>

### **Assessment of trade agreements**

3.30 The need for comprehensive assessment and evaluation of FTAs was of high importance to many of the contributors to this inquiry. Several witnesses and submissions advocated for independent economic modelling to be conducted early in the process as well as broader evaluation of FTAs during the implementation stage.

#### ***Economic modelling on the TPP-11***

3.31 The modelling included in the NIA pointed to updated modelling by the Peterson Institute for International Economics (PIIE) which found that TPP-11 would increase Australia's income by 0.5 per cent by 2030 (compared to 0.6 per cent under the original TPP).<sup>33</sup> The NIA also highlighted modelling by the Canada West Foundation which found that Australia's exports to other TPP-11 parties would grow by 0.12 per cent, compared with a reduction of 0.14 per cent in Australian exports to other TPP parties under the TPP.<sup>34</sup>

3.32 The NIA concluded:

The economic benefits to Australia can be expected to increase in the event that other significant economies join the TPP-11. The PIIE's modelling showed that in a TPP-16 scenario (TPP-11 plus Indonesia, the Republic of Korea, Philippines, Taiwan and Thailand), Australia's income would increase by 0.7 per cent by 2030. Some of these economies, such as Indonesia, the Republic of Korea and the Philippines, have publicly shown interest in the TPP in the past.<sup>35</sup>

3.33 In its submission, the Australian Manufacturing Workers' Union (AMWU) referred to research undertaken by Tufts University which shows that 'Australia is likely to lose some 39,000 jobs in the energy products, primary commodities, manufacturing and services industries'.<sup>36</sup> The AMWU also pointed to World Bank modelling of the former TPP-12 which showed that 'it will increase Australia's GDP by just 0.7% by 2030 – less than one tenth of 1 per cent each year over the next 15

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31 Senate Foreign Affairs, Defence and Trade References Committee, *Blind agreement: reforming Australia's treaty-making process*, June 2015, pp. xiii-xiv; Joint Standing Committee on Treaties, *Report 165*, 30 November 2016. See Chapter 5.

32 Senate Foreign Affairs, Defence and Trade References Committee, *Blind agreement: reforming Australia's treaty-making process*, Government response, presented February 2016; Government response to Joint Standing Committee on Treaties, *Report 165*, 8 August 2017, p. 2.

33 NIA, pp. 6-7.

34 NIA, p. 7.

35 NIA, p. 7.

36 *Submission 12*, p. 1.

years'.<sup>37</sup> The AMWU also noted that the PIIIE 'forecast a total boost to Australia's GDP of a mere 0.5% over the next decade to 2025-26'.<sup>38</sup> The AMWU concluded that the 'low growth rates for TPP-11 are likely to be similar to the TPP-12 modelling and potentially less'.<sup>39</sup>

3.34 Other submissions also provided detail about other economic modelling that has been conducted on the TPP-11. The Minerals Council of Australia submitted:

Several modelling studies have estimated the economic benefits which the TPP-11 and/or the original TPP (including the United States) would deliver for Australia and other countries. The most detailed modelling has been carried out by Professor Peter Petri of Brandeis University and Michael Plummer of Johns Hopkins University. Their most recent study finds that by 2030 the TPP-11 will boost Australia's:

- Real national income by US\$12 billion (A\$15.4 billion) or 0.5 per cent
- Real GDP by US\$14 billion (A\$18 billion) or 0.5 per cent
- Exports by US\$23 billion (A\$29.6 billion) or 4 per cent (in real terms).

A review of 10 modelling studies shows the average finding for Australia is an increase of 0.54 per cent in real GDP, in line with Petri and Plummer's most recent study. A Tufts University modelling study finding job losses under TPP suffers from serious methodological flaws, has been widely criticised by economists and uses inaccurate data and unrealistic assumptions for Australia. Its results lack credibility and contradict Australia's real-world experience.<sup>40</sup>

3.35 The Victorian Government provided a submission to the JSCOT inquiry which contained a report they had commissioned to 'provide detailed analysis of the commercial opportunities that TPP-11 will provide'.<sup>41</sup> The executive summary included the following summary of the Agreement:

The TPP-11 offers some modest gains for exports of Australian goods in the immediate term, with greater gains likely as implementation proceeds. However, some gains are likely to be negated to some extent by heightened competition in the TPP-11 area, with a number of member countries undertaking an FTA with each other for the first time.

In the longer term, as the various aspects of economic integration bear fruit (mutual recognition of professional qualifications, technical standards

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37 *Submission 12*, p. 1. World Bank modelling also referred to by Mr Harry Creamer, *Submission 13*, p. 1.

38 *Submission 12*, pp. 1–2.

39 *Submission 12*, p. 2.

40 *Submission 37*, p. 1. For further information, see Peter A. Petri and Michael G. Plummer, *Australia will gain from continued Asia-Pacific trade integration*, modelling report, September 2018, pp. 10–13.

41 The Hon Philip Dalidakis MLC, 'Victoria backs TPP and benefits of free trade', *Media Release*, 26 June 2018.



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conformity, streamlined processes supporting cross-border trade and so on), further and wider reaching benefits are likely to be realised.<sup>42</sup>

3.36 In a response to a question taken on notice at a JSCOT hearing, DFAT advised that multiple economic studies have found that 'the TPP would have positive economic benefits for all TPP Parties'. It was also noted by DFAT that an often quoted study undertaken by Tufts University did not use the mainstream GTAP [Global Trade Analysis Project] model to examine the effects of trade liberalisation arising from the TPP and 'is an outlier in finding negative impacts from the TPP'.<sup>43</sup>

3.37 At the hearing on 30 July 2018, Mr Mina pointed out that 'this agreement has been extensively evaluated, through economic evaluation'.<sup>44</sup> Mr Mina went on to note:

There has been no shortage—happily—of such interest by the economic modelling community globally. So we have a good sense of the economic impacts. Of course, with trade reform and the consistent messages and lessons from the economics discipline about the allocative and other efficiency gains that arise from trade reform, successive Australian governments have a view—and this government certainly has a view—about the economic benefits of trade reform.<sup>45</sup>

#### *Criticisms of the economic modelling*

3.38 Submissions argued the need for independent modelling and suggested that such modelling is necessary to enable a comprehensive understanding of the proposed benefits to the Australian economy. In particular, several submissions were critical of the lack of independent modelling for an Australian context.

3.39 AFTINET argued that the NIA presented is 'not independent but is conducted by the same department which negotiated the agreement'.<sup>46</sup>

3.40 Several submissions called for broad analysis of the TPP-11 to be undertaken. Friends of the Earth Australia called for an independent economic, social and environmental impact assessment.<sup>47</sup> The Public Health Association of Australia advocated for a comprehensive Health Impact Assessment (HIA) to be undertaken on the final text of the TPP-11.<sup>48</sup> ActionAid Australia expressed the view that the Australian Government should commission 'independent analysis of potential

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42 *Submission 67, Attachment 1*, p. 5.

43 DFAT, *Submission 65*, p. 2.

44 *Proof Committee Hansard*, 30 July 2018, p. 66.

45 *Proof Committee Hansard*, 30 July 2018, p. 66.

46 *Submission 14*, p. 3.

47 *Submission 15*, p. 1.

48 *Submission 20*, p. 14.

economic, health, environmental and gender impacts' and this analysis should be 'publicly available for debate and discussion'.<sup>49</sup>

3.41 The AMWU indicated that 'all finalised trade agreements should be subject to independent assessment of their costs and benefits before parliament is asked to ratify them'.<sup>50</sup>

3.42 In a number of forums, DFAT has not accepted the criticism that there has not been sufficient economic modelling undertaken of the TPP-11. DFAT responded to these criticisms in its *Myth Busters* document published on its website and referred to the modelling undertaken by the PIIE. DFAT also noted that modelling:

...including of the kind done by the PIIE, understates the potential benefits of the TPP-11 because it is mainly focussed on tariff reductions. Modelling the impacts of other aspects of the TPP-11, such as services market access, improved customs procedures, enhanced investment conditions and rules on transparency, are very difficult.

Similarly, modelling is not currently able to quantify the benefits from a regional deal, such as the TPP-11, which provides a framework in which value chains can function more efficiently and at lower cost among the countries in the Agreement.

Ultimately, free trade agreements (FTAs) like the TPP-11 help to break down trade barriers. The fewer trade barriers Australian businesses face, the easier it is to trade, which in turn brings productivity improvements and higher competitiveness levels across our economy.<sup>51</sup>

#### *Recommendations from previous inquiries about independent modelling*

3.43 Several previous inquiries have made recommendations that the Australian Government consider implementing a process to ensure that independent modelling and analysis of proposed FTAs is undertaken by a body such as the Productivity Commission and provided alongside the NIA.<sup>52</sup> The government has not accepted such a recommendation.<sup>53</sup> The recent JSCOT report, tabled on 22 August 2018 again recommended that independent modelling and analysis be undertaken by the Productivity Commission or equivalent organisation and be provided at the same time as the NIA.<sup>54</sup>

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49 Ms Michelle Higelin, Executive Director, ActionAid Australia, *Proof Committee Hansard*, 30 July 2018, p. 20.

50 AMWU, *Submission 12*, p. 2; Open Source Industry Australia, *Submission 47*, p. 5.

51 <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Pages/tpp-11-myth-busters.aspx> (accessed 1 May 2018).

52 Joint Standing Committee on Treaties, *Report 165*, 30 November 2016, p. 47.

53 Joint Standing Committee on Treaties, *Report 165, Trans-Pacific Partnership Agreement*, Government response, 8 August 2017, p. 23.

54 Joint Standing Committee on Treaties, *Report 181, Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, August 2018, p. 73.