Chapter 3

Treaties and the parliamentary process

3.1 An issue which was a recurring theme in a number of submissions made to the Committee was concern about the lack of parliamentary involvement in Australia in the process of negotiating trade agreements, whether on a multilateral or bilateral basis.

3.2 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

3.3 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.[1]

3.4 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.

3.5 Whilst this section does not specifically refer to the power to enter into treaties, it is regarded as well settled by the High Court that this power resides with the Executive.[2]

3.6 Section 51(xxix) of the Constitution confers on the Commonwealth parliament the power to legislate with regard to 'external affairs'. This has been interpreted by the High Court to mean that the Commonwealth parliament may

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

2 Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995, p. 46.

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]

3.7 The Department of Foreign Affairs and Trade's (DFAT) Australia and International Treaty Making Information Kit[4] notes that it is generally accepted that such legislation will be constitutionally valid if it is reasonably appropriate and adapted to giving effect to a treaty. In some specific cases, the government may rely on the trade and commerce power (s.51(i)) as well as the external affairs power. In other cases, there may be no need to rely on the external affairs power, because the subject of the treaty lies within other Commonwealth powers or because State and Territory governments will enact appropriate legislation.

3.8 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 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.[5]

3.9 DFAT states that Australia's constitutional system ensures that checks and balances operate, through the parliamentary process of examining all proposed treaty actions and in passing the legislation required to give effect a treaty. DFAT points out that this 'efficiency and certainty of process enables the government to negotiate with its overseas counterparts with authority and credibility, and contributes to Australia becoming a source of influence in the treaty's negotiation.'[6]

3.10 Although there is no formal role set out in the Constitution for parliament in the treaty–making process, DFAT points out that the processes of the Joint Standing Committee on Treaties (outlined below) involve 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.

3.11 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

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

4 Department of Foreign Affairs and Trade (DFAT) *Australia and International Treating Making Information Kit* (2002) p. 7. Available at http://www.austlii.edu.au/au/other/dfat/infokit.html accessed 28 October 2003. The following paragraphs are drawn from this publication.

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

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

argued, there is the opportunity for further debate on any implementing legislation which is required as a result of the treaty.[7]

3.12 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.[8]

3.13 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.

The 1996 reforms

3.14 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.[9]

3.15 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.

3.16 The SCOT meets twice a year and plays a coordinating role for the Treaties Council. The SCOT is comprised of officers representing the Premiers' and Chief Ministers' Departments of the States and Territories, and officers from the Commonwealth Departments of Prime Minister and Cabinet, Foreign Affairs and Trade, and Attorney General's. This committee receives a Treaties Schedule on a quarterly basis, listing all international treaties that Australia is currently negotiating or which or under review. The SCOT process allows State and Territory

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

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

9 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.

representatives to seek further details, offer views and comments and flag any matters on which they wish to be consulted or improve consultation mechanisms.[10]

3.17 The Australian Treaties Library is an internet database established by DFAT in conjunction with the Australasian Legal Information Institute.[11] The Treaties Library is one of the world's most complete, freely available national databases of treaty information, and is regarded as very successful innovation. It contains a wide range of documents and information about treaties including:

- all treaties in force for Australia;
- National Interest Assessments for all tabled treaties;
- lists of multilateral treaties under negotiation; and
- treaties signed, but not yet in force, for Australia.[12]

Joint Standing Committee on Treaties

3.18 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.[13]

3.19 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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10 DFAT, *Australia and International Treaty Making Information Kit* (2002), p. 6.

11 See http://www.austlii.edu.au/au/other/dfat/, accessed 29 October 2003.

12 DFAT, *Australia and International Treaty Making Information Kit* (2002), p. 26.

13 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.

3.20 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.

3.21 The term 'treaty actions' has a broad meaning. It covers bilateral and multilateral agreements and encompasses a range of actions including entering into new treaties, amendments to existing treaties and withdrawal from treaties. The exception to the rule that treaties be tabled before binding action is taken is where the Minister for Foreign Affairs certifies that a treaty is particularly urgent or sensitive, involving significant commercial, strategic or foreign policy interests.

3.22 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.

3.23 The text and the NIA for each proposed treaty are automatically referred to the JSCOT for review. The Committee advertises its review in the national press and on its website, inviting comments from anyone with an interest in the subject matter of the proposed treaty. The JSCOT routinely takes evidence at public hearings from government agencies and people who have made written submissions.

3.24 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.

3.25 The JSCOT has also conducted seminars designed to improve public awareness of the opportunities that exist for community involvement in the process of making and reviewing Australia's international treaty obligations.[14]

Consultation and parliamentary scrutiny of treaties

3.26 The Committee acknowledges the work that has been done, in particular since the reforms introduced by the government in 1996, to ensure that the treaty–making process is more open, transparent and systematic, and that there is a greater level of

14 Further information on these seminars, held in 1999 and 2000, can be found at the JSCOT website: http://www.aph.gov.au/house/committee/jsct/index.htm

parliamentary involvement than there has been in the past as a result of the creation of the JSCOT. In the main, the reforms undertaken are regarded as having 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.

3.27 The Committee accepts, too, that DFAT has made efforts to increase the level of public consultation as part of the treaty-making process. The particular consultations undertaken in the context of the GATS and the US FTA are discussed in detail in Chapters 5 and 6.

3.28 Notwithstanding these successful reforms, it was apparent from evidence received by the Committee that there remains a level of concern 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).

3.29 The Victorian Trades Hall Council indicated that it was concerned 'about the continuing trade liberalisation and the pressure that goes on during these trade negotiation rounds, without any appropriate assessment of the impacts of that, including at the state and regional level'. In relation to the GATS, the Council expressed unease that, because the round is continuing, there is 'no real time for civil society involvement in the deliberations' and parliament has very little involvement in setting the parameters and initiating the negotiations.[15]

3.30 The power to sign up to international treaties resides exclusively with the executive arm of government under the foreign affairs power in the Constitution, yet in trade treaties, it is state and local governments that are almost always the bodies responsible for the delivery of services which may be affected, for example health, education, water and waste management. The Council drew attention to a lack of debate in the community about these issues, and also a lack of debate in government at the state level, arguing that state governments should be much more involved in the negotiations:

> Many people, at both local and state government level, have no idea of how fundamentally some of the decisions by national governments—by the executive arm—affect other tiers of government. I would welcome any recommendations by this committee that would further incorporate state and local governments—not just state government, but local government—into that process.[16]

15 *Committee Hansard,* 8 May 2003, p. 33 (Mr Leigh Hubbard, Victorian Trades Hall Council)

16 *Committee Hansard,* 8 May 2003, p. 41 (Hubbard, Victorian Trades Hall Council)

3.31 The Public Health Association of Australia (PHAA) advocates greater public involvement in the process of negotiating trade agreements. The PHAA is concerned that the 'process for the actual negotiations has left structured democratic debate out of the process altogether':

> We have four recommendations for the negotiations. The first is that research be undertaken before any trade negotiation is commenced or continued to evaluate the effects of potential trade agreements on the health of Australians, our trading partners and developing countries likely to be affected by the agreements. The second is that such research be made publicly available for consideration in public debate… The third is that the negotiation of any trade agreement be contingent upon the adoption of a set of principles, as outlined above, and broad community debate. The fourth is that the inclusion of specific areas in the negotiations be contingent upon [P]arliament's approval rather than the [G]overnment's approval.[17]

3.32 The Castan Centre for Human Rights Law highlighted the human rights aspect of the debate, arguing that given the potentially massive impact a treaty like the GATS can have on human rights (through liberalisation in sectors such as health, water, education, prisons and a number of others) there should be a great deal more openness in the process than is currently the case.[18]

3.33 In the context of the negotiation of the Free Trade Agreement with the United States (US FTA), the AUSTA Business Group made the point that, given the constrained time frame for the completion of the agreement, it was very important to ensure that those who have an interest in and are affected by the US FTA are involved in the negotiating processes, the parliament being an obvious vehicle for this.[19]

3.34 The Communications, Electrical and Plumbing Union (CEPU) expressed concern at the lack of transparency of the negotiating processes, arguing for the development of mechanisms to allow much wider public debate over, and input into, agreements such as the GATS, which have such far-reaching consequences in many areas of the Australian community. The CEPU further argued that the decision-making powers of our democratic institutions must not be undermined by commitments which bind future governments indefinitely and which foreclose policy options in response to new technological developments.[20]

3.35 In the context of the GATS and governments' right to regulate, which is discussed in Chapter 5, the Australian Manufacturing Workers Union expressed

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17 *Committee Hansard,* 22 July 2003, p. 220 (Ms Pieta Laut, Public Health Association of Australia (PHAA))

18 *Committee Hansard,* 8 May 2003, p. 54 (Mr Adam McBeth, Castan Centre for Human Rights Law)

19 *Committee Hansard,* 9 May 2003, p. 120 (Mr Alan Oxley, AUSTA)

20 *Committee Hansard,* 9 May 2003, p. 96 (Mr Brian Baulk, Communications, Electrical and Plumbing Union (CEPU))

concern that future policy decisions may be compromised by the commitments entered into by the government of the day:

> The AMWU is deeply concerned that modern trade treaties, and in particular GATS, fetter future parliaments in a way that most international treaties do not. While human rights based treaties, such as ILO conventions, have no enforceable dispute mechanism—for a nation to legislate or act in a manner inconsistent with GATS carries the risk of substantial economic penalties. This novel feature of trade treaties dramatically increases the importance of the government acting with complete openness. This feature also dictates that GATS commitments should be made sparingly, if at all, and only after extensive community consultation… [US FTA and] GATS negotiations should only take place with the oversight and consent of both houses of parliament.[21]

3.36 The Australian Council of Trade Unions (ACTU) points out that the key issue with regard to process is transparency, arguing that it is vitally important to know what is 'on the table' when trade agreements are being negotiated:

> As a democratic country, we really do need to know what is on the table, we need to have the kind of research base that provides for broad based debate in the community and we need to be able to model the ambit claims, if you like, in terms of winners and losers. To do anything less is … to allow a bureaucratic approach that sees negotiations conducted in secret without an understanding of who wins, who loses and how we make those decisions.[22]

3.37 The ACTU argues further that greater parliamentary scrutiny and involvement is required as part of the process of negotiating trade agreements, which, because of their potentially broad ranging impacts, are in a different category to other types of international treaties:

> We are very interested in … progressing the parliamentary role within all of this. … It seems to us that without at the very least something like the US environment, where you have an oversight committee and a genuine debate on the parliamentary floor, then we are not operating with an appropriate democratic process.
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> We are not now talking about treaties that might be ratification of international standards that have gone through numerous processes of discussion; we are not talking about treaties around the sorts of the debates that might go on between countries pursuant to international standards or rules or indeed in a defence environment; we are actually talking about the shape of Australia's economic and social future. I think we would argue other treaties need something similar but treaties concerning Australia's

21 *Submission* 160, p. 51 (Australian Manufacturing Workers Union (AMWU))

22 *Committee Hansard,* 22 July 2003, p. 234 (Ms Sharan Burrow, Australian Council of Trade Unions (ACTU))

> economic and social future seem to us to require a much more broadly based environment.[23]

3.38 Similarly, AFTINET advocates greater parliamentary involvement and scrutiny of multilateral trade agreements such as the GATS, and bilateral agreements such as the proposed US FTA. AFTINET points out that trade agreements now cover a wide range of issues, and are not just about trade in goods and lowering of tariffs. Agreements such as the GATS can have wide ranging impacts in areas such as social policy, health and environmental policy and legislation. The WTO has a range of agreements covering areas such as trade in goods, services, agriculture, intellectual property rights, sanitary and phytosanitary measures (health, safety and environment), trade related investment and government procurement.[24]

3.39 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 of the GATS. These types of agreement have the potential to impact on any area of government regulation which is not specifically excluded from the agreement.

3.40 Further, AFTINET points out that, once signed, trade agreements effectively bind future governments and are difficult to change. Amending Australia's commitments under the GATS for example 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.[25]

3.41 AFTINET acknowledges the review of treaties undertaken by the JSCOT but argues that there are a number of flaws in this process. The JSCOT reviews all treaties and its workload means that there is often not sufficient time for proper consideration of complex treaties, or time to seek submissions from community groups or hold public hearings.

3.42 For example, the Singapore-Australia Free Trade Agreement was finalised on 17 February 2003, and tabled on 4 March 2003, with three other treaties. AFTINET argues that during the negotiation of this treaty there was little consultation with civil society groups, and no disclosure of what the government was negotiating, including the adoption of the 'negative list' approach. The JSCOT allowed a short time period for public submissions on the treaty, and did not hold advertised public hearings for community groups to give evidence, receiving verbal evidence from DFAT only.[26]

3.43 The JSCOT may make recommendations about a treaty but as treaties are referred to the committee after signature but prior to action being taken to bind

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23 *Committee Hansard,* 22 July 2003, pp. 239–240 (Burrow, ACTU)

24 *Submission* 42B, p. 2 (AFTINET)

25 *Submission* 42B, p. 2 (AFTINET)

26 *Submission* 42B, pp. 2–3 (AFTINET)

Australia to the terms of the treaty, there is limited, if any, scope for influence over the process. AFTINET points out that in some cases, the government does not wait for the JSCOT's recommendations before introducing implementing legislation into parliament.[27]

3.44 Liberty Victoria also makes the point 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. In addition, trade treaties have a greater impact on government regulatory powers and have the capacity to bind future governments far more than human rights treaties, yet the trend is for these treaties to be displaced by trade rules.[28]

3.45 Liberty Victoria acknowledges that in the past, the treaty-making process has worked reasonably well, but argues that new developments in respect of the binding nature of trade agreements and of international institutions such as the WTO require reform of the process. The key distinction, it is argued, 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.

3.46 Although governments are obliged to adhere to their responsibilities under conventional treaties, in reality, these treaties 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. In effect, the rules of international trade are able to limit the processes of democratic decision-making.[29]

3.47 The current treaty–making process, involving scrutiny by JSCOT (as outlined above) may appear democratic but Liberty Victoria argues that it is fundamentally flawed, expressing similar concerns to AFTINET on this point. The JSCOT or parliament may have issues with the provisions of a treaty or its impact on certain sectors of the community, but the JSCOT makes recommendations only and the Executive can choose to ignore these recommendations.

3.48 Liberty Victoria argues that given the processes of JSCOT and the exceptional nature of international trade agreements, there needs to be more parliamentary involvement in and scrutiny of trade agreements. State and local governments are

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27 *Submission* 42B, pp. 3 (AFTINET)

28 *Submission* 14A, pp. 2–3 (Liberty Victoria–Victorian Council for Civil Liberties)

29 *Submission* 14A, pp. 5, 7 (Liberty Victoria)

bound by these agreements, particularly the GATS, and therefore need to be more involved in the process.

3.49 Liberty Victoria points out that 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 further later in this Chapter.

3.50 In the absence of a similar process in Australia, Liberty Victoria recommends 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.[30]

Senate Legal and Constitutional Committee Report—Trick or Treaty?

3.51 The 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*.[31] 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.[32]

3.52 The Legal and Constitutional 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.[33]

3.53 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

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30 *Submission* 14A, pp. 9–10 (Liberty Victoria)

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

32 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.

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

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.[34]

3.54 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'.[35]

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

3.55 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*[36], including community education and consultation and parliamentary scrutiny of WTO agreements. The JSCOT noted calls for greater parliamentary scrutiny of Australia's relationship with the WTO, particularly in debating any future WTO Agreements before they are ratified by the government.[37]

3.56 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.[38]

3.57 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

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

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

36 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.

37 JSCOT, *Who's Afraid of the WTO? Australia and the World Trade Organisation*, p. 67.

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

committee undertake an annual review of Australia's WTO policy, including negotiating positions, dispute cases, compliance and structural adjustment.[39]

3.58 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.[40]

3.59 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.

3.60 The JSCOT clearly recognised that there was a need for greater transparency in Australia's international trade relations, and saw the proposed joint committee as a way of encouraging this transparency.[41]

3.61 In response to the recommendations regarding greater parliamentary scrutiny of Australia's trade policies and relationship with the WTO, the government 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.[42]

Conclusions

3.62 The 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 Committee agrees that 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,

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

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

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

42 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.

the trend towards bilateral agreements. These developments have occurred largely since the Legal and Constitutional Committee's report was tabled.

3.63 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 WTO agreements including GATS). The GATS, along with a number of other WTO Agreements, has a binding dispute resolution process and WTO Members are exposed to potentially significant financial penalties or 'compensatory adjustment' if they withdraw from commitments made under the GATS, as has been discussed earlier in this Chapter.

3.64 This means that future governments and future parliaments are bound to comply with Australia's current and future GATS commitments, and similarly, with the provisions of bilateral trade agreements. Once commitments have been made to liberalise particular sectors, it is extremely difficult, if not impossible, to reverse those commitments. Indeed, this is one of the main 'selling points' of the GATS—it provides certainty in the multilateral context and Members are able to rely on the commitments of other Members, in the knowledge that those commitments are very difficult to revoke once given. Another advantage of the GATS, in terms of providing certainty for Members, is the existence of an enforceable dispute resolution mechanism.

3.65 In the 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.[43]

3.66 In accordance with the evidence discussed earlier in this Chapter, the 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.

3.67 The 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

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43 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.

on the domestic impacts of trade liberalisation in general, and of the GATS and the proposed US FTA in particular. 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 centered 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.

3.68 This focus has perhaps contributed to the concerns that union groups, NGOs and others expressed to the Committee regarding the impacts of liberalisation of trade in services on the provision of public services and the government's right to regulate, and the level of consultation undertaken by the government prior to committing Australia to legally binding trade agreements. These concerns are discussed earlier in this Chapter, and in Chapter 5.

3.69 The 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.[44]

3.70 The JSCFADT resolved in August 2001 to 'undertake continuous and cumulative parliamentary scrutiny of the World Trade Organisation.' This scrutiny takes the form of an annual one-day public hearing on the WTO with specific reference to its progress towards trade liberalisation and the implications of its activities for Australia. The Trade Sub-Committee of the JSCFADT undertakes the scrutiny in the context of the Annual Report of the Department of Foreign Affairs and Trade. The first public hearing, with a focus on the prospects for the Doha Round, was held on 23 August 2002.[45] A second was held on 24 November 2003.

3.71 However, there appears to be no similar initiative for the scrutiny and discussion of proposed free trade agreements, in particular the US FTA. 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. In addition, as discussed to earlier in this Chapter, the JSCOT may not always be able to give individual treaties the level of scrutiny which may be warranted (an example is

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44 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.

45 See the Joint Standing Committee on Foreign Affairs, Defence and Trade web page at http://www.aph.gov.au/house/committee/jfadt/WorldTrade/WTOIndex.htm, accessed 31 October 2003.

the case of the Singapore–Australia Free Trade Agreement) because of time pressures and the number of other treaties to be examined.[46]

3.72 The crucial point for trade agreements is 'prior to signature', because once a treaty has been signed, although Australia is strictly not bound to the terms of that treaty in international law, it would be extremely unlikely for the government to refuse to ratify a treaty on the basis of any JSCOT recommendations, or indeed for any other reasons.

3.73 The 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.

3.74 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.[47]

3.75 The JSCOT's Resolution of Appointment empowers it to inquire into and report on any question relating to a treaty or other international instrument whether or not negotiated to completion referred to it by either House of parliament or a minister. It seems that this power is rarely used, however, with the bulk of the JSCOT's work involving examination of treaties after signature by Australia.

3.76 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 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.

3.77 The Committee has referred above to the process by which trade negotiations are initiated by US administrations. In brief, the Congress must approve a Trade

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46 See *Submission* 42B (AFTINET) and *Committee Hansard* 23 July 2003, p. 278 (Dr Patricia Ranald, AFTINET). Dr Ranald argues that JSCOT is not structured to deal adequately with the number of treaties it receives, and that there is scope to have a committee which deals only with trade agreements, and has the necessary expertise to thoroughly scrutinise such agreements.

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

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.

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

> 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 two branches of government.
>
> 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.[48]

3.79 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.

3.80 In any event, current procedures require the parliament to pass relevant implementing legislation before any agreement can properly come into effect. Lead negotiator Stephen Deady explained the situation to the Committee in the following terms:

> There would be a clause [in the agreement] that would say that for both governments the necessary legislative procedures have to take place. Then a date of entry into force would be set, agreed by both parties, once those procedures had concluded…

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

> Until … all [legislation is] passed, we would not be 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.' … These are the commitments we have entered into with the United States and these are the legislative requirements necessary to bring those commitments into effect, so unless that happens we cannot identify the date to allow the agreement to come into effect.[49]

3.81 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.

3.82 For example, in the case of the current US FTA, where cultural protection and the Pharmaceutical Benefits Scheme are proving contentious issues, should the government settle an FTA by making some concessions on these, the Senate may well vote down the relevant domestic legislative amendments. 'If that looked like happening, however, the US Congress would be even less likely to ratify the FTA.' [50]

3.83 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. 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.

3.84 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.

3.85 The 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.

3.86 The 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

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49 *Committee Hansard,* 2 October 2003, p. 470-471 (Deady, DFAT)

50 Toohey, B 'Not much in trade pact for us' *West Australian* 10 November 2003, p. 17.

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, ie, on the basis that the package is either accepted or rejected in its entirety.

3.87 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.

3.88 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.

3.89 The 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 GATS and the US FTA 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.

3.90 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.

Recommendation 2

3.91 **The Committee recommends that the government introduce legislation to implement 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 then 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, ie, on the basis that the package is either accepted or rejected in its entirety.**

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.

3.92 A number of submissions to the inquiry raised the issue of 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.

3.93 The 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 Australia since the conclusion of the Uruguay Round in 1994.[51] 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.[52] The Committee further notes that the government to date has not commissioned multidisciplinary research as recommended by the JSCOT. Nor would it appear that such research has been undertaken prior to making binding commitments under the GATS or commencing negotiations for the US FTA.

Recommendation 3

3.94 **The Committee recommends that the government commission multi-disciplinary research to evaluate the socio-economic impact of trade liberalisation in Australia since the conclusion of the Uruguay Round.**

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

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