

5 March 2015



The Secretary
Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: fadt.sen@aph.gov.au

Dear Secretary

The Commonwealth's Treaty-Making Process

The Law Council of Australia welcomes the opportunity to make a submission to the inquiry of the Senate Committee on Foreign Affairs, Defence and Trade into the Commonwealth's treaty-making process.

The concerns and submissions set out below may not be relevant to the treaty-making in other fields, for example, defence or criminal investigation, where the consideration of the need for confidentiality or secrecy would be affected by other matters.

The submission has been prepared by the International Law Section of the Law Council of Australia. Our submission covers two points. First, that the current processes for public and stakeholder consultation and the opportunities for openness, transparency and accountability in negotiating treaties are inadequate because of the level of secrecy maintained by the Government. Second, that the current processes for public and stakeholder consultation and the opportunities for openness, transparency and accountability in reviewing treaties and the matters regulated by treaties are inadequate because of the failure to publish appropriate records of bodies operating under treaties.

1. Processes for transparency and accountability in negotiating treaties

This part of the submission relates to the role of the Executive in negotiating treaties. It addresses a number of the specific points in the inclusive list of matters described in the Committee's Terms of Reference:

- a. the role of the Parliament and the Executive in negotiating, approving and reviewing treaties;*
- b. the role of parliamentary committees in reviewing and reporting on proposed treaty action and implementation; ...*
- f. the scope for independent assessment and analysis of treaties before ratification; ...*
- h. the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties;*

- i. *a comparison of the consultation procedures and benchmarks included by our trading partners in their trade agreements;...*
- k. *related matters.*”

1.1 Limitations of the benefits of the existing procedures for review by parliament committees, in particular the Joint Parliamentary Committee on Treaties

The Law Council acknowledges the benefits of the procedures for treaty review by Parliamentary Committees, in particular the Joint Standing Committee on Treaties (JSCOT). However, we note that by the time a treaty reaches the stage of a JSCOT review, the negotiation of the treaty text is complete and it is too late to argue for different treaty provisions.

We note that in the 1999 Review of the JSCOT process under the original 1996 resolutions, there were some calls for the JSCOT process to operate inquiries in relation to treaties under negotiation not only in relation to treaties the negotiation of which had been completed. The 1999 Review report included the following:

“4.3 Some submissions to this Review have suggested that it should be possible for JSCOT to inquire into a treaty during negotiations before the text, and Australia’s position, have been finalised. This is provided for in the JSCOT Resolution of Appointment, and has already occurred during JSCOT’s first term, with the consideration of the draft Multilateral Agreement on Investment, which was being developed by the members of the Organisation for Economic Cooperation and Development.

4.4 It may be appropriate, on occasion, for the Minister for Foreign Affairs to refer a treaty to the Committee during the negotiation stage, to assist the Government with making the decision whether to sign and subsequently ratify a treaty. Such a referral could only be effective if clear terms of reference were determined following close consultation with JSCOT (through its Chairman).”¹

We acknowledge that the resolution in 2013 appointing JSCOT is broad enough in its form to allow it to consider treaties under negotiation in addition to considering treaties the negotiation of which has been concluded - but observe that it has been extremely rare for JSCOT to review an ongoing negotiation.² Paragraph (b) of the Resolution refers to:

“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 the Parliament, or*
- (ii) a Minister, and*
- (iii) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.”*

It is our understanding that there has never been an instance in which the Minister for Foreign Affairs has referred a treaty to the Committee during the negotiation stage to assist the Government in determining its position in relation to the treaty negotiation or its response to the position of other countries.

¹ Report of the Review of Treaty Making Process August 1999.

² The webpage of JSCOT notes that resolution was passed by the House of Representatives on 21 November 2013 and the Senate on 2 December 2013.

In practice, the JSCOT has not functioned as a means for enhancing openness and transparency in relation to the negotiation of treaties. In practice, the JSCOT process only permits scrutiny of treaties after the negotiation of the treaty text has been finalized. It does not provide a channel for influencing the formulation of the Australian position on what the text should say.

1.2 Limitations of existing stakeholder and public consultations engaged in by the Department of Foreign Affairs and Trade

The following comments relate to treaties in the field of international economic relations. We note that the Terms of Reference refer to:

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

1.2.1 Limitations of Calls for Submissions

The Law Council acknowledges that the Department of Foreign Affairs and Trade (DFAT) does:

- in some cases, commission and publish a feasibility study into a possible treaty;
- call for submissions in relation to negotiations or proposed negotiations for treaties;
- publish all submissions (other than those lodged on a confidential basis).

The Law Council commends the Government for these efforts at openness and transparency.

However, the Law Council is of the view that the benefit of the process of calling for and publishing submissions is frequently impaired because of the limited information that the Government makes available. The Australian Government does not publish any statements setting out the outcomes which the Government wants to achieve in the negotiation. Nor does the Government provide comprehensive briefing documents on the subject matter of the negotiations.

Persons making submissions or considering making submissions would be better able to do so if the Government would publish briefing documents which describe issues under negotiation, describe a range of possible outcomes, and set out cogent reasons why particular outcomes would be preferable.

Persons making submissions or considering making submissions at the stage of a negotiation when there is already a draft text in existence, perhaps accompanied by several versions of submitted text, would be better able to contribute to the Government’s position if they could read the same text which is in front of the negotiators.

1.2.2 Limitations of Value of Participation in Stakeholder and Public Consultations

From time to time, DFAT hosts stakeholder and public consultations at which they provide succinct summaries and answer questions. They also engage in direct discussions with persons unable to obtain sufficient information on particular matters during the public consultations.

However, the Law Council is of the view that the benefit of participating in the process of stakeholder and public consultations is limited by the fact that participants' knowledge of the issues being negotiated is limited to the information provided by DFAT. Very little of the information made available by DFAT is put in writing. Information that is put in writing tends to be in the form of listings of topics under discussion without information about the substance of any of the topics. A little bit more information is made available orally to those who are able to attend the public briefings. The information provided by DFAT does not include the provision of any draft text. Sometimes, at a public briefing, DFAT gives an oral indication of which direction it would like to see a particular issue move.

Persons wishing to educate themselves about what is happening in a particular treaty negotiation would be better able to do so if DFAT would put information in writing. Ideally that written information should include a description of specific issues under negotiation, offer the reader an appreciation of what the possible outcomes could be and indicate what Australia is arguing for.

The Law Council values its long standing and productive relationship with DFAT. However, if DFAT would provide information in writing, then interested parties in business and in the community of persons with expertise would be better able to make intelligent contributions to debate about which positions Australia should be supporting.

1.3 The Critical Issue is Secrecy

The Law Council submits that the Government should reconsider the arguments for maintaining secrecy of negotiations of trade and investment treaties.

The practice of keeping at least some aspects of trade negotiations secret has a long history, going back at least as far as the initial negotiation of the General Agreement on Tariffs and Trade between October 1946 and October 1947. The negotiating history reflects a practice of trying to complete negotiation of proposed schedules of concessions of tariff reductions within a short time frame to avoid leaks. However, the GATT negotiating history does not indicate that there was secrecy regarding the texts that set out the framework for the obligations that would come into force on the basis of the tariff rates specified in the negotiated Schedules of Concessions. Consider the aspects of the negotiating history set out below.

When the United States put forward a first draft of a proposed text for the proposed International Trade Organization, the draft "Suggested Charter":

"contemplated the contingency that it would be possible to reach agreement on tariff reductions before it would be possible to bring the entire charter into effect. Accordingly, Article 56 of the Suggested Charter provided for an Interim Tariff Committee the members of which should be "those members of the Organization which shall have made effective the General Agreement on Tariffs and Trade dated, 194...." The footnote said*

This Agreement refers to the proposed arrangement for the concerted reduction of tariffs and trade barriers among the countries invited by the United States to enter into negotiations for this purpose. It is contemplated that the Agreement would contain schedules of tariff concessions and would incorporate certain of the

provisions of Chapter IV of the Charter (e.g., the provisions relating to most-favoured-nation treatment, to national treatment on internal taxes and regulations, to quantitative restrictions, etc.).”³

By the end of the first session of the Preparatory Committee for the Conference to establish an International Trade Organization, the participating UN Members had produced the London Draft of the charter for an International Trade Organization:

“The London Draft of the charter for an International Trade Organization also contemplated that a General Agreement on Tariffs and Trade might come into force before the charter itself. Article 67 of the London Draft incorporated Article 56 of the suggested Charter and its reference to a General Agreement on tariffs and Trade.

The Report of the London Session also adopted a set of procedures for the tariff negotiations to be held under the United States Trade Agreements Act. The procedures proposed that the results of the tariff negotiations.

Be incorporated in an agreement among the members of the Preparatory Committee which would also contain either by reference or reproduction, those general provisions of Chapter V of the Charter considered essential to safeguard the value of the tariff concessions and such other provisions as may be appropriate ... a draft outline of a General Agreement on Tariffs and Trade appears in Section I.

In fact, it was Section K (rather than Section I) which was headed “Tentative and Partial Draft Outline of General agreement on Tariffs and Trade”.⁴

The negotiating record shows that there was an expectation that the negotiation and ratification of a treaty to establish an International Trade Organization might take a substantial period of time. The record also indicates that negotiators wanted to put one section of the draft charter into place as a stand-alone General Agreement on Tariffs and Trade as soon as possible without waiting for completion of the process of bringing the entire International Trade Organization into existence. This may have been motivated by a desire to improve the world economy by implementing tariff reductions as soon as possible. It may also have been influenced by recognition that if a negotiation of tariff

³ Quoted from Brett Williams, “The Importance of Disciplining the Choice between Policy Instruments to the Effectiveness of the GATT as International law Disciplining Agricultural Trade policy” (unpublished PhD thesis, University of Adelaide, 2000. There is a copy in the library of the University of Adelaide and the library of the Australian Department of Foreign Affairs and Trade. At FN21, Williams gives this citation for the Suggested Charter: United States, *Suggested Charter for an International Trade Organization of the United Nations*, US Department of State Publication No 2598, Commercial policy Series No 93 91946) pIII (citation taken from p121, fn3 of Robert E Hudec, *The GATT Legal System and World Trade Diplomacy* (Butterworth Legal Publishers, Salem, New Hampshire, 2nd ed 1990). Generally on the Suggested Charter, FN21 cites Wilcox, Clair, *A Charter for World Trade* (The Macmillan Company New York, 1949) pp40-42.

⁴ Quoted from Brett Williams, “The Importance of Disciplining the Choice between Policy Instruments” as above at p33-34. At FN25, Williams cites “Multilateral Trade Agreement Negotiations: Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee”, Annexure 10 to the *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*. UN Doc E/PC/T/33 (London, Oct 46).

reductions were carried out over a long period of time, then it would be difficult to avoid leaks of the proposed tariff reductions.

It appears that they negotiated tariff concessions without publicizing the details and did so in a reasonably short period of time which would help avoid leaks about the tariff reductions being negotiated. This would be consistent with a desire among at least some negotiating countries that they be able to publicize a more or less complete package of tariff reductions at the conclusion of a negotiation knowing that at that point, it would be reasonably difficult for particular industries to plead a special case for being exempted from trade liberalization.

Although it appears that efforts were made to maintain secrecy around the negotiation of the content of schedules of concessions, there does not appear to have been a concern with keeping the draft texts secret. Before the first UN negotiation, the US published its Suggested Charter. After the first round of UN negotiations in October 1946, the UN published the London Draft containing a bare draft of the GATT.⁵ It was published in October 1946 while the negotiation was still going on. After the intermediate drafting session early in 1947, the UN published the draft text of the GATT.⁶ This was published in July 1947 while the negotiation was still going on. The UN published the completed text of the GATT in August 1947⁷ while the negotiators continued to complete negotiation of the content of the Schedules of Concessions which they did on 30 October 1947.

The point is if the rationale for keeping trade negotiations secret were to make it easier to negotiate a package which imposes trade liberalization on the whole economy and allows specific industries to lobby for exemptions only at a point where they would need to offer a strong reason why they should be treated differently from all the other industries which are being exposed to trade liberalization, then even if that rationale offered a basis for maintaining secrecy up to a point with the content of proposed Schedules of Concessions, it does not offer a rationale for maintaining secrecy of the provisions which establish the framework of legal obligations within which the Schedules of Concessions would operate.

1.4 Reconsideration of the Approach to Secrecy

Since the post war period, the Australian and other governments appear to have expanded their approach to secrecy in a manner which is not related to any rationale that applied in the post war period to the maintenance of secrecy of draft Schedules of tariff concessions.

This approach to secrecy in the negotiation of trade treaties should be reconsidered. In considering the need for secrecy, a distinction can be drawn between:

- the provisions of a treaty which set up the framework for making commitments in schedules, including provisions which discipline other policies related to the policies disciplined under schedules; and
- the content of the Schedules themselves.

⁵ *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N.Doc E/PC/T/33 (London, Oct 46).

⁶ *Report of the Drafting Committee of the Preparatory Committee*, UN Doc E/PC/T/34. See also Interim Report of the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment (UN Doc E/469), 14 July 1947.

⁷ *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, UN Doc E/PC/T/186 (Geneva, August 1947).

In considering the approach to the content of Schedules themselves, separate consideration can be given to:

- Other parties' Offers to Australia.
- Other parties' Requests to Australia
- Australia's Requests to other parties
- Australia's Offers to other parties

1.4.1 Considerations regarding secrecy of other Parties' Offers to Australia

There may be circumstances in which another country party to a trade negotiation submits an offer of the proposed content of its Schedule of Concessions on Goods or its Schedule of Concessions on Services (or depending on the architecture of the agreement, schedule of Non-Conforming Measures or excluded Services Sectors) on the basis that Australia must treat the document as confidential.

Australia should advise the country that Australia cannot decide on the conclusion of the negotiation until it has had an opportunity to assess the views on our negotiating partners' proposed liberalization of interested exporters in Australia and that this requires that the Offer must be made public for a period of time sufficient to enable interested Australian exporters to react to it.

Australia would acknowledge that an Offer from another country is not binding and is conditional upon the other country being satisfied that the final negotiated package is satisfactory.

1.4.2 Considerations regarding secrecy of Other Parties' requests to Australia

When other negotiating parties submit requests to Australia about what they wish to see contained in Australia's Schedules, it is unlikely that they would request Australia to keep the request secret.

There does not appear to be any reason why a county would submit a Request to Australia on the basis that it must be kept secret, unless that country wished to make different levels of Requests to different countries and to avoid allowing those countries to gain knowledge of the differential Requests. The Australian Government should avoid facilitating that kind of conduct.

Australia should not maintain secrecy of Requests made by other countries on Australia.

Even if another country did ask that Australia keep another country's Request secret, Australia should advise the country that Australia cannot decide on what it is prepared to offer without consulting with stakeholders and that Australia could not engage with the Request if the Request must be kept secret.

1.4.3 Considerations regarding secrecy of Australia's requests on Other Parties

Australia's Requests on other parties would always be made with the expectation that the other side will only finalize its offer as it becomes clear what it will receive in exchange. If Australia always published its Requests on other parties, there is some possibility that the final outcome of the negotiation may not contain all the commitments that Australia has requested. There is also a possibility that in the later stages of a negotiation, Australia

may indicate to the other party that it will accept less than everything it asked for, even if it does not formally reissue its request. Therefore, once a deal is concluded, there is a reasonable prospect that interested parties in Australia may pose questions to the Government on why it concluded a deal without attaining some of the Requested liberalization. The Government would need to explain whether it recommends accepting the deal or not accepting it and, if appropriate, would need to explain what happened as the deal was concluded. This is within the appropriate scope of the tasks of the Executive and there is no reason why secrecy should be maintained so as to shield the executive from having to explain why it backed off its Requests in the negotiation or generally to explain the balance between the obligations to be assumed by all sides. Secrecy should not be justified on the basis that it provides a shield to the Executive from having to explain how it fared in a negotiation.

1.4.4 Considerations regarding secrecy of Australia's Offers to other Parties

The Law Council appreciates the efforts that the Government makes to ensure that it is aware of all applicable existing legislation so that the Government avoids making offers inconsistent with existing legislation. The Law Council appreciate the efforts that the Government has made toward making its offers open and transparent. For example, in WTO negotiations, in April 2003, the Australian Government submitted a draft revised Schedule of Commitments under the General Agreement on Trade in Services. The draft Schedule would have been given to other WTO Members on a 'nothing is agreed until everything is agreed' basis so it is conditional upon Australia receiving an adequate package of GATS Offers from other countries and an adequate overall package in the WTO negotiation. The Australian Government submitted the document to the WTO on the basis that the WTO was free to publish it on the WTO website.⁸ In May 2005, Australia submitted a revised Services Offer and allowed the WTO to make that public.⁹ DFAT has published that May 2005 Offer on its website.¹⁰ There are many WTO Member countries which do not operate with this level of openness and transparency. It is our understanding that Australia (regardless of which party has been in power) has been one of the WTO member countries seeking to extend the openness and transparency of all processes in the WTO: committee proceedings, dispute settlement proceedings and negotiations. The Law Council appreciates those efforts.

It is when we look beyond the WTO that the position is much less satisfactory. For example, in the negotiation of the proposed Trans Pacific Partnership, the Government has not made its offers public. We might reasonably expect that in the area of trade in goods,

⁸ The WTO gives each Services offer a WTO job document number. In cases, where the Member submitting the document gave its permission that the document could be made available publicly, the WTO assigned a document number in the series TN/S/O . See https://www.wto.org/english/tratop_e/serv_e/market_access_negs_e.htm and click on the word TN/S/O to run a search of the WTO document facility for the documents in that series. The Australian government's April offer is document "TN/S/O/AUS".

⁹ When a country lodged a revised GATS offer on the basis it could be made public, the WTO assigned it a number in the series TN/S/O Rev.1 See https://www.wto.org/english/tratop_e/serv_e/market_access_negs_e.htm and click on the highlighted text TN.S/O Rev.1 to run a search of the WTO document facility for the documents in that series. The Australian government's May 2005 offer is document "TN/S/O/AUS/Rev.1" dated 31 May 2005.

¹⁰ See the website of the Department of Foreign Affairs and Trade on the page for Services under the WTO at <http://www.dfat.gov.au/trade/topics/Pages/services.aspx> containing a link to the May 2005 Offer on Services in the WTO negotiation.

the text is structured so that all tariffs are zero unless listed in a Schedule and that Australia may have offered to give a blank schedule. However, Australia has not published its draft Schedule. We might reasonably expect that the TPP text is structured so that certain market access and national treatment obligations apply across all services sectors except for measures listed in a Schedule of Non-Conforming Measures or for sectors listed in a Schedule of Exempt Sectors. However, Australia has not published those draft Schedules.

Another example is the negotiation for the proposed Trade in Services Agreement. The Australian Government has indicated in a public briefing¹¹ that the draft text of the TISA includes market access provision on a positive list basis: that is, it contains a provision similar to the market access rule in GATS Article XVI:2 and the rule is expressed to apply only to those service sectors which a country lists in a Schedule. At the public briefing, the Government was prepared to state that it had submitted a draft Schedule relating to the market access obligations but it has not been prepared to publish that draft offer. Although the Government has not been prepared to publish the offer, the Government did state in the same public briefing that the May 2005 GATS Offer in the WTO negotiations was a reasonable indication of what is in Australia's draft positive list schedule in the TISA negotiations. In the same public briefing, the Government indicated that the draft TISA text includes a national treatment rule which applies on a negative list basis: that it contains a provision similar to the national treatment obligations in Australia's existing bilateral trade agreements and the rule is expressed to apply to all sectors except those sectors or measures listed in a negative List Schedule of National Treatment. At the public briefing, the Government was prepared to state that it had submitted a draft Negative List Schedule on National Treatment but the Government has not been prepared to publish that draft document. Although the Government has not been prepared to publish the offer, the Government did state in the same public briefing that Australia's negative List Schedule on National Treatment in the Australia Chile FTA was a reasonable indication of what is in Australia's draft Negative List Schedule under the TISA. The Australian Government indicated to a public briefing that there was no agreement among parties to the TISA negotiation that they should abstain from making their offers of Schedules public and that each party was permitted to make its own decision on whether to make its offer public. At least two countries, Switzerland and Norway, had made their offers public but Australia had decided to keep its offer secret.

In relation to the negotiation of other bilateral trade agreements, the Australian Government takes the same approach of not publishing draft Schedules of Commitments. It is not possible for persons reasonably skilled in the subject matter to make an informed assessment of what Australia is proposing to commit to.

However, the Law Council observes that particularly in the context of highly technical legal obligations relating to trade in services and investment, it is difficult for a person with good expertise to make a submission regarding the access which the Australian Government proposes to grant to the Australian market without reading the draft text. The services obligations affect a variety of matters: regulation of inward foreign investment, regulation of movement of natural persons, regulation of access to premises, as well as regulation specific to particular services sectors. It is extremely difficult, if not entirely

¹¹ On the basis of notes taken by Brett Williams at a public briefing by DFAT on 20 March 2014 in Sydney.

impossible even for a person with substantial expertise in the subject matter, to make an assessment of what the Australian Government is proposing to commit to in the absence of being able to read the draft Schedules and the draft text of the agreement under which the Schedules will operate.

The same considerations apply to consideration of offers made by other countries, and consideration of requests made by Australia on other countries. It is extremely difficult, if not entirely impossible, even for a person with substantial expertise in the subject matter to make an assessment of what the other country is proposing to commit to in the absence of being able to read the draft Schedules and the draft text of the agreement under which the Schedule will operate.

1.4.5 Considerations regarding secrecy of draft treaty text

Earlier sections of this submission have noted that:

- in the original negotiation of the GATT, draft texts had been published.
- Australia has been a contributor to the widening practise of making WTO documents public.

In the case of WTO negotiations, the WTO has a practice of making draft texts publicly available. It publishes them on its website. Anyone can scrutinize the draft texts.

In the case of Australia's negotiations outside the WTO, draft texts are kept secret. The community of legal experts does not have an opportunity to scrutinize the rules under negotiation. One consequence is that the community of legal experts is not in a position to write about the texts under negotiation in a way that is useful for the wider audience of experts in other disciplines. To a large extent this means that the community of experts in various fields other than law do not have an opportunity to scrutinize the rules under negotiation.

Legal rules in a trade agreement form an integrated whole. There is no doubt that the existence of Trade agreements tends to lead to government decisions that are different to those that occur in the absence of trade agreements. As in any policy area, governments and politicians tend to be more influenced by the strongest lobby groups. In the absence of trade agreements, it is local producers competing against imports who are usually the strongest lobby group and other business interests tend to have less influence. Trade agreements change this balance by giving Exporters an incentive to be engaged in political decisions about the adoption of a trade agreement which would be accompanied by changes to domestic law and policy.

The design of trade agreements has not been accidental. A study of trade agreements since the middle of the last century reveals that there has been deliberation over the principles to be embodied in trade agreements. The result has mostly been agreements which:

- discipline some policy instruments more than others, a preference for price based import protection rather than quantity based import protection and a greater tolerance for policies funded from the government budget rather than policies based on discrimination against imports;
- at least attempt (not always successfully) to allow liberalization to apply broadly across the economy rather than just to politically easy sectors;

- attempt to separate trade commitments from political influence (which in the case of the WTO is the key consequence of the unconditional Most Favoured Nation rule); and
- attempt to leave governments free to pursue other policy objectives at the same time as achieving trade liberalization.

The community of legal and trade experts are not able to make an assessment of the structure of rules under negotiation without being able to read the text of proposals. Receiving snippets of information at those public briefings which they are able to attend is insufficient.

The earlier part of the submission described the difficulty in assessing proposed scheduled commitments in the absence of reading the text of the draft schedules. A corollary of that point is that it is not possible to assess proposed schedules without reading the text of the provisions in the main part of the agreement under which the entries in the schedules acquire their legal force.

Therefore, the Law Council submits that:

- the Australian Government should publish draft negotiating texts where such texts exist; and
- the Australian Government should publish what it regards as the desirable outcome.

We acknowledge that during a negotiation, parties in the negotiation will have different views about the drafting of particular aspects of agreements. That may mean that different parties have proposed different text or it may mean that no-one has formulated any text yet. In WTO negotiations, the practice is to publish draft texts which contain bracketed text representing submissions from one or more negotiating parties around which there is no consensus. The Australian Government could adopt the same practice in other negotiations.

Those who would like to make a contribution to the positions of the Australian Government need to know what the Australian Government is proposing. In the early stages of a negotiation, the Australian Government could publish position papers on different issues to describe what it sees as a desirable outcome and its reasons for taking that position. Sometimes it may be necessary for the Australian Government to modify its position and when it does it should publish supplementary position papers which further develop the reasons for its position.

It is useful to observe that the European Union has adopted a practice of publishing position papers and publishing its submissions on the wording of texts in its negotiations with the United States for the Trans-Atlantic Trade and Investment Partnership Agreement (See the material published at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>). On its website, the European Commission is publishing its proposals of particular text. It is also publishing papers explaining its position on individual issues.

The Law Council recommends that the Australian Government should adopt a similar practice of publishing position papers and proposals of text.

1.4.6 Considerations regarding agreements on secrecy with other Countries

One of the causes of secrecy can be that our negotiating counter-parts insist on secrecy. The Trans Pacific Partnership grew out of a negotiation to expand the membership of the Trans-Pacific Strategic Economic Partnership Agreement in force since 2006 between New Zealand, Chile, Singapore and Brunei (see the text at <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/0-P4-Text-of-Agreement.php>). When negotiations were opened to expand the agreement to include the United States, Australia, Peru and Vietnam, all of the parties agreed that the text would not be released until the agreement was concluded and that other documents relating to the negotiation should not be made public for 4 years. (The agreement between the parties about secrecy is not on the website of the Australian DFAT or the NZ MFAT but we believe the above statement to be true.) Throughout the TPP negotiation, the Australian Government has explained that the reason for its refusals to release any draft texts or documents is that it entered into an agreement with other parties agreeing not to release the documents.

The Trade in Services Agreement negotiation grew out of an initiative by a subset of WTO members seeking to go further than the WTO negotiations under the GATS. The participants in that negotiation have not treated it as a WTO negotiation. The Australian Government has refused to release any documents relating to that negotiation. In public briefings, DFAT indicated that it cannot release documents because the parties to the negotiation have not yet reached an agreement on how documents should be dealt with. When some countries released the texts of the offers, the Australian Government indicated that participating countries were free to decide whether to release their own offers.

The Law Council does not see any justification for negotiating such treaties in secret. We submit that generally Australia should not in future enter into agreements to keep draft texts and other negotiating documents secret.

1.4.7 Considerations regarding secrecy of the Government's negotiating position

Australia can establish some parameters for the way that Australia will engage in treaty negotiations, even if other countries wish not to publicize their own proposals.

First, the Law Council submits that Australia should establish a practice of always making its own submissions public, and Australia should publish position papers explaining why it supports a particular position.

Second, in publishing position papers explaining Australia's own position, if it is necessary to explain why that preferred position is better than alternative positions, then the position paper should do that. This can be done without saying that a particular party has made a particular proposal. This will be important in situations in which a position paper by Australia will only make sense if it refers to alternative positions that have been proposed by other parties. We submit that Australia should publish reasons why its preferred position is better than the alternative proposed by other parties. Australia can do that without publishing the text of proposals submitted by other parties and without identifying which other party has proposed particular positions.

Third, in publishing position papers, we submit that Australia can publish indications of what it expects that treaty text might look like – this could include commentary on the extent to which particular draft text is likely to receive support from other negotiating parties or that other parties are strongly supportive of alternative text which would reach a different outcome.

2. Processes for post-ratification review

This part of the submission relates to the role of the Executive in maintaining openness, transparency and accountability in ongoing participation in treaties. It addresses a number of the specific points in the inclusive list of matters described in the Committee’s Terms of Reference:

- “a. the role of the Parliament and the Executive in negotiating, approving and *reviewing* treaties;
- b. the role of parliamentary committees in reviewing and reporting on proposed treaty action and *implementation* ...
- g. the scope for government, stakeholder and independent review of treaties after implementation; ...
- k. related matters.”

2.1 Treaty provisions establishing post-ratification working parties, committees and other activities

The Law Council is concerned that there are many provisions in trade agreements outside the WTO which provide for the creation of a committee, or a working party or which provide for ongoing consultations where there is no reporting by the Australian Government about whether those committees or working parties meet, where there is no publication of minutes and where there is no report on whether consultations have taken place.

This is in marked contrast to what happens in UN bodies and in the WTO. The following are useful examples of what happens in the WTO:

- The WTO *Understanding on Dispute Settlement* provides for members to request consultations. When a member request consultations, the request is published by the WTO and the making of the request is recorded in the minutes of the WTO Dispute Settlement Body. The WTO publishes those minutes (though it does not derestrict the document for a few months);
- The WTO *Agreement on Agriculture* required member to notify the WTO of any new domestic support measure. The WTO publishes the notification received. The WTO Committee on Agriculture records any comments made by members on notifications submitted by other members and the WTO publishes the minutes of the committee.
- The WTO *Agreement on Sanitary and Phytosanitary Measures* establishes a Committee on Sanitary and Phytosanitary Measures. Deliberations of the Committee are recorded in minutes and the WTO publishes the minutes. This process should be contrasted with trade agreements outside the WTO. The following examples illustrate the point.

- Under the *Australia - United States Free Trade Agreement*:

Chapter 5 on Rules of Origin, at Article 5.16.2 Australian and the USA agreed to consult regularly to discuss amendments to the rules relating to rules of origin. DFAT has not published any minutes of any consultations if in fact any consultations have ever been held. Nor is there any record of such consultations on the website of the United State Trade Representative. The website of the Department of Customs does contain a page with information of rules of origin applying to trade between Australia and the United States including some records of changes made (<http://www.customs.gov.au/site/page6016.asp>).

A side letter dated 18 May 2004, on consultations on telecom committed the “US and Australia to “endeavour to meet annually, or as otherwise mutually agreed, to review relevant developments in market access, market structure, technological innovation and standards development domestic regulation, and international policy trends in telecommunications and information technology.”¹² (DFAT has not published any information regarding whether any such consultations have ever been held. A search of the website of the Department of Communications has a page on international matters (<http://www.communications.gov.au/international>) but there is no reference to records of consultations under the 18 May 2004 side letter.

Chapter 8 on Technical Barriers to Trade requires the two countries to establish a Chapter Coordinator responsible for communicating with the other party’s Chapter Coordinator in all matters relating to technical regulations and standards and provides that the parties may convene an ad hoc working group to identifying solutions to matters raised in consultations. DFAT has not published any information on whether any consultations have ever occurred or whether any ad hoc working groups have ever been convened. The website of the Department for Industry and Science has a page recording that the Department is the Chapter Coordinator under the AUSFTA but it does not indicate whether any matters have ever been raised in consultations or any working groups convened. (see <http://www.industry.gov.au/industry/IndustryInitiatives/TradePolicies/TechnicalBarriersToTrade/Pages/AustUSFTATBT.aspx>).

- Under the *Australia – New Zealand ASEAN FTA*:

Chapter 16 establishes an FTA Joint Committee. Chapter 16, Article 1.6 requires the FTA Joint Committee to report to the ASEAN Economic Ministers, the Trade Minister of Australia and the Trade Minister of New Zealand through the meetings of their Senior Economic Officials. DFAT has not published minutes of the Joint Committee and it appears that no-one takes responsibility for publishing the minutes of the Joint Committee. The ASEAN website has a link to a page for the ANZASEAN Free Trade Agreement but on 3 March 2015 the link was not working. The ASEAN website has a link to the ASEAN Economic Ministers meetings. The Joint Media Statement regarding the most recent AEM meeting (the 46th) does not mention any report from the FTA Joint Committee. (See <http://www.asean.org/communities/asean-economic-community/category/46th-asean-economic-ministers-meeting>) The webpage for the

¹² http://www.dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Documents/12_telecom_consultations.pdf

ASEAN Economic Ministers Meetings contains links to each annual meeting of the AEM which in turn contains a link to a Press Statement of AEM-CER consultations. The records of the most recent AEM (46th) include a press release from the most recent AEM-CER (19th) consultations at <http://www.asean.org/images/Statement/2014/aug/JMS%20-%20AEM%20CER%20-%20Final%2026%20Aug.pdf> . The press release does not refer to any report of the FTA Joint Committee.

Chapter 17 provides for any party to request consultations with any other party regarding any dispute under the Agreement and requires a copy of the request to be provided to all Parties. It also provides for parties to request establishment of an Arbitral Tribunal. The treaty does not establish any mechanism for making public any requests for consultations or requests to establish Arbitral Panels. DFAT has not published any reports on whether any disputes have arisen. If an Arbitral Body makes a report, the Agreement requires that the report be supplied to all Parties but only the Parties to the dispute may make the report publicly available. In effect this means that an Arbitral Award can make interpretations of a treaty text binding on Australia without having to make the report public.

Chapter 5 on Sanitary and Phytosanitary matters (at Article 10) establishes a Sub-Committee on Sanitary and Phytosanitary Matters which is required to meet within one year of entry into force of the agreement and thereafter as mutually determined by the parties. DFAT has not published any information on whether this committee has ever met, or any minutes of meetings. Article 10 appears to allow any party to the treaty to prevent records being kept: "... all decisions and/or records shall be by mutual agreement of the relevant Parties".

Chapter 8 on Trade in Services establishes a Committee on Trade in Services. The functions of the Services Committee include considering any matter identified by the Parties and reporting to the FTA Joint Committee (Article 24). DFAT has not published minutes of this committee, and it appears that no-one takes responsibility for publishing the minutes of the Services Committee. The ASEAN webpage on trade in services does not contain any documents related to the ANZASEAN FTA Committee on Trade in Services. (See <http://www.asean.org/communities/asean-economic-community/category/services>).

Under Chapter 12, the parties established an ANZASEAN FTA Economic Cooperation Work Programme. This has various aspects. DFAT has not published any information about what has happened pursuant to the Work Programme.

The Economic Cooperation work programme has a number of aspects. A few of them are mentioned below:

- Component 1 provides for a comprehensive programme of support to educate the private sector, develop procedures to implement ROO, develop procedures to facilitate the use and authenticity of Certificates of Origin, ensure the timely transposition of tariff schedules from HS2002 to HS2007. The website of DFAT has no information of whether anything has ever happened under this component of the work programme.

- Component 3 relates to joint efforts in the field of standards, technical regulations and conformity assessment procedures. DFAT has not published any information about whether anything has happened under this component of the work programme.
- Component 5 relates to joint efforts regarding investment including providing a joint vehicle for parties to assess the climate for investment and identify areas of concern for consideration by the FTA Joint Committee. DFAT has not published any information on whether anything has happened under this component of the work programme.

The ASEAN website page for meetings of the ASEAN Economic Ministers contains a link to Press Releases of the AEM-CER Consultations. The most recent press release for the 19th consultations (at <http://www.asean.org/communities/asean-economic-community/category/46th-asean-economic-ministers-meeting>) record that the Ministers “were pleased with the momentum of the implementation of the AANZFTA Economic Cooperation Support Programme”. The Press release also the dissemination of new communications material including the Programme Highlights and fact Sheets which provide a snapshot of each project’s contribution to the AEC [ASEAN Economic Community] priorities” but we were unable to find any of those publications. The Press release for the 19th AEM-CER consultations refers to “relevant AANZFTA committees” but does not refer to any documentation of reports or minutes of any such committees. The Press release also refers to the “FTA’s built-in agenda”, to “achievements in intellectual property cooperation”, to “the Competition Law Implementation Programme”, to the “Task Force on [ASEAN Qualification Reference Framework]” but contains no references to any reports or minutes kept by those bodies.

2.2 Recommendation regarding Committees, etc, created under trade agreements

The Law Council recommends that DFAT publish all minutes of committees and working parties established under trade agreements. DFAT should publish an annual report which includes all of the minutes or where relevant a statement that the relevant body has not met or engaged in any activities.

2.3 Recommendation regarding Dispute Settlement under trade Agreements

The Law Council recommends that the Australian Government should require that any trade agreement which establishes a dispute settlement procedure involving the making of rulings by any body (whether described as arbitral reports or otherwise) should provide that the ruling and legal reports must be made public (after removal of any commercial confidential information of private traders involved).

3 Summary of Submissions

From Section 1.4.1 above, with respect to Offers of proposed Schedules to Trade Agreements received from other countries:

Australia should indicate that it would prefer to make the offer public. In cases where the other country requests that the offer should be confidential, Australia should advise the country that it cannot respond to the Offer until it has made the

Offer public for a period of time sufficient to enable the interested Australian exporters to react to it.

From Section 1.4.2 above, 3.2, with respect to Requests from other countries regarding proposed Australian Schedules to trade agreements:

Australia should not maintain secrecy of Requests made by other countries on Australia.

From Section 1.4.3 above, with respect to Australia's requests on other parties:

Once Australia has submitted a Request to another party in a negotiation, Australia should make that request public.

From Section 1.4.4 above, with respect to Australia's Offers to other Parties:

Once Australia has submitted an Offer to other parties in a negotiation, Australia should make that Offer public.

From Section 1.4.5 and 1.4.7 above, with respect to draft treaty text and position papers:

Australia should publish draft negotiating texts where such texts exist.

The Australian Government should publish position papers indicating what it regards as the desirable outcome.

From Section 1.4.6 above, with respect to agreements on secrecy:

Australia should not in future enter into agreements to keep draft texts and other negotiating documents secret.

From Section 2.2 above, regarding Committees, etc, created under trade agreements:

DFAT should publish minutes of all committees, working parties, and other bodies established under trade agreements, or where relevant a statement that the body has not met nor engaged in any activity

From Section 2.3 above, regarding Dispute Settlement under trade Agreements:

Australia should require dispute settlement provisions in trade agreements to require that any rulings and legal reports must be made public.

Yours sincerely



MARTYN HAGAN
SECRETARY-GENERAL