
15 Processes for establishing BRTAs

Just as good design principles and appropriate limits on scope can contribute to the quality of BRTAs (chapters 13 and 14), so can well structured government processes for making such agreements. However, participants raised various concerns about aspects of the processes currently employed by the Australian Government. These relate to:

- choice of prospective bilateral or regional partner countries;
- assessment of the economic and strategic impacts and benefits likely to flow from an agreement;
- consultation with interested parties; and
- the roles of the executive vis-à-vis parliament for approving agreements.

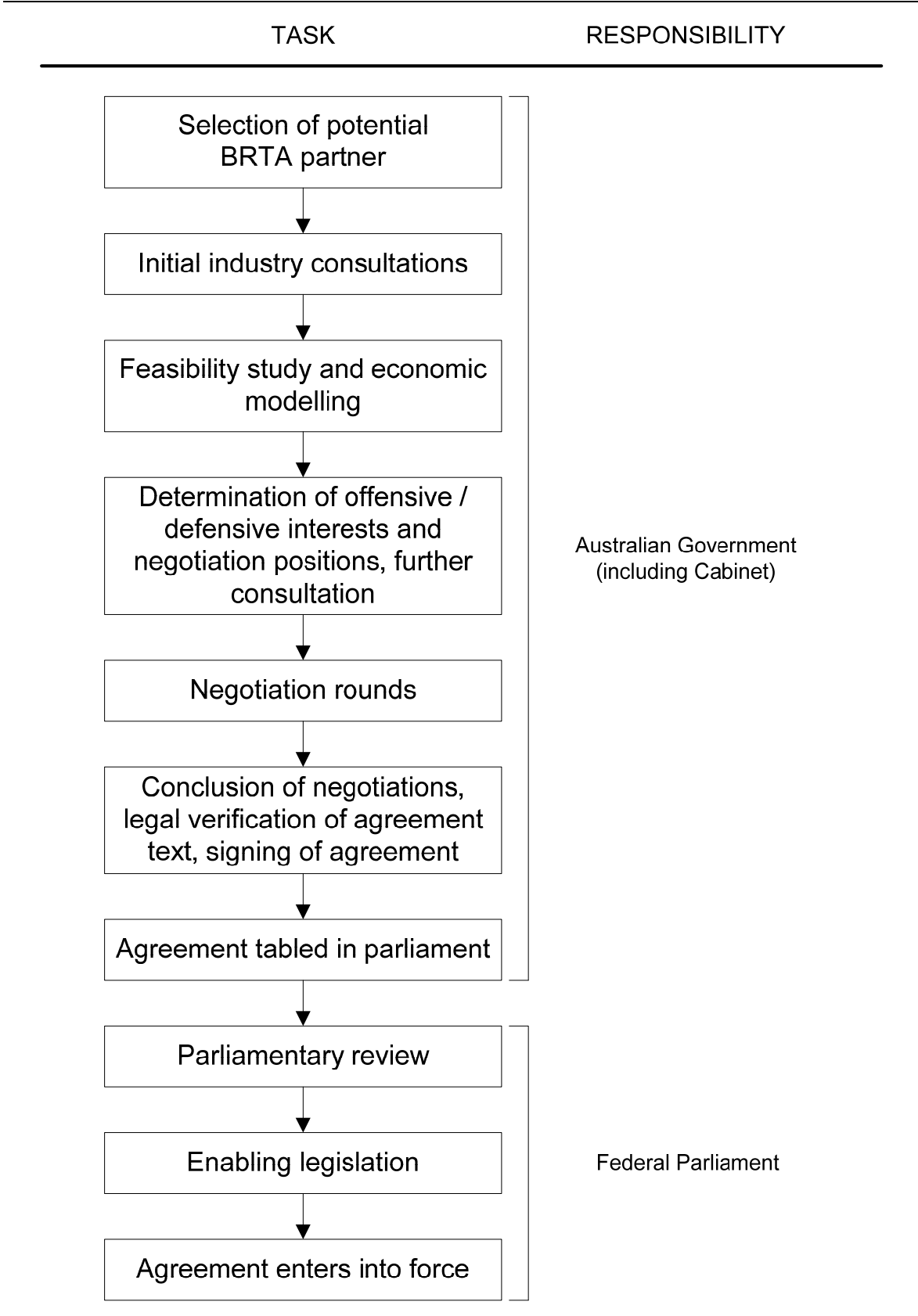
The Draft Report considered the current processes for establishing trade agreements, and examined the concerns with that process raised by participants. The Commission has received further feedback on the problems identified with current processes, as well as the draft recommendation. While the emphasis of submissions has been on preferential agreements, the options for reform relate more broadly to a range of trade policy options.

15.1 Current processes

The current process for BRTAs commences with the emergence and choice of potential partners to reflect strategic, trade and economic development interests of the prospective members. All agreements involve some level of commitment to future action and involvement between members. These commitments are arrived at through a process of negotiation between partners and are given effect through enabling legislation, regulation or government policy announcements, as appropriate.

For the preferential agreements recently entered into by Australia or that are in prospect, the broad approach involves, from the identification of potential partners: domestic consultation; negotiating rounds with prospective partners; finalising an agreement with the partner(s); and enacting enabling legislation to give effect to the commitments made in the agreement (figure 15.1).

Figure 15.1 Current process for establishing preferential trade agreements



Some of these steps are the responsibility of the executive arm of government; others fall within the ambit of the parliament. In some circumstances, some of the steps may be omitted, repeated, or sequenced slightly differently.

There is no set length of time for establishing an agreement, and the length of time taken from the initiation of a new agreement to its implementation differs based on a wide range of factors. These include the level of existing barriers between Australia and the partner country, the sensitivity of particular sectors, and the difficulty of concluding negotiations. While some of Australia's BRTAs have been concluded in a short period of time (for example, AUSFTA), others are more protracted. For example, negotiations with China commenced in 2005 and it is not clear that a final agreement is close to being reached.

15.2 Concerns with the current process

Selecting and prioritising agreement partners

While the stated intention of the Australian Government is to pursue BRTAs that are comprehensive in nature and that support multilateral liberalisation efforts (DFAT, sub. 53), the Commission is unaware of any clearly articulated principles that are currently used by the Government for selecting prospective BRTA partners and for prioritising the negotiation of different BRTAs. Indeed, the Winemakers' Federation of Australia stated:

Questions are raised concerning prospective partners for FTAs. It appears to us that there is no coordinated plan on priority FTAs. (sub. 1, p. 11)

And the Office of Horticultural Market Access stated:

The process for determining prospective partners for possible trade agreements is unclear. However it is important that there is a pre-decision process which gives a chance for industry to present initial views prior to government decision to proceed to negotiations. For example horticulture views that the Australia-Chile FTA did not follow such a process. (sub. 39, p. 16)

In practice, a range of matters no doubt influences which countries are selected for pursuing agreements, and the timing of those negotiations, including political considerations and the willingness of other country's governments to engage in discussions, as well as judgments about possible economic or other benefits to be had from such agreements. In this regard, the Commission notes that the then Minister for Trade highlighted in February 2010 Australia's lack of any trade agreements with either Europe or African nations as being a 'missing link' in Australia's policy (Crean 2010).

Following the Draft Report, several participants expressed a desire for a more transparent and coordinated approach to prospective agreements:

... the NFF agrees that it is a good objective for the Australian Government to attempt to enhance scrutiny of the reasons for, time frames, exit strategies, potential impacts and benefits of prospective agreements. At a time where there is an increasing global focus on pursuing ‘geo-political’ deals that have little interest in genuine trade liberalisation, it is important that the Australian Government makes it clear to stakeholders about what direction they intend to drive the negotiations. (NFF, sub. DR85, p. 5)

ACCI would like to see a greater strategic and coordinated approach to trade policy, in order to both benefit domestic industry and also to provide Australian business with better access to overseas markets. (ACCI, sub. DR87, p. 7)

... current processes for assessing, prioritising, and reporting outcomes of [trade agreements] lack transparency and tend to oversell benefits of the agreements. A3P supports more transparency in the [trade agreement] negotiating process. (Australian Plantation Products & Paper Industry Council, sub. DR64, p. 2)

In response to concerns raised in the Draft Report, DFAT submitted that:

Decisions to embark upon FTA negotiations are “whole-of-government” decisions made by Cabinet. The resource implications; potential costs, benefits, risks; and specific issues that may emerge during the course of negotiations are assessed during the Cabinet process. The Government’s practice has been that consideration of whether to embark upon FTA negotiations, and the negotiating mandate, follows wide public consultation associated with the preparation of an FTA feasibility study, including assessment of the economic and broader bilateral relationship with the country in question, and the costs and benefits associated with an FTA. (sub. DR98, p. 16)

Notwithstanding these observations, based on broader consultation during this study, the Commission is concerned that initial consideration of the decision to enter a trade agreement by Cabinet is often rushed and heavily reliant on the findings of the feasibility study or other overly optimistic assumptions (discussed below). There was also a perception that, not only does a public commitment to undertake a feasibility study appear to create a strong expectation that there will be negotiations and a deal will be reached, but that feasibility studies can sometimes be commissioned after a decision to pursue negotiations has been taken, in order to build public support for the undertaking. Further, while Cabinet is involved in agreeing to a negotiating mandate, and has to agree to any subsequent changes to the mandate, the Commission heard that it does not, as a matter of course, receive regular updates on BRTA negotiations and the extent to which they are meeting the original objectives.

A broader concern raised during the Commission’s consultations was that the advancement of trade objectives with a given partner country appear to be

‘automatically’ pursued through preferential trade agreements, without apparent consideration of alternative instruments (or combinations thereof) that may be more targeted means of addressing particular trade issues. In this light, the Australian Chamber of Commerce and Industry (ACCI) noted that one significant theme that emerged from its survey of businesses was that:

The BRTA process is seen by some companies as self-serving and that there may be more cost efficient processes available to government in delivering the current BRTA agenda. (sub. DR87, p. 9)

Of course, matters of partner and instrument selection may well form part of the consideration of trade policy priorities by DFAT and relevant Ministers. Indeed, in relation to partner choice, the Commission notes that some of Australia’s major trading partners are amongst those countries with which Australia has negotiated, or is negotiating, a trade agreement.

Despite this, it is apparent from participants’ comments that, at a minimum, the basis for partner and instrument selection have not been effectively communicated in a public manner.¹

Assessing the potential impacts

Following the identification of a potential trade agreement partner and confirmation of an interest in negotiating with Australia, DFAT prepares a feasibility study, usually in consultation with other government departments and private consultants. Feasibility studies were prepared prior to the negotiations of Australia’s current agreements with the United States, Thailand, Singapore and Chile, as well as for some agreements currently being negotiated, including China, Japan, Korea, Malaysia and the Gulf Cooperation Council. Feasibility studies have also been prepared in advance of possible negotiations with India and Indonesia. Consideration of entry into the AANZFTA negotiations in 2004 was informed by a High Level Task Force Report conducted in 2000, rather than a specific feasibility study at the time. As far as the Commission is aware, no feasibility study was conducted prior to entering negotiations for the Trans-Pacific Partnership agreement.

¹ Of course, some considerations currently included in the trade agreement process (for example security and strategic relationships) may not easily lend themselves to detailed public consideration.

A number of participants in this study raised concerns with the way feasibility studies, and the modelling on which they are based, are currently undertaken, including with the:

- stage at which the modelling and analysis of likely effects are prepared in the overall process;
- assumptions used to underpin any economic modelling of potential costs and benefits; and
- use of such studies once completed, in particular their use to unduly raise expectations about the benefits that might flow from concluding an agreement.

In brief, there are concerns that pre-agreement modelling is used to overstate the benefits likely to be reaped from BRTAs, and that the assumptions and other qualifications surrounding the modelling tend to be downplayed in public statements by those promoting BRTAs (box 15.1). In the Commission's assessment, this leads to unrealistic expectations about what will be obtained, and skews consideration of the merits of proceeding with negotiations.

It should be acknowledged that assessing the potential benefits and costs of many policy measures can be difficult, and BRTAs are no different. Because feasibility studies and their associated economic modelling are prepared prior to the commencement of negotiations, they are unable to model an actual agreement. Instead, as the CIE indicated, 'the Australian Government typically wants comprehensive and overnight liberalisation modelled, with liberalisation spanning merchandise trade, service trade, investment, non-tariff barriers (if estimates are available) and inclusion of dynamic productivity gains'. (sub. DR75, p. 6) The studies generally have not taken into account possible carve outs, the effects of rules of origins or the potential for tariff cuts to not be passed on in the form of lower prices. However, the recent India and Indonesia studies have included simulations of both five and ten year phase-in periods for tariff cuts.

A further aspect raised by several participants is the limitations of any modelling used as part of a feasibility study. While modelling can be a useful component of economic analysis of policy, such analysis often proceeds using other quantitative and qualitative methods in addition to any modelling. On the specific limitations of modelling BRTAs, DFAT stated:

Modelling can provide an indication of the possible quantitative impacts of an FTA on the basis of certain assumptions and particular data sets. Such modelling can be a very useful input both to policy-making processes and to public debate ... However, modelling can never provide a full assessment of a trade agreement as it cannot adequately assess all the impacts of an agreement. Many elements of trade agreements are simply not amenable to quantitative assessment. For example, models generally do

not have a means to adequately quantify the impacts of tariff bindings on investment or of provisions disciplining and limiting the use of non-tariff measures ... [or] the streamlining of customs procedures, greater transparency and good regulatory practice in domestic regulations, or greater regulatory dialogue and consultation to reduce the impact of non-tariff measures. (sub. DR98, p. 17)

The CIE added that the limitations of modelling do not mean that it should not be used, but rather that care should be taken in the use of any results:

... modelling results should only be used to infer the direction of outcome of trade liberalisation (positive or negative) and the broad magnitude of such impacts (small or large). It is inappropriate to, for example, report modelling results to the 2nd decimal point and claim that as the unambiguous impact of any trade reforms. That is, only broad messages and trends should be taken from the modelling results. ...

What economic modelling can do is to provide a rigorous and best available quantitative framework for estimating the potential economic impacts of an FTA, noting the above comments about how modelling results should be taken. Without such a tool there is no real way of knowing whether a particular FTA should be pursued, or allowing potential FTAs to be prioritised. (sub. DR75, p. 5)

It is doubtful whether feasibility studies overall, as they are currently produced, are an adequate decision making tool for deciding whether to proceed with negotiations or not. While it is important to determine if an agreement is 'feasible', the more important questions are whether an agreement, in a form that might feasibly be reached, is likely to generate net benefits within a reasonable time scale, and whether it compares favourably to the relative merits of other approaches to trade liberalisation (or other use of government resources).

Achieving the most meaningful estimates possible of prospective impacts would, in practice, depend on the final text of an agreement — information not available at the feasibility study stage. While the analysis for some of Australia's agreements has been updated as negotiations have progressed (such as for the AUSFTA), this is not standard for all agreements. And while National Interest Analyses (NIA) and Regulatory Impact Statements are tabled in Parliament with concluded agreements, and various Senate committees have the option of investigating the impacts of an actual agreement, these analyses are unable to inform Cabinet's decision as they all come after an agreement has been signed.

Box 15.1 Some participants' concerns about feasibility studies

Victorian Government (sub. 40, p. 3):

Economic modelling has a useful role to play in projecting the impact of a proposed FTA, and modelling based on reasonable assumptions can assist in the evaluation of the impact of an FTA. However, there are limitations to modelling. As an FTA is being negotiated its scope can change and this can have an impact on the modelling results. The modelling scenarios may have to make assumptions about the final scope of the FTA and it is possible that the final outcome may differ from that assumed. Results generated under these conditions, with assumptions that do not reflect the reality of an agreement, are not only ineffective but can also be misleading and counterproductive because they can be used to support arguments about the impact of trade agreements on certain industries and/or the economy as a whole.

Office of Horticultural Market Access (sub. 9, p. 16):

Feasibility studies do not seem to penetrate to the heart of industry concerns and situations. It may be unreasonable to expect them to do so, as many issues become evident during the course of the negotiations. Feasibility studies may need to bring to greater prominence the rationale for and against choice of partner country for a trade negotiation.

Carmichael, B., Cutbush, G., Hussey, D. and Trebeck, D. (sub. 43, p. 3):

The feasibility study on an agreement with China, for instance, also relied on projections of possible gains for Australia from a 'nirvana' agreement that will bear no relationship to what is ultimately agreed. Although those projections were qualified to a degree in the body of the study, they were subsequently used without qualification to support the conclusion (posted on the DFAT website) that '*there would be significant economic benefits for ... Australia ... through the negotiation of an FTA (sic).*' Such a conclusion could not be drawn from either the projections of possible gains or from the outcome of negotiations, which had not yet begun.

As happened in negotiations with the United States, the all important distinction between possible gains (as measured in the econometric projections) and the actual outcome of (future) negotiations became blurred. This is evident, for instance, in the study's conclusion that: '*Australian merchandise exports to China are estimated to increase by around A\$4.3 billion or 14.8 per cent in 2015 as a result of the FTA.*' The contribution to community understanding made by this slide from possible to actual outcomes is reflected in a Sydney Morning Herald editorial comment [of 21 April 2005], following release of the study: '*The government has released a feasibility study which promises (sic) a \$24.5 billion bonanza for Australia from the China deal over the next decade (sic).*' The study was used to create this quite specific public expectation about the magnitude of our gains from negotiations, which had not yet begun.

The Music Council of Australia (sub. 35, p. 4):

The Music Council considers that during this decade the value of bilateral free trade agreements has been considerably oversold and the benefits do not appear to be living up to the expectations posited at the time negotiations commenced.

The Centre for International Economics (sub. DR75, p. 10):

Due to (likely) differences between comprehensive liberalisation and the actually negotiated provisions in an FTA, the modelling results from FTA Feasibility Studies should not be used to portray the gains that could be expected from a negotiated FTA.

The upshot of commissioning analysis that is likely to overstate the benefits of an agreement prior to the decision to enter negotiations, and the lack of a comprehensive and robust analysis of the benefits and costs of the actual provisions in an agreement before it is signed, is that Australia risks entering agreements that will ultimately reduce welfare or foregoing options with potentially greater net benefits.

FINDING 15.1

The approach to conducting feasibility studies used for most previous Australian BRTAs has produced overly optimistic expectations of the likely economic effects of BRTAs. Such an approach does not provide an adequate basis for assessing their merits.

Engagement and consultation

DFAT currently provides substantial public information, and seeks community input, on trade agreements. The department operates an online portal that provides information on Australia's existing and proposed trade agreements. For agreements under consideration, the website provides information about the partner country as well as the opportunities available under a trade agreement, makes publically available the feasibility study and seeks submissions on potential issues related to the agreement. For agreements currently under negotiation, the department provides ongoing updates following each round of negotiations.

In addition to the provision of information, following the Draft Report DFAT submitted that its current processes involve wide public consultation:

DFAT's public consultation processes for FTAs involve invitations for submissions; meetings in Canberra and state capitals with state governments and participants from the private sector and broader community; as well as ongoing day-to-day engagement with interested parties. ... Throughout the process of FTA negotiation, Ministers, officials and State and Territory Governments have made use of a wide range of industry and other forums, as well as official websites, to seek to ensure that the community is aware of the negotiations and understands the issues being discussed, and to encourage the provision of any comments or information... (sub. DR98, p. 16)

While some participants — for example the National Farmers' Federation (sub. DR85) and the Australian Sugar Industry Alliance (sub. DR93) — supported the efforts of DFAT to consult with the community, others saw room for improvement. For example, the Business Council of Australia (BCA) stated:

The BCA appreciates the longstanding commitment of DFAT to consulting widely with business and other stakeholders. The department's approach has resulted in high quality and beneficial outcomes for Australia. At the same time, the BCA considers that an

improved mechanism for collaboration between business and negotiators could be developed. (sub. 41, p. 3)

Some participants also indicated that there are reasonable opportunities for early consultation with the department, but that those opportunities were much more limited during negotiations. For example, Telstra Corporation stated:

The best outcomes are achieved when decision makers have the most timely and relevant data. Although DFAT is open to industry input in its initial consultations, the negotiations themselves are conducted without ongoing industry involvement. This prevents Australian industry from being able to provide timely and contextual advice to Australian negotiators. (sub. 31, p. 4)

More critically, LyondellBasell Australia stated:

During the negotiations of the recent FTAs, consultation with our industry (via PACIA) has often been unstructured and last minute. They have mostly concentrated on macro issues such as Rules of Origin and there has been very little opportunity for input from industry at the enterprise or even tariff code line item level. Negotiating teams have been very reluctant to discuss detailed progress or take company input during the course of their discussions until after a deal is struck and then its of course too late. Its not clear to us how the national benefit is judged especially in regards to potential benefits. (sub. 16, p. 2)

Other participants considered that the breadth of consultation was not sufficient. For example, ACCI suggested that ‘... wider industry consultation is necessary and at present many industry players are not being included in the consultation process.’ (sub. DR87, p. 7)

Further, in relation to the AUSFTA, the Australian Digital Alliance and Australian Libraries Copyright Committee submitted that consultations regarding copyright matters were rushed and lacked transparency:

The process of negotiating AUSFTA was closed and accelerated. Although some consultation processes took place throughout 2003, participants in the consultations were not privy to information at an appropriate level of detail so as to fully comment on the nature of the provisions being considered. When the draft text was released in March 2004, its content was largely settled between the parties and was substantially different to assurances given during the consultation process. (sub. DR79, p. 4)

During consultations, the Council of Textile & Fashion Industries of Australia indicated that it had been inadequately consulted during the negotiation of one recent PTA (the AANZFTA), leading to a concession being provided to the partner country in the TCF area without the benefit of the Council’s input. The Council also expressed concern about the sheer volume of PTAs being negotiated, pointing out that it was difficult for industry bodies to contact and provide feedback to negotiators within tight timeframes, especially during negotiating rounds. The same

issue can also affect government departments involved in the broader trade negotiation process (beyond DFAT), who must also prioritise the limited resources they have available for trade issues.

In regards to input from the states and territories, the Victorian Government indicated that it was ‘primarily engaged in the process at the negotiating stage and there is limited involvement beyond that once an agreement enters into force.’ The Victorian Government also noted concerns around ongoing industry consultation:

For example, in the horticulture sector, there is a perception that the Department of Foreign Affairs and Trade (DFAT) could consult on a more ongoing basis with stakeholders about the impacts of FTAs in a ‘real world’ commercial context. In particular, there is a perception that DFAT would benefit from more industry-specific knowledge (such as becoming familiar with the movement of fruit into export markets) before making future concessions on behalf of such industries. (sub. 40, p.7)

This view was supported by the Office of Horticultural Market Access (sub. 39, p. 17), and the Cherry Growers of Australia (sub. 26, p. 2).

While recognising the consultation undertaken by DFAT prior to the commencement of negotiations on a trade agreement, the evidence before the Commission is that there is at least a perception amongst industry groups and businesses that consultation during negotiations is inadequate and that it does not always take account of prevailing industry policies and conditions. The Commission also heard the view that groups with the ‘loudest voices’ can exert the most influence over negotiations. As well as disadvantaging some industry sectors, this could potentially lead to consumer interests, and those of other sectors, being downplayed or even disregarded.

Parliamentary involvement

Previous parliamentary inquiries into Australian trade policy have examined the issue of parliamentary involvement in establishing trade agreements, including bilateral and regional agreements — an issue raised by participants in this study. Current government policy, as expressed by DFAT, states that:

The power to enter into treaties is an executive power within Section 61 of the Australian Constitution and accordingly, is the formal responsibility of the Executive rather than the Parliament. Decisions about the negotiation of multilateral conventions, including determination of objectives, negotiating positions, the parameters within which the Australian delegation can operate, and the final decision as to whether to sign and ratify are taken at Ministerial level, and in many cases, by Cabinet. (DFAT 2010d)

While this statement relates to the negotiation of multilateral treaties, the same policy applies to the negotiation of bilateral and regional trade agreements.

Tensions over whom is the correct body to commence and conclude negotiations for a trade agreement arise because of a separation of powers within the Australian Constitution itself. Section 61 of the Constitution gives broad powers to the executive for the ‘execution and maintenance of [this] Constitution, and of the laws of the Commonwealth’. However, the power to *implement* treaties is a legislative power, conferred on the parliament by section 51(xxix) of the Constitution.

Submitters to previous inquiries have argued that there is insufficient parliamentary scrutiny of trade agreements prior to their signing, as opposed to following their signing but prior to their legislative implementation (SFADTC 2003). Under the current policy in Australia, the executive decides with whom to negotiate a trade agreement, as well the initial negotiating ‘positions’ and any concessions that will be accepted. In addition, trade agreements are signed at the conclusion of negotiations by the executive; however, agreements are tabled in parliament prior to any enabling legislation being enacted.

As noted by DFAT (see above), on the one hand, this process gives the government the ability to negotiate with flexibility and authority, without having to seek parliamentary authority prior to making decisions. The counter argument to this is that trade agreements frequently involve making binding commitments with a trade partner, both around substantive trade barriers (such as a bilateral reduction in tariffs), as well as process issues (such as dispute mechanisms between investors and partner countries) that have implications for industry, social and environmental policy, and the economy overall. Once entered into force, they also bind both the current and future parliaments to such decisions. Thus, in regard to making decisions that bind future parliaments, parliament itself would be the appropriate body to decide whether to enter a trade agreement or not.

In its 2003 report *Voting on Trade*, the Senate Foreign Affairs, Defence and Trade Committee concluded that reforms to the system were necessary to permit greater parliamentary oversight of trade agreements. The committee stated:

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. (SFADTC 2003, p. 34)

The committee went on to recommend changes to the process for negotiating and concluding trade agreements, to improve parliamentary oversight of the process (box 15.2).

Box 15.2 Voting on Trade: Recommendation 2

In its 2003 report *Voting on Trade*, the Senate Foreign Affairs, Defence and Trade Committee recommended:

- a) Prior to making offers for further market liberalisation under any WTO Agreements, 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.

Source: SFADTC (2003), p. 40.

A similar recommendation was made by the Joint Standing Committee on Treaties (JSCOT 2008) during its study of the Australia-Chile FTA. Recommendation 3 of that report states:

The Committee recommends that, prior to commencing negotiations for bilateral or regional trade agreements, the Government table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the costs and benefits. Such assessments should consider the economic regional, social, cultural, regulatory and environmental impacts which are expected to arise.

The Australian Government has responded to the earlier JSCOT inquiry, stating that it is already implementing the recommendation (in relation to the proposed Trans-Pacific Partnership Agreement) through a range of transparency activities including tabling the Government's priorities for that agreement and an outline of the views expressed during initial consultation regarding potential costs and benefits of the TPP (Australian Government 2010).

In response to the Draft Report, AFTINET (sub. DR68) contended that this response was inaccurate, highlighting the ‘very short consultation period’. In fact, the Australian Government announced that it would consider participating in the TPP on 23 September 2008 (Crean 2008). DFAT held consultations throughout October 2008. The then Trade Minister, Simon Crean, announced that Australia would join the negotiations at an APEC meeting on 20 November 2008, and again in the Australian Parliament on 26 November 2008 (sub. DR68, pp. 15–16).

AFTINET also noted that the document tabled in parliament:

... does not contain an independent assessment of the costs and benefits. The time frame involved did not allow for a feasibility study to be conducted. This highlights the need for a process which enables proper parliamentary and public scrutiny for the BRTA process. (sub. DR68, p. 16)

There has been no response to the broader 2003 recommendation of the SFADTC.

In this study, some participants have also submitted that the current process does not allow for an appropriate role for parliament. For example, the Australian Digital Alliance and Australian Libraries Copyright Committee contended that:

Parliament has a limited role in treaty making: it is unable to influence the negotiation process, the terms, or even the decision of ratification. The ability of Parliament to influence the implementing legislation is too little too late. It gives no ability to influence the terms of the treaty and limits public discourse to whatever flexibility may be found within the interpretation of those terms. (sub. DR79, p. 14)

While trade agreements operate by restraining the future actions of sovereign states (including preventing ‘backsliding’ on otherwise agreed trade liberalisation between agreement partners), the newer form of ‘third wave’ agreements deal with a much wider range of issues. As discussed earlier, some of Australia’s current trade agreements have involved changes to areas that have traditionally been solely domestic policy, including government procurement rules, investment, competition policy and intellectual property. Indeed, elements of these are included in the express powers granted to the parliament by section 51 of the Constitution.

15.3 Improving the process

The Commission’s examination of the current processes for establishing BRTAs has identified a range of concerns. While many aspects of the current process are conducted effectively, there are also problems and deficiencies. Some of these are inherent to the process of establishing trade agreements, but others suggest that the current system can be improved.

Broadly, the concerns discussed above can be summarised as:

- a perception that the selection of partner countries is not prioritised or coordinated in a strategic fashion;
- inadequate (public) assessment of all available options for advancing trade policy objectives with partner countries before embarking on BRTAs;
- given the timing and lack of realism of analysis in feasibility studies, agreements are not subject to meaningful, transparent assessment before they are signed;
- lack of transparency, coverage and pace of consultations (particularly once negotiations have begun); and
- an inadequate role for Parliament in the process.

More broadly, the Commission is concerned that, at least in some quarters, there tends to be a mindset of ‘agreements for agreements sake’, premised partly on the view that Australia must follow a trend in other countries. Some negotiations have run on for several years with few signs that a worthwhile outcome is close. The resources devoted to different negotiations are not made public, and it is not clear that other trade liberalisation options are given sufficient consideration before decisions to pursue BRTAs are taken.

In the Commission’s view, a more transparent and strategic approach is required to ensure that there is an appropriate focus on policies that are most in Australia’s interests.

Many of these concerns are interrelated, so it is important to consider the overall framework for establishing BRTAs. In the Commission’s assessment, the process can be improved in particular through:

- the formal development and publication of an overall trade policy strategy;
- improvements to the scope and realism of the pre-negotiation assessment process; and
- independent and transparent post negotiation analysis.

Importantly, the Commission’s proposal operates in stages. In particular, both the trade policy strategy and pre-negotiation analysis involve the consideration of, and decisions on, options before advancing to later stages of the process. Each stage of the Commission’s framework is discussed in turn below.

Trade Policy Strategy

In the Commission's view, there would be value in the preparation, analysis and publication of a formal trade policy strategy, involving all aspects of trade policy development including, among other things, options for multilateral, plurilateral, bilateral and non-discriminatory reductions in trade barriers. As ACCI noted:

In order to more greatly benefit Australian industry, BRTA and wider trade liberalisation reform is necessary. BRTAs are one part of the process of trade liberalisation and need to be understood in this context. As Carmichael pointed out, a spectrum of approaches to trade liberalisation will all yield benefits (from unilateral to multilateral), but ideally these should be delivered under a single strategic framework. (sub. DR87, p. 8)

While substantial information on the progress of agreements is currently publicly available for each agreement through agreement home pages on DFAT's website, their 'agreement-by-agreement' nature inherently lacks an overall strategic perspective.² The Commission is aware that past practice (until 2007) involved publication of 'Trade Outcomes and Objective Statements' (later called 'Trade Statements'), annual documents which detailed the trade policy environment, progress at the WTO and other forums such as APEC, trade agreements both existing and under consideration at the time, and other trade matters such as e-commerce and biosecurity. While a return to such a publication would provide an overview of trade policy, it could be developed further to provide a forward-looking element to the development of trade policy measures in Australia.

The Commission envisages that the strategy would include priority lists of relevant trade policy developments in the broad, and, where they are identified, key issues with prioritised partner countries or regional groupings.

In order to prioritise trade policy developments and possible countries with which to undertake specific actions to improve trade opportunities, the strategy would take into account:

- the nature and level of impediments to trade and investment in Australia;
- existing bilateral trade flows and the size and nature of the potential partner country's economy;

² The Commission heard during consultations that some of the information provided lacks specificity, and is of limited practical value. While there may be scope for improvement in this regard (discussed in the consultation section below), the Commission acknowledges that a balance needs to be struck between providing useful, public, information and the need for confidentiality so as to not prejudice the outcome of negotiations.

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- the existing barriers faced by Australian industries' in that country (for example, tariffs, regulatory cooperation on services regulation, or physical infrastructure constraints);
 - the extent to which a potential partner country might be considered a low cost producer in a range of products of interest to Australian producers and consumers; and
 - the likelihood of the country undertaking trade liberalising reforms, including consideration of its existing trade agreements.

In addition, the Commission agrees with the Mortimer recommendations that consideration be given to prioritising those potential agreements that can achieve substantial liberalisation within a reasonable time period, as well as agreements that promote open regionalism. However, the Commission considers that this assessment should apply to broader possibilities for trade liberalisation, from domestic actions to consideration of what may be achieved internationally, through bilateral, regional or broader negotiations.

Further, consultation for, and publication of, a trade policy strategy could improve public understanding of, and support for, the trade policy objectives to be pursued.

Before being released, the strategy should be considered by Cabinet. The Commission appreciates that sensitivities with other countries may limit the specificity of the publicly released version of the trade policy strategy, but believes that the 'full' version of the document should be considered by Cabinet. While preparation of the initial strategy would require broad consultation, the following annual updates could be conducted in a more streamlined fashion. Annual review of the trade policy strategy (including progress of existing agreements) provides a structured forum to guard against negotiations continuing for an inordinate time period, without mandating set timeframes for conclusion, and for liberalisation options that provide the greatest benefit to be passed by.

The publication of a trade policy strategy — with clearly prioritised trade policy objectives and opportunities — would contribute to the more effective use of limited resources (in government, industry and the community) for consultation and involvement in any trade liberalisation that may eventuate, alleviating 'consultation fatigue' issues amongst industry. The strategy would also assist in managing the overall process, including assessing whether particular opportunities should be pursued as they arise.

A requirement for annual (explicit) review of the strategy by Cabinet would also formally ensure that trade policy matters (which affect a broad range of government portfolios) receive the appropriate consideration on a whole of government basis,

and allow the strategy to evolve in response to domestic and international developments.

The strategy would provide the Government with the opportunity to consider and pursue trade liberalisation options that afford the greatest opportunities for benefit to Australia.

Pre-negotiation analysis

If, as part of the strategy, it is decided to pursue trade liberalisation objectives in conjunction with particular partners, this would lead to a pre-negotiation analysis of policy options for furthering trade liberalisation objectives with the nominated partner(s).

While several elements of the current approach should be retained, there are also some deficiencies in the feasibility study process as it is currently conducted. The Commission believes that improvements could be made, particularly regarding the consideration of options for action, and realism of assessment.

As with current practice, background information on existing trade flows with the partner would be provided in the pre-negotiation assessment, and consultation with industry and other interested parties would be conducted as an input into identifying the barriers, opportunities and concerns that could be addressed with the partner country. Official exchanges with the partner country would be also held to share information and form judgments about the likely receptiveness of the partner to different liberalisation scenarios.

Importantly, the assessment would also explicitly consider the spectrum of possible approaches for furthering Australia's trade objectives with the selected partner, including actions such as mutual involvement in critical mass agreements or negotiation of bilateral and regional trade agreements, investment treaties, cooperation frameworks, arrangements for technical exchanges, capacity building initiatives and mutual recognition arrangements, among other things. Drawing on assessments of the relative costs and benefits likely to be achievable under the key options, the impact assessment would advise on the most effective means for achieving trade objectives with the partner country. As DFAT noted (sub. DR98), this need not be a single mechanism, but could involve a combination of trade policy actions. However, as with single policy options, it is important that where options are pursued concurrently it is because, together, they are judged to constitute the most cost-effective approach (rather than simply because the pursuit of multiple options is possible).

Importantly, the advised approach may not necessarily include a comprehensive trade agreement, but rather more focussed instruments where they can provide more efficient, effective and achievable means of accomplish the objectives in question. While past experience suggests that many trading partners are open to entering more targeted arrangements, it is possible that some potential trading partners may not be willing to negotiate mutual recognition arrangements, investment protections and other, individual trade reforms outside the scope of a broader agreement in which more trade-offs are possible. In such cases, the assessment would need to consider whether the likely benefits of the comprehensive approach would warrant going ahead, or whether instead no further action should be taken.

While the analysis conducted in the impact assessment would include economic modelling, it should serve as a component alongside other quantitative and qualitative policy analysis. As at present, careful judgement and an appropriate combination of analytical methods will be required in determining what benefits and costs are likely to be realised under different approaches. It is important that the combination of analytical tools is used comprehensively, with explicit consideration of the impacts of a given policy on producers, consumers and government, as well as the economy as a whole.

To illustrate the broad context of a potential agreement and the implications of partial liberalisation, future impact assessments could substantially improve the realism of the analysis undertaken by using a ‘tops-down’ approach, starting with the current full liberalisation as the base scenario, then moving to contemplate more realistic or even pessimistic scenarios. These scenarios would consider likely ‘carve outs’ or phase-ins, based on past practice (recent examples of this approach are discussed in box 15.3). These could be compared to the base scenario to show the ‘loss’ that could be incurred in each case. Publicly framing each step away from comprehensive liberalisation as a loss would allow for more realistic assessment, without prejudicing the outcome of negotiations. The public discussion would not specify which combination of scenarios is regarded as the most likely, but such advice (based on past agreements and expertise within DFAT) would be provided to Cabinet, including warnings of particularly unadvisable approaches and unachievable objectives.

Box 15.3 'Realistic' approaches to impact assessment

A key criticism of the current feasibility study process is that 'outer-envelope' scenarios typically used in modelling are unlikely to resemble the actual outcome of agreements, limiting the usefulness of the studies. One example of such criticism arose in relation to government procurement in the AUSFTA:

The DFAT–CIE study of the economic effects of the agreement considers this issue at length, and judges that as a result of market opening, Australian market penetration of the United States might reach 30 per cent of that of Canadian businesses (\$200 million per year for Australia, compared with \$650 million for Canada). This is doubtful. Canada tends to trade significantly more than normal with the United States on all fronts, not just on government procurement, because the countries are adjacent to each other ... The United States trades as much with Canada as it does with all 15 countries of the EU combined, and its trade with Ontario exceeds its trade with Japan (Wall 2000). This is not surprising, given that nearly 90 per cent of the Canadian population lives within 160 kilometres of the border with the United States ... The Canadian economy is about 70 per cent larger than the Australian economy and the Australian economy is almost 30 times further away from the United States than is Canada ... (Dee 2004, pp. 19–20)

As noted earlier, other concerns include the credibility of assumptions that tariff reductions or other liberalising actions will occur in full and immediately.

The 'realism' of studies undertaken before negotiation could be improved. For example, recent feasibility studies for both India and Indonesia included scenarios for 5 and 10 year phase-ins of tariff reductions.

The Commission also notes that, in the case of the NZ-Korea feasibility study, the scenarios used were:

... developed through consideration of what liberalisation has been achieved/negotiated by NZ and Korea in recently commenced trade agreements. (NZIER et al 2007, p. 50)

The scenarios developed for that study reflected past practice by both parties in relation to specific sectors. For New Zealand, 10 year phase-ins were assumed for textiles, leather products, wearing apparel, motor vehicles, transport and electronic equipment and some machinery and manufactures. For Korea, 10 year phase-ins were assumed in the case of meat and dairy products, 20 year phase-ins for processed rice and vegetables fruit and nuts, and paddy rice was not included (NZIER et al. 2007, p. 51).

There would be merit in having any quantitative analysis (including modelling and other forms of quantification of potential policy outcomes) undertaken as part of the options assessment overseen by a body independent of the executive. This should enhance its credibility and validity, heading off any concerns that modelling approaches or results may reflect pressures to legitimise a particular course of action. Further, the results, scenarios and assumptions used in the analysis should be made public, to allow them to be assessed and considered more widely.

After completion and publication of assessment, Cabinet would determine (and announce) the selected trade policy action or combination of actions. If the selection includes a trade agreement, Cabinet would determine (but not publish) ‘minimum acceptable outcomes’, as well as exit strategies and/or fallback outcomes that may be achieved should progress with negotiations become frustrated. The following assumes that some form of negotiated agreement (including a BRTA) is one of the selected options.

Negotiation process

While the Commission’s proposed approach should provide discipline to the options under consideration and the assessment of (potential) outcomes, it would not entail substantial change to the process of negotiation of Australia’s agreements.

Some participants made suggestions for improvement to the consultation process. For example, both the Business Council of Australia (sub. 47) and the Law Council of Australia (sub. 41) suggested the model of private sector involvement in the preparation of advisory committee reports used in the United States. However, the Commission does not consider that it would be appropriate to pursue such a model in Australia at this time, given the available consultation resources in Australia, and the sectoral outlook it could engender.

While DFAT does undertake consultation during negotiations (Mugliston 2009, p. 10), other possibilities for improvement could still be considered. To respond to concerns from some in industry that consultation during negotiations is limited both in scope of parties consulted and depth of detail, the Commission considers that further use of confidentiality deeds (as utilised in consultation on taxation matters) could be explored to facilitate greater industry and public involvement in those stages of the negotiation where confidentiality is necessary to avoid prejudicing negotiations. In addition to existing consultation, the use of confidentiality agreements would act as a proxy for trust and understanding built up between DFAT and experienced participants over years, potentially allowing the Department to expand the reach of its consultations during negotiations to include a broader variety of parties. It may also be possible for the Department to use the confidentiality agreements, where appropriate, to respond to requests for consultation by interested parties not already involved in the process.

In relation to wider concerns that negotiations can be left open without meaningful progress for substantial periods, one possibility would be to require six monthly Cabinet review of progress, through a brief submission updating the status of ongoing BRTA negotiations (including the length and cost of negotiations so far,

potential benefits still in play and likelihood of conclusion). However, the Commission considers that the annual update to the trade policy strategy would provide adequate Cabinet oversight of the progress of negotiations.

Subject to Cabinet approval, negotiations would continue until agreement is reached and the text is finalised. It would *not* be signed at that stage, but submitted for a post-negotiation analysis.

Post-Negotiation analysis

In addition to pre-negotiation assessment, the Commission considers that the economic implications of any proposed BRTA should be analysed *after* the completion of negotiations and prior to the signing of an agreement. At this time, there should be analysis of the likely costs and benefits of the actual provisions of a prospective agreement. As the CIE argued, analysis of a negotiated agreement can provide useful information, not included in a feasibility study, to decision makers:

... we see a role for quantitative analysis at several stages in the FTA evaluation process — in the Feasibility Study, to help inform the negotiations, and in quantifying the expected economic impacts of the negotiated agreement. ... The negotiated agreement should also be subjected to a rigorous quantitative exercise to assess/estimate the expected economic impacts. It is on the basis of this modelling exercise, plus assessment of qualitative and geopolitical considerations and risks, that the decision should be based about whether or not a country should enter into a particular agreement. (sub. DR75, pp. 8,10)

To ensure that such processes are as clear and robust as possible, they should be commissioned and overseen by a body that is independent from the executive. A transparent process should be adopted to ensure that the assumptions made as part of any economic modelling and other analyses are open to public scrutiny. This may also provide scope to formally elicit the views of stakeholders on the proposed agreement. There would be efficiencies (in time and consistency) in the same independent body overseeing both the pre- and post-negotiation analyses.

Such a process would provide more realistic information about the likely benefits and costs Australia may realise from entering into an agreement and illuminate any potential aspects which would likely have particularly adverse impacts that may have arisen during the course of negotiations, providing a better basis for a final decision by government as to whether the agreement in question should be proceeded with. While the prospective impact assessment process above can improve information available before initiating an agreement, the nature of the negotiation process means that a post-negotiation assessment will be more realistic than one conducted before negotiations have begun. Indeed, the substantial amount

of change agreed to as negotiations near finalisation alone would limit the usefulness of any pre-negotiation assessments.

While such a process would be intended to bolster confidence in the likely economic gains of any agreements, a number of participants expressed concerns about the Commission's draft recommendation that agreements be subject to final post-negotiation scrutiny (box 15.4).

Box 15.4 Some participants' concerns with post-negotiation analysis

Office of International Law (sub. DR83, p. 3):

It would be difficult, once an agreement has been negotiated, to suspend its conclusion, usually signified by signature, until after further assessment. Rather the two stage process for States to become bound by a treaty, namely signature and ratification, allows such an assessment to take place between signature and ratification. Indeed after signature each treaty is considered by the Joint Standing Committee on Treaties prior to being ratified. The review by the [JSCOT] could incorporate an economic analysis. We do not think it is necessary to create a new body to deal with an economic analysis when there is already a process, such as the [JSCOT], which can be utilised.

Department of Agriculture, Forestry and Fisheries (sub. DR95, p. 2):

The department agrees that there should be greater scrutiny of potential benefits prior to negotiations, but equally, assessments of actual benefits of agreements require a longer term view. At the same time, the department is not convinced that a post-negotiations "full and public assessment of a proposed agreement" ... as recommended by the PC would be beneficial. There would be a risk that such an assessment could destabilise years of negotiation and deter trading partners from committing to negotiate or sign agreements with Australia. However, we acknowledge that this is an issue that deserves closer attention.

Department of Foreign Affairs and Trade (sub. DR98, p. 17):

There are significant practical difficulties with proposals to release negotiated FTAs for purposes of public and independent assessment before the agreement is signed. Under Australian treaty practice, and in accordance with international practice, the details of the FTA package are not released until the FTA has been formally signed. DFAT's view is that to do otherwise could risk creating tensions with the negotiating partner country; damage confidence in Australia's credibility as a negotiating partner; and complicate the process of finalising the FTA. For example, such an approach would allow interest groups within the partner country to seek further changes to the negotiated agreement, and hence cause difficulties in being able to bring the FTA to a final conclusion.

National Farmers' Federation (sub. DR85, p. 5):

However, the NFF does acknowledge that, in practice, additional scrutiny after the completion of negotiations could be difficult to achieve and has the potential to politicise the agreement sign-off process to a standstill. It may also have the potential to undermine the integrity of an 'in good faith' negotiation process.

The Commission accepts that the additional processes it has recommended could apply some braking to the development of BRTAs. In particular, it could lengthen the time required for consideration and approval of a given agreement. Further, the Commission acknowledges that not all prospective partners would be as amenable to entering negotiations with Australia, particularly where the likely benefits are marginal, as they would be under the current arrangements (without post-negotiation analysis).

Nonetheless, on balance, the Commission's assessment is that the concerns raised are not sufficient to override the benefits from the recommended approach.

Specifically, in relation to concerns of uncertainty or 'destabilising' the negotiation process (DFAT, sub. DR98; DAFF, sub. DR95), the Commission's considers that these changes would improve the likelihood that any BRTA agreed and entered into is in Australia's public interest. Indeed, the Commission considers that if earlier steps in this process are followed, and negotiations proceed within the broad parameters envisaged, the post-negotiation analysis would ordinarily serve to confirm the benefits of the agreement. Prospective negotiating partners would be notified of Australia's processes before negotiations commence, providing a clear indication of the broad policy parameters with which Australia's negotiators are working. They are also likely to provide incentives for negotiators from partner countries to be mindful that whatever is offered to Australia within an agreement will be subject to public analysis.

Another concern was that public exposure of an agreement before signing could 'cause difficulties' by allowing interest groups (including in partner countries) to comment on the agreement as negotiated (DFAT, sub. DR98). While this may be true, the Commission considers that the transparency entailed is appropriate given the sometimes broadranging nature of the issues subject to negotiations, and the concerns raised in relation to some past BRTA processes. Given the impact on several domestic policy areas, the Commission's view is that it is appropriate that domestic stakeholders are consulted before a government commits to an agreement. The post-negotiation analysis would provide an opportunity for experts and interested parties from outside of the government to comment on the details of the agreement. It would also facilitate the testing of the veracity of the assumptions, analysis and results presented, improving accountability and confidence in the final analysis that emerges. In the Commission's view, trade agreements that would deliver significant net benefits should be sufficiently robust to be able to withstand such scrutiny.

In relation to the concern about introducing a delay to the agreement process between conclusion of negotiations and signing (OIL, sub. DR83), the Commission

notes that current practice includes a process of legal verification to ensure that there are no technical errors and that the text accurately reflects negotiated outcomes. In the case of the AANZFTA negotiations, this process meant that there was over six months between the substantive conclusion of negotiations and the signing of the agreement (Mugliston 2009, p. 12). The Commission acknowledges that its proposal would also entail a time period between initialling and signing of an agreement, and would bring forward an evaluation that might otherwise be undertaken, to some degree, by JSCOT. As noted above, however, the present JSCOT process cannot be utilised to provide improved information to Cabinet before a decision is made. While JSCOT would still of course be at liberty to undertake its own assessment, it could draw on the already published independent analysis during its considerations, supplementing it with further analysis if it saw fit.

Following the completion and publication of the post-negotiation analysis, Cabinet (informed by the analysis) would determine whether or not to sign the agreement.

Parliamentary process and enabling legislation

Under the Commission's proposed approach, the process for the implementation of agreements (including parliamentary review and enabling legislation) would remain largely unchanged, except that the improved economic analysis would be available when enabling legislation is presented to Parliament.

The Commission is cognisant of the recommendations of past Senate committees for greater parliamentary involvement both in endorsing negotiations and voting on treaties. However, the Commission does not consider that direct parliamentary involvement in the signing of agreements is necessarily appropriate, as the proposed approach should bring an appropriate level of transparency and accountability to the process of establishing trade agreements, by providing improved information to allow Parliament to assess the implication of ratifying agreements through the passage of enabling legislation.

Such assessments should not have the effect of penalising trade policy proposals that are likely to deliver significant economic gains.

15.4 Proposed approach

To achieve the improvements envisaged under its process framework (set out in figure 15.2), the Commission recommends:

RECOMMENDATION 5

The Australian Government should improve the scrutiny of the potential impacts of prospective trade agreements, and opportunities to reduce barriers to trade and investment more generally.

- a) It should prepare a trade policy strategy which identifies impediments to trade and investment and available opportunities for liberalisation, and includes a priority list of trading partners. This trade policy strategy should be reviewed by Cabinet on an annual basis, and be prepared before the pursuit of any further BRTAs. A public version of the Cabinet determined strategy should be released.***
- b) Before entering negotiations with any particular prospective partner, it should undertake a transparent analysis of the potential impacts of the options for advancing trade policy objectives with the partner. All quantitative analysis and modelling should be overseen by an independent body.***
- c) It should commission and publish an independent and transparent assessment of the final text of the agreement, at the conclusion of negotiations, but before an agreement is signed.***

In relation to existing agreements, there is some reason to leave those aspects of the process that directly affect the negotiating partner as they are, as changes to the procedures mid-negotiation could run the risk of harming relations with partner countries, and therefore progress in negotiations. However, the Commission considers that, where possible, aspects of the process that are within the Australian Government's control and do not directly impact on relations with partner countries, could be improved for those negotiations already in train. In particular, consultation during negotiations could be improved and the feasibility study could be updated and enhanced with consideration of potential scenarios, including already publicly announced aspects of an agreement.

The Commission also considers that formal Cabinet oversight of progress of agreements could be instituted in the short term, in order to examine progress against milestones for existing agreements, as an input to the first trade policy strategy.

Figure 15.2 The Commission's proposed process framework

