PARLIAMENTARY INQUIRIES INTO FREE TRADE AGREEMENTS AND INDIGENOUS ISSUES

MEGAN DAVIS*

In recent years a number of parliamentary inquiries have been conducted examining the impact of international trade agreements upon the Australian community. These inquiries have included an inquiry into the World Trade Organisation[1] (WTO), the WTO *General Agreement on Trade in Services*[2] and two parliamentary inquiries into the impact of a *United States - Australia Free Trade Agreement* (FTA).[3] Submissions from Indigenous communities have been few. This is concerning given the likely impact of further trade liberalisation upon the most vulnerable in the Australian community, Indigenous peoples. The impact upon Indigenous communities may range from changes to intellectual property laws to the liberalisation of health services or education services or the increase in prices for medicines. Part I of the paper considers the importance of parliamentary inquiries including the role of Joint Standing Committee on Treaties (JSCOT) and introduces broad community concern about the FTA. Part II addresses the major Indigenous concerns that were raised in the few submissions to the parliamentary inquiries into the FTA. Part III concludes the paper speculating as to why Indigenous input was limited and considers the effects of limited Indigenous participation in democratic deliberation.

PART I: The Importance of Parliamentary Inquiries

Contemporary liberal democracies such as Australia are inherently minimalist – they are "ballot box" democracies that require only limited citizens participation.[4] Key to the Western liberal democratic configuration is full and free periodic elections - multiple parties, full franchise and a secret ballot. There are other ways in which citizens can participate beyond the ballot box and these typically involve joining a political party, running for a

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* Megan Davis is Senior Lecturer and Director of the Indigenous Law Centre, Faculty of Law, UNSW.

1 '*Who's Afraid of the WTO? Australia and the World Trade Organisation'* Report No. 42, Joint Standing Committee on Treaties report (24 September 2001).

2 Ibid.

3 *Joint Standing Committee on Treaties, Parliament of Australia, Australia – United States, Free Trade Agreement (2004),* <http://www.aph.gov.au/house/committee/jsct/usafta/report.htm> at 5 June 2006;
Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Parliament of Australia,Final Report on the Free Trade Agreement between Australia and the United States of America (2004), <http://www.aph.gov.au/Senate/committee/freetrade_ctte/report/final/report.pdf> at 5 June 2006.

4 See generally, Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (2000).

representative position, writing letters to the editor or making submissions to parliamentary inquiries. In Australia parliamentary inquiries have been one of the main avenues for citizens to participate in policy decisions beyond the ballot box.

At the last Federal election, the government won control of the Senate. Prior to this, the Federal government did not have full control of the Senate. This meant that for many significant legislative initiatives and amendments, bipartisan parliamentary inquiries were conducted to consider the impact of new legislation and legislative changes upon the Australian community. The period leading up to the Federal government gaining control of the Senate coincided with the period leading to the signing of the FTA. The Senate was thus in a position to hold inquiries into the impact of the FTA upon the Australian community.

Changes to the domestic incorporation of International law into the Australian legal system

When the current Federal government came to power in 1996, it initiated significant changes to the way in which international agreements were entered into. The Federal government established a JSCOT to provide a more efficient and transparent process for entering into international agreements. JSCOT's role is to review and report on all treaty actions proposed by the Government.[5] The JSCOT review includes a National Interest Analysis (NIA) which includes consideration of the following information:

- The economic, environmental, social and cultural effects of the proposed treaty;
- The obligations imposed by the treaty;
- How the treaty will be implemented domestically;
- The financial costs associated with implementing and complying with the terms of the treaty; and
- The consultation that has occurred with State and Territory Governments, industry and community groups and other interested parties.

It is the role of JSCOT to take evidence in public hearings and consider written submissions on the subject matter of the proposed treaty action and

[5] The Committee's resolution of appointment empowers it to inquire into and report upon: (a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament; (b) any question relating a treaty or other international instrument whether or not negotiated to completion, referred to the committee by: i. either House of Parliament; or ii. a Minister; and (c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

finally to present a report to Parliament about the issues that were raised in considering the proposed treaty.

JSCOT is one parliamentary procedure that provides an important opportunity for organizations and individuals from within the Indigenous community to make submissions about the impact of proposed international treaties upon Indigenous economic, environmental, social and cultural interests.

The US-Australia Free Trade Agreement

Australia and the United States are both member states of the WTO. The WTO has as its primary agreement the General Agreement on Trade and Tariffs (GATT). The two core principles of the multilateral trading system and GATT are 'Most Favoured Nation' (MFN) and 'National Treatment'. Most Favoured Nation is defined by Article 1 of the GATT and provides that with respect to customs duties and charges of any kind imposed on any Member State, any advantage, favour, privilege or immunity shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[6] This means that under MFN all state members must give other members the same treatment as they would any other country or member. The MFN rule would presumably preclude the negotiation of free trade agreements however under GATT there are exemptions for these types of agreements even though they conflict with the MFN principle.[7] The WTO Committee on Regional Trade Agreements monitors these agreements and examines the implications of these agreements for the multilateral trading system. According to the World Trade Organisation (WTO) the majority of state members are party to one or more free trade agreements.

On 1 January 2005, the FTA came into effect covering a wide range of areas including agriculture, dairy, seafood, manufacturing, services, intellectual property, investment and government procurement contracts. The prospect of a free trade agreement with the United States had been controversial among a diverse range of community groups and academic experts and the inquiries sustained some of the highest number of submissions of any parliamentary inquiry. It has been described as a 'devastating'[8] and 'a deal at any cost'.[9] Two major inquiries were held into the FTA - the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America and the Joint Standing Committee on Treaties Australia – United States, Free Trade Agreement. The Senate Select Committee had 548 submissions of which four were Indigenous or dealt solely and specifically with Indigenous issues

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[6] *General Agreement on Tariffs and Trade 1944, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), Article 1 GATT.

[7] Ibid, Article XXIV GATT.

[8] Linda Weiss, Elizabeth Thurbon and John Mathews, *How to kill a country: Australia's devastating trade deal with the United States* (2004).

[9] Ann Capling, *All the way with the USA: Australia, the US and Free Trade* (2005) 56.

including the AWD Aboriginal Justice Support Group, the Aboriginal Heritage Support Group, the Central Australian Aboriginal Congress Inc and a submission from the Aboriginal and Torres Strait Islander Commission (ATSIC). The JSCOT received 214 submissions with two solely and specifically dealing with Indigenous issues. This was a submission by the Aboriginal & Torres Strait Islander Services (ATSIS) that was a duplicate copy of the Aboriginal and Torres Strait Islander Commission's submission to the Senate Select inquiry and a submission from Jumbunna Indigenous House of Learning, University of Technology, Sydney.

The main areas of concern among groups in the community included proposed changes to the Pharmaceutical Benefits Scheme and changes to the Pharmaceutical Benefits Advisory Committee (PBAC) which enable US pharmaceutical companies to seek review of the decisions of the PBAC. Chapter 17 of the Agreement also entrenches the WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS) as well as providing for an extension in copyright protection from 50 years to 70 years – potentially resulting in rising costs for schools and libraries. The establishment of a joint committee on quarantine called the Committee on Sanitary and Phytosanitary Matters raised serious environmental concerns for Australia particularly given the scrutiny of quarantine in Australia. The dispute resolution process for the FTA also permits the US government to challenge particular Australian laws. This may have a significant impact upon policy relating to health, environment and culture.

The final text of the FTA contains a small exemption for Indigenous peoples. First, in relation to Cross Border Trade in Chapter 10, Australia reserves the right to:

> …adopt or maintain any measure according preferences to any Indigenous person or organisation or providing for the favourable treatment of any Indigenous person or organisation in relation to the acquisition, establishment, or operation of any commercial or industrial undertaking in the service sector.[10]

In Chapter 11 on Investment:

> Australia reserves the right to adopt or maintain any measure with respect to investment that accords preferences to any Indigenous person or organisation or provides for the favourable treatment of any Indigenous person or organisation.[11]

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[10] Text Australia-United Stated Free Trade Agreement, annex II-1; see Department of Foreign Affairs and Trade, Australia-United States Free Trade Agreement, <http://www.dfat.gov.au/trade/negotiations/us.html> at 5 June 2006. See Department of Foreign Affairs and Trade, Australia-United States Free Trade Agreement, <http://www.dfat.gov.au/trade/negotiations/us.html> at 5 June 2006; Office of the US Trade Representative, Australia FTA, <http://www.ustr.gov/Trade_Agreements/Bilateral/australia_FTA/Section_Index.html> at 5 June 2006.

[11] Ibid.

The Cross Border Trade in Services exemption applies to government procurement made for the health and welfare of Indigenous people and for government measures for their economic and social advancement. The exemption for Investment allows for the right to adopt or maintain any measure with respect to investment that accords preferences to any Indigenous person or organisation or provides for the favourable treatment of any Indigenous person or organisation.

PART II: Issues for Indigenous Australia

Culture

The issue of culture and the protection of culture was one of the main Indigenous concerns. In particular, rules with respect to audio-visual services and local content rules including US access to Australian media will have significant implications for the Australian local content quota. Indigenous media and audio-visual content may be disproportionately impacted if Australian audiences have less access to Australian content. As the Aboriginal Heritage Support Group argued in its submission to the Senate Select Committee:

> The maintenance of Australian control over the content and ownership of our media is vital to facilitate debate on essential issues. This is under threat under the proposed FTA and must be guarded against. It is essential to maintain a distinctly Australian voice telling our own stories exploring issues pertinent to our own history and culture, particularly in relation to Indigenous peoples. Any US interference in this sphere to ensure economic benefit to itself would be a very destructive influence.

Of even greater concern is the decade of work in advocating law reform of Australian intellectual property laws by Indigenous peoples to better accommodate Indigenous knowledge. It is a concern that advances made in reform of these laws may be negated by the intellectual property provisions of the FTA. This point was highlighted by the submission from Jumbunna Indigenous House of Learning, UTS which argued:

> The strengths and weaknesses of the regime of intellectual property laws has been the subject of substantial research and comment. Issues such as recognition of collective rights in relation to works, duration of copyright in relation to cultural expression, access to traditional knowledge and sharing in the benefits arising from research, development and patenting of products and processes based on traditional knowledge, a resale royalty and breach of confidence in relation to Indigenous knowledge or cultural expressions which acquires the characteristics of confidentiality have been canvassed as vital areas in need of reform.[12]

Moreover with the implementation of intellectual property rules that go beyond that of TRIPS, Indigenous peoples should be concerned given that

[12] Jumbunna Indigenous House of Learning, UTS submission, Senate Select Committee on the Free Trade Agreement between Australia and the United States.

much Indigenous international advocacy has been targeted at critiquing the impact of TRIPS upon the capacity to make *sui generis* laws to protect Indigenous knowledge. TRIPS is acknowledged internationally as being inimical to Indigenous traditional knowledge. The *International Cancun Declaration of Indigenous Peoples* stated that:

> The patenting of medicinal plants and seeds nurtured and used by Indigenous Peoples, like the quinoa, ayahuasca, Mexican yellow bean, maca, sangre de drago, hoodia, yew plant, etc. Such biopiracy and patenting of life-forms is facilitated by the TRIPS Agreement.[13]

The gap in TRIPS on issues such as traditional knowledge protection and access to medicines has been identified by some of Australia's international trade law experts. As Bryan Mercurio observes of the agreement:

> WTO Member States and interested observers have recognized that significant gaps exist in the agreement with respect to patent protection and access to life-saving medicines in developing and least-developed countries (LDCs); but finding and agreeing on improvements to the system has proven to be a much harder proposition.[14]

Indigenous culture contributes millions of Australian dollars to the Australian economy annually but because of intellectual property laws and inertia in law reform much of this income does not return to Indigenous communities. Given the amount of work done internationally on TRIPS it is surprising that there has been so little attention paid to the potentially disastrous impact of more strict and tighter intellectual property laws as inherited through the FTA for Indigenous Australia. As Australian intellectual property expert, Matthew Rimmer, argued before the JSCOT: 'There is no requirement on the United States to provide for recognition of communal ownership of Australian Indigenous cultural works. This is a significant setback given that New York in particular is a hub of the art market'.[15] It is deeply concerning that no mention of Indigenous peoples was made in the intellectual property chapter.

Health

Broadly, health issues dominated much of the public debate on the FTA. Not surprisingly given the health crisis in Indigenous communities, health issues including the potential for rising medicine costs dominated the

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[13] The International Cancun Declaration of Indigenous Peoples 5th WTO Ministerial Conference, Cancun , Mexico, 12 September 2003. <http://www.eireview.org/eir/eirhome.nsf/(DocLibrary)/EC2E0481ADA1BCD485256DAA006A4410/$FILE/Cancun%20declaration.doc>

[14] Bryan Mercurio, 'TRIPSs, Patents and Access to Life-Saving Drugs in the Developing World' (2004) 8 *Marquette Intellectual Property Law Review* 211.

[15] Matthew Rimmer, The Australia – United States Free Trade Agreement and the Copyright Term extension, 43, <http://www.aph.gov.au/house/committee/jsct/usafta/subs/SUB027.pdf> 18 September 2005.

Indigenous submissions to the inquiries. As the Central Australian Aboriginal Congress Inc argued:

> Given that in 2000 the average weekly income for aboriginal people resident in Alice Springs was only $200 their ability to absorb the costs of medicines becomes questionable.[16]

Indigenous submissions were concerned about any potential changes to the PBS. According to the Central Australian Aboriginal Congress:

> Pharmaceutical Benefits Scheme Section 100 coverage was extended to remote Aboriginal Health Services in 1997, improving access for Aboriginal clients of these services. Nationally aboriginal people were only accessing the PBS at a rate of 22 cents in the dollar compared to non-Aboriginal Australians prior to this change, afterwards this changed to 33 cents in the dollar.[17]

The Congress's observation had been backed up by a government commissioned report:

> The implementation of Section 100 medications for remote area Aboriginal Health services has completely revolutionised medicines access and has been one of the most substantial, positive developments in remote Aboriginal health service delivery for many years. Already evidence is emerging regarding the health outcomes for Aboriginal people.[18]

Yet the Congress expressed its concern to the inquiry that:

> Currently through access to Section 100 our clients are shielded from these impacts. However if governments were to review the degree to which they were prepared to provide PBS Section 100 coverage to Aboriginal people in remote clinics and attempted to recoup costs through including those Aboriginal people in the co-payment category, modelling undertaken by the Australian Institute would suggest a considerable cost burden shift onto this group.[19]

This is backed up by the Aboriginal heritage support group submission which stated:

> The possible changes to the Pharmaceutical Benefits Scheme under the Free Trade Agreement which could see price rises on medications would have a severe impact on the Aboriginal community, which has a significant reliance on medical assistance to manage health problems. Combined with recent attacks on Medicare and a reduction in bulk-billing doctors, this could be catastrophic.

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[16] Central Australian Aboriginal Congress Inc submission, Senate Select committee on the Free Trade Agreement between Australia and the United States, 4.
[17] Ibid 3.
[18] H Loller, Final Report Section 100 Support Project Commonwealth Government Australia (2003) cited in Central Congress submission above n 16.
[19] Central Congress submission above n 16.

Clearly, Indigenous organisations that made submissions to the inquiries highlight the significant impact changes to the pharmaceutical Benefits Scheme will have upon Indigenous communities. It is likely that in years to come, US Pharmaceutical companies will put pressure upon the Australian government to make changes to the PBS. Given that Indigenous peoples are the most vulnerable community in Australia this would impact upon resources and the provision of health services in Indigenous communities.

PART III Conclusion

The low number of Indigenous submissions to the parliamentary inquiries into a FTA is surprising given that 'There is a risk that AUSFTA will severely limit the government's capacity to continue measures to improve the economic and social status of Indigenous peoples'.[20] As the Congress noted in its submission:

> For people in marginalised social positions and remote geographic locations we are sceptical that the private sector would provide culturally appropriate services at affordable rates and believe that Aboriginal people would have little to no leverage upon these institutions to effect policy change on this issue.[21]

There are a number of reasons why Indigenous community groups didn't participate in the inquiries. There is not a clear nexus between trade liberalisation and trade rules with contemporary Indigenous issues in a traditional sense ie land rights, customary law or native title. Indigenous communities perhaps consider public debate on trade agreements and trade rules as having greater synergy with business interests and having less daily relevance to them. At the time of the inquiries the Aboriginal and Torres Strait Islander Commission was still in existence and perhaps it was considered that the submission of ATSIC was sufficient to represent the concerns of Indigenous peoples. Another plausible reason is the general disengagement of Indigenous peoples from public institutions and public processes and equally possible, the lack of resources in Indigenous communities to analyse the FTA and contribute to public debate.

Whatever the reason for the paucity of submissions and engagement from Indigenous communities it is nonetheless concerning. The influence of externally determined trade rules and negotiated free trade agreements will have an increasing impact upon the capacity of Australian governments to make laws and regulations in a variety of areas from environment, health and welfare to intellectual property protections. The failure to forge a significant voice of opposition in alliance with civil society's response to international trade laws and further trade liberalisation will enable policy makers to disregard the opinions and needs of Indigenous communities. This is

[20] Chapter 8, Aboriginal and Torres Strait Islander Commission submission Senate Select Committee on the Free Trade Agreement between Australia and the United States.
[21] Central Australian Congress submission above n 16.

particularly inevitable in the absence of entrenched recognition of inherent rights and certainly in the absence of any national Indigenous representative body that can advocate politically on behalf of Indigenous issues. In the end there were limited exemptions granted to Indigenous communities however the monitoring of the effectiveness of these exemptions and how the broader FTA will impact upon Indigenous communities depends upon the role Indigenous community organisations and interested individuals fashion in making the Australian government accountable.