

TRADE POLICY: THE ROLE OF PUBLIC ENQUIRIES[?]

by

PETER LLOYD*

1 Trade Policy

Trade policy is at once one of the most complex of economic subjects, involving as it does the whole macro-economy of the country and its interrelations with other countries, and a subject about which most Australian households have an opinion. This combination of complexity and common concern is a dangerous mix from the point of view of the formation of public policy. It introduces numerous possibilities of interest groups misrepresenting policy issues. They can do so by exaggerating their individual losses, and misrepresenting their private interests as national interests. They can hire 'experts', who are really articulate spokespersons for some interest group.

In this policy environment, the quality of advice given to our parliamentarians is crucial if they are to pass legislation that promotes the interests of Australia as a whole. This is the subject I take for the 2005 Lecture[?] how can we make sure that parliamentarians receive the best advice before they legislate to change trade policies? I shall argue that we need to improve our processes of public enquiry.

I am honoured to be given the opportunity to expound on this important question. Stan Kelly, in whose memory this Lecture Series is named, was a member of the Tariff Board from 1929 to 1939. He passed away even before I arrived in Australia but I am fortunate in having known his son, the late Bert Kelly. Bert chose two fora to put forward his passionately-held views on tariffs and related issues of trade policy. He was the Liberal Member of Parliament for the South Australian seat of Wakefield. But he was also a journalist. While still a Member of Parliament, he was the author of the column that appeared regularly in the *Australian Financial Review* and the *Bulletin* under the pseudonym 'The Modest Member' and later 'the Modest Farmer'. The column was both enlightened and brilliantly witty.¹

But it had another characteristic, which helps to explain its large following. It was superbly well written. It was a model of how to convey a message to ordinary people ?

[?] This article first appeared in the Economic Society of Australia's journal *Economic Papers* Vol 25 No. 1 March 2006 and is reproduced here with the Society's permission. *Economic Papers* is available on-line at www.informit.com.au/library. Instructions for submitting articles to this journal can be found on the Society's web site www.ecosoc.org.au/cc/publications

* Department of Economics, University of Melbourne.
This paper was delivered to the Economic Society of Australia, Victoria Branch, on 7 September 2005, as The Stan Kelly Memorial Lecture 2005.

¹ For those unfamiliar with Bert Kelly's writings, I would recommend his books: Kelly (1978, 1981).

John Howard's 'battlers' ? by the use of simple language. Bert wrote columns with headings like

How our high tariffs lower our standard of living.

How if we do not sell, we cannot buy.

How in a land of import licensing we could become a land of beggars.

In making my presentation, I shall try to emulate his plain speaking. My first heading is 'Trade policy matters'.

2 Trade Policy Matters

Let me explain how trade policy matters to Australian households.

First, there is the 'Principle of Comparative Advantage'. In plain language, firms in a given nation seek to specialise in what they produce efficiently by comparison with firms in other nations. This means that they must give up the things that they do not produce efficiently. When trade is freed, the total supply of goods and services available to Australians increases and with it the welfare of Australians collectively. And importantly, we should add, the choice of final goods and services is increased. Freedom of trade is freedom of choice. But this is only part of the story of free trade. This benefit is a 'once-and-for-all' effect.

Second, freeing trade may affect permanently the long-term rate of growth of the economy. There has been a vigorous controversy among economists about the effects of liberalising international trade in goods on the long-run rate of economic growth. In a number of ways, international goods-trade liberalisation may increase the rate of saving and capital formation and it may assist the transfer and adoption of new technologies and the rates of growth of factor productivities.

What is the evidence bearing on this aspect of trade?

The results of empirical studies are remarkably consistent, not only in terms of finding a positive association between opening of economies and higher economic growth but even about the magnitude of the effect. (The empirical literature is conveniently summarised by Lewer and Van den Berg, 2003.) Holding other growth-inducing factors constant, a one percentage point increase in the growth of exports is associated with a one-fifth percentage point increase in the rate of growth of real GDP per capita. Thus, a country whose exports grow more rapidly by, say, five per cent per year as a result of opening up the trade sector, can expect to have an increase in its annual growth of per capita output of one percentage point. This is a big gain.

Accepting, then, that trade policy matters for the residents of a nation, there is an immediate corollary: policy advice matters.

3 Where do Governments get their Advice?

But the advice a government receives on any trade matter comes from many different sources and advice from different sources can conflict. Conflicts arise because a change in trade policy leads to changes in the prices of the goods and services that we trade and? more importantly to many households? this induces changes in their factor incomes: the wages and salaries of workers; the prices of capital assets employed in industries that will expand or contract when border prices change; and farm and mineral rents. The real incomes of some factor owners will increase and those of others will

decrease.² Thus consumers, workers and asset owners will press a government to make or to not make a proposed change in trade policy, depending on whether the real incomes of individuals in each group are increased or decreased by the change. This is completely normal and desirable in a democracy. But how are governments to weigh conflicting advice?

In order for a democracy to function so that its government's decisions are made for the good of the residents collectively, there must be some enquiry before decisions are taken. The enquiry must be public, otherwise the process of policy-making is not transparent to voters. But governments and ministers have a tendency to keep things from the public. They often seem to follow the principle that applies to growing mushrooms, the 'Mushroom Principle': keep them in the dark, feed them on manure, and all will be well.

I interpret the term 'public enquiry' broadly as any advice given to a government that is made public. There are three major sources of public advice:

- Commissioned studies, such as consultants' reports
- Parliamentary committees
- Independent statutory authorities such as the Productivity Commission

4 Two Recent Examples of Trade Policy Advice

I shall consider two examples of trade policy-making: the ongoing WTO Doha Round of Multilateral Trade Negotiations and the 2004 Australia–US Free Trade Agreement.

These are the most important events in trade policy for many years.

The Doha Round is the first round of multilateral negotiations held under the auspices of the WTO. The outcome of the Round will be to lay down the course of multilateral trade liberalisation for the next ten years or so. Measures covered by these negotiations are much more comprehensive than those in any of the rounds conducted under the auspices of its predecessor, the GATT? they now cover measures relating to all goods and services and also intellectual property. These negotiations are vitally important for all Australian households, though not many of them recognise this.

The political debate over AUSFTA, the Australia–US Free Trade Agreement, which came into effect on 1 January 2005, was one of the most intense political wrangles over trade policy for many years. The agreement is important to Australians for several reasons. First, the US is our single most important trading partner. Second, the negotiations covered a number of beyond-the-border measures that had not previously been subject of international agreement by this country? notably the Pharmaceutical Benefits Scheme and copyright law. Third, the Agreement marked a major expansion in the scope of our regional preferences for the entry of goods and services into Australia. Prior to this agreement, preferences were limited to trade with New Zealand, Singapore, and Thailand, all countries that are lesser trading partners.

² There is an important result in the theory of international trade, known as the Stolper–Samuelson Theorem, which states that when the price of one tradeable rises relative to all others (for example, by protecting it by a tariff or import quota if it is an importable) it is inevitable that some factor-owners must gain and some must lose. (For a recent general treatment of this theme, see: Lloyd, 2000). This universality of conflict between different groups of households when governments intervene at the border explains why trade policy is, and always has been, contentious.

Example 1: WTO Doha Round of Multilateral Trade Negotiations

What did the Government do in the way of public enquiry for these negotiations? Because of the way trade policy is formulated in Australia, I shall have to consider inquiries initiated by the executive branch of the Government and those initiated by the legislative branch, the Houses of Parliament. Consider first inquiries by the legislative branch of the Government.

There has been only one parliamentary inquiry regarding the WTO negotiations, and this was confined to only one aspect, namely trade in services.³ The Senate Foreign Affairs, Defence and Trade References Committee held a public inquiry into the General Agreement on Trade in Services. It produced a report (Senate Foreign Affairs, Defence and Trade References Committee, 2003) that made a number of recommendations concerning the position that Australia should take in the negotiations on services trade.

In framing trade legislation, the Executive branch of government relies on advice from the Department of Foreign Affairs and Trade, the line department for trade-policy matters. This is supplemented these days by advice from other departments, given the expanded scope of the trade negotiations. In the negotiation of trade treaties, decisions as to the position that Australia takes in these negotiations, including determination of objectives and the position on individual measures, and the final decision as to whether Australia signs the agreement are taken by the Minister of Trade or, in important cases, by Cabinet. The advice that the administering department gives to the Minister and through him to Cabinet is the critical determinant of the advice the Minister and Cabinet receive.

The Department of Foreign Affairs and Trade has in recent years substantially increased its public consultations as a part of the treaty-making process. The consultations have taken the form of formal and informal meetings with groups of stakeholders, principally industry groups, with face to face meetings, and invitations to the public to give their views.

As a part of these consultations, the Department issued two discussion papers on the WTO negotiations and invited the members of the public to give their views on two occasions: in July 2001, before the Doha Ministerial Meeting, which was to lay down the scope of the negotiations; and in April 2002. The Department also issued a public discussion paper in January 2003 on the issues subject to negotiation under the General Agreement on Trade in Services (GATS). This set out the options for negotiations and invited submissions (Department of Foreign Affairs and Trade, 2003).

Example 2: AUSFTA

As in the first example, I shall consider enquiries by the legislative branch and then consider that by the executive branch of government.

There were three parliamentary inquiries. First, the Senate Foreign Affairs, Defence and Trade References Committee prepared a report on the prospective Agreement (Foreign Affairs, Defence and Trade References Committee, 2003). This Committee

³ The Joint Standing Committee on Treaties examined a range of issues relating to Australia's relationships with the WTO in JSCOT (2001). However, this report dealt with the general nature and operation of the WTO. It did not examine the issues under negotiation.

held public hearings between May and October of 2003 and tabled its report in November, 2003. Thus the Committee began examining the proposal after the negotiations had begun and reported before the negotiations had concluded. (See Table 1.) Second, the Joint Standing Committee on Treaties prepared a report on the Agreement (JSCOT, 2004). Third, the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America considered the text of the agreement that was reached in February 2004 and tabled in Parliament on 8 March, 2004. This inquiry had been recommended by the earlier report of the Senate Foreign Affairs, Defence and Trade References Committee in 2003 (though the Government members of the Committee, in a Minority Report attached to the main report, considered this unnecessary). This text was the final form of the Agreement, apart from some 'legal scrubbing'. It tabled its report in August 2004 (Senate Select Committee, 2004).

TABLE 1
SEQUENCE OF EVENTS RELATING TO THE NEGOTIATION OF AUSFTA

| | |
|---------------------------|--|
| 14 November, 2002 | Formal announcement that negotiations would begin |
| March 2003–February, 2004 | Five rounds of negotiation |
| November, 2003 | Foreign Affairs, Defence and Trade Reference Committee Report tabled |
| 8 February, 2004 | Agreement reached on AUSFTA |
| 8 March, 2004 | Agreement tabled in Parliament |
| 18 May, 2004 | Agreement signed |
| June, 2004 | Joint Standing Committee on Treaties Report tabled in Parliament |
| August, 2004 | Senate Select Committee report tabled in Parliament |
| 13 August, 2004 | Enabling legislation passed by Australian Parliament |
| 1 January, 2005 | Agreement entered into force |

As with the multilateral negotiations, consultations by the Department of Foreign Affairs and Trade over AUSFTA took the form of formal and informal meetings with groups of stakeholders, principally industry groups. As a part of these consultations, the Department issued a number of background papers on the AUSFTA negotiations and, during the course of the negotiations, it published a newsletter regularly. It also invited members of the public to give their views.

This case illustrates another feature of public enquiry that is new to Australia:⁴ the use by the Department of Foreign Affairs and Trade of commissioned studies. During the time a free-trade agreement between Australia and the US was under discussion by the governments of the two countries, the Department commissioned two studies. The

⁴ There is a precedent. In an earlier round of discussions with the US Government over the possibility of a free-trade agreement, the Department commissioned one study by Snape (1986) and a later one by Snape, Adams and Morgan (1993).

first, by the Australian APEC Studies Centre at Monash University, was published in 2001 (Australian APEC Studies Centre, 2001). This was a general review of the issues and the possible scope of an agreement. The second, by the Centre for International Economics, was also published in 2001 (Centre for International Economics, 2001). It was a modelling exercise, indeed, the first model ever used in Australia as part of the enquiry process into a bilateral or a multilateral trade treaty. This model assumed that trade in all sectors of the economy would be completely freed. After conclusion of the Agreement, the Department of Foreign Affairs and Trade commissioned another study from the CIE to provide an analysis of the actual terms of the Agreement (CIE, 2004). The model and the analysis from this model were heavily criticised in two other modelling exercises that were constructed to look at the outcome of a possible bilateral agreement with the US. The first of these was in a report by ACIL (2003). This was commissioned, not by the Department of Foreign Affairs and Trade, but by the Rural Industries Research and Development Corporation. The second of these was the report by Dee (2004), which was commissioned by the Senate Select Committee. In commissioning this report, the Senate Committee followed the general practice of the Department but it specifically requested that the author examine the assumptions on which the CIE study was based.

Since the first study commissioned from the Monash APEC Studies Centre in 2001, the Department of Foreign Affairs and Trade has developed a new style of public enquiry into bilateral or regional proposals. It calls for submissions from the public on the proposed bilateral arrangement. It calls for public tenders to carry out modelling and analysis of the possible outcomes. This was the style it adopted for the Free Trade Agreements with Singapore and with Thailand that were signed in July 2003 and July 2004 respectively. And it is style it is currently following in the Australia–China Free Trade Agreement Joint Feasibility Study, the Australia–Malaysia FTA Scoping Study and the Australia–Japan Trade and Economic Framework. In the last three cases, the Australian Department is playing a coordinating role, along with a department or agency from the other country, in the studies and the published results. For these modelling exercises, the Department has used a variety of consultants and think-tanks outside the Public Service: Access Economics, the Centre for International Economics, the Monash APEC Studies Centre and the Centre for Policy Studies at Monash University.

What can we conclude about the adequacy of the enquiry process in these two examples? To reach any conclusions, we need principles against which we can compare practice.

5 Some Principles of Enquiries

It is desirable to base suggestions for improving the process of enquiry on trade policy matters on general principles. I suggest five basic principles:

- Public enquiry
- Timeliness
- Transparency
- Disinterested and independent investigation
- Technical competence

The first means that enquiries should be conducted in public and the results published.

The second means that major enquiries should be completed before negotiations begin.

The third is standard. It means that the processes and procedures should be known to all interested parties before it begins.

The first part of the fourth principle is obvious. Because the issues arising from trade negotiations raise or lower the real incomes of different groups, it is essential that any investigator not be a member of, and have no direct connection with, any interested party. The second part of independence is desirable because any connection between an investigator and the government may bias, or be seen to bias, the assessment of a proposed policy change.

The fifth is important because trade policy relates to government measures that have complex effects on different groups and the macro-economy, which can only be traced by detailed economic analysis.

6 How Adequate were the Enquiries into the Doha Round and AUSFTA?

In the case of the Doha Round negotiations, the enquiries conducted by the Department and by Parliament did elicit the views of the main stakeholders. However, they were seriously deficient in providing analyses of the many issues involved in the negotiation. Department of Foreign Affairs and Trade consultations are selective and not public. When it calls for public submissions, the Department does not make public the submissions or even a list of those who made submissions. The Department consults when it feels input is required on particular issues or when it wishes to inform stakeholders of developments. In the Doha Round, however, for the first time, it made public the offers made by Australia to other members in the various areas of the negotiations and the requests made of Australia by other Members of the WTO under the request-and-offer process of this organisation.

In the case of the AUSFTA, all three parliamentary reports examined all the major provisions of the proposed agreement. While noting that one of them considered only a draft text and the other two considered the final text, three full Parliamentary reports is not an efficient way for Parliament to examine the issues. For the two Senate enquiries conducted after the agreement had been concluded, many of the submitters were the same and they made the same arguments.

None of the three Parliamentary reports had much influence on the negotiations and the final form of the Agreement. The non-Government parties had a majority in the Senate before the last election in 2004. The first Senate Committee was clearly unhappy with many of the features of the agreement that were taking shape in the negotiations and made a number of recommendations, but they were not taken up by the negotiators. As will be noted below, the Joint Standing Committee cannot amend a treaty: it can only send it back to the House with suggested amendments. However, the Government was not free to change the text of a treaty that it just agreed to with the US Government. The Opposition in the Senate did extract one change to the review procedures of the Pharmaceutical Benefits Scheme, which the Government accepted on the grounds that it did not abrogate or conflict with the terms of the treaty.

The Department has performed well in the two negotiations discussed above with respect to the criteria of timeliness and transparency. As the department responsible for carrying the negotiations, it necessarily has to prepare for them. In the case of the Free Trade Area negotiations, it commissioned the APEC Study Centre study well before the negotiations began. In both examples, it announced its programme of consultations. As part of the Commonwealth public service, the Department staff are disinterested.

The Department was criticised by the Senate Foreign Affairs, Defence and Trade References Committee in its investigation of the WTO negotiations on trade in services, and by some witnesses appearing before it, for not publishing the submissions it had invited (Senate, 2003, Chapter 3). This is a fair criticism. This Senate Committee recommended that, in its future public consultation processes on trade issues, the public submissions received by the Department be published or made accessible on websites (Senate Foreign Affairs, Defence and Trade Reference Committee, 2003, Recommendation 5).

As with the enquiries into the Doha Round negotiations, the enquiries conducted by the Department and by Parliament into AUSFTA elicited the views of the main stakeholders. The groups of income earners who feared they might lose or might gain less than they hoped came forward readily; for example, users of intellectual property and, in the second category, exporters of farm products.

The possible gains and losses to different income groups were analysed intensively by both the Department and the Parliament processes. There was a vigorous and public disagreement between the builders of the CIE model and the ACIL model, each criticising the other's model and analysis and defending their own.

I applaud the use of economic models in this context as one of the analytical tools to investigate the economic effects of trade policies. The emergence of models tailored to the analysis of issues in a prospective agreement is recognition of the need for sophisticated economic analysis. But the differences between the outcomes of the models clouded rather than resolved the conflicts. There was no way for the public to have these differences resolved. The end result of the conflicting evidence from these models was that Senate Committees did not use them in coming to their recommendations. The Senate Select Committee, which had commissioned the third of the modelling exercises by Dee, declared:

The Committee has therefore used these studies as a guideline for some individual sectors that lend themselves more readily to quantitative analysis. It has not used the results to draw overall conclusions on the value of the Agreement in Australia (Senate Select Committee, 2004, para. 1.99).

The Joint Standing Committee, which has the constitutional responsibility to pass or reject the treaty, received the last of the modelling exercises: the report by Dee. In its report, the Joint Standing Committee noted that it "has opted to note the report but not get into close analysis in the time available for the Committee to report to Parliament" (Joint Standing Committee, 2004, para. 3.37).

There is another notable feature of the public enquiry process relating to the Doha Round of multilateral negotiations or the Australia–US Free Trade Agreement. No reference relating to these trade policies was sent to the Productivity Commission. In fact, over more than fifty years of multilateral trade negotiations, the Government has

only ever sent two references on matters relating to multilateral trade negotiations to the Tariff Board or its successors, and both were confined to tariff questions, and neither was released to the public. The first was in 1963 at the start of the Kennedy Round. GATT multilateral negotiations on tariffs were examining the scope for reduction in MFN tariff rates. In Australia this scope had increased under the 1957 United Kingdom–Australia Trade Agreement, which reduced the margins of preferences required in trade between these two countries but the Government was opposed in the GATT negotiations to the across-the-board tariff cuts (Crawford, 1968, 5.13). The second was during the Tokyo Round of negotiations, when the 1976 Industries Assistance Commission (1976) made a similar report on the scope for reductions in General (Non-Preferential) rates of duty.

Similarly, no reference was sent to the Tariff Board at the time of the negotiation of the 1967 New Zealand–Australia Free Trade Area or to the Industries Assistance Commission at the time of the CER negotiations in the early 1980s. No reference has been sent to the Productivity Commission in regard to any of the subsequent bilateral agreements or those currently under examination.

Thus, these enquiry processes do not stack up well in terms of the public nature of the enquiry and the need for a thorough and technically competent examination of the issues.

7 How Can the Present Processes be Improved?

In this section, I shall consider two proposals to change the processes of public enquiry: one relates to the Parliament and the other to the roles of the Department of Foreign Affairs and Trade and of the Productivity Commission.

Parliamentary enquiries

As a preliminary, it is necessary to look at the way in which government works in Australia. The trade agreements that come from bilateral or from multilateral negotiations such as those under the WTO are treaties⁵ between governments. Under Section 61 of the Australian Constitution, the power to make treaties is an Executive power. After it has been negotiated and signed, a treaty is tabled in Parliament. Like most treaties, a trade treaty has to be passed by both Houses of Parliament.⁶ It must be tabled in both Houses at least fifteen days prior to legislation being passed (or to executive action in the case of treaties that do not require legislation) and since 1996 it has had to be considered by the Joint Standing Committee on Treaties (JSCOT) of Parliament. Legislation put to the Senate cannot be amended by that House; it must be passed or rejected *in toto*. This is a so-called ‘up-or-down’ vote.

⁵ “A Treaty is an agreement between States (countries) which is binding at international law” (DFAT, 2002, p.1).

⁶ This applies to treaties relating to the WTO and bilateral trade agreements. Other trade treaties can be implemented through executive action. This applies, for example, to trade cooperation treaties. For a discussion of the process of making treaties in Australia, see DFAT (2002). For the Senate view of this process, see Senate Legal and Constitutional Committee (1995) and Senate Foreign Affairs, Defence and Trade References Committee (2003, Chapter 3). This view is rather critical, but it should be remembered that Opposition parties had a majority in the Senate at that time.

In its 2003 report, the Senate Foreign Affairs, Defence and Trade Reference Committee looked at the process of trade treaty making in Australia in some depth.⁷ It recommended that:

Prior to making offers for further market liberalisation under any WTO Agreements, or commencing negotiations for bilateral or regional free trade agreements, the government shall table in both Houses of Parliament a document setting out its priorities and objectives, including comprehensive information about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise (Senate Foreign Affairs, Defence and Trade Reference Committee, 2003, Recommendation 2).

This recommendation was repeated in the report of the Senate Select Committee (2004).

If adopted, these procedures would be a radical departure from past practice in Australia. The Senate Committees were influenced by the process of making trade treaties in the US. (See Senate Committee on Foreign Affairs, Defence and Trade References, 2003, Chapter 3.) US trade negotiators can proceed only when Congress has approved a Trade Promotion Authority, which sets out the objectives of the negotiations and any conditions which must be met.

I leave it to constitutional lawyers to decide if these recommended procedures are permissible under our constitution. The Constitution gives the power of treaty making exclusively to the Executive.

If the procedure were constitutionally permissible and were implemented, it would change very considerably the whole way in which the parliamentary process operates in Australia with regard to the making of trade treaties that bind the nation. Presumably the same changes would have to be made for other non-trade treaties, such as those applying to human rights, security, the UN, etc. This raises a host of issues that go far beyond trade treaties. Moreover, I note that this recommendation was made by a Senate in which Labor and the other opposition parties had a majority and were clearly frustrated by being excluded from the negotiations.

The US model on which the recommendation was based relates to a very different model of government. In particular, the American President has quite different powers and responsibilities from those of our Prime Minister. There is a formal separation of the powers of the executive and legislative branches of government under the US Constitution, and Members of the Congress have much more freedom to vote according to their individual convictions than are Members of the House of Representatives in Australia. A procedure devised under the US system of government does not transfer easily to the Westminster system. For the purposes of this lecture, I shall stick to improvements that can be made within the existing Westminster practice.

Inquiries that have been held by a committee of the Senate or of the joint Houses and relate to the Doha Round and to the AUSFTA negotiations have satisfied the principles of transparency and public enquiries. Members of Parliament are, with occasional exceptions, disinterested, though there is a closely related problem that the views of a Member tend to be dominated by the views of the Party of which they are a member. However, parliamentary inquiries fall down on the principle of technical

⁷ This process had been reviewed previously by the Senate Legal and Constitutional References Committee (1995) and the Joint Standing Committee on Treaties (2001).

competence. Although they receive much advice from advisors, the Parliamentary Library, and other sources as well as from submissions, parliamentarians are, in general, not well equipped to pass judgements on the complex legal and economic aspects of trade negotiations. They can commission studies, as the Senate Select Committee did in the case of AUSFTA, but the scope for this is limited. Perhaps the main problem with parliamentary inquiries relates to timeliness. Most of them have taken place *after* the multilateral or bilateral negotiations have begun and sometimes even after they were concluded, that is, after the horse had bolted.

Parliamentary inquiries have had little influence on either the substance of what has been negotiated or on the Parliamentary approval of the outcome of negotiations. In the end, when trade legislation comes before the House of Representatives and the Senate, a Member of Parliament follows the line of his/her party (apart from independents, if and when voting).

In Australia, under the Westminster system of government, the formation of trade policies thus relies essentially on the enquiry that provides advice to the Minister and Cabinet.

8 Roles of the Department of Foreign Affairs and Trade and of the Productivity Commission

From the point of view of the analyses of the issues involved in the negotiations, the important issue is how conflicting views concerning an issue can be resolved by a full and technically competent analysis. Competence is required in the economic analysis of trade laws as well as in the application of the laws themselves.

There are three alternatives. One is the use of a Department-controlled enquiry, as in the enquiry into the free trade area with the US. As the Department responsible for administering trade law, it has staff who are experts on WTO trade law, bilateral trade agreements, and national laws regulating international trade. But it does not have a strong capacity for economic analysis. It has relied in recent years on commissioned reports.

The second alternative is the Productivity Commission. In fact, the report of the Foreign Affairs, Defence and Trade References Committee recommended that

the Government? prior to embarking on the pursuit of any bilateral trading or investment agreement? request the Productivity Commission to examine and report upon the proposed agreement (Senate Foreign Affairs, Defence and Trade References Committee, 2003, Recommendation 11).

This was repeated by the Senate Select Committee that reported on the agreement (Senate Select Committee, 2004, para. 2.104). A number of submissions to these two Senate enquiries had advocated an inquiry by the Productivity Commission. This has been my position too (Lloyd and MacLaren, 2004, p. 26).

The third option is a combination of Department of Foreign Affairs and Productivity Commission inquiry.

My preference is for the Productivity Commission as the main inquirer. It is important that I spell out the reasons why the Productivity Commission is the preferred body to conduct a public inquiry on trade policy.

The main differences between the Department-controlled and the Productivity Commission forms of enquiry have to do with principles of independence, public enquiry, and technical competence.

In respect of the principle of independence, the Department of Foreign Affairs and Trade reports on trade matters to the Minister of Trade and its task is to promote and implement Government trade policy. A number of witnesses appearing before the Senate Foreign Affairs, Defence and Trade Reference Committee complained of the lack of balance in the Department's views (Senate Foreign Affairs, Defence and Trade Reference Committee, 2003, Chapter 6). Its thinking tends to reflect that of the government of the day. In contrast, the Productivity Commission is an independent body that does not report directly to a Minister. The Productivity Commission (and its predecessor organisations, the Tariff Board, IAC, and the Industry Commission) have a long tradition of questioning current government policies. As the Productivity Commission stated, proudly, in its thirty-year history of the Productivity Commission and its two predecessor Commissions:

It [the Commission] has an arm's-length relationship with the Government, which can tell it what to do but not what to say (Productivity Commission, 2003, p. 1).

In respect of the principle of public enquiry, both enquiries that are conducted by the Department of Foreign Affairs and Trade and those conducted by the Productivity Commission are public in that the fact that their enquiries are being conducted is public knowledge and the reports at the end of the inquiry are made public. But there are two significant differences between the two.

First, in a Productivity Commission inquiry all submissions are made public whereas, in the case of public enquiries controlled by the Department of Foreign Affairs and Trade to date, submissions remain confidential to the inquiry. Second, in the case of the Department-controlled enquiries calling for submissions, the Department does not produce a public report. By contrast, when the public make submissions to a Productivity Commission inquiry the Commission releases a draft of its report as well as a final report. Anyone making a submission may respond to the Productivity Commission draft report and argue that it is mistaken in some way before the finalisation of its report. In each Productivity Commission inquiry, some stakeholders use this opportunity to question the logic of the draft report. This subjects the inquirer to an intensive criticism of its views. This intensive criticism is lacking in the case of public inquiries controlled by the Department of Foreign Affairs and Trade.

In respect of the principle of technical competence, the Commission has accumulated knowledge and expertise relating to the economic analysis of public policy issues through years of enquiries. In particular, it (and its predecessor organisations, the Tariff Board, IAC, and the Industry Commission) has played a major role in the development of computable general-equilibrium modelling of the Australian economy, which is the type of model used for the analysis of trade issues in the Department-controlled enquiries into the recent bilaterals, through funding and co-development of the ORANI and the Monash models. It may also use models constructed and operated outside the Commission and has done so on a number of occasions. In the 2003 Textiles, Clothing and Footwear inquiry the Commission held an economic modelling

workshop that allowed a comparative assessment of the preliminary findings from five different models of the impact of post-2005 reductions in assistance to the industry. The Commission is also expert, under its charter to investigate industry matters and productivity, in matters of industry economics and industry regulation of the type which emerged during the AUSFTA negotiations. In addition, it may consult with any person it wishes, appoint consultants with relevant expertise to work on an inquiry and it may (through the Minister) appoint part-time Associate Commissioners with special expertise or knowledge to an inquiry. These possibilities give the Commission access to resources outside its own staff and Commissioners, and access to advice on any matter of analysis. It is in a much stronger position to carry out analysis than any private sector organisation or the Department of Foreign Affairs and Trade.

My own position is that the Executive arm of Government should be required, by legislation, to send a reference to the Productivity Commission on any prospective bilateral or multilateral trade treaty and on unilateral changes to tariffs and other trade policies, requesting it to report on the changes. This requirement should apply to trade in services as well as trade in goods. In the case of bilateral and multilateral treaties, this should be done before the negotiations begin. Of course, the Government is not bound by advice received from the Productivity Commission. It is only an advisory body.⁸

This mandatory reference procedure should apply to changes in trade measures outside bilateral and multilateral treaties. These are the so-called unilateral policies. Throughout the days of the Tariff Board (1921–1973), it was mandatory for the Government to send a reference to the Tariff Board whenever it wished to change a tariff rate or bounty.⁹ In the period of the Industries Assistance Commission (1974–1990), mandatory reference was required for ‘long-term assistance’ measures. This practice was continued again when the Industry Commission (1990–1998) succeeded the Industries Assistance Commission. However, when the Productivity Commission succeeded the Industry Commission in 1998, the Legislation passed by the Howard Government dropped mandatory reference on trade policy and industry assistance measures. In this respect, the responsibilities of the Productivity Commission were narrower, not broader, than those of its three predecessors.

Mandatory reference should also apply to government measures which regulate international trade in services. ‘Trade policy’ covers these measures too. This is how we use the term today. WTO trade law has covered trade in services since the WTO began operation in 1995. Australian Government regulation of trade in services covers many important areas? trade in international aviation, shipping, health, education, banking and insurance, etc, which in turn are regulated by many Acts of Parliament. And in many of these areas we are also bound by treaties with other governments. Our Parliament legislates regularly in these areas, but mostly without any form of public

⁸ In this respect the Tariff Board and its successors have operated differently from the Commonwealth Conciliation and Arbitration Commission and its successors, whose decisions are binding on the Government.

⁹ It is important to note that the provision for mandatory references to the Tariff Board, the IAC, and the Industry Commission did not extend to international treaties, that is to bilateral and multilateral agreements. The Acts establishing the IAC and IC explicitly exempted international trade treaties from the mandatory reference provision. The argument behind this exemption seems to be that the Department needed flexibility while negotiating these treaties as the scope of changes to tariff rates and other measures changes during negotiation (see Crawford, 1973, para 69).

enquiry. I note that the Productivity Commission has reported in recent years on some services trade measures; see the reports on International Air Services, International Telecommunications Market Regulation, and on International Liner Cargo Shipping.

There should be a process of public enquiry for changes in policies that affect international trade in services in the same manner as there is for policies that affect international trade in goods. On economic grounds, there is no reason to treat services industries differently from goods industries.

This role for the Productivity Commission does not preclude the Department of Foreign Affairs and Trade, or the Minister of Trade, from commissioning studies on some of the issues arising in negotiations with other countries. Negotiations such as those in the multilateral Doha Round or the bilateral AUSFTA are very complex and rather different than the negotiations in earlier GATT rounds. New issues emerge during negotiations which need detailed technical analysis. A combination of a mandatory Productivity Commission analysis before negotiations begin and selective commissioned enquiries on new issues that emerge during negotiations is desirable. The Productivity Commission is also one of the sources that might be used for selective studies.

9 A Generic Problem of Democracy

For trade policy, I have considered the question: how can we make sure that parliamentarians receive the best advice before they legislate to introduce new trade policies? This question applies equally to all legislation. It is a generic problem of policy-making in a democracy. This naturally raises the question of how the processes in the area of trade policy that I have been considering compare with other areas of policy-making that require legislation in Australia.

This is too big a topic to discuss in general. It applies to all Australian Government legislation. I note that in other areas of economic policymaking? for example, tax and welfare policy? any form of public enquiry into major legislative change is the exception, not the rule. It applies equally to the whole raft of policy-making by State Governments. Public enquiries into matters requiring State Government legislation are much rarer than at the Commonwealth level of government. Let me discuss briefly two examples in areas of policy making that are closely related to those of international goods and service trade.

The first is foreign investment policy. Much the same economic issues arise in this area as in the area of goods and services trade policy. This is the area, if you like, of cross-border flows of capital rather than of cross-border flows of goods. Here there is no practice of public enquiry remotely like that in the field of goods-trade policy. The governing legislation is the Foreign Acquisitions and Takeovers Act 1975 and regulations pursuant to it. These give a great deal of latitude to the government of the day as to whether or not it approves applications for inward flows of foreign direct capital. The Treasurer takes decisions in this area after taking advice from the Foreign Investment Review Board (FIRB). Some of these decisions have been very contentious in much the same manner as goods-trade measures? for example, the attempted takeover in 2001 by Shell of Woodside Petroleum. The FIRB is, like the Productivity Commission, an advisory body but it operates very differently. It operates within the Department of the Treasury. In foreign investment cases there is no public enquiry. It

does not invite public submissions and its advice to government is not made public. In my view, for those foreign direct investment applications that are not exempt from approval, there should be a process of public enquiry like those for policies that affect trade in goods and services.

There is another group of cases where government action to change border trade policies has additional effects on the environment; for example, exports of uranium and the approval of the technology of producing genetically modified crops. I shall take GM canola as an example of a process of enquiry as I took part in this process in the State of Victoria as the Independent Reviewer. The debate over the last few years as to whether we should allow commercial release of GM canola was mainly about the possible adverse effects on international trade in non-GM crops such as non-GM wheat and other grains, and on the possible adverse effects on the environment. There is, at the national level, a public authority whose approval is required before a licence can be issued for commercial release, the Office of the Gene Technology Regulator. Under the Commonwealth Gene Technology Act 2000, this Office must conduct a risk assessment before a licence is issued. The Office examines risks to the health and safety of people and the environment, but it cannot, under the Act, examine international market risks. The international market risks and the environment risks were examined in each State separately (other than Queensland which is not a significant producer of canola). Some states used a parliamentary inquiry and some used a form of public enquiry. Plainly what was needed was a national public inquiry which covered both international market risks and environment risks.

10 General Conclusion

This leads to my general conclusion. Continuing to open up the Australian economy to competition from foreign goods producers, service providers, and capital providers, as we did in the 1990s is essential if the Australian economy is to continue to grow at recent rates. This in turn requires that policies concerning international trade in goods, services, and capital need independent and public and technically competent inquiries before new policies are adopted. Policy mushrooms grow best in the light, fertilised by appropriate enquiries and public debate.

REFERENCES

- Australian APEC Studies Centre (2001) *An Australia–US Free Trade Agreement: Issues and Implications* (Melbourne: The Australian APEC Studies Centre, Monash University).
- Centre for International Economics (2001) *Economic Analysis of AUSFTA: Impact of the Bilateral Free Trade Agreement with the United States* (Canberra: Centre for International Economics).
- Centre for International Economics (2004), *Economic Impacts of an Australia- United States Free Trade Area*. (Canberra: Centre for International Economics).
- Crawford, Sir John (1973), *A Commission to Advise on Assistance to Industries* (Canberra: Australian Government Publishing Service).
- Dee, P. (2004) “The Australia–US Free Trade Agreement: An Assessment”, paper prepared for the Senate Select Committee on the Free Trade Agreement between

- Australia and the United States of America, June (Canberra: Australian National University).
- Department of Foreign Affairs and Trade (DFAT) (2002) *Australia and International Treaty Making Information Kit* (Canberra: Department of Foreign Affairs and Trade).
- Department of Foreign Affairs and Trade (DFAT), Office of Trade Negotiations (2003) *Discussion Paper on the General Agreement on Trade in Services* (Canberra: Department of Foreign Affairs and Trade).
- Industries Assistance Commission (1976) *Multilateral Trade Negotiations? General Duties. First Report (Abridged Edition)* (Canberra: Industries Assistance Commission).
- Joint Standing Committee on Treaties (JSCOT) (2001), *Who's Afraid of the WTO? Australia and the World Trade Organisation* (Canberra: Commonwealth of Australia).
- Joint Standing Committee on Treaties (JSCOT) (2004), *Report 61. The Australia–United States Free Trade Agreement* (Canberra: Commonwealth of Australia, Canberra. Available at: <http://www.aph.gov.au/house/committee/jcsreport.htm>
- Kelly, C. R. (1978) *One More Nail* (Adelaide: Brolga Books).
- Kelly, C. R. (1981) *Economics Made Easy* (Melbourne: Sun Books).
- Lewer, J. J., and H. Van den Berg (2003) “How Large is International Trade’s Effect on Economic Growth?”, *Journal of Economic Surveys*, 17, pp. 363–396.
- Lloyd, P. J. (2000) “Generalizing the Stolper–Samuelson Theorem: A Tale of Two Matrices”, *Review of International Economics*, 8, pp. 597–613.
- Lloyd, P. J. and D. MacLaren (2004), “Recent Developments in Australian Trade Policy”, *Quarterly Bulletin of Economic Trends*, 3.04, pp. 19–28.
- Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (2004) *Final Report*. Available at http://www.aph.gov.au/Senate/committee/freetrade_cttee/final/report.pdf.
- Senate Foreign Affairs, Defence and Trade References Committee (2003) *Voting on Trade: The General Agreement on Trade in Services and an Australia–US Free Trade Agreement*. Canberra, Commonwealth of Australia.
- Senate Legal and Constitutional References Committee (1995), *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Canberra: Commonwealth of Australia).
- Snape, R. H. (1986) *Should Australia Seek a Trade Agreement with the United States?*, Discussion Paper No. 86/01 (Canberra: EPAC).
- Snape, R. H., J. Adams and D. Morgan (1993) *Regional Trade Agreements: Implications and Options for Australia* (Canberra: Australian Government Publishing Services).