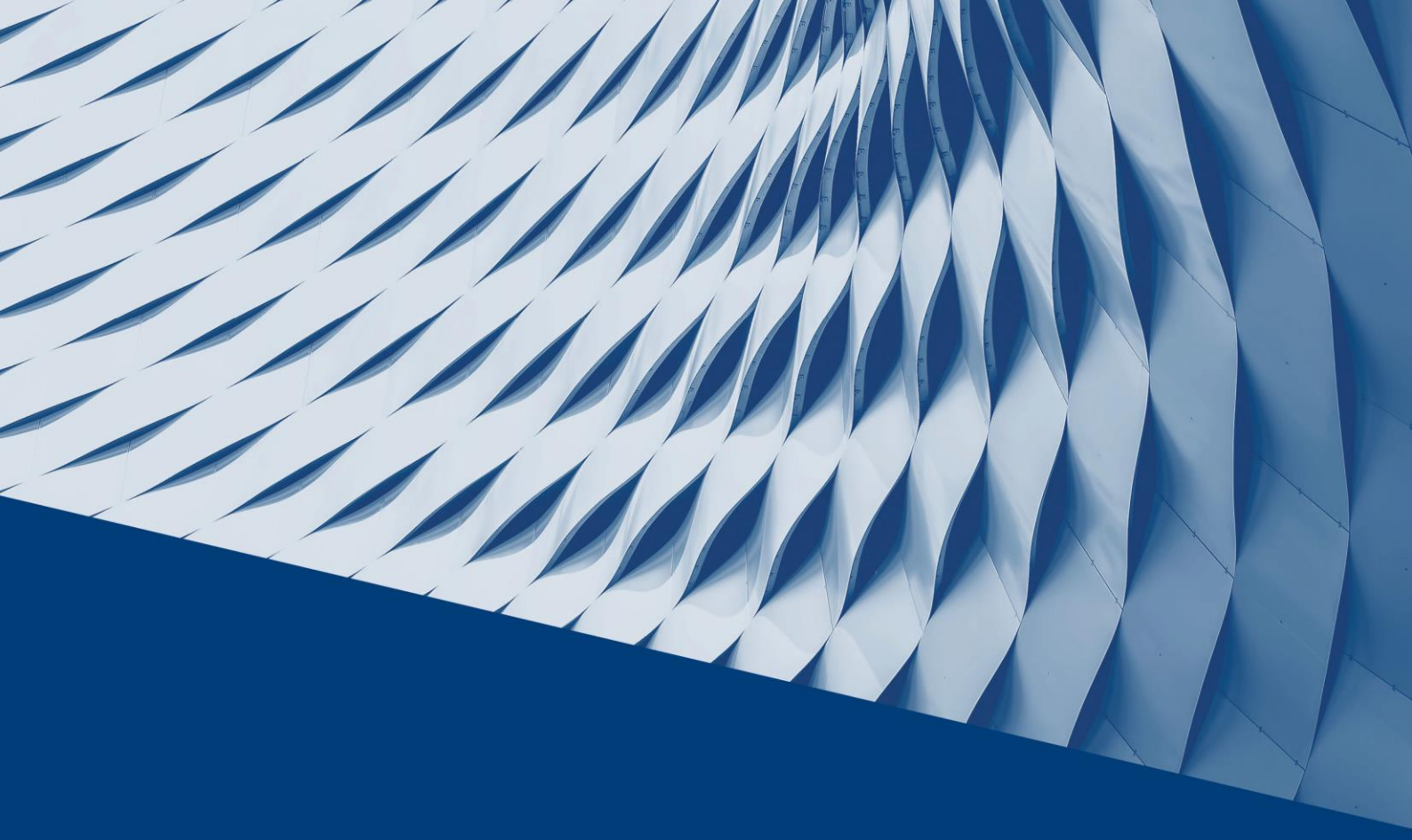

Inquiry into the Australian Government's approach to negotiating trade and investment agreements

Submission to the Joint Standing Committee on Trade and Investment Growth

ACTU Submission, 6 October 2023
ACTU D. No 41/2023

ACTU
australian council of trade unions

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Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates with approximately 1.8 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

A worker-centric approach to trade

The ACTU supports fair trade as a vehicle for economic growth, job creation, tackling inequality and raising living standards. The most important objective of trade policy should be to deliver benefits to workers, the community and the economy by increasing opportunities for local businesses, creating quality local jobs, and protecting public services. The benefits of trade must be shared among our community, and promote equitable development abroad. We have longstanding concerns, however, about the previous Government's agenda on trade which places the needs of business above all else - where businesses and investors enjoy significant rights with few responsibilities - jeopardising local jobs, undermining working conditions, and compromising the ability of current and future Australian Governments to regulate in the public interest.

The need for a more open and democratic process for trade agreements is more important than ever now because they are no longer simply tariff deals: they increasingly deal with an expanding range of other regulatory issues which would normally be debated and legislated through the democratic parliamentary process, and which have deep impacts on workers' lives.

The *process* for negotiating trade agreements must be reformed: trade agreements must be subject to proper scrutiny and unions, civil society and business stakeholders should have the opportunity for genuine input into the negotiations on behalf of those they represent. Trade agreement negotiations are currently conducted behind closed doors, and Australia lags behind other likeminded countries when it comes to transparency and public scrutiny of agreements.

It is not just the undemocratic process for negotiating trade agreements that must be reformed, but the *content* of the agreements: for too long Australia has put forward negotiating priorities that only benefit business and are detrimental to the interests of workers and our communities here in Australia, and abroad. Unions have long called for the Australian Government to not sign up to trade agreements that contain damaging provisions such as Investor-State Dispute Settlement (ISDS) - which enables private investors to sue the Government for changes to laws and regulation that may impinge on their profits - and to ensure that agreements they sign up to have enforceable labour standards to protect workers' rights, among other things. The COVID-19 pandemic further exposed flaws in our current approach to trade, such as lack of local manufacturing capacity, and intellectual property rules that restricted the ramping up of vaccine manufacturing. It is clear Australia's approach to negotiating trade agreements has not served the community as a whole.

We are calling for a reformed trade policy that puts the Australian community at the centre – workers and our communities must be genuinely consulted on trade agreements, and our Parliament must have democratic oversight. The United States is perhaps the best international example of a consultative approach to trade agreements, that prioritises workers' rights in its negotiating agenda. The Biden Administration has explicitly adopted a 'worker centric trade policy'[1] as a key priority. Under this policy, workers have a seat at the table to advise on the development of new trade policies that promote equitable economic growth by including strong, enforceable labour standards in trade agreements that protect workers' rights. The Biden Administration is also committed to using trade to engage its partners to secure commitments to combat forced labour and increase transparency and accountability in global supply chains.

The US has a legislated approach to guide its consultation and negotiating parameters for trade agreements. The US Congress passed the Bipartisan Congressional Trade Priorities and Accountability Act[2] ('the Trade Priorities Act') in 2015 which established new and expanded consultation requirements and negotiating objectives, including the requirement for labour clauses, and robust consultation before, during and after negotiations. The Biden Administration's approach provides an example of how Australia could adopt legislation that embeds a consultative

[1] Office of the United States Trade Representative, 'Fact Sheet: 2021 President's Trade Agenda and 2020 Annual Report' https://ustr.gov/sites/default/files/files/reports/2021/2021%20Trade%20Agenda/2021%20Trade%20Report%20Fact%20Sheet.pdf

[2] 'Overview of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015: Prepared by the staffs of the Ways and Means Committee and Senate Finance Committee' https://www.finance.senate.gov/imo/media/doc/Bipartisan%20Congressional%20Trade%20Priorities%20and%20Accountability%20Act%20of%202015%20Summary.pdf

approach to trade that centres the voices and the interests of working people, and ensures that workers' rights are non-negotiables in trade deals.

We support the approach put forward in the Australian Labor Party's 2023 platform to legislate a framework for the development and ratification of future agreements. A legislated approach will ensure clarity and democratic oversight of Australia's approach to trade, giving DFAT negotiators the ability to determine strategy, but within a clear, democratically accountable set of parameters in the public interest. It would also clearly signal to our trading partners Australian values and priorities. Legislation would set out the baseline for what is expected in terms of stakeholder consultation but would enable Governments the flexibility to further develop consultative mechanisms over time.

While this inquiry is concerned with the approach Australia takes when negotiating trade and investment agreements, the principles and framework we outline must also be adopted by Australia at the WTO, and in trade strategy more generally. In addition, we note Australia's Southeast Asia Economic Strategy to 2040 recommends that Australia's Trade 2040 Taskforce, in collaboration with Southeast Asian partners, review the scope of existing FTAs to determine priorities for agreement update negotiations.[3] This Southeast Asian Economic Strategy and the review of existing agreements must be undertaken within the context of a new approach to trade agreements that contains the elements we outline in our submission.

We note that terms of reference *(a)-(e)* deal with the *process* for negotiating trade agreements, terms of reference *(f)-(h)* deal with the *content* of trade agreements – as such, we will address these terms of reference broadly under these two categories, including examples of approaches to negotiating trade agreements in similar countries (term of reference *i),* and conclude with a discussion of how a new approach to Australian trade could be legislated (term of reference *j).*

[3] Nicholas Moore AO, 'Invested: Australia's Southeast Asia Economic Strategy to 2040', September 2023 https://www.dfat.gov.au/sites/default/files/invested-southeast-asia-economic-strategy-2040.pdf

Recommendations

- **The Australian Government must legislate a transparent, consultative, and democratically accountable process for negotiating trade agreements:**
  - Prior to commencing negotiations for bilateral or regional trade agreements, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, social, regulatory, health, labour and environmental impacts, and impacts on First Nations peoples, which are expected to arise.
  - There should be regular stakeholder consultation during negotiations, including with unions, business and civil society representatives. The Australian Government should legislate an advisory committee system based on the system in the US, to enable stakeholders to provide information and advice with respect to negotiating objectives and bargaining positions before Australia enters into a trade agreement. The committees would be consulted as negotiations progress and provided with negotiation text on a confidential basis in order to provide real-time advice, and be provided with the final text before it is signed in order to provide advice on whether the agreement should be entered into. The committee would also provide advice on the operation of existing trade agreements and other related trade policy issues.
  - The Australian government should publicly release proposals and discussion papers during trade negotiations for public comment.
  - The Australian Government must release the final text of agreements for public and parliamentary debate, and parliamentary approval *before* they are authorised for signing by Cabinet.
  - After the text is completed but before it is signed, comprehensive, independent assessments of the likely economic, social, environmental and health impacts of the agreement should be undertaken and made public for debate and consultation and review by parliamentary committees.
  - An inquiry should review the text of a trade agreement which has been released before signing with the independent assessment of its costs and benefits, and make a recommendation to Parliament.
  - After release of the text and before signing, and after a review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should decide whether the Cabinet should approve the agreement for signing – this should be subject to a debate and vote by Parliament.

- If the agreement is approved by Parliament, and approved for signing by Cabinet, Parliament should then vote on the implementing legislation.
- Independent evaluations of the agreement should be held five years after the agreement comes into force, and at five yearly intervals thereafter. These evaluations should examine the economic, employment, environmental, social, health and gender impacts of the agreement, and be made publicly available.

- The Australian Government must legislate to ensure that trade agreements:
  - Will not be negotiated with countries that abuse workers' rights.
  - Include binding, enforceable labour rights protections to hold governments and businesses accountable for violations of workers' rights.
  - Include binding, enforceable commitments to end modern slavery, including banning the import of products made with forced labour.
  - Support the capacity-building of unions in developing countries to assist with upholding workers' rights.
  - Are consistent with a robust permanent migration system which protects the rights of migrant workers and ensures temporary migration is only used in situations of genuine workforce shortages.
  - Exclude provisions that facilitate increased numbers of temporary migrant workers who are vulnerable to exploitation.
  - Exclude provisions that enable the waiving of labour market testing requirements or other processes to verify labour shortages.
  - Exclude the 'specified work' requirement for Working Holiday Maker visas by abolishing second and third year visas to prevent exploitation.
  - Include enforceable commitments to UN Human Rights Treaties and Declarations and multilateral environmental agreements.
  - Are consistent with protecting the rights of First Nations people.
  - Exclude ISDS provisions, and review ISDS provisions in existing agreements.
  - Do not restrict the use of government procurement.
  - Maintain current government procurement exclusions for SMEs, indigenous enterprises, national treasures, ethical standards, environmental standards, and for local government procurement.
  - Are supported by a robust and well-resourced anti-dumping policy.
  - Exclude cultural industries through a broad-based cultural exception or reservation, to ensure the Government is free to regulate this sector.
  - Exclude all public services.

- Include a blanket exemption for all existing State Government non-conforming measures regarding investment and services.
- Enable Governments to retain the ability to regulate or re-regulate public services.
- Use a positive list structure for trade in services, rather than a negative list.
- Contain a complete definition of cabotage to ensure it is properly excluded from trade agreements.
- Do not extend patent monopolies or data protection monopolies on medicines in trade agreements.
- Exclude digital trade provisions which would restrict regulation of cross-border data flows, restrictions on requirements for local presence and storage of data, and restrictions on access to source code.
- Include provisions that ensure digital companies do not evade labour law, tax law, and must abide by Australian standards for privacy and consumer protection, including where data is held offshore.

- **The Australian Government should assess current trade agreements against the new legislated framework, and where they are inconsistent, those aspects should be renegotiated.**

The process for negotiating trade agreements

Australia's current process

Trade agreements are major undertakings with profound implications for both the Australian and the partner country/countries economy and society. They often deal with a wide range of matters that are traditionally the preserve of national governments to determine through their own domestic, democratic parliamentary processes. Yet the process to get to the point of a signed agreement being presented to the Australian Parliament is far from democratic.

Australia's usual approach is that trade agreements are negotiated and finalised largely in secret and signed with very little, if any, public and parliamentary scrutiny. The secrecy of the detail of these negotiations has meant that the occasional unauthorised leaking of text documents has been the only way stakeholders have gained access to documents that should have been the subject of open debate in the parliament and in the community throughout negotiations.

Only after a trade agreement has been signed does the Parliamentary Joint Standing Committee on Treaties (JSCOT) provide an opportunity for Parliament to properly scrutinise an agreement that has been years in the making. The experience of past trade agreements suggests the scope for meaningful changes to be made to deficiencies with any agreement once it is signed is limited. In the end, Parliament only votes on the implementing legislation, not the whole text. Essentially, it becomes an all or nothing proposition at that point in terms of ratification of the agreement.

National Interest Analyses

The National Interest Analysis (NIA) is supposed to set out the advantages and disadvantages to Australia of becoming, or not becoming, a party to the treaty, including significant quantifiable and foreseeable economic and/or environmental effects of the treaty. The Regulatory Impact Statement (RIS) includes an assessment of the impact of the proposed regulation. These analyses are not independent and are completely insufficient for determining the impact of a trade agreement. There is no assessment of the labour, social, health, environmental impacts, nor an analysis of the impact on jobs, regions, women, Indigenous communities, etc.

The so-called national interest analyses conducted by DFAT officials are akin to someone marking their own homework. The NIA and RIS prepared by DFAT negotiators are delivered after the agreements have been signed and so far have always recommended they be ratified. They do not contain significant or robust analysis of the impacts of trade agreements, for example they do contain detailed analyses of the impacts on the labour market. In contrast, the initial impact

assessment commissioned by EU for the EU-Australia agreement states there are potential job losses in the Australian labour market. The 'reallocation of jobs' (i.e. job losses) section states there are likely to be negative changes in the automotive and machinery sectors.[4] It is unacceptable that the Australian public finds out more information about the agreement from the EU than from our own Government.

Even the Productivity Commission has noted that current processes for establishing trade agreements are flawed and lack transparency, noting that "the results of modelling in feasibility studies are used to 'oversell' the benefits of agreements, while typically the actual text of agreements is not subject to assessment", "consultation is inadequate in some respects, particularly once negotiations have begun", and "Parliament is often not well placed to affect the outcome of negotiations."[5] They state:

> ...the Commission is concerned that, at least in some quarters, there tends to be a mindset of 'agreements for agreement's 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 [bilateral and regional trade agreements] are taken...a more transparent and strategic process is required to ensure an appropriate focus on policies that are most in Australia's interests.[6]

Parliamentary process

Currently the trade agreement must be tabled before Parliament for twenty sitting days – this is the first time the text is made public. The agreement is considered by the Joint Standing Committee on Treaties (JSCOT), who conduct a public inquiry. JSCOT always recommends the treaty action be taken. Following that, enabling legislation may be required to be passed by Parliament.

Stakeholder consultation

The current process is not genuinely consultative. While DFAT negotiators occasionally hold stakeholder briefings, they are very general in nature as they are unable to give detail about the current status of negotiations. While we acknowledge the Albanese Government is taking steps to improve consultation through establishing pilots of four stakeholder advisory groups (business,

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[4] Commission Staff Working Document '*Impact Assessment;* Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with Australia', European Commission, Brussels, 2017, p. 35

[5] Productivity Commission Research Report, 'Bilateral and Regional Trade Agreements', November 2010, https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf, p. xxix

[6] *Ibid.*

unions, civil society and First Nations), and more frequent DFAT public and stakeholder briefings, the process is still one-sided: since the negotiations are confidential, DFAT can give very little information about the detail of negotiations.

Most stakeholder engagement that does occur is with business, rather than with unions and civil society stakeholders. For example, the negotiations for the UK-Australia Free Trade Agreement illustrate the previous Government's approach to consultation. The National Interest Analysis for the UK FTA notes the consultation undertaken by DFAT with stakeholders before the launch of negotiations on 17 June 2020, including through engagement during the four years of preparatory discussions under the bilateral Trade Working Group established in 2016, and then during negotiations until they concluded in 2021. It lists 142 organisations consulted with, which shows there were only 7 civil society/NGO groups consulted with, and no trade unions.[7] There are two Government agencies/entities (Australian Health Practitioner and Regulation Agency and the Future Fund), and the rest are businesses, employer groups and industry associations. Likeminded countries have a much more inclusive approach to trade negotiations than Australia, with well-developed stakeholder consultation mechanisms.

Box 1: The European Union's approach to consultation

Negotiation process

The EU Commission has a transparency policy for trade negotiations, which sets out the following process:

Before negotiations

- The Commission systematically publishes its recommendations for negotiating directives for trade agreements before the launch of a negotiation.
- The Commission also encourages the Council to publish the final adopted negotiating directives (ie. The final document by which the Council authorises the European Commission to start the negotiation) which is adopted after discussions with member states in the Council.

During negotiations

- Once negotiations have started, the Commission publishes substantive material to

[7] 'National Interest Analysis, Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland', Attachment 1, December 2021, https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JSCT/2022/Free_Trade_Agreement_-_UK/i_NIA_and_Attachment_I_Consultation.pdf?la=en&hash=5AE180B3AFE89641508453B87C736D0A07860322 pp. 17-19.

Box 1 continued

allow all interested stakeholders to follow the discussions. Since 2015, the Commission systematically publishes the EU's initial proposals for legal text.

- After each negotiating round, a round report is published online.
- Throughout the negotiations, the Commission also engages with stakeholders through regular Civil Society Dialogue meetings that are open to any EU civil society organisation, trade union and business.
- A Sustainability Impact Assessment (SIA) process is conducted in parallel to negotiations, conducted by independent external consultants to provide a robust analysis of the potential economic, social, and human rights and environmental impacts that the trade agreement under negotiation could have. An open, transparent and wide-ranging consultation process is at the core of every SIA.
- In 2017, the Commission created an Expert Group on EU trade agreements comprised of stakeholders ranging from trade unions, employers organisations, consumer groups and other NGOs, which provide technical expertise and insights to the Commission both in the context of negotiations and regarding the overall implementation of trade agreements in force. The group's meeting documents are published in the Commission's Expert Groups' Register.

After negotiations

- Shortly after a negotiation is finalised, the consolidated negotiation text is published online, before the final legal revision is completed.
- An economic assessment of the negotiated outcome is published.
- During the implementation phase, agendas and reports of all committee meetings are published.
- After enough time has passed, generally 5 years after the agreement comes into force, the Commission prepares and publishes a post evaluation of the effects of the agreement.

References:

- European Commission, 'Transparency in EU trade negotiations', https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/transparency-eu-trade-negotiations_en

Box 2: The United States Government's legislated approach to consultation

The US established the trade advisory committee system in 1974 to institutionalise domestic input into trade negotiations to ensure that US trade policy and trade negotiating objectives reflect the interests and views of stakeholders. The advisory system consists of 33 advisory committees, with a range of advisory groups covering industry sectors and interest areas, including a specific Labor Advisory Committee comprised of union representatives, and in addition there are union representatives on various industry sector groups. The mandate of the Labor Advisory Committee is to:

> provide information and advice with respect to negotiating objectives and bargaining positions before the United States enters into a trade agreement with a foreign country or countries. The committee advises, consults with, and makes recommendations to the Secretary of Labor and the United States Trade Representative on issues and general policy matters concerning labour and trade negotiations, the operation of any trade agreement once entered into, and other matters arising in connection with the administration of the trade policy of the United States.

In addition to consulting with US unions through the Labour Advisory Group, the Biden Administration added US peak union body AFL-CIO President Liz Shuler and two other union leaders to the Advisory Committee for Trade Policy and Negotiations (ACTPN), which is the highest ranking advisory body to the USTR.

The Office of the USTR notes the importance of the advisory committee system:

> Trade advisory committees have made valuable contributions to U.S. trade policy and serve as a unique forum for discussions of trade issues and to bring candid advice and outside input into government decision-making. Because advisory committee members provide expert, outside advice, they help increase the accountability of trade negotiations to stakeholders and the public. Stakeholder engagement helps ensure that differing viewpoints are heard during trade negotiations and, in doing so, strengthens the U.S. negotiating position.

The USTR consults with trade advisory committees throughout trade negotiations, and provides regular briefings to the advisory committees regarding ongoing and future negotiations, including by providing them with access to the negotiation texts. The Committees are also able to provide their own written report advising on the proposed agreement at the conclusion of negotiations.

The *Bipartisan Congressional Trade Priorities and Accountability Act* ('the Trade Priorities Act') in 2015 established new and expanded consultation requirements and negotiating objectives. The Act:

- Directs the Administration to pursue Congressional prerogatives through Congressionally-mandated negotiating objectives, which include requiring labour and environment clauses and promotion of human rights;
- Establishes robust consultation and access to information requirements before, during, and after negotiations that ensure an open and transparent process; measures include:
    - providing every member of Congress access to the negotiating text
    - requiring the USTR to publish agreements 60 days before signing, including publishing detailed summaries of US proposals throughout
    - allowing any member of Congress to be accredited to attend negotiating rounds
- Preserves Congressional prerogatives and gives Congress the final say in approving trade agreements, allowing removal of TPA procedures if the Administration fails to meet TPA requirements.

References:

- US Department of Labor and USTR, 'Charter of the Labor Advisory Committee for trade negotiations and trade policy', https://ustr.gov/sites/default/files/files/LAC%20Charter%20052020.pdf
- USTR, 'Guidelines for Consultation and Engagement', https://ustr.gov/sites/default/files/USTR%20Guidelines%20for%20Consultation%20and%20Engagement.pdf p. 9.
- Overview of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015: Prepared by the staffs of the Ways and Means Committee and Senate Finance Committee' https://www.finance.senate.gov/imo/media/doc/Bipartisan%20Congressional%20Trade%20Priorities%20and%20Accountability%20Act%20of%202015%20Summary.pdf

Box 3: New Zealand's approach to trade

The New Zealand Government adopted its 'Trade for All' policy initiative in 2018, in response to public concern about 'who benefits from trade and the long-term sustainability of our economic development.' As part of this initiative, the Trade for All Advisory Board was established to provide the Government with an independent report with recommendations on trade policy. The report of the Trade for All Advisory Board was released in November 2019, and made a number of findings and recommendations, including better processes for stakeholder consultation, evaluation and assessment, and frameworks for particular subjects such as trade and labour, and trade and environment.

Reference:

- New Zealand Foreign Affairs and Trade, 'Trade For All Agenda', https://www.mfat.govt.nz/en/trade/nz-trade-policy/trade-for-all-agenda/

The content of trade agreements

Ensuring agreements protect and advance Australia's national interests

Trade agreements must be consistent with the Australian Government's broader national interest policy agenda, such as commitments to protect workers' rights, including regulating the 'gig economy'; reforming the migration system to address migrant worker exploitation and complement the jobs, wages and conditions of local workers; local industry development and the *Buy Australian* plan; and the transition to a net-zero emission economy. Trade must be seen as a mechanism to further these policy agendas. Fundamental to policy coherence is ensuring trade agreements enable governments to retain full rights to regulate in the public interest. This has not been the case, however, as we will outline in the following sections which examine key issues for the union movement in trade agreements, and recommendations for reform.

Workers' rights

Trade has the potential to lift living standards and conditions of work, instead of being a race-to-the-bottom on workers' rights. For this potential to be realised, all trade agreements must contain enforceable labour rights to level the playing field and ensure that companies cannot just locate themselves in jurisdictions where wages are lower and workers are vulnerable to exploitation.

Countries and businesses violating labour rights should not have access to preferential trade agreements with Australia. The Australian Government should require potential trading partners to demonstrate respect for fundamental workers' rights *before* agreeing to negotiate a deal with them. This should include, for instance, demonstrated commitment to social dialogue and ratification of Fundamental ILO Conventions. Before negotiations begin, a prior assessment of the existence of rights to freedom of association and collective bargaining, a minimum wage and an assessment of other conditions of work including OHS, licensing and other regulatory standards, social protection, should occur in consultation with trade unions. This assessment should be part of the comprehensive assessment of costs and benefits of entering into negotiations with partner countries tabled and discussed in Parliament prior to the commencement of negotiations.

Australia must ensure robust, fully enforceable labour rights provisions in agreements it negotiates, with accountability mechanisms for governments and businesses. These provisions must be as enforceable as the rest of the trade agreement with material consequences if these commitments are not followed. These provisions must be part of the government's negotiating 'red lines' – so no enforceable workers' rights mean no trade deal.

Box 4: RCEP and labour standards

The previous Australian Government ratified the Regional Comprehensive Economic Partnership (RCEP) trade agreement on 2 November 2021, a regional free trade agreement between the ten member states of ASEAN (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam) and Australia, China, Republic of Korea, Japan, and New Zealand. It is the largest free trade agreement in the world by members' GDP, and contains no labour or human rights provisions.

The ACTU and other stakeholders raised concerns prior to ratification regarding the lack of minimum standards for human and labour rights, particularly given over half of the 15 countries party to RCEP are ranked among the worst countries in the world for workers' rights. In particular, we were alarmed that Myanmar was able to remain a party to the RCEP agreement after the military coup of February 2021. This raises serious questions about how human rights and labour rights should be taken into account during trade negotiations, and whether the Australian Government should negotiate preferential trade deals with illegitimate regimes and serial human rights abusers.

Issues with current labour chapters

The labour chapters in current agreements – such as in the US-Australia FTA, the Comprehensive and Progressive Trans Pacific Partnership (CPTPP) and the chapter proposed in the UK-Australia FTA are not effective because:

- There are too many barriers to making a case successful, one of which is that the violation has to occur 'in a manner affecting trade or investment between the parties' and it has to be a 'sustained and recurring course of action or inaction.'[8] These narrow provisions mean that workers in non-trade related areas of the economy are not covered and that a recurring pattern of violations has to be established before any action can be taken through the consultation and dispute process. The burden of proof required is too high to be practical.
- They do not reference the core ILO Conventions:
    - For example, in the US-Australia FTA, the definition of 'internationally recognised labour principles and rights' means the right to freedom of

[8] See for example, Chapter 19 'Labour', Comprehensive and Progressive Trans Pacific Partnership Agreement https://www.dfat.gov.au/sites/default/files/19-labour.pdf

association, the right to organise and bargain collectively, etc – but does not refer to the actual conventions.

    - For example, the UK FTA contains a commitment to the ILO Declaration on Fundamental Principles and Rights at Work, which is weaker in enforcement of international law.

- They do not contain an effective enforcement mechanism: the dispute settlement process is only state-to-state, and long and convoluted and the mechanism is very weak.
    - In the UK FTA, for example, a Party (the 'requesting Party') may request in writing consultations with the other party regarding a matter arising in the labour chapter, and Parties shall begin consultations in good faith no later than 30 days after receipt of the request. If the Parties are unable to resolve the matter, either Party may request a joint committee to convene after another 30 days to seek to resolve the matter. If the matter is not resolved after 60 days, the requesting Party may request the establishment of a dispute panel under the terms in the Dispute Settlement Chapter.
    - In the US FTA, for example, a party may request consultations with the other party regarding any matter in this chapter within 30 days after a party delivers a request for consultations to the other Party's contact point. If consultations fail to resolve the matter, either party may request a Subcommittee on Labour Affairs to be convened – to be convened within 30 days after a Party delivers a request to the other party's contact point, unless they otherwise agree. If a Subcommittee has not been established as of the day a Party delivers a request, they shall do so within the 30 day period described in this paragraph. The Subcommittee shall endeavour to resolve the matter expeditiously. If a Party requests consultations pursuant to article 21.5 more than 60 days after the delivery of a request for consultations under Article 18.6.1 the parties may agree at any time to refer the matter to the Joint Committee pursuant to Article 21.6.
- There is not a role for unions.
- There is no avenue for workers to seek remedy for violations of their rights.

Effective and enforceable labour rights protection

In order to be effective, labour chapters must:

- Be open to all complaints of labour violations without condition - remove the limitations that the dispute must occur 'in a manner effecting trade and investment', or that it has to be 'sustained and recurring.'

- Ensure Parties ratify, adopt and maintain laws in compliance with the ILO Core Conventions. Instead of just a reference to the ILO 1998 Declaration on Fundamental Principles and Rights at Work, the agreement must reference each of the fundamental Conventions:
    - *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*
    - *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*
    - *Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol)*
    - *Abolition of Forced Labour Convention, 1957 (No. 105)*
    - *Minimum Age Convention, 1973 (No. 138)*
    - *Worst Forms of Child Labour Convention, 1999 (No. 182)*
    - *Equal Remuneration Convention, 1951 (No. 100)*
    - *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*
    - *Occupational Safety and Health Convention, 1981 (No. 155)*
    - *Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)*
- Recognise and protect the right of each Party to determine its labour policies and priorities, set and regulate its levels of domestic labour protection and adopt or modify relevant policies and laws accordingly – in full conformity with the obligations in the labour chapter, including the international instruments referred to above.
- Highlight and reinforce the central role of the social partners (workers' and employers' representatives) participation in achieving the objectives of the labour chapter, including their role in the dispute settlement mechanisms, and implement policies and measures for social dialogue.
- The Parties commit to giving balanced representation to the organisations representing workers and employers.
- Include an arbitration mechanism that is effective, timely and accessible:
    - Must be a role for trade unions in each country to bring disputes to challenge Government and exporters for violations of fundamental labour standards.
    - Workers must have access to remedy for violations of their rights
    - Arbitration processes should be developed with the participation of union representatives from partner countries
    - Exporters found violating rights should be blacklisted until violations are remedied.
- Create a tripartite consultative body to oversee labour standards
- Include a prohibition on countries importing/exporting products made with forced labour.

- Must ensure the protection of migrant workers
- The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement in the same way as other chapters and provisions of the agreement, and through enforceable enterprise-specific dispute processes.
- Australia should work with developing country trading partners and provide resources through its ODA programs to progressively adopt, develop and implement international standards on labour rights, including the ILO Declaration on Fundamental Principles and Rights at Work and the Fundamental Conventions.

Require companies to respect workers' rights

In addition to holding Governments accountable for upholding workers' rights, trade agreements should also contain a commitment to the three main international instruments that are the reference point for responsible business conduct: the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the ILO Tripartite

Box 5: USMCA's Rapid Response Mechanism

The best example of an effective corporate accountability mechanism in a trade agreement is the Rapid Response Mechanism (RRM) in the US-Mexico-Canada (USMCA) agreement, which entered into force on 1 July 2020. The RRM enables stakeholders to file petitions alleging violations of the rights to freedom of association and collective bargaining under Mexican law. It is a dispute settlement mechanism that provides for expedited enforcement of workers' rights to freedom of association and collective bargaining at the workplace level. The RRM permits the US Government to take enforcement actions against individual factories to protect workers' rights, including the suspension of USMCA tariff benefits or denial of entry of goods from businesses that are repeat offenders.

The RRM is leading to concrete results: the ACTU's US counterpart, the AFL-CIO, filed allegations jointly with the National Independent Union of Industry and Service Workers in Mexico, that workers at the Tridonex auto parts factory were being denied the rights to freedom of association and collective bargaining. As a result the US Government and Tridonex announced an agreement where Tridonex commits to paying severance and backpay, expressing neutrality in any union representation election, and protecting workers from intimidation and harassment in the election. In addition, the Government of Mexico has agreed to facilitate workers' rights training for employees, monitor any union representation election at the facility, and investigate claims by employees of workers' rights violations.

Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration), and the requirement for companies to conduct human rights due diligence.

Agreements must also contain an effective corporate accountability mechanism, such as the Rapid Response Mechanism (RRM) contained in the US-Mexico-Canada Agreement. In addition to the RRM, the USMCA includes new provisions that require the Parties to take measures to prohibit the importation of goods produced by forced labour.

Support for workers' rights in developing countries

Australia's trade strategy should support partner countries in our region to lift labour standards. We note the Albanese Government released Australia's Southeast Asia Economic Strategy to 2040 on 1 September[9] which presents a number of recommendations to deepen trade relationships with Southeast Asia. It is concerning, however, that the strategy fails to reference the growing inequality and workers' rights violations occurring in our region, and how the increased benefits of trade can be shared more equally by protecting workers' rights, human rights and the environment. The only reference to working with countries to strengthen legal and policy frameworks on workplace health and safety, environmental standards and modern slavery is couched in terms of making countries more attractive to investors.[10] The focus of this strategy is not aligned with the Government's broader policy agenda of strengthening workers' rights – the Government must review the Southeast Asia Economic Strategy to work with Southeast Asian countries to adopt and implement international labour standards, human rights and environmental standards.

In addition to working with partner governments to lift labour standards, the Australian Government should support programs through Official Development Assistance (ODA) that enhance and resource the capacity of unions to protect workers' rights, including promoting and supporting ILO standards, monitoring and assisting in the enforcement of clauses in labour chapters in trade agreements, and engaging with temporary migrant workers, including pre-departure and on return from Australia.

Australia must legislate to ensure that trade agreements:

- **Will not be negotiated with countries that abuse workers' rights**

[9] Nicholas Moore AO, 'Invested: Australia's Southeast Asia Economic Strategy to 2040', September 2023 https://www.dfat.gov.au/sites/default/files/invested-southeast-asia-economic-strategy-2040.pdf
[10] Recommendation 16, *Ibid.*

- **Include binding, enforceable labour rights protections to hold governments and businesses accountable for violations of workers' rights.**
- **Include binding, enforceable commitments to end modern slavery, including banning the import of products made with forced labour.**
- **Support the capacity-building of unions in developing countries to assist with upholding workers' rights.**

Box 6: New Zealand's trade and labour framework

The New Zealand Government revised its 'Trade and Labour Framework' to guide the future of Aotearoa New Zealand's trade negotiations in September 2023, replacing the 2001 Trade and Labour Framework. The framework was informed by public consultation and includes principles of ongoing engagement with Māori, civil society, unions and business in the negotiation and implementation of trade agreements. The framework provides that each trade negotiation New Zealand engages on will seek to reinforce ILO commitments, and address labour rights and labour issues through a number of measures, and includes current and emerging issues relevant to the world of work, such as modern slavery in supply chains, vulnerable workers and migrant workers.

Reference:

- MFAT, 'Aotearoa New Zealand's Trade and Labour Framework', September 2023, https://www.mfat.govt.nz/assets/Trade-General/Trade-policy/Aotearoa-New-Zealands-Trade-and-Labour-Framework.pdf

Temporary migrant workers

The exploitation of temporary migrant workers is widespread in Australia; temporary migrant workers are regularly facing issues of wage and superannuation theft, discrimination and bullying, job insecurity, and risks to their health and safety. More than 2/3 of migrant workers surveyed by the Migrant Workers Centre[11] reported being paid less than the minimum standards, and a quarter reported other forms of workplace exploitation like forced or unpaid overtime. UnionsNSW research[12] found that 35% of migrant workers surveyed were paid or offered a lower salary

[11] Migrant Workers Centre, 'Lives in Limbo: the experiences of migrant workers navigating Australia's unsettling migration system', https://www.migrantworkers.org.au/lives_in_limbo

[12] Unions NSW, 'Wage Theft: the shadow market', https://www.unionsnsw.org.au/wp-content/uploads/2022/12/Wage-Theft-The-Shadow-Market-Empowering-Migrant-Workers-to-Enforce-Their-Rights.pdf p. 28.

because of their visa type; and 20% of workers on employer-sponsored visas felt afraid to report underpayment or other workplace law breaches. Single-employer sponsorship, such as the Temporary Skill Shortage (TSS) visa, means workers are tied to their employer and are at risk of being deported if they lose their job, creating a highly vulnerable situation for these workers. Side letters in many trade agreements also provide for Working Holiday Makers from partner countries to come to Australia, where they are required to undertake 'specified work' requirements[13] to be eligible for a second and third year visa, which is a significant driver of exploitation.

Unions have a long-held position that the temporary movement of workers is the remit of migration policy, and should not form part of trade agreements. But where these provisions do exist, labour market testing and skills testing requirements must be applied, with strong protections for workers' rights to prevent exploitation. Labour market testing is an important measure to ensure that employers properly advertise vacancies locally to provide workers with opportunities and to ensure that employers are not building their business model on exploiting temporary migrant workers.

We commend the Albanese Government on commencing the development of a migration strategy, which has as one of its underpinning objectives 'enabling a fair labour market, including complementing the jobs, wages and conditions of Australian workers', and prioritises addressing migrant worker exploitation.[14] The Australian Union movement believes our migration system needs to be rebalanced in favour of permanent migration, where workers are given rights and protections, including ending the single-employer sponsorship model where workers are tied to their employers in favour of mobility where workers can move between employers. The system must also be reformed to ensure that temporary migrant workers are only engaged to fill *genuine* shortages – and that so-called 'labour shortages' are not simply a result of low pay and conditions, poor job quality, and lack of skills development. Jobs and Skills Australia will have a critical role to play in that regard, formulating a skills list based on an independent analysis of labour market data and qualitative analysis, including input from employers and unions in the relevant industry.

We are concerned that the inclusion of provisions on temporary migrant workers is at odds with the reforms the Government is making in the areas of migration and skills, and in particular the establishment of Jobs and Skills Australia which will take an evidence-based approach to assessing labour market shortages, and how they are best addressed, which may include migration

[13] The recent UK-FTA has removed this 'specified work' requirement for UK passport holders.
[14] 'A Migration Strategy for a More Prosperous and Secure Australia: Outline of the Government's Migration Strategy', April 2023, https://immi.homeaffairs.gov.au/programs-subsite/files/migration-strategy-outline.pdf , p. 3.

but should also consider other levers such as skills and training, increasing wages and conditions, improving job quality.

Australia must legislate to ensure that trade agreements:

- **Are consistent with a robust permanent migration system which protects the rights of migrant workers and ensures temporary migration is only used in situations of genuine workforce shortages**
- **Exclude provisions that facilitate increased numbers of temporary migrant workers who are vulnerable to exploitation**
- **Exclude provisions that enable the waiving of labour market testing requirements or other processes to verify labour shortages**
- **Exclude the 'specified work' requirement for Working Holiday Maker visas by abolishing second and third year visas to prevent exploitation.**

Human Rights and Environmental standards

Australia's trade agreements should be consistent with its commitments to UN human rights standards and international environment agreements in order to ensure sustainable and inclusive development.

Trade agreements should include enforceable commitments to the following UN human rights conventions and declarations:

- the International Covenant on Civil and Political Rights (ICCPR)
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the Convention on the Rights of the Child (CRC)
- the Convention on the Rights of Persons with Disabilities (CRPD)
- the UN Declaration on the Rights of Indigenous Peoples

Trade agreements should include enforceable commitments to the following UN multilateral environmental agreements, including:

- the UN Convention on Biological Diversity
- the UN Convention on International Trade in Endangered Species

- the UN Framework Convention on Climate Change 1992, the Paris Agreement 2015, and subsequent Climate Change Agreements at COP 26 2021 and COP 27 2022

Box 7: European Union's approach to negotiating parameters and priorities

The EU also has policy of requiring countries it negotiates agreements with to commit to implementing international labour standards and environmental standards through Trade and Sustainable Development Chapters (TSD). EU trade policy[1]:

- Requires countries negotiating trade agreements with the EU to commit to implementing the United Nations Paris Agreement on Climate Change
- Obliges countries to implement basic workers' rights, environmental standards and international environmental agreements, for example on biodiversity
- Promotes the respect for core human rights and workers' rights standards set out in the United Nations and International Labour Organisation conventions
- Promotes responsible business conduct
- Requires the establishment of civil society mechanisms to monitor the commitments made in this chapter: a domestic advisory group (DAG) for each party and an annual transnational civil society meeting.[1]

In June 2022 the EU Commission outlined a new plan to enhance climate, environment and labour rights in EU trade agreements which will involve the use of trade sanctions for breaches of core TSD provisions[1]. Including by:

- Making it easier for civil society and Domestic Advisory Groups (DAGs) to lodge complaints on violations of sustainability commitments.
- Stepping up engagement with trade partners in a cooperative process to foster compliance with international labour and environmental standards, including through technical and financial assistance.
- Extending the standard state-to-state dispute settlement compliance phase to the TSD chapter, meaning any party found in violation of the TSD commitments will have to inform how it will implement the panel report and comply within a certain period of time
- Including the possibility to apply, as a last resort, trade sanctions for material breaches of the Paris Climate Agreement and the ILO fundamental labour principles.

Australia must legislate to ensure that trade agreements:

- **Include enforceable commitments to UN Human Rights Treaties and Declarations and multilateral environmental agreements**

Indigenous Rights

The previous Government's approach to trade was not inclusive of First Nations peoples. We note the recent steps the current Government has taken to pilot a First Nations trade advisory group, and establish Australia's inaugural Ambassador for First Nations People, however the Government should go further and ensure that consultative mechanisms for First Nations communities regarding trade is enshrined in legislation.

The Government must also ensure that trade agreements are consistent with protecting the rights of First Nations people and consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). This must include guaranteeing the right to free, prior and informed consent for investment projects on indigenous land. Additionally, there should be specific protections in intellectual property rules for indigenous art, culture and use of traditional plants.

Australia must legislate to ensure that trade agreements:

- **Are consistent with protecting the rights of First Nations people.**

Investor-State Dispute Settlement (ISDS)

Investor-State Dispute Settlement (ISDS) clauses enable foreign investors to sue governments for actions, including law, policy and regulation that threaten their profits – or have the potential to negatively impact their future profits. Australia currently has ISDS provisions in ten FTAs[15]:

- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
- China–Australia Free Trade Agreement
- Korea–Australia Free Trade Agreement
- Australia–Chile Free Trade Agreement
- Singapore–Australia Free Trade Agreement
- Thailand–Australia Free Trade Agreement
- ASEAN–Australia–New Zealand Free Trade Agreement
- Peru-Australia Free Trade Agreement (PAFTA)
- Australia-Hong Kong Free Trade Agreement and Associated Investment Agreement (A-HKFTA)
- Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA)

[15] DFAT, 'Investor-state dispute settlement', https://www.dfat.gov.au/trade/investment/investor-state-dispute-settlement

Australia also has ISDS in 15 Investment Protection and Promotion Agreements with Argentina, China, Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay.[16]

The ACTU has a consistent position that ISDS clauses are a restriction on national sovereignty and the ability of governments to regulate in the public interest and impose an unnecessary cost

Box 8: Philip Morris ISDS case

ISDS cases are being used to claim compensation for legitimate public interest regulation, with the infamous Philip Morris ISDS case against the Australian Government challenging tobacco plain packaging being a prime example. In December 2011, the *Tobacco Plain Packaging Act 2011* became law in Australia, as part of a comprehensive range of tobacco control measures to reduce the rate of smoking in Australia. Philip Morris Asia challenged the plain packaging legislation under an obscure FTA: the *1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments* which contains ISDS provisions.

The arbitration was conducted by a tribunal composed of three arbitrators, who issued a unanimous decision in December 2015 agreeing with the Australian Government's position that the tribunal had no jurisdiction to hear Philip Morris Asia's claim. The tribunal found that Philip Morris Asia's claim was an abuse of process because Philip Morris Asia acquired an Australian subsidiary, Philip Morris (Australia) Limited, for the purpose of initiating arbitration under the Hong Kong Agreement challenging Australia's tobacco plain packaging laws.

In March 2017 the Tribunal issued the Award on Costs to the parties. It was revealed later through a freedom-of-information request that Australia's external legal fees and arbitration costs amounted to almost $24 million, with Philip Morris only having to pay half of Australia's legal costs, which shows that even when Governments win ISDS cases, the cases take years and cost millions in taxpayer dollars.

Reference:

Philip Morris ISDS case information sourced from Attorney General's Department, 'Tobacco plain packaging – investor-state arbitration', https://www.ag.gov.au/international-relations/international-law/tobacco-plain-packaging-investor-state-arbitration

[16] *Ibid.*

burden on Australian taxpayers. They should not be included in any trade agreement that Australia enters into.

We welcome Trade Minister Farrell's commitment that new agreements will not contain Investor State Dispute Settlement clauses and will review ISDS in existing agreements[17]. Scrapping ISDS is essential to enable Governments to regulate to protect the environment, public services, workers' rights, and public health. Given the dire impacts ISDS can have on the Government's ability to regulate, particularly in developing countries, and the chilling effect the threat of ISDS has on regulation - we urge the Australian Government to codify this commitment in legislation to ensure that future Australian Governments cannot include ISDS in agreements. The Australian Government should review all ISDS commitments in existing agreements, seeking to remove them from bilateral agreements, and negotiate side letters for regional agreements to exclude Australia from ISDS provisions. This has already occurred between Australia and New Zealand in relation to the Comprehensive and Progressive Trans Pacific Partnership (CPTPP) agreement, where the Governments negotiated a side letter in 2018 excluding the use of CPTPP ISDS provisions between Australia and New Zealand[18]

Australia must legislate to ensure that trade agreements:

- **Exclude ISDS provisions, and review ISDS provisions in existing agreements.**

Government procurement

Over the past decade Australia has faced a steady decline in our sovereign manufacturing capability and the supply chains that support and rely on it. We suffer from low levels of economic complexity and research and development when compared internationally. The consequences of this were painfully put on display both during the pandemic and the current inflation crisis, where Australians' health suffered when we couldn't produce enough PPE and vaccines required to rapidly protect ourselves from a wildly contagious disease. The highest inflation since 1990—driven in part by global supply chain disruptions—has starkly illustrated the need for strong domestic supply chains. In addition, the climate crisis highlights the need to develop local renewable energy industries. A key policy lever at the Government's disposal is procurement: Government has significant buying power through its procurement activities, purchasing tens of billions of dollars'

[17] Minister for Trade and Tourism, Senator the Hon Don Farrell, 'Trading our way to greater prosperity and security', 14 November 2022 https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security

[18] DFAT, 'Agreement between Australia and New Zealand regarding Investor State Dispute Settlement, Trade Remedies and Transport Services', 3 March 2018 https://www.dfat.gov.au/sites/default/files/sl15-australia-new-zealand-isds.pdf

worth of goods and services every year across a range of portfolios. The Government can—and must—leverage its status as a large purchaser to:

- Drive better wages, conditions, job security, and job quality across the economy.
- Rebuild local supply chains and our national sovereign manufacturing capability.
- Contribute to our social and environmental objectives as a society, including on gender equality and Indigenous Australian's social and economic empowerment.

The Albanese Government's 'Buy Australia' plan is a significant opportunity to achieve these goals, but provisions in trade agreements that restrict the ability of Government to preference local suppliers put this plan at risk. Procurement provisions in trade agreements are aimed at opening up procurement markets to global competition, while restricting the ability of Governments to develop local procurement strategies. Non-discrimination clauses, such as chapter 16 of the Australia-United Kingdom Free Trade Agreement (A-UKFTA), which commits Australia to not discriminating in tendering for Government work between domestic or foreign businesses. Although there are some exemptions to enable Governments to preference small and medium suppliers, for instance, procurement provisions have a chilling effect on the ability of governments to preference local industry.

Australia must legislate to ensure that trade agreements:

- **Do not restrict the use of government procurement.**
- **Maintain current government procurement exclusions for SMEs, indigenous enterprises, national treasures, ethical standards, environmental standards, and for local government procurement.**

Anti-dumping

Dumping occurs when 'products of one country are introduced into the commerce of another country at less than the normal value of the products.[19] A robust anti-dumping policy is critical to ensuring Australian industry remains competitive. The Australian Government must ensure that the Anti-Dumping Commission, Anti-Dumping Review Panel, International Trade Remedies Forum and the Department of Industry have sufficient resources to investigate and enforce anti-dumping measures, and have broad industry and union representation to deliver their function effectively. Additionally, Australia's anti-dumping system requires reform to clarify that shipping services are within the scope for investigation by the Anti-Dumping Commissioner and by the Minister.

[19] GATT Article VI, 'Anti-dumping and countervailing duties', https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art6_e.pdf

Australia must legislate to ensure that trade agreements:

- Are supported by a robust and well-resourced anti-dumping policy

Cultural industries

Australia's cultural industry is critical for protecting and promoting our national identity, including First Nations culture. Culture is a sector, therefore, where economic considerations should be subordinated to other social considerations. Trade agreements must ensure that local content rules for all forms of media and subsidies to promote local cultural expression are exempted from trade rules. Unfortunately, the Australian Government has not always protected the cultural sector in its trade agreements. The Australia-United States Free Trade Agreement (AUSFTA) which entered into force in 2005 did not include a broad cultural exemption – existing local content rules were frozen at current levels, meaning they could not be increased except in limited circumstances, and if they were reduced in the future they cannot be increased to previous levels (these are 'standstill' and 'ratchet' clauses, meaning that the direction of regulation can only one way – towards further liberalisation). The AUSFTA significantly restricts the ability of the Australian Government to regulate streaming and other new audiovisual services that have developed since the agreement was negotiated.

Trade agreements Australia negotiates must contain a broad-based cultural exception or reservation that:

- is technology neutral;
- allows for the Government to introduce protective legislation in the future to accommodate technologies including delivery platforms under development or not yet invented;
- allows for the Government to make protective strategic interventions at any time and in any manner it believes appropriate to maintain, strengthen or enhance development, production and/or the delivery and distribution of any sector or aspect of the cultural industries;
- is self-judging and not subject to dispute;
- is not subject to standstill, roll-back, snap-back or ratchet provisions, and
- is able to override all provisions in the entirety of the agreement including any commitments that might be made in respect of e-commerce.

See the submission of ACTU affiliate the Media, Entertainment and Arts Alliance (MEAA) for a further discussion on the impact of trade agreements on cultural industries.

Australia must legislate to ensure that trade agreements:

- **Exclude cultural industries through a broad-based cultural exception or reservation, to ensure the Government is free to regulate this sector.**

Services

Trade in Services chapters in trade agreements are aimed at reducing the regulation of services, freezing regulation at current levels unless they are specifically exempted, and opening up services markets to foreign investors. Trade in services rules use a 'standstill' and 'ratchet' structure which freeze regulation at current levels, where regulation cannot be increased over time, only reduced (unless particular services are specifically exempt – 'non-confirming measures clauses'[20]). This has the effect of locking in deregulation, liberalisation and privatisation, and can prevent governments from addressing the failures of deregulation and privatisation – such as re-regulating vocational education to deal with the failure of privatisation - through re-nationalising or re-regulating services. The very existence of these provisions can create a chilling effect on Government regulation of public services.

Agreements do this through a few key provisions:

- 'National Treatment' provisions, which state that service providers from the partner country must be treated as if they were local suppliers with full market access and no discrimination, meaning they are not obliged to have local presence as a condition for the supply of the service.[21]
- 'Most-Favoured-Nation Treatment' which ensures that if either Government reaches a more favourable agreement on services with another Government, it will extend the same treatment to the other Party to the agreement.[22]
- 'Market Access' which prohibits certain regulation, for instance on numbers of service providers (including monopolies or exclusive service providers), and numbers of staff employed to supply a service (for example, minimum staffing numbers or ratios of staff).[23] This may limit planning for staffing levels in services such as aged care.
- 'Local presence' which prohibits parties from requiring a service supplier of the other party to establish or maintain a local presence in its territory (a representative office, enterprise or to be a resident)[24]. No requirement for service providers to have a local presence creates possibilities for companies to evade tax, labour law and other regulation.

[20] See Art 8.7 of the UK-Australia FTA, for example
[21] Eg. Art 8.3, UK-Australia FTA
[22] Eg. Art 8.4, UK-Australia FTA
[23] Eg. Art 8.5, UK-Australia FTA
[24] Eg. Art 8.6, UK-Australia FTA

- 'Domestic Regulation' disciplines apply to measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services to ensure they 'do not constitute unnecessary barriers to trade in services'.[25]

Public services exclusion

Although Trade in Services chapters tend to have an exclusion for public services, the exclusion narrowly defines public services as a 'service supplied in the exercise of governmental authority' which means 'any service that is supplied neither on a commercial basis nor in competition with one or more service suppliers.'[26] This is ambiguous in the context of increasing privatisation of public services – there are very few public services that are not supplied on a commercial basis or in competition with one or more service providers, for example public health and education would not fit into this definition of public services, as they are provided alongside private health and education services.

Australia must clearly exclude all public services from all levels of government from trade agreements. Agreements should include a blanket exemption for all existing State Government non-conforming measures regarding investment and services, such as that existing in the Comprehensive and Progressive Trans Pacific Partnership (CPTPP), but which was removed from the UK-Australia FTA, meaning that all State Government service exemptions must be listed, otherwise they are automatically covered by the agreement.

Negative vs positive list approach

Australia is party to trade agreements that take a 'negative list' approach to services, where the services not covered by the agreement must be specifically listed as exemptions. Most recently, Australia has ratified the UK-Australia FTA which takes this approach. Negative lists are a highly risky approach, where Governments must be very careful to list all services for which they retain the right to regulate. This means new services developed in the future as technology develops, for example, will be automatically covered by the Agreement. In addition, negative lists are open to interpretation and legal challenge. This is particularly problematic in the health sector, where an exclusion for services provided by Medicare may or may not include treatments available from both private and public health providers, for example. The preferable alternative would be a 'positive

[25] Eg. Art 8.15, RCEP
[26] Eg. Art 8.1, UK-Australia FTA

list' approach, where the Government specifically lists all services that are covered by the agreement.

Box 9: Aged care

The Royal Commission into Aged Care Quality and Safety tabled its Report in Parliament in 2021, making almost 150 recommendations for extensive reform including increases in staffing numbers, increases in qualification requirements, and changes to the requirements for quality of care and licensing arrangements. The Albanese Government is now implementing these recommendations, including measures to increase staffing levels requiring a registered nurse to be on site in residential aged care at all times and mandated minimum care minutes per resident. Reforms to the sector are ongoing.

The right to regulate the aged care sector was not expressly reserved in the Regional Comprehensive Economic Partnership (RCEP) trade agreement negotiated by the previous Government, however, and many of the Recommendations of the Aged Care Royal Commission could be areas of regulation restricted in the RCEP clauses. Annex III of RCEP provides a list of services 'established or maintained for a public purpose' for which governments reserve the right to increase regulation and make new regulations. While childcare is listed, meaning the right to regulate the childcare sector is preserved, aged care has been omitted. This omission would mean that Government is restricted in its ability to improve qualified staff and staffing ratios (Recommendation 86 of the Royal Commission), for example, by Article 8.5 (Market Access) and 8.15 (Domestic Regulation).

DFAT argued at the JSCOT inquiry hearing that the ability for the Australian Government to regulate aged care and implement the recommendations of the Royal Commission would not be impacted by RCEP, however JSCOT noted there was ambiguity:

> It is understandable that such inconsistencies give rise to public concern, and it would be better if they were avoided. (4.25, JSCOT Report 196, p. 27)

Maritime Services

The recent UK-Australia FTA provides for the first time in a trade agreement Australia is party to that Australia will no longer be permitted to legislate for the exclusive access to certain maritime services covered by the agreement of Australian registered ships as defined in the *Shipping Registration Act 1981,* because the agreement requires UK registered ships to be given equivalent access to those specified maritime services. That feature of this agreement directly undermines Australia's historic support for retention of maritime cabotage. We are concerned the same

provisions on maritime services in the UK FTA will be replicated in the agreement currently under negotiation with the EU.

Although maritime cabotage services is listed as an exemption by Australia[8], the definition of 'cabotage' is unsatisfactory[9] and makes no reference to the core principle of cabotage which is the reservation for the ships and associated seafarers of the nation in question in relation to the transportation of goods and services between domestic ports. We suggest 'cabotage' could be more appropriately defined as follows and carved out of all Australian trade agreements:

> 'Cabotage' is defined as the reservation for Australian registered ships, crewed by Australian nationals, in the transportation of passengers or goods between a port located in Australia and another port located in Australia and traffic originating and terminating in the same port located in Australia.

Refer to our affiliate the Maritime Union of Australia's submission to this inquiry for a more extensive discussion of this issue.

Australia must legislate to ensure that trade agreements:

- **Exclude all public services.**
- **Include a blanket exemption for all existing State Government non-conforming measures regarding investment and services**
- **Enable Governments to retain the ability to regulate or re-regulate public services**
- **Use a positive list structure for trade in services, rather than a negative list**
- **Contain a complete definition of cabotage to ensure it is properly excluded from trade agreements**

Pharmaceutical monopolies

Trade agreements must not contain provisions to extend medicine monopolies and intellectual property rules beyond the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sets a minimum patent monopoly period of 20 years for WTO Members, with some limited exceptions for least developed countries and for medical emergencies. TRIPS-Plus – that is, provisions extending medicine monopolies and intellectual property rules beyond WTO TRIPS - are increasingly being included in Australia's trade agreements, including the CPTPP, and the UK and US FTAs. These provisions extend monopoly rights beyond 20 years, strengthen patent enforcement measures, and reduce the WTO flexibilities for developing countries – increasing

prices and delaying access to medicines for the Government and the public.[27] The transition to generic medicines after 20 years is also critical for the financial sustainability of the Pharmaceutical Benefits Scheme (PBS). For example, a 2013 study estimated the cost of patent term extensions for 2012-13 was approximately $240 million in the medium term, and $480 million in the longer term.[28] In addition, a 2019 study found that listing biosimilars[29] (generic) versions of certain biologic[30] drugs on the PBS could lead to considerable savings and PBS outlays could be reduced by up to 24%.[31]

While pharmaceutical companies claim longer monopolies are necessary to drive innovation and enable them to recoup the costs of developing new drugs before a competitor enters the market, these arguments do not stack up: a 2016 Productivity Commission study found that extensions of pharmaceutical patents had little effect on investment and innovation,[32] found that there were no grounds to extend the period of data protection for any pharmaceutical products, including biologics.[33]

Hence the EU's published proposals at the beginning of the EU-Australia FTA negotiations for longer data protection monopolies to match the EU standard of 8-10 years (compared to Australia's 5 years), in addition to the 20 year patent monopolies on new medicines, are a serious cause for concern.

Australia must legislate to ensure that trade agreements:

- **Do not extend patent monopolies or data protection monopolies on medicines in trade agreements**

[27] Tenni B, Moir H, Townsend B, Kilic B, Farrell A, Keegel T, Gleeson D, 'What is the impact of intellectual property rules on access to medicines? A systematic review', Global Health 18:40, 2022, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9013034/

[28] Harris T, Nicol D, Gruen N. 'Pharmaceutical patents review report', https://figshare.utas.edu.au/articles/report/Pharmaceutical_Patents_Review/23166947/1

[29] 'Generic' versions of biologic medicine. Due to the complexity of biologics exact copies are not possible, but 'biosimilars' which have the same effects in the body, can often be made. https://theconversation.com/explainer-what-are-biologics-and-biosimilars-45308

[30] Biologics are medicines that are made using certain types of cells to produce the right kind of protein, for example insulin. Biologics have become the fastest growing class of therapeutic compounds https://theconversation.com/explainer-what-are-biologics-and-biosimilars-45308

[31] Gleeson D, Townsend B, Lopert R, Lexchin J, Moir H. Financial costs associated with monopolies on biologic medicines in Australia. *Aust Health Rev.* 2019;43(1):36–42. doi: 10.1071/AH17031.

[32] Productivity Commission, 'Intellectual Property Arrangements: Overview and recommendations', No. 78, 23 September 2016 https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf p. 18.

[33] *Ibid.,* p. 35.

Digital trade

Australia must retain the ability to regulate the digital economy. Workers need governments to implement strong regulations in the rapidly evolving digital economy to protect human rights and ensure new technology benefits us all. Australia's employment laws, human rights laws, privacy laws, and competition laws all need to be strengthened to respond to the development of the digital economy.

Locking in deregulatory rules at such an early stage of development of the digital economy will see the ownership and control of data concentrated in the hands of a few corporations, leaving governments unable to maximise the public good benefits that can come with digitalisation. The Australian Government must preserve the ability to regulate in the digital domain through excluding restrictions on the regulation of cross-border data flows, restrictions on requirements for local presence and storage of data, and restrictions on access to source code. These rules will lock in deregulation of the digital economy and cement the power of big tech companies over workers. Although tech companies did not invent insecure work, many have developed digital platform business models built on precarity and exploitative labour practices. We are concerned digital trade rules could impede the ability of current and future governments to regulate for decent work in the growing digital platform economy, including regulating the use of AI.

We note with concern the 'ambitious' digital trade rules adopted in the 2020 Digital Economy Agreement (DEA) between Australia and Singapore (SAFTA).[34] The DEA and SAFTA contain some exceptions for cross-border data flow and location of computing facilities. Exceptions include government procurement, information held or processed on behalf of government, personal credit information, and data related to measures like health are listed as reservations in SAFTA. The DEA also enables the financial regulatory authorities of the Parties to access information processed or stored on computing facilities outside the Party's territory.

Even with these exceptions, the restrictions on regulating cross-border data flows, location of computing facilities and local presence have implications for the ability of governments to regulate and enforce laws, including tax law, and implications for workers' rights. Digital trade rules mean that governments will not be able to access data for public policy reasons, such as monitoring labour practices. The DFAT National Interest Analysis notes that the DEA 'will impose new

[34] DFAT, 'Australia-Singapore Digital Economy Agreement: fact sheet', https://www.dfat.gov.au/trade/services-and-digital-trade/australia-singapore-digital-economy-agreement-fact-sheet

restrictions on Australia's policy flexibility to impose certain measures to restrict data flows or require data localisation' but that 'the Government considers these restrictions are outweighed by the benefits.'[35] We note with alarm that the Australian Government is leading the push for digital trade rules at the WTO, following on from those established in the SAFTA.

These rules give corporations the right to operate across borders while limiting the ability of workers and the community to obtain justice. If the rights of a worker are violated by an online platform with no local presence, it is unclear how they obtain justice. As the International Trade Union Confederation, the ACTU's global union body, argues: 'Without a local presence of companies, there is no entity to sue and the ability of domestic courts to enforce labour standards, as well as other rights, is fundamentally challenged.'[36]

At present, digital platform workers (for example Uber drivers or food delivery workers) find that they have little ability to understand and challenge company decisions and practices. Workers find it difficult to resolve issues due to a lack of a dispute resolution process, lack of contact points and pathways for resolution. These rules prohibiting local presence requirements are likely to entrench these difficulties.

Box 10: Foodora case

The difficulties of holding digital platform companies without a local presence is highlighted by the Fair Work Ombudsman dropping its legal action against food delivery company Foodora. Foodora Australia Pty Ltd exited Australia in 2018; administrators sold the company's assets resulting in more than 1000 delivery workers only receiving 31% of entitlements owing to them. The Fair Work Ombudsman stated in June 2019 that it had discontinued its legal action against Foodora as it was unlikely the action would result in extra payments for workers or financial penalties against the company.

Reference:

- Anna Patty, 'Fair Work watchdog drops legal case against Foodora', *Sydney Morning Herald,* 21/06/19, https://www.smh.com.au/business/workplace/fair-work-watchdog-drops-legal-case-against-foodora-20190621-p5202q.html

[35] DFAT National Interest Analysis, Australia-Singapore Digital Economy Agreement, https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JSCT/2020/Digital_Economy_Agreement/11_NIA__AustraliaSingapore_Digital_Economy_Agreement.pdf?la=en&hash=CD46A7A13BAA3FC3A3D3C01FA045798BEC440F97 , p. 4.

[36] International Trade Union Confederation, https://www.ituc-csi.org/e-commerce-push-at-wto-undermines-workers

Workers require legal measures to govern data use and algorithmic accountability in the world of work to ensure transparency, data protection and the prevention of discrimination and undue interference. The work of digital platform workers in particular is dictated by complicated algorithms, and workers are not provided with any information about how the algorithm makes decisions. Digital platform food delivery riders surveyed by ACTU affiliate the Transport Workers' Union (TWU) and Victorian Trades Hall Council report being penalised by the algorithm for taking time off, reducing their hours, or refusing jobs.[37] They reported receiving fewer jobs as a result of being unavailable, and platforms deactivating their accounts as a result of not accepting jobs. Riders questioned the decisions behind how jobs are allocated, saying the companies' decisions and their algorithm are not transparent.[38] Similarly, the 'deactivation' – or dismissal - of workers from digital platforms is not transparent. There is an urgent need for the Australian Government to regulate digital platforms to ensure platforms respect certain minimum rights and protections, and that algorithms governing work are transparent and accountable.

Keeping source code and algorithms[39] secret from government also means it would be almost impossible for a government regulator or trade union to expose bias or discrimination in source code. For example, an algorithm used in recruitment that perpetuates gender or racial biases (for example Amazon's hiring tool that systematically discriminated against women applying for technical roles[40]) or that profiles workers as union activists. Preventing governments from accessing source code and algorithms could also restrict governments from being able to check for company compliance with domestic regulations, for example checking car safety, or the ability to access source code in accounting software to check for tax compliance.

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[37] Victorian Trades Hall Council submission into the *Inquiry into the Victorian on-demand workforce*, 2019, p. 39 https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/8515/7248/2483/Victorian_Trades_Hall_Council_supplementary_submission.pdf

[38] Victorian Trades Hall Council submission into the *Inquiry into the Victorian on-demand workforce*, 2019, https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/8515/7248/2483/Victorian_Trades_Hall_Council_supplementary_submission.pdf

[39] 'An algorithm can be understood as a recipe that involves a series of sequential steps with options and decision points, whereas source code is the language and form by which these instructions are written by people and interpreted by computers.' – ITUC and New Economics Foundation, 'Free Trade Agreements, Digital Chapters and the Impact on Labour', https://www.ituc-csi.org/IMG/pdf/digital_chapters_and_the_impact_on_labour_en.pdf , p. 14.

[40] Reuters, 'Amazon scraps secret AI recruiting tool that showed bias against women', 11/10/2018, https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G

Box 11: Workplace surveillance and worker privacy

The inability of governments to require data to be stored locally also has implications for workers' privacy, as new technologies generate large amounts of data on workers. New technology also brings with it increasing risk of worker surveillance. Many digital platform workers are subject to constant surveillance while working, and in 2015 it was reported that Uber had updated its privacy policy to allow the company to track the location of users even when they were not using the app or when their phones are turned off, and to pass data to third parties. The trend of workplace surveillance has accelerated since the start of the COVID-19 pandemic and the rapid shift to 'work from home' arrangements for many workers. The ABC reported a 300% increase in sales of software that monitors employees working remotely in the first two months of the pandemic.

References:

- International Labour Organisation's Global Commission on the Future of Work report *Work for a brighter future*, p. 44.
- New Uber Policy tracks users even when phone turned off, *Geelong Advertiser*, 30 June 2015
- ABC news, 'Employee monitoring software surges as companies send staff home', 22/05/20 https://www.abc.net.au/news/2020-05-22/working-from-home-employee-monitoring-software-boom-coronavirus/12258198

Australia must legislate to ensure that trade agreements:

- **Exclude digital trade provisions which would restrict regulation of cross-border data flows, restrictions on requirements for local presence and storage of data, and restrictions on access to source code.**
- **Include provisions that ensure digital companies do not evade labour law, tax law, and must abide by Australian standards for privacy and consumer protection, including where data is held offshore.**

Enshrining the process for negotiating trade agreements in legislation

Legislating a democratic negotiating process

The Australian Government must legislate a transparent, consultative, and democratically accountable process for negotiating trade agreements:

- Prior to commencing negotiations for bilateral or regional trade agreements, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, social, regulatory, health, labour and environmental impacts, and impacts on First Nations peoples, which are expected to arise.
- There should be regular stakeholder consultation during negotiations, including with unions, business and civil society representatives. The Australian Government should legislate an advisory committee system based on the system in the US, to enable stakeholders to provide information and advice with respect to negotiating objectives and bargaining positions before Australia enters into a trade agreement. The committees would be consulted as negotiations progress and provided with negotiation text on a confidential basis in order to provide real-time advice, and be provided with the final text before it is signed in order to provide advice on whether the agreement should be entered into. The committee would also provide advice on the operation of existing trade agreements and other related trade policy issues.
- The Australian government should publicly release proposals and discussion papers during trade negotiations for public comment.
- The Australian Government must release the final text of agreements for public and parliamentary debate, and parliamentary approval *before* they are authorised for signing by Cabinet.
- After the text is completed but before it is signed, comprehensive, independent assessments of the likely economic, social, environmental and health impacts of the agreement should be undertaken and made public for debate and consultation and review by parliamentary committees.
- An inquiry should review the text of a trade agreement which has been released before signing with the independent assessment of its costs and benefits, and make a recommendation to Parliament.

- After release of the text and before signing, and after a review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should decide whether the Cabinet should approve the agreement for signing – this should be subject to a debate and vote by Parliament.
- If the agreement is approved by Parliament, and approved for signing by Cabinet, Parliament should then vote on the implementing legislation.
- Independent evaluations of the agreement should be held five years after the agreement comes into force, and at five yearly intervals thereafter. These evaluations should examine the economic, employment, environmental, social, health and gender impacts of the agreement, and be made publicly available.

Legislate a negotiating mandate

The Australian Government must legislate to ensure that trade agreements:

- Will not be negotiated with countries that abuse workers' rights.
- Include binding, enforceable labour rights protections to hold governments and businesses accountable for violations of workers' rights.
- Include binding, enforceable commitments to end modern slavery, including banning the import of products made with forced labour.
- Support the capacity-building of unions in developing countries to assist with upholding workers' rights.
- Are consistent with a robust permanent migration system which protects the rights of migrant workers and ensures temporary migration is only used in situations of genuine workforce shortages.
- Exclude provisions that facilitate increased numbers of temporary migrant workers who are vulnerable to exploitation.
- Exclude provisions that enable the waiving of labour market testing requirements or other processes to verify labour shortages.
- Exclude the 'specified work' requirement for Working Holiday Maker visas by abolishing second and third year visas to prevent exploitation.
- Include enforceable commitments to UN Human Rights Treaties and Declarations and multilateral environmental agreements.
- Are consistent with protecting the rights of First Nations people.
- Exclude ISDS provisions, and review ISDS provisions in existing agreements.
- Do not restrict the use of government procurement.
- Maintain current government procurement exclusions for SMEs, indigenous enterprises, national treasures, ethical standards, environmental standards, and for local government procurement.

- Are supported by a robust and well-resourced anti-dumping policy.
- Exclude cultural industries through a broad-based cultural exception or reservation, to ensure the Government is free to regulate this sector.
- Exclude all public services.
- Include a blanket exemption for all existing State Government non-conforming measures regarding investment and services.
- Enable Governments to retain the ability to regulate or re-regulate public services.
- Use a positive list structure for trade in services, rather than a negative list.
- Contain a complete definition of cabotage to ensure it is properly excluded from trade agreements.
- Do not extend patent monopolies or data protection monopolies on medicines in trade agreements.
- Exclude digital trade provisions which would restrict regulation of cross-border data flows, restrictions on requirements for local presence and storage of data, and restrictions on access to source code.
- Include provisions that ensure digital companies do not evade labour law, tax law, and must abide by Australian standards for privacy and consumer protection, including where data is held offshore.

We propose that this negotiation mandate be set democratically and transparently through legislation, and in addition there should be stakeholder consultation before negotiations begin for an agreement to inform DFATs submission to cabinet to set the Australian Government's negotiating mandate.

Box 12: The US Government's approach to negotiating parameters and priorities

In terms of the negotiating parameters for agreements, the US Congress gives the President a negotiating mandate in the form of the Trade Promotion Authority (TPA). The TPA is a legislative procedure, written by Congress, through which Congress defines US negotiating objectives and spells out a detailed oversight and consultation process for trade negotiations, and Congress retains the authority to review and decide whether any proposed US trade agreement will be implemented. The most recent TPA was enacted in 2015 and expired in July 2021; President Biden has not asked Congress for a new TPA to date The Office of the United States Trade Representative outlines the following key elements of the previous TPA:

1. TPA outlines Congressional guidance to the President on trade policy priorities and negotiating objectives.

Box 12 continued

2. TPA establishes Congressional requirements for the Administration to notify and consult with Congress, with the private sector and other stakeholders and with the public during the negotiations of trade agreements.
3. TPA defines the terms, conditions and procedures under which Congress allows the Administration to enter into trade agreements, and sets the procedures for Congressional consideration of bills to implement the agreements.

The TPA gives the United States negotiators a mandate which ranges from quite broad provisions (e.g. to obtain more open, equitable, and reciprocal market access) to fairly precise ones (e.g. to promote universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour). United States negotiators must address each of the negotiating objectives listed in the TPA.

References:

- USTR, 'Trade Promotion Authority' https://ustr.gov/trade-topics/trade-promotion-authority
- Congressional Research Service, 'Trade Promotion Authority', 6 December 2022, https://crsreports.congress.gov/product/pdf/IF/IF10038#:~:text=The%20most%20recent%20TPA%20was,(FTAs)%20under%20TPA%20statutes

Review existing agreements

In addition to legislating a framework for transparent trade negotiations and parameters to ensure trade agreements deliver for all Australians, the Government must review all existing trade deals in the context of the new framework. This is particularly urgent in the case of ISDS, as demonstrated by Clive Palmer's current ISDS cases against the Australian Government: Singapore-based Zeph Investments seeking $296bn for an alleged breach of the ANZ-ASEAN FTA over Western Australia's law to prevent Palmer from seeking compensation over his Pilbara iron ore project, and a second case for $41.3bn alleging Australia breached the ANZ-ASEAN FTA in relation to coal exploration permits.[41]

[41] https://www.theguardian.com/australia-news/2023/jul/10/clive-palmers-second-case-against-australia-is-413bn-claim-it-broke-trade-deal

We note the recently released report on Australia's Southeast Asia Economic Strategy to 2040 recommends Australia's Trade 2040 Taskforce, in collaboration with Southeast Asian partners, to review the scope of existing FTAs to determine priorities for agreement upgrade negotiations. This work should be a more comprehensive exercise for all of Australia's FTAs, and must include a stocktaking of not just the economic benefits of these agreements for Australian businesses, but the broader economic and social impacts on Australia and partner countries. We recommend the top priorities for review be agreements that contain ISDS provisions, and that a forward workplan be established to bring current agreements into line with the new legislated framework for negotiation parameters and consultation.

- **The Australian Government should assess current trade agreements against the new legislated framework, and where they are inconsistent, those aspects should be renegotiated.**

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