

Interim Australia-India Economic Cooperation and Trade Agreement

Submission by the Australian Council of Trade Unions to the
Joint Standing Committee on Treaties Inquiry

ACTU Submission, 26 August 2022

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1. Introduction and Executive Summary

1.1. 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. The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have more than 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector. The ACTU and affiliated unions have had a long and significant interest in so-called free trade agreements on behalf of our members and workers generally. We appreciate the opportunity to make a submission to this Joint Standing Committee on Treaties Inquiry into the Interim Australia-India Comprehensive Economic Partnership Agreement (Interim Australia-India CEPA).

1.2. The ACTU Position on Broad Principles for Trade Policy

The ACTU is a supporter of trade as a vehicle for economic growth, job creation, tackling inequality and rising living standards. Having a strong export sector is imperative for Australia's prosperity. However, unions should not be expected to be 'cheerleaders' for a trade agenda that does not deliver for Australian workers or the broader community. Where proposed free trade agreements, or provisions of those agreements, are not in the national interest and the interests of our members and workers generally, we will make the case for change.

Australia's current trade policy undermines workers' rights, local jobs, the ability of government to regulate in the public interest, and expands corporate power. Key elements in bilateral and plurilateral trade agreements that are of concern to Australian Unions include:

- Labour mobility clauses that waive labour market testing requirements and expand the number of temporary visas, where workers are highly vulnerable to exploitation
- Intellectual property provisions that expand monopolies for pharmaceutical companies and other corporations at the expense of public health and the public interest
- Investment provisions that enable corporations to sue Governments for changes to laws and policies that have the potential to 'devalue' their investment (Investor-State Dispute Settlement)
- Trade in services and procurement provisions that open up public services to competition and lock in privatisation and deregulation.
- Restrictions on procurement that undermine local industries.
- Lack of enforceable protections for labour rights.
- Lack of enforceable protections for the environment.
- Lack of public consultation and transparency in the agreement-making process.

The new Labor Government has committed to an overhaul of current Australian trade policy to better promote workers' interests. The 2021 ALP National Platform states:

Labor will set out an ambitious, fair trade agenda in government aimed squarely at increasing the complexity of our exports in order to create more well paid, secure jobs, strengthen economic resilience and ensure that every trade deal increases the living standards of the Australian people. Labor is committed to trade policies consistent with Australian values of justice and equality, community views, workers' rights and the interests of developing countries. Trade agreements must be consistent with Australia's social and economic values, be based on widespread consultation, provide for appropriate minimum and enforceable labour and

environmental standards, take account of social and economic impacts and allow sovereign governments to make decisions and implement policies in the interests of their citizens.

Furthermore:

Labor in Government will not enter into and will prohibit through legislation trade arrangements that undermine the Australian government's capacity to govern in the interest of all Australians, including any provisions that obviate Australia's protection of local jobs through the regulation of temporary work, waive labour market testing, further limit the capacity of governments to procure goods and services locally; require the privatisation or contestability of public services; undermine Medicare, the public health system and the Pharmaceutical Benefits Scheme, undermine State or Commonwealth workplace laws or occupational licencing arrangements, or undermine laws that relate to anti-dumping. Labor will not enter into agreements that include ISDS provisions or that do not include skills assessments to be undertaken in Australia and labour chapters with enforceable international labour standards.¹

1.3: List of Recommendations

1. The new Australian Government must renegotiate provisions in the interim agreement to ensure they are consistent with its own trade policy.
2. The comprehensive agreement must not include ISDS provisions.
3. The comprehensive agreement must include robust, enforceable chapters on labour rights and the environment
4. The Australian Government must broaden the definition of public service to ensure that all public services at all levels of Government are effectively excluded.
5. The Australian Government must amend Annex 8F Part B to replicate Paragraph 4 from Annex 8F Part A to enable future changes to regulation of services.
6. The Australian Government must renegotiate the Australia-India ECTA to insert a blanket exemption for all existing State Government non-conforming measures.
7. The comprehensive agreement must include a strong, enforceable labour chapter to protect workers, and especially migrant workers
8. The Australian Government must review the arrangements for temporary workers in the Australia-India ECTA to ensure they are consistent with the new Government's commitment to preferencing permanent migration.
9. The comprehensive agreement must not waive labour market testing.

2. ACTU Position: The Interim Australia-India Comprehensive Economic Partnership Agreement

After 11 years of stop-start negotiations, Australia and India signed an 'Economic Cooperation and Trade Agreement' on 2 April 2022. Both governments have committed to continue negotiations for a more comprehensive agreement. The decision to conclude a hasty interim agreement appears to have been driven by the Morrison Government wishing to conclude the agreement before the election, and followed the Coalition Government's usual undemocratic practice of not consulting with unions or civil society stakeholders. Although the interim

¹ 2021 ALP National Platform, Chapter 1, page 9.

agreement is missing some of the worst elements of modern trade agreements, such as ISDS, and does not waive labour market testing, the ACTU is concerned these elements may be back on the table in negotiations for a final, comprehensive agreement. The ACTU is deeply concerned about the absence of a labour chapter and environment chapter.

The ACTU understands the new Government intends to continue with the negotiations for a comprehensive agreement. We note the new Labor Government's commitment to reforming Australia's trade agenda to ensure negotiations are conducted transparently and democratically, with genuine consultation with unions and civil society stakeholders, and to ensure trade agreements entered into protect workers' rights.

We recommend the new Government use this opportunity to renegotiate provisions in the interim agreement and ensure that a comprehensive agreement includes protections for workers' rights and is consistent with the trade policy of the new Government.

Recommendation: The Australian Government must renegotiate provisions in the interim agreement to ensure they are consistent with its own trade policy.

Recommendation: The comprehensive agreement must not include ISDS provisions.

Recommendation: The comprehensive agreement must include robust, enforceable chapters on labour rights and the environment.

2.1 Trade in Services

The Trade in Services chapter is aimed at reducing the regulation of services, freezing regulation at current levels unless services are specifically exempted, and opening up services to competition from the other Party. It does this through a few key provisions:

- National Treatment (Article 8.4): services from the other Party must be treated as if they were local suppliers with full market access and no discrimination.
- Most-Favoured-Nation Treatment (Article 8.5): if either Party reaches a more favourable agreement on services with another Government, it will extend the same treatment to the other Party to this agreement. In the Australia-India ECTA, this clause only applies going forward, rather than to existing agreements each Party has signed, however the Party may request consultations to discuss the possibility of extending the treatment provided under an agreement with another Party.
- Market Access (Article 8.6): prohibits certain forms of government regulation, including on the numbers of service suppliers, numbers of workers employed to supply a service, and prohibitions on limits to the participation of foreign capital. In addition, there are specific restrictions on domestic regulation (Article 8.14) relating to qualification requirements and procedures, technical standards, and licensing requirements and procedures to ensure they do not constitute “unnecessary barriers to trade in services.”

Although this chapter intends to exclude 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.”² This is ambiguous in the context of increasing privatisation of Government services - there are very few public services that are not supplied on a commercial basis or in competition with one or more service providers.

This agreement takes a highly liberal approach to trade in services by taking a ‘negative list’ approach, where the services not covered by the agreement – ie. services or regulation that the Australian Government can retain the right to regulate - must be specifically listed as reservations or exemptions in Annex 8F. This is a highly risky approach, where Governments must be very careful to list all services for which they wish to retain current regulation or increase future regulation. This means new services developed in the future as technology develops, for example, will be automatically covered by the Agreement.

Australia has listed as an exemption existing regulations on qualifications, licensing and service standards³, however, unlike the recent UK-Australia FTA, this exemption is not included in Annex 8F Part B, which deals with the ability of governments to change or increase future regulation. The Australian Government must ensure that it has the ability to regulate qualifications, licensing and service standards now and into the future. This is vital to ensuring the Government can fully implement the recommendations of the Royal Commission into Aged Care Quality and Safety, for instance.

The Australia-India ECTA, like the recent UK-Australia FTA, also fails to provide a blanket exemption for State Government regulation – instead requiring each exempted service to be listed separately in the annex.

Recommendation: The Australian Government must broaden the definition of public service to ensure that all public services at all levels of Government are effectively excluded.

Recommendation: The Australian Government must amend Annex 8F Part B to replicate Paragraph 4 from Annex 8F Part A to enable future changes to regulation of services.

Recommendation: The Australian Government must renegotiate the Australia-India ECTA to insert a blanket exemption for all existing State Government non-conforming measures.

2.2 Temporary Movement of Natural Persons

There are a number of commitments in the Australia-India ECTA regarding temporary migrant workers:

- 1,800 qualified chefs and yoga teachers for four years (Annex 9A)
- A list of other industries and occupations for those with specialised qualifications and experience to enter for one year (Annex 9A)

² Article 8.1, Australia-India ECTA

³ Annex 8F, Part A, Paragraph 4

- A Side Letter which permits up to 1000 people to enter Australia on temporary Work and Holiday Visas
- A Side Letter on Post-Study Work Visas permits longer post-study stays for ICT and STEM graduates of 2-4 years for those with higher degrees.

Australian Unions do not believe that trade agreements should include provisions on temporary workers, particularly in the absence of strong protections for workers' rights in a labour chapter. Moreover, temporary migrant workers should only be used to fill genuine skill shortages based on strict labour market testing.

Temporary migrant workers are highly vulnerable to exploitation and modern slavery due to their temporary status which limits their bargaining power and agency. Despite employer claims that exploitation is the result of a few 'bad apple' employers, there is a strong body of evidence⁴ that exploitative practices such as wage theft are endemic and widespread among migrant workers.

The current system of temporary migration does not recognise the contribution migrant workers make to this country. Instead, the system has turned Australia into a guest worker state, creating an underclass of temporary migrant workers who are highly vulnerable to exploitation. Australian Unions reject the current system of temporary migration that serves the needs of corporations while treating workers as disposable. Australia's migration system must be reset to a system based on permanent migration, where migrant workers are given security, have their rights respected, and are able to settle here with their families and become a permanent part of our communities.

Recommendation: The comprehensive agreement must include a strong, enforceable labour chapter to protect migrant workers

Recommendation: The Australian Government must review the arrangements for temporary workers in the Australia-India ECTA to ensure they are consistent with the new Government's commitment to preferencing permanent migration.

Recommendation: The comprehensive agreement must not waive labour market testing.

2.3 Charting a new course: transparent, inclusive negotiations in the comprehensive agreement

Australians should expect that trade agreements are subject to proper scrutiny and that unions and others in civil society, as well as business, have the opportunity for genuine input into the negotiations on behalf of those they represent. To date trade agreement negotiations are conducted behind closed doors and Australia lags behind other countries and institutions when it

⁴ See for example, L Berg and B Farbenbum, 'Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey', UNSW Law, Sydney and University of Technology Sydney, 2017 <https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf> ; S Martin, '88 days a slave: backpackers share stories of farm work exploitation', The Guardian, 26/9/19, <https://www.theguardian.com/australia-news/2019/sep/26/88daysaslave-backpackers-share-stories-of-farm-work-exploitation>; I Campbell, 'Harvest Labour Markets in Australia: Alleged Labour Shortages and Employer Demand for Temporary Migrant Workers', *Journal of Australian Political Economy*, No. 84, pp. 46-88; Unions NSW and Migrant Workers Centre, 'Working for \$9 a day: wage theft and human rights abuses on Australian farms', 2021, <https://www.unionsnsw.org.au/wp-content/uploads/2021/06/piece-rates-report.2-2.pdf>

comes to public scrutiny. This whole process in Australia contrasts with the experience in the European Union, for example. The EU has recognised legitimate community demand for the negotiating papers and final text to be exposed to public debate.

Australia's Current Trade Agreement Process is secretive and lacks democratic accountability:

- Cabinet makes the decision to initiate trade negotiations and receives reports on the progress of negotiations.
- The text remains secret until the deal is completed.
- Cabinet makes the decision to sign the completed agreement before the text becomes public and without independent evaluation.
- Only after the agreement is signed is the text tabled publicly in Parliament and reviewed by the Joint Standing Committee on Treaties (JSCOT).
- There is no independent assessment of the economic costs and benefits of the agreement, or of social or regional impacts, before it is signed. The National Interest Assessment is done by DFAT, the department that negotiated the agreement, and it always gives a favourable assessment.
- The JSCOT reviews the agreement, but it cannot make any changes to the text. It can only make recommendations which are not binding on the government.
- Parliament does not vote on the text of the agreement, only on the enabling legislation, which is mostly confined to changes in tariffs.

Trade agreements now deal with a wide range of issues that affect communities and are normally decided by parliament, including stronger medicine monopolies, foreign investor rights to sue governments over health and environmental laws, regulation of essential services, digital trade rules, temporary workers, industry policy and product standards. Such issues should be transparent, independently evaluated and decided by parliament, not traded off behind closed doors. This is even more relevant since the COVID-19 pandemic has exposed the flaws in current trade rules, like lack of local manufacturing capacity and rights for foreign investors to sue governments over actions taken to save lives.

Trade agreements are major undertakings with profound implications for both the Australian and the partner country or 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 leaves a lot to be desired. As is the way with all trade agreements Australia is involved in, they 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 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.

The negotiating process for an agreement that Australia has already signed up to cannot be undone. Many agreements are put together without a proper transparent and inclusive process for public input into negotiations. This should give this Inquiry and Parliament even greater cause to ensure any agreement is subject to comprehensive scrutiny.

To this end, we call for an independent, external inquiry into the social, economic and health costs and benefits to be part of the normal trade processes. This inquiry should also take a lead role in advocating for reforms to the treaty-making process and future trade agreement negotiations to set a new standard, both for the conduct of negotiations and for the process by which Australia enters into such agreements. The existing, flawed and inadequate process that we have seen with past agreements does not have to be set in stone forever more.

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; increasingly they 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. We submit that the following recommendations should be applied to all future trade agreement processes, including to future negotiations involved in the process of upgrading the interim Australia-India agreement into a final, comprehensive agreement:

Recommendation: Before advancing future negotiations in the process of upgrading the interim Australia-India agreement into a final, comprehensive agreement, and prior to commencing negotiations for any future 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, cultural, regulatory, health, labour and environmental impacts which are expected to arise.

Recommendation: There should be regular public consultation during negotiations, including submissions and meetings with stakeholders including with trade unions. The Australian government should follow the example of the European Union and release proposals and discussion papers during trade negotiations.

Recommendation: The Australian Government should follow the example of the European Union and release the final text of agreements for public and parliamentary debate, and parliamentary approval before they are authorised for signing by Cabinet.

Recommendation: After text is completed but before it is signed, independent assessments of the economic, social, environmental and health impacts of the agreement should be undertaken and made public for debate and consultation and review by parliamentary committees.

Recommendation: 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.

Recommendation: Legal experts agree that the Executive power to enter into treaties is a prerogative power which can be abrogated or controlled by legislation. There is no constitutional barrier to Parliament playing a greater role in the treaty decision-making process. 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.

Recommendation: If the agreement is approved by Parliament, and approved for signing by Cabinet, Parliament should then vote on the implementing legislation.

3. Conclusion

Good trade policy should be transparent and accountable to the public and deliver quality jobs, rising wages and greater equality. The Australia-India ECTA must be reformed to address these needs, removing those elements regarding trade in services and temporary movements of people which are not consistent with the new Government's trade policy before it is ratified. Failing this, the new Government must ensure that those elements are excluded during current and future negotiations over the final comprehensive agreement. The Government must also ensure that the final comprehensive agreement does not prohibit active industry policy or support for local renewables, including through procurement policy. The Government must also rule out other elements such as the ISDS and the removal of labour market testing for temporary workers (not included in the interim agreement) being included in the final comprehensive agreement. Finally, the Government must ensure the agreement includes enforceable international labour rights and environmental standards, consistent with ALP policy and the National Platform.

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