



**Australian Fair Trade and Investment Network (AFTINET)
supplementary submission to the Joint Standing Committee on
Trade and Investment Growth Inquiry into the Australian
Government's approach to negotiating trade and investment
agreements October 2023**

**A short step-by step summary of the current trade agreement
process, why there is pressure from previous parliamentary
inquiries and community organisations for a more open and
accountable process and recommendations for change**

Introduction

AFTINET is a network of unions and community organisations which advocates for trade policy consistent with human rights, labour rights and environmental sustainability. We are making this short supplementary submission in response to the publication of the evidence given to the Committee by the Department of Foreign Affairs and Trade representatives on September 13, 2023.

It was claimed that there was wide consultation with both business and community organisations during trade negotiations, and that changes to the current process were not needed. Some Committee members asked for a step-by-step explanation of the current trade agreement process. The following information is extracted from our longer submission in the hope that it will give a clearer picture of the process, and the public and parliamentary debate about its adequacy, including a series of Parliamentary inquiries which have called for a more open and accountable process.

Our longer submission deals with both the process and content of trade agreements.

The current Australian Trade agreement process

Trade agreements are legally binding and have stronger enforcement mechanisms and penalties than United Nations (UN) human rights and environment treaties, which rely on naming and shaming. All trade agreements contain a government-to-government dispute process which can ultimately result in trade sanctions. This means that one government can lodge a dispute with a tribunal if it can claim that another government breaches the terms of the agreement. If the complaint is found to be valid, the tribunal can allow the successful complaining government to ban or tax the products of the other nation.

Over the last 30 years the range of issues in trade agreements has expanded and now includes rights for international investors to sue governments, quarantine and food labelling issues, regulation of finance and investment, regulation of essential services like health, education, water and energy, temporary migration, digital trade, intellectual property, including patents and other monopolies on medicines which affect access to affordable medicines, labour rights, environmental standards, state-owned enterprises, regulatory coherence and small and medium-sized enterprises. Agreements often contain up to 30 chapters and thousands of pages.¹

Since Australia now has very low tariffs, there is a temptation to trade off some forms of regulation in order to gain market access for agricultural products and services exports. Trade policy should have red lines to protect public interest regulation. Public demand has also grown for a more open and accountable process for trade negotiations.

Decisions about such issues as medicines policy and other forms of public interest regulation should be debated publicly and decided by parliament, not traded off behind closed doors. The secrecy of the trade agreement negotiating process means that these issues are effectively removed from democratic debate and parliamentary scrutiny before the agreement is signed and tabled in Parliament. Parliament does not vote on the whole text, only the enabling legislation for the agreement. Such legislation mostly involves only tariff changes and does not deal with the ways in which other chapters in the agreement may restrict future government regulation.

¹ Department of Foreign Affairs and Trade (2017) Text of the CPTPP, TPP and associated documents, <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents>

In short, trade agreements are legally binding, and are difficult to revoke. They have increasingly complex commitments on laws and policy that should normally be decided through open democratic parliamentary processes. This should mean that the process for negotiating, signing and ratifying trade agreements should be subject to the highest levels of public debate, scrutiny and democratic accountability to ensure that the benefits outweigh the costs. But this is not the case. The current trade agreement process is secretive and lacks democratic accountability.

The steps of the current trade agreement process are as follows:²

- Cabinet makes the decision to initiate trade negotiations and receives reports on the progress of negotiations.
- The text remains secret until after the agreement is completed. There is limited consultation by DFAT with business, trade unions and other community organisations, but there is no direct access to the negotiating text. Consultation with business has usually been far more extensive than consultation with community organisations.
- Cabinet makes the decision to sign the completed agreement, which is then done by the Federal Executive Council, comprising the Governor-General and serving Ministers and Parliamentary Secretaries. Signing of the text takes place before the text becomes public and without independent evaluation of the costs and benefits of the text.
- 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, nor of health, environmental, gender or regional impacts, before it is signed.
- The National Interest Assessment and Regulatory Impact Statement considered by JSCOT are done by DFAT, the department which negotiated the agreement, and always give 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. Parliament does not debate or vote on the thousands of pages of text which can impact on the regulatory capacity of future governments.
- After Parliament has adopted the enabling legislation, the agreement is ratified through the exchange of letters between governments and comes into force at a specified period after ratification.

The current process was established in 1996, after the *Trick or Treaty Report*³ which resulted in the establishment of the JSCOT process.

Since then the trade agreement process has been the subject of continuous debate and four parliamentary inquiries, in 2003, 2012, 2015 and 2021, all of which recommended increased transparency and accountability. The 2015 report was aptly called *Blind Agreement*.⁴ The 2021 report

² Department of Foreign Affairs and Trade (2013) *The Treaty making process*, <http://www.dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/treaty-making-process.aspx>

³ Senate Legal and Constitutional Affairs References Committee (1995) *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November, https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/pre1996/treaty/report/index

⁴ Senate Foreign Affairs, Defence and Trade References Committee (2003) *Report: Voting on Trade*, Joint Standing Committee on Treaties (2012) *Report on the Inquiry into the Treaties Ratification Bill 2012*, Senate

made bipartisan recommendations for stakeholder access to the text of trade agreements during negotiations and independent assessments of the impacts of trade agreements.⁵ The current government has a policy supporting a more open process, stakeholder access to texts during negotiations and independent assessment of the final text of agreements.⁶ While there has been some more frequent consultation with community organisations, this policy has not yet been implemented.

AFTINET is recommending a more open and accountable process which is consistent with government policy and with practice in comparable countries. The US allows access to negotiating texts for representative of business and community groups and members of Congress, and the Congress votes on the whole agreement. The EU publishes its own negotiating proposals and also publishes the text with an independent evaluation of its social and economic impacts before signing.

Recommendations for changes to the trade agreement process

- ***Prior to commencing trade negotiations, the Government should table in Parliament a document setting out its priorities and objectives. The document should include assessments of how the agreement relates to other whole-of-government priorities, including local industry development and sovereign capability development in strategic industries, the transition to a low carbon economy to meet the government's carbon reduction emissions strategies, and the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, health, gender and environmental impacts, and impacts on First Nations Peoples.***
- ***There should be regular public consultation during negotiations, including submissions from and meetings with business, unions, First Nations groups, women's, environment and other relevant civil society groups, and reports to JSCOT and parliament. Consultation should include access to negotiating texts.***
- ***The final negotiated text should be released before signing together with an independent evaluation of its economic, employment, environmental, gender, and public health impacts.***
- ***After parliamentary 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, by voting on the whole agreement. After signing, Parliament should vote on the implementing legislation.***
- ***The government should commission independent reviews of the post-implementation impacts of trade agreements 5 years after the agreement comes into force. These should include economic, employment, environmental, health and gender impacts.***

Foreign Affairs, Defence and Trade References Committee (2015) Blind Agreement: Report on the Commonwealth's treaty-making process, particularly in light of the growing number of bilateral and multilateral trade agreements,

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report

⁵ Joint Standing Committee on Treaties (2021) Report 193 Certain aspects of the treaty making process in Australia, August, pp. xvii-xviii,

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaty-makingProcess/Report_193

⁶ Australian Labor Party (2023) ALP Draft National Platform, August

<https://laborconference.org.au/files/ALP%20Draft%20National%20Platform%2049th%20Annual%20Conference%202023.pdf> The trade section of the draft pp. 78- 85 was not amended at the conference. See pp. 83-85 for the policy for a more open trade negotiation process.