Joint Standing Committee on Treaties

Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland

SUBMISSION BY THE

CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION)

18th March 2022

Introduction

1. On 8th February 2022 the *Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland (Adelaide, 17 December 2021 and London, 16 December 2021)* (the **AU-UK FTA**) was tabled in the Australian Parliament.

2. The Joint Standing Committee on Treaties (the **Treaties Committee**) is empowered by its resolution of appointment to inquire into and report on *'matters arising from treaties and related National Interest Analysis and proposed treaty actions presented or deemed to be presented to the Parliament*.'[1] The Treaties Committee has invited interested persons and organisations to make submissions on the AU-UK FTA by 18th March 2022.

3. The Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division) (the **CFMEU**) welcomes the opportunity to make a submission on the AU-UK FTA. The CFMEU has tens of thousands of members employed in the Australian building and construction industry whose employment may be jeopardised by those seeking to invoke the provisions of the AU-UK FTA.

4. The CFMEU is not generally supportive of free trade agreements, as history has shown that most, if not all, pay scant attention to the protection of the jobs of Australian workers and are more concerned with benefitting the big end of town rather than small employers and workers. Many of the "benefits" identified in FTA's are illusory and never realised and unfortunately the real impact of FTA's end up being the destruction of domestic industries, particularly manufacturing.

5. The AU-UK FTA is a wide-ranging document consisting of 32 chapters, 4 annexures and 17 side letters. In the limited time available it is impossible to do a comprehensive critique of such a large collection of documents, therefore the CFMEU has concentrated its attention on two chapters: Chapter 8 - Cross Border Trade in Services, and Chapter 11 - Temporary Entry for Business Persons, which are addressed in this submission.

6. Before doing so there is one significant issue that we wish to raise with the Treaties Committee and that is the failure of DFAT to genuinely consult with any trade union organisation over the content of the AU-UK FTA. In the Regulation Impact Statement Final Assessment (Attachment II to the AU-UK FTA National Interest Analysis)[2] under the heading "The stakeholder engagement process in the AU-UK FTA negotiations", it states that,

> *171. The Australian negotiating team also holds stakeholder consultations at the conclusion of every round for other Australian stakeholders,*

[1] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/FreeTradeAgreement-UK
[2] https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JSCT/2022/Free_Trade_Agreement_-_UK/i_NIA_Attachment_II_RIS.pdf?la=en&hash=6EDB704CD2577DD02B22F4926EE5ABE16E3DAABC

> *including worker representatives such as trade unions and other entities such as peak bodies as requested. These consultations are key to nuancing our negotiating positions and making sure we are getting the right outcomes for Australians to diversify our trade and drive an export-led recovery.*

7. Taken at face value this would appear reasonable, however we are reliably informed that the ACTU were only invited to occasional stakeholder briefings held following negotiation rounds, and one briefing for unions arranged at their request on 25th November 2021. These were briefings rather than genuine consultations to inform the Australian Government's negotiating position.

8. Our concern is further reinforced by the following paragraph which appears just 2 paragraphs later in the Regulation Impact Statement where it states that,

> *173. In the last 12 months alone, DFAT has communicated with at least 140 organisations and participated in over 250 meetings regarding the AU-UK FTA negotiations. The organisations are listed in the table below. They include private organisations, individuals, consumer groups and peak bodies.*

In the table of 140 organisations there are no trade unions. This is totally unacceptable and confirms our view that the interests of Australian workers and the effect on their jobs has not been adequately considered, if at all.

Chapter 8 - Cross Border Trade in Services

9. This chapter applies to measures of a Party affecting cross-border trade in services by service suppliers of the other Party. According to the AU-UK FTA National Interest Analysis,

> "*The Chapter on Cross-Border Trade in Services (Chapter 8) will establish rules for the cross-border supply of services between the Parties, including obligations to provide access to UK service suppliers (Market Access), to treat local and UK suppliers equally (National Treatment) and to treat service suppliers of the UK at least as well as suppliers of any non-Party (MFN).*"[3]

10. Under Article 8.5 – Market Access, the AU-UK FTA requires that neither Party shall adopt or maintain a measure that:

> *(a) imposes a limitation on:*

[3] 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 at p.6

> *(i) the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test;*
>
> ……
>
> *(iv) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;*

11. The concern here is that under this Article UK based companies providing a service will be free to tender for and win work on building and construction projects in Australia and bring their own labour from the UK without limitation. This Article, when invoked with articles under Chapter 11, as discussed below, will allow UK suppliers of machinery and equipment to supply the necessary workforce to install them to the detriment of Australian workers. This could apply on any project where the installation of equipment or machinery can be completed in a short period of time of 3 months or less. Example of where this could occur are the installation of components on wind farms or solar farms, shutdown work on major industrial complexes, refurbishment of buildings, etc.

12. It is noted that under Article 8.7 – Non-Conforming Measures, paragraph 2 provides an exemption from a number of articles within this chapter, including Article 8.5 (Market Access), for "*any measure of a Party with respect to sectors, sub-sectors or activities, as set out by that Party in its Schedule to Annex II*." The sectors identified in Australia's Schedule[4] include vital industries in Victoria declared under the *Vital State Industries (Works and Services) Act 1999*, maritime cabotage services and offshore transport services, gambling and betting, wholesale and retail trade services of tobacco products, alcoholic beverages, or firearms, and the creative arts. There is no exemption for the building and construction industry.

13. The CFMEU submits that should the Treaties Committee support the ratification of the AU-UK FTA then it should require an amendment to the Australian Schedule, to Annex II, to exclude the building and construction industry.

Chapter 11 - Temporary Entry for Business Persons

14. According to the AU-UK FTA National Interest Analysis this chapter, "*facilitates the temporary entry and stay of skilled persons in support of business or investment opportunities*" and "*waives requirements for economic needs tests with respect to committed categories*".

[4] https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JSCT/2022/Free_Trade_Agreement_-_UK/Annex_II_-_Schedule_of_Australia.pdf?la=en&hash=05B9586D7F28A46B8C9BF03196F2CAF373B6F3CF

15. Under paragraph 1 of Article 11.2 – Scope, the chapter applies to the following categories as defined in each Party's Annex IV (Schedules of Specific Commitments on Temporary Entry for Business Persons):

    (a) for Australia:

    (i) business visitors;

    (ii) installers and servicers;

    (iii) intra-corporate transferees;

    (iv) independent executives; and

    (v) contractual service suppliers

    (b) for the United Kingdom:

    (i) business visitors for establishment purposes;

    (ii) short-term business visitors;

    (iii) intra-corporate transferees;

    (iv) investors;

    (v) contractual service suppliers; and

    (vi) independent professionals.

16. It is surprising and questionable as to why "installers and servicers" only applies in Australia and not in the UK. Under Australia's Annex IV, the description of this category and the conditions and limitations are the following:

Description of Category of Business Persons	**Conditions and Limitations (including length of stay)**
B. Installers and Servicers	
Definition: A business person who is an installer or servicer of machinery or equipment, where such installation or servicing by the supplying enterprise is a condition of purchase under contract of the said machinery or equipment, and who must not perform services which are not related to the service activity which is the subject of the contract.	Entry is for periods of stay up to a maximum of three months.

17. For Intra-Corporate Transferees the definition and conditions for a specialist are:

Description of Category of Business Persons	Conditions and Limitations (including length of stay)
C. Intra-Corporate Transferees	
Definition: (b) a specialist, who is a business person with advanced trade, technical or professional skills and experience who is assessed as having the necessary qualifications, or alternative credentials accepted as meeting Australia's domestic standards for the relevant occupation, and who must have been employed by the employer for not less than two years immediately preceding the date of the application for temporary entry.	Entry for specialists is for a period of stay up to four years, with the possibility of further stay.

18. Article 11.4 – Grant of temporary Entry contains further conditions relating to entry of persons under this chapter. It is noted that paragraph 4 allows a Party to refuse temporary entry if the entry of that person might adversely affect "*the settlement of any labour dispute that is in progress at the place or intended place of employment*" or "*the employment of any natural person who is involved in such dispute*", and is effectively a discretionary provision to stop the importation of strike breakers, but it is only discretionary and not mandatory.

19. Paragraph 6 is more concerning as it provides as follows:

> *6. In respect of the commitments on temporary entry in this Chapter, neither Party shall:*
>
> *(a) impose or maintain any limitations on the total number of visas to be granted to business persons of the other Party; or*
>
> *(b) require economic needs tests, including labour market tests, or other procedures of similar effect, as a condition for temporary entry.*

20. This paragraph essentially removes any limitation on temporary workers coming into Australia that can meet the definitions of "Installers and Servicers" and "Intra-Corporate Transferees", and removes any semblance of trying to protect the jobs of Australian workers by removing labour market testing.

21. The CFMEU's position on labour market testing was set out in our 2nd Submission to of 21st March 2021, to the Joint Standing Committee on Migration *Inquiry into Australia's skilled migration program*:

> "*32. The CFMEU ..... totally opposes the removal of labour market testing. Labour market testing is an important part of the equation in*

determining whether or not there are sufficient workers in Australia with the skills required willing to perform the work required. It is not the only part and can be improved by strengthening the test not by weakening it. In particular improvements should be made to increase minimum salary levels used and where jobs are advertised (jobactive is not a widely used website by workers who may be already employed but underutilised)."

22. The CFMEU submits that the provisions in Chapter 11 essentially give UK companies open slather to bring in skilled workers on temporary visas. If the AU-UK FTA is to be endorsed either the whole of Chapter 11 should be removed or as a minimum its scope should be restricted by removing installers and servicers and intra-corporate transferees for Australia.

23. The final comment we wish to make is in regard to the side letters on Mutual Understandings on Mobility. The 16th December 2021 letter[5] from the Hon Dan Tehan MP, Minister for Trade, Tourism and Investment, sets out the agreed understanding on working holiday makers and includes the following:

Understandings on Operation of the Working Holiday Maker and Youth Mobility Schemes

I. The Participants will permit citizens aged 18 to 35 (inclusive) at the time of application to participate in their respective Working Holiday Maker and Youth Mobility schemes.

2. The Participants will allow eligible citizens to remain in Australia or the United Kingdom for a maximum period of three years in accordance with the Participants' Working Holiday Maker or Youth Mobility Scheme.

3. The Participants will not require eligible citizens to undertake specified work during their stay in Australia or the United Kingdom.

4. The Participants will arrange for their respective commitments in paragraphs I to 3 to be implemented within two years of entry into force of the Agreement and jointly decide on a date for all of the commitments in paragraphs I to 3 to come into effect.

5. Working Holiday Maker or Youth Mobility Scheme visa holders may apply for other visa routes in-country where permitted by the Participants' domestic immigration systems.

[5] https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JSCT/2022/Free_Trade_Agreement_-_UK/Side_Letters_-_03_-_Mutual_Understandings_on_Mobility_-_Australia_to_UK.pdf?la=en&hash=A4A0AF3C8B904475700DFB45AC66DFDB88B69621

24. It is well known that working holiday makers and young tourists are attracted to the building and construction industry and that jobs for certain occupations such as traffic controllers are actively promoted in backpacker hostels in major cities across Australia. The extension of the visa period and the relaxation of the specific work requirements identified in points 2 and 3 of the Minister's letter will have a significant impact on the number of Working Holiday Maker or Youth Mobility Scheme visa holders working in the building and construction industry.

25. The propensity of employers to exploit temporary visa workers by way of wage theft and sham contracting is widespread, notorious and ongoing, particularly in the construction industry. This was highlighted by the recent High Court decision in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1, where the union had to go all the way to the High Court to get justice for Daniel McCourt, a 22 year old backpacker on a working holiday visa who was unlawfully paid as an independent contractor at a rate 25% less than the Award.

26. The AU-UK FTA chapters identified above and the proposed changes to the Working Holiday Maker and Youth Mobility Schemes will further exacerbate the problem of exploitation. Further, the increase of temporary visa workers will put downward pressure on wages for Australian residents and citizens, the same people who expect their elected parliamentary representatives to protect their interests, not undermine them. The CFMEU therefore does not support the changes to the Working Holiday Maker or Youth Mobility Scheme visas and calls on Parliament to reject them.