

Australia-Chile FTA: JSCOT Consideration
DFAT response to submissions



Services and investment

- An efficient services sector is crucial to the development of vibrant, modern and resilient economies. Open services markets promote innovation and entrepreneurship, generate lower costs and higher quality, increase the pace of technology diffusion, and are critical to growth in all sectors of the economy.
- Australia's exports of services increased by 9.4 per cent to \$48 billion in 2007 – since 2002, export values have increased by an average of 6.0 per cent per annum. Australia's exports of services accounted for 22.1 per cent of Australia's total exports in 2007. Australia's services exports are set for continued growth in 2008, with the latest ABS data indicating that exports, on a seasonally adjusted basis, were 12 per cent higher for the six months to June 2008 compared with the six months to June 2007.
- Achieving further services liberalisation through Free Trade Agreement (FTA) and World Trade Organisation (WTO) negotiations is therefore a high priority for the Australian Government. Key areas of interest include education services, travel-related services, financial services and professional services (such as law, accounting and engineering).
- FTAs promote the expansion of trade in services through improving access for Australian services providers into key overseas markets, and through ensuring increased transparency and predictability of relevant rules and regulations that apply to trade in services.
- FTAs, including the recently concluded Australia-Chile FTA (ACI-FTA), do not prevent Australia from regulating services and investment in the public interest. General exceptions to key services and investment obligations protect the ability of the Parties to regulate for legitimate policy objectives (including environmental objectives), where that regulation is non-discriminatory, and does not constitute an unnecessary barrier or disguised restriction on trade. In this way, the FTA strikes the requisite balance between promoting services liberalisation and permitting regulation where legitimate and necessary. An article on Domestic Regulation similarly preserves Australia's right to impose requirements as to qualifications and licensing for service providers.
- Regulation of public services is additionally protected through carve-outs for services provided in the exercise of governmental authority, and for a range of social services. Again, these exceptions provide an appropriate balance between the promotion of services trade and the need to allow for legitimate regulation.
- Australia has strong offensive interests in improved temporary access arrangements for Australians wishing to do business abroad, especially in the professional services sector (eg Australian lawyers, accountants, engineers). The ACI-FTA outcome reflects Australia's current regulatory practice with respect to business mobility. Trade commitments in this area do not limit the Government's

ability to regulate to ensure the protection and well-being of people working temporarily in Australia. The current review of the sub-class 457 visa program is concerned primarily with the integrity of the program, as well as its responsiveness to the needs of Australian businesses.

- Investor-State Dispute Settlement (ISDS) is an important mechanism for protecting the interests of Australian investors overseas, especially in developing country markets where the domestic legal systems may not be adequate. (We note also that, to date, Australia has not been subject to an ISDS challenge despite having this mechanism in concluded FTAs with Thailand and Singapore, as well as in a range of bilateral investment agreements).

Intellectual property

- In general, both Australia and Chile provide for high standards of intellectual property protection. The provisions of the ACI-FTA do not require any amendment to intellectual property law in Australia and are consistent with our current intellectual property regime. Australian businesses will benefit from Chile's commitment to lock in its high standards.
- We have specifically addressed only those recommendations of Dr Rimmer's that refer directly to the content of the ACI-FTA – recommendations 3 to 9.
 - : With respect to Recommendations 3, 6, 7 and 8, both Australia and Chile retain flexibilities under the FTA with provisions providing for exceptions to intellectual property rights with respect to copyright (Article 17.31), trade marks (Article 17.11) and patents (Article 17.20). DFAT is unable to comment on Dr Rimmer's view as to how those flexibilities should be utilised in domestic law. This is outside the scope of the ACI-FTA.
 - : Regarding Recommendation 5, the purposive statement of the ACI-FTA is not intended to be "biased or skewed towards intellectual property rights-holders". On the contrary, it explicitly recognises the rights of users which is consistent with the provisions on exceptions (as referred to above). DFAT wishes to clarify that Article 17.3.2(a) replicates the language of Article 8(2) of TRIPS, as referred to by Dr Rimmer. DFAT also notes that in Article 17.3.1, Australia and Chile reaffirm existing rights and obligations under TRIPS and other multilateral intellectual property agreements, such as the Berne Convention.
 - : In relation to Recommendation 9, as noted, the ACI-FTA Intellectual Property Chapter does recognise the rights of users and includes provisions on exceptions to intellectual property rights. It also includes provision (Article 17.3.2) against the abuse of intellectual property rights and anticompetitive practices that may result from such abuse. DFAT draws attention also to the Preamble which provides context for the FTA as a whole.

Consultation

- Prior to commencing negotiations, DFAT called for submissions and conducted an extensive series of consultations with state and territory governments, Australian business and non-government bodies, including face-to-face consultations in Sydney, Melbourne, Perth, Adelaide and Brisbane. This process provided stakeholders with the opportunity to raise any issues or concerns about the proposed FTA with Chile. We also made significant efforts to inform stakeholders of the progress of the negotiations and encouraged them to provide us with comments and feedback at any stage. A more detailed account of the consultation process both before and during the ACI-FTA negotiations is included in the National Interest Analysis submitted to JSCOT.

Labour

- Members of the World Trade Organisation have agreed that the ILO, rather than the WTO, is the competent body to negotiate labour standards. Australia is an active participant in the ILO, which is the global body responsible for drawing up and overseeing international labour standards, and is an active supporter of ongoing cooperation between the ILO and the WTO.
- In the ACI-FTA, the Cooperation Chapter includes a provision promoting cooperation between the parties on labour matters of mutual interest, as follows:

Cooperation on labour and employment matters of mutual interest and benefit will be based on the concept of decent work, including the principles embodied in the ILO *Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)*.

Environment

- Inclusion of environment provisions in FTAs is considered on a case by case basis. In the ACI-FTA, the Cooperation Chapter mentions environment provisions in the context of international agreements, mutual interests and strengthening of the trade relationship.

**Movement of Natural Persons:
Comparison of Australia's Current WTO Commitments, Commitments under SAFTA,
TAFTA and the Chile FTA, and WTO Doha offer**

Australia has strong offensive interests in improved temporary access arrangements for Australians wishing to do business abroad, especially in the professional services sector (eg Australian lawyers, accountants, engineers). In return for getting outcomes for Australians in this area, Australia has agreed to make similar commitments in trade agreements. The provisions in our trade agreements, including the Chile FTA, reflect Australia's current regulatory practice with respect to business mobility. Australia's own trade commitments in this area do not provide permanent access to the Australian employment market. Nor do they limit the Government's ability to regulate to ensure the protection and well-being of people working temporarily in Australia.

Australia currently meets its trade commitments on temporary entry through the sub-class 456 and sub-class 457 visas, but these visas are not mentioned in any of our trade agreements. The current review of the sub-class 457 visa program is concerned primarily with the integrity of the program, as well as its responsiveness to the needs of Australian businesses and the broader needs of the Australian economy.

Business Visitors – access period

Current WTO commitments – only as service sellers (see below) which is 6 months up to a maximum of 12 months

SAFTA – 3 months

TAFTA – 90 days / 3 months

Chile FTA – 90 days

WTO Doha offer – 3 months

Business Visitors that are service sellers – access period

Current WTO commitments – 6 months with provision for extension

SAFTA – 3 months

TAFTA – 6 months up to 12 months

Chile FTA – up to 12 months

WTO Doha offer – 6 months

Contractual Services Suppliers (CSS) – access periods

Current WTO commitments – only under business visitor category – 6 months

SAFTA – only under business visitor category – 3 months

TAFTA – up to 3 years

Chile FTA – up to 4 years

WTO Doha offer – up to 12 months with provision for extension

Intra-corporate Transferees (ICT) as executives and senior managers– access periods

Current WTO commitments – up to 4 years with provision for extension

SAFTA – 4 years up to 14 years

TAFTA – 4 years up to 10 years

Chile FTA – 4 years with opportunity for extension

WTO Doha offer – 4 years with opportunity for extension

Intra-corporate Transferees as specialists– access periods

Current WTO commitments – no commitment

SAFTA – 4 years up to 14 years

TAFTA – 4 years up to 10 years
Chile FTA – 4 with provision for extension
WTO Doha offer – 2 years with provision for extension

Independent Executives/executives establishing a new business/subsidiary

Current WTO commitments – up to 2 years
SAFTA – under business visitor category – 3 months
TAFTA – up to 4 years
Chile FTA – up to 4 years
WTO Doha offer – up to 2 years

Specialists

Current WTO commitments – 2 years up to 4 years
SAFTA – no commitment outside business visitor and ICT categories
TAFTA – no commitment outside CSS and ICT categories
Chile FTA – no commitment outside CSS and ICT categories
WTO Doha offer – no commitment outside CSS and ICT categories

Spouses and Dependents (of persons in above categories)

Current WTO commitments – no commitments
SAFTA – may work as managers, executives, specialists or office administrators
TAFTA – commitment only for spouses of Intra-corporate Transferees
Chile FTA – for spouses when temporary entry is granted for longer than 12 months
WTO Doha offer – for spouses of CSS, ICT and Independent Executives

Labour Market Testing (LMT)

Current WTO commitments – committed to not apply LMT for Executives and Managers as ICTs, Business Visitors, Independent Executives, and Specialists under labour market agreements or those with specialised knowledge at an advanced level.
SAFTA – Committed to not apply LMT for all categories under Chapter
TAFTA – Committed to not apply LMT for all categories under Chapter
Chile FTA – no commitment
WTO Doha offer – no commitment

Movement of Natural Persons – Comparison of Australia’s Current WTO Commitments, Commitments under SAFTA, TAFTA and the Chile FTA, and WTO Doha Offer

Category of person	Current WTO Commitments	WTO Doha offer	SAFTA	TAFTA	Chile-FTA
Business Visitors	YES As service sellers. No LMT requirement Up to 6 months Also allows for entry by those with a contract to supply a service.	YES i) As service sellers Up to 6 months with provision for extension ii) as business visitors Up to 3 months	YES 3 months • Service suppliers • Service sellers • Investors or employees of investors as managers, executives or specialists. • Contractual service suppliers as managers, executives or specialists employed for 1 year prior only professional services, ITC or Financial services sectors. YES under business visitor category	YES 90 days (and 3 months) Service sellers (6 months with extension of up to 12) Investor or rep of an investor Goods seller	YES i) as a service seller Up to 12 months ii) as a business visitor up to 90 days.
Contractual Service Supplier	Not explicitly (see business visitor)-	YES Including independent professionals and specialists Subject to employer sponsorship and existence of a contract Skills assessment for gazetted occupation Up to 12 months with opportunity for extension	YES As a manager, executive or specialist employed for not less than 1 year. Up to 4 years with extension of up to 14 years	YES As managers, executives or specialists. Up to 3 years Thai Chefs up to 4 years	YES With high level technical or professional skills. Up to four years Requires employment and contract Skills assessment
Intra-corporate transferee	YES As executives and senior managers For up to 4 years	YES i) As executives and senior managers Subject to employer sponsorship Minimum skill levels gazetted occupation UP to 4 years with opportunity for extension ii) as specialists – employees for not less than 2 years Subject to employer sponsorship Skills assessment for gazetted occupation Up to 2 years with opportunity for extension	YES As a manager, executive or specialist employed for not less than 1 year. Up to 4 years with extension of up to 14 years	YES As managers, executives or specialists. Up to 4 years with extension to 10 years.	YES As a manager or a specialist with trade technical or specialist skills. 4 years with opportunity for further stay

Independent Executives	YES Establishing a new business of an OS service supplier. No LMT requirement Up to max stay of 2 years.	YES Establishing a new business of an OS service supplier. Subject to employer sponsorship Minimum skills level in a gazetted occupation Up to a max of 2 years.	YES under business visitor category	YES As executives and managers of a subsidiary in Aust. Up to 4 years	EXECUTIVES (currently not/not restricted to those of a business) YES Up to 4 years
Specialists	YES Subject to LMT 2 years with extension to 4 years. Employment requirement. Skills assessment. LMT not required when i) 'specialised knowledge at advanced level of proprietary nature' and 2 years prior employment with company and ii) position under a labour agreement				
LMT	As indicated above – we have committed to no LMT on Business visitors, independent executives and types of specialists employed under a labour agreement		We have committed to no LMTs being imposed for any category of temporary entrant covered by the Chapter	We have committed to no LMTs being imposed for any category of temporary entrant covered by the Chapter	
Employment of Spouses and Dependents	No	Work rights for spouses of CSS, ICT and Independent Executives	YES As managers, executives, specialists or office administrators.	Only spouses of Intra-corporate Transferees.	YES for spouses when temp entry granted for longer than 12 months.