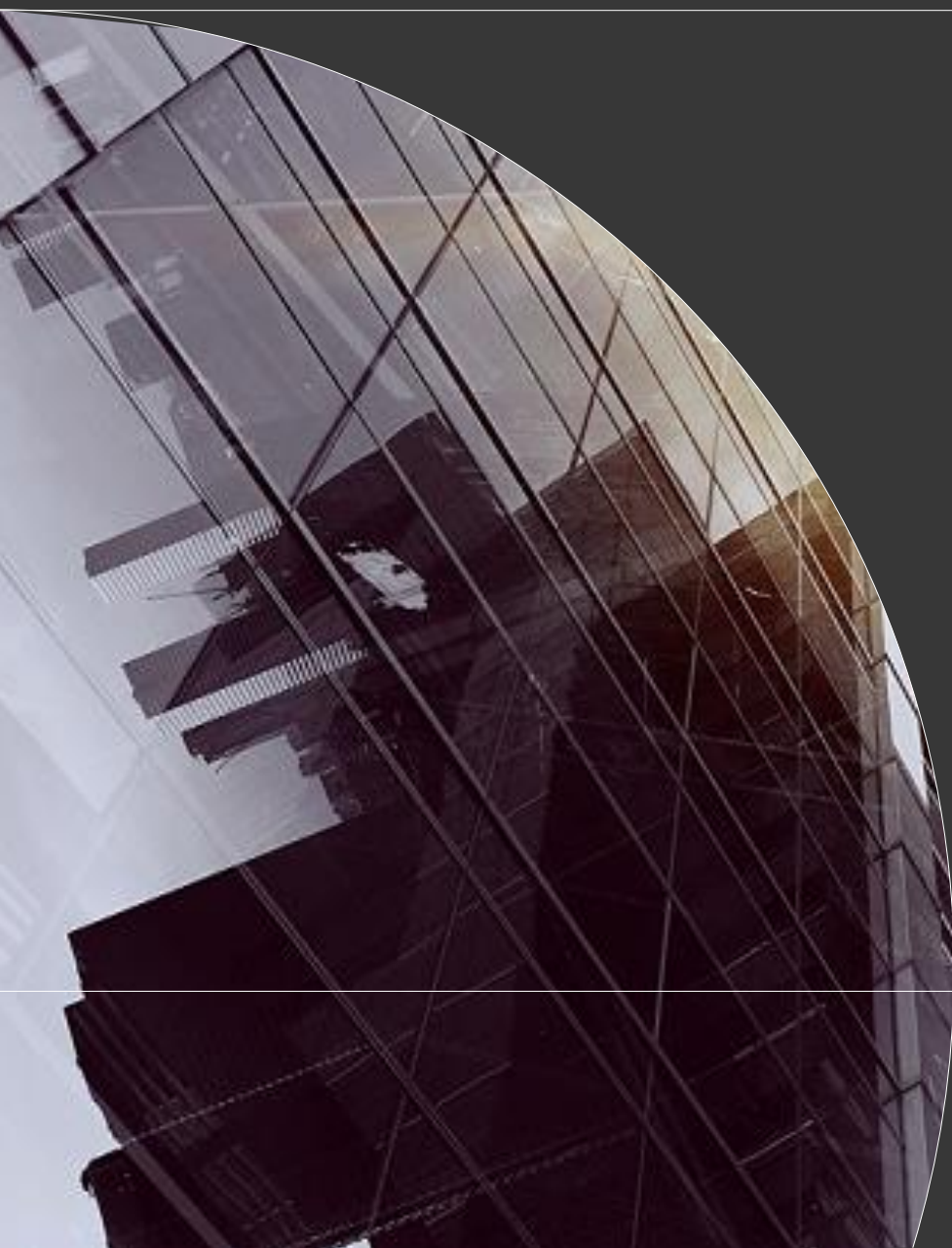


The Australian Government's Approach to Negotiating Trade and Investment Agreements

Submission

September 2023



BCA

Business Council of Australia

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1. Overview

The Business Council of Australia (BCA) welcomes the opportunity to provide this submission to the Joint Standing Committee on Trade and Investment Growth's inquiry into the Australian Government's approach to negotiating trade and investment agreements.

The inquiry presents an opportunity to enhance the prospective benefits of Free Trade Agreements (FTAs), including the creation of well-paid jobs, economic resilience, and improved living standards for all Australians. It is also an opportunity to improve business and other stakeholder involvement in the processes for negotiating FTAs so that they better reflect the broad set of community interests, including those of the business sector.

As outlined in BCA's comprehensive plan, *Seize the Moment*, FTAs are critical to helping Australia unlock the full economic, trade and investment potential of our existing trade relationships. We must optimise the use of existing FTAs, conclude ongoing negotiations, and revise current agreements to enhance market access, particularly in areas like digital trade and sustainability.

Additionally, it is crucial to finalise an FTA with the European Union, strengthen the existing FTA with India, and expand digital trade agreements. Leveraging strategic alliances in fields like clean energy and critical minerals is essential for maximising these opportunities.

The vast majority of international trade and investment takes place between firms and Australia's approach to negotiating FTAs needs to proceed from acknowledgement of this simple reality. This means that business is uniquely well-placed to advise governments on the most salient barriers and frictions to cross-border trade and investment, barriers behind the border, as well as the potential benefits of trade liberalisation. The business community has a strong, natural alignment with the trade-expanding objectives of FTAs. It is also business that ultimately shoulders the burden of complying with the provisions of trade agreements.

2. Key recommendations

- The BCA encourages the government to provide business stakeholders with greater access at an earlier stage in the negotiating process for FTAs.
- Bilateral industry working groups are an important adjunct to FTA negotiations. The BCA recommends earlier engagement with bilateral business groups in framing its negotiating priorities and strategy.
- The Australian government should study the US Industry Trade Advisory Committee system with a view to establishing what elements of that system could be incorporated into its approach to consulting with the business community.
- One model to address issues around the transparency of FTA negotiations is the US 'Cleared Advisor' program within the Industry Trade Advisory Committees (ITACs) that advise the US Trade Representative and Commerce Department on sector-specific trade issues.
- The BCA does not support legislating general or specific requirements for consultation processes for the negotiation of trade agreements.

3. The essential role of business in trade negotiations

The vast majority of international trade and investment takes place between firms and Australia's approach to negotiating FTA needs to proceed from acknowledgement of this simple reality. This means that business is uniquely well-placed to advise governments on the most salient barriers and frictions to cross-border trade and

investment, barriers behind the border, as well as the potential benefits of trade liberalisation. Business often has industry and sector-specific knowledge that cannot be obtained from other sources.

Input from the business community can be used to establish negotiating priorities that will help maximise the benefits of any agreement, but this underscores the need for early and detailed consultation. While other stakeholders have potentially valuable insights to lend to the negotiating process and can provide valuable support to an agreement, the business community typically has much greater visibility than other stakeholders over the issues that are likely to arise in any negotiation. It is also business that ultimately shoulders the burden of complying with the terms of trade agreements.

Extensive consultation and engagement with business through the negotiating process also helps to socialise the benefits of FTAs once agreement is reached, ensuring stronger uptake of their provisions. Australian business has not always been able to make the best use of FTAs, either due to a lack of understanding of an agreement's provisions or because of the complexity of rules that make the agreement less workable. In some cases, the provisions of the agreement may be so complex it is easier to pay a foreign duty than comply with rules that provide for preferential access. This problem can be mitigated by early engagement with business on the form of those rules.

The BCA is an active participant in bilateral and multilateral exchanges with business groups in a wide range of countries and across a wide range of issues. These existing ties can be harnessed in support of FTA negotiations but requires government engagement to make the most of these well-established relationships.

It is also important that government engage with both importing and exporting businesses. While governments tend to see FTAs as benefiting the economy mainly through increased exports, there are often substantial benefits on the import side when Australia lowers its own trade and other barriers. The government needs to ensure that its negotiating strategy does not sacrifice potential benefits for importers in trying to also secure the best deal for Australian exporters.

4. Approaches to consultation

The BCA welcomes the government's approach to consulting with business and other stakeholders on trade-related issues, expanding both the breadth and depth of engagement, including through quarterly meetings of stakeholder groups, biannual peak bodies meetings and the Trade 2040 Taskforce. However, it is the quality of the consultation and engagement with stakeholders, more than its frequency or form, that matters most. The BCA also notes government efforts to publish negotiation aims and objectives in relation to current and future treaty negotiations, including the Australia-EU free trade negotiations.

Despite these efforts, concerns have been raised regarding the effectiveness and transparency of the government's consultation processes. Our members have reported issues related to transparency, inclusivity, and the timeframe for providing input. Some have expressed concerns about being excluded from consultations, while others are unaware that their interests are being affected by proposed agreements. Furthermore, the pace of the consultation process can sometimes be rushed, limiting the depth and breadth of stakeholder engagement. The BCA encourages the government to provide greater access at an earlier stage to the negotiating process for FTAs.

Transparency is a critical concern during trade negotiations. Some members have highlighted that once negotiations commence, opportunities for meaningful consultation become scarce. Negotiators are often hesitant to share details of the proposed agreements due to concerns about confidentiality and potentially prejudicing negotiations. Consequently, stakeholders can find it challenging to offer constructive feedback on specific agreement provisions.

In response to concerns about transparency, the Australian government established the Ministerial Advisory Council (MAC) in 2020 to provide a more transparent framework for trade negotiations. The MAC comprises members representing a broad cross-section of Australian society, including business, academia, and

community-based organisations. It is intended as a platform for open and candid discussions on FTAs between MAC members, the government, and senior trade experts. However, greater use could be made of these arrangements, including greater clarity on the relationship between the MAC and other consultative processes.

Relative to other trade policy issues, free trade agreement negotiations require more bespoke consultative arrangements to inform the negotiating agenda and strategy, to maintain momentum for a successful conclusion to the negotiations and to socialise potential benefits among stakeholders.

Bilateral industry working groups are an important adjunct to FTA negotiations. For example, the Indonesia-Australia Business Partnership Group (IBPG) played an important role in the Indonesia-Australia Comprehensive Economic Partnership Agreement negotiations. The Group provided important support for the progressive removal of all trade barriers between Australian and Indonesia and helped generate momentum behind the negotiations. The BCA recommends earlier engagement with bilateral business groups in framing its negotiating priorities and strategy.

5. The US approach

The United States government has a comprehensive and systematic approach to engaging with business on trade policy, including the negotiation of free trade agreements. While not all elements of the US approach are applicable to Australia, the US model provides a benchmark against which Australia should evaluate its own consultative processes.

As part of the US Trade Representative-led trade advisory committee system, the Department of Commerce and USTR co-administer fifteen Industry Trade Advisory Committees (ITACs), a Committee of Chairs and over 300 industry executives. ITACs engage business leaders in formulating US trade policy. The fifteen ITACs were created to reflect the manufacturing and services sectors of the US economy, as well as issue-oriented matters that cut across all sectors. Recommendations from the ITACs cover trade barriers, negotiation of trade agreements and implementation of existing trade agreements and how they affect industry sectors.

The US government relies on these trade advisors to identify barriers and to provide advice on key objectives and bargaining positions. This advice covers multilateral, bilateral, and regional trade negotiations, as well as other trade-related policy matters. This enables the US to display a united front when it negotiates trade agreements with other nations. The United States' negotiating position is strengthened because its objectives are developed with bipartisan, private-sector input throughout the negotiations.¹

The Australian government should study the US ITAC system with a view to establishing what elements of that system could be incorporated into its approach to consulting with the business community.

6. Confidentiality agreements

One proposed solution to enhance transparency during trade negotiations is the use of confidentiality agreements (or deeds) between the government and key stakeholders. These agreements can facilitate formal consultation on draft treaty text, even for those who cannot be physically present in the negotiation room. By identifying parties capable of offering critical assessments of proposals, negotiators can gain valuable insights into the potential benefits and drawbacks of prospective agreements.

The BCA advocates greater involvement of business stakeholders in trade negotiations. These stakeholders possess valuable expertise and direct knowledge of operational challenges in their respective sectors. They can also provide insights into the broader impact of FTAs on supply chains, a crucial aspect of trade agreements' effectiveness.

¹ International Trade Administration, Industry Trade Advisory Center, <https://www.trade.gov/industry-trade-advisory-center>.

One model to address issues around the transparency of FTA negotiations is the United States' 'Cleared Advisor' program within the Industry Trade Advisory Committees (ITACs) that advise the US Trade Representative and Commerce Department on sector-specific trade issues. This program grants over 600 American industry representatives access to trade-related information before agreements are signed. Membership is limited to those directly or indirectly representing firms engaged in the manufacture of a product or the provision of a service and a required to have security clearances given the sensitivity of the negotiating material to which they are given access.

Another method of increasing the transparency and the effectiveness of the consultation process may be the development of a public database listing the status of each set of FTA negotiations and the stakeholders who have or will be consulted by Australia's negotiators. This could be supported by a process where interested stakeholders register with DFAT so that they are formally identified as a stakeholder who will be consulted throughout the negotiations. Such an arrangement would be expected to increase the involvement of interested business organisations. In addition, it would allow those that are not directly involved in negotiations to more effectively collaborate with other parties who are identified as being part of the consultations process.

7. Legislating approaches to negotiating trade agreements

The BCA does not support legislating general or specific requirements for consultation processes for the negotiation of trade agreements. These processes do not lend themselves to legislative definition. There are already well-established requirements for the legislation of trade agreements that provide ample opportunity for parliamentary scrutiny and debate on an agreement's substance. The Australian government's negotiating priorities and strategy already reflects an expectation that any agreement will ultimately have to secure parliamentary approval and broader public support.

Overseas precedents take a very minimalist legislative approach. The United States Trade Act of 1974, for example, mandates only that the President 'shall seek...and take into account' advice from the private sector. But such a legislative mandate is unlikely to add much to the Australian government's engagement with business or other stakeholders.

If the government seeks to legislate specific arrangements for consultation on free trade agreements, it should ensure that these legislative requirements are placed outside the scope of administrative and judicial review so they do not become the subject of vexatious litigation aimed at stifling or disrupting the negotiation and legislation of free trade agreements.

BUSINESS COUNCIL OF AUSTRALIA

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