



Australian Government
Department of Foreign Affairs and Trade



Joint Standing Committee on Treaties Inquiry into Certain Aspects of the Treaty-Making Process in Australia

SUBMISSION OF THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE

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1. Terms of reference

On Monday 15 June 2020, the Minister for Foreign Affairs and Minister for Women, Senator the Hon Marise Payne, asked the Joint Standing Committee on Treaties (JSCOT) to inquire into and report on Certain Aspects of the Treaty-Making Process in Australia. The Department of Foreign Affairs and Trade (DFAT) welcomes the opportunity to make a submission to the Inquiry. This submission addresses the Inquiry's Terms of Reference:

- considering the role of JSCOT in respect of trade-related agreements, including during the negotiation phase;
- considering the consultation process undertaken by DFAT before and during the negotiation of trade agreements;
- considering the effectiveness of independent analysis to inform negotiation or consideration of trade agreements; and
- reviewing the process around the categorisation of treaty actions.

2. Executive summary

- Economic liberalisation and greater openness to trade and investment has made a significant contribution to Australia's prosperity over the past three decades. Trade and investment will play a key role in supporting Australia's economic recovery as we manage the impact of COVID-19.
- Trade agreements, such as free trade agreements (FTAs) and bilateral investment treaties (BITs), create new opportunities for Australian businesses and investors.
- The Government's approach to engaging the Parliament and stakeholders on trade negotiations seeks to balance the need for confidentiality during the negotiations, the respective roles of the Executive and Parliament, and the interests of the range of stakeholders.
- The Government has recently introduced two additional measures to enhance the engagement of the Parliament and stakeholders in trade negotiations:
 - DFAT is piloting biannual briefings on FTA negotiations for the Trade Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade; and
 - a Ministerial Advisory Council with a wide range of stakeholder representatives has been established to help inform the Government's approach.
- DFAT is committed to effective consultations with all interested stakeholders throughout the negotiating process. Consultations and stakeholder engagement begin before formal trade negotiations start, continue throughout the negotiations and after a new agreement enters into force.
- The Government's consultations and stakeholder engagement process on trade agreements generally includes formal stakeholder consultation meetings, involving community groups, non-government organisations (NGOs), trade unions, academics, peak industry bodies and business representatives.
- JSCOT's assessment of whether a trade-related agreement is in the national interest can take into account the Government's National Interest Analysis (NIA) tabled with the text of the agreement, stakeholders' views and independent analysis.
- The process of categorising treaties has evolved over time. The categorisation into 'major' and 'minor' treaty actions has improved the efficiency of the treaty-making system by streamlining the process for treaty actions that do not impact significantly on Australia's national interests.

3. Introduction

Australia is one of the most open and successful economies in the world. Current challenges, including COVID-19 and the very serious economic impact of the pandemic, as well as an evolving geo-strategic landscape, have underscored the importance of trade and investment to Australia’s economic resilience and recovery.

Economic liberalisation and greater openness to trade and investment has driven significant improvements in Australia’s prosperity over the past three decades. Trade is a key driver of the Australian economy, equivalent to 46 per cent of GDP in 2019, and a significant source of jobs and incomes for Australians.

More than 53,000 Australian businesses of all sizes – micro, small, medium and large – export goods and services and one in five Australian jobs is trade related. Compared with non-exporters, exporting businesses employ more staff, are more productive, and pay more in average wages¹. Foreign investment is also of key importance for the Australian economy, stimulating economic growth and innovation. Australian businesses with foreign investment generate around 40 per cent of Australian exports and foreign direct investment supports one in ten jobs in Australia².

Australia has broad community support for globalisation³ with the country as a whole sharing in its benefits. Mining and agriculture are concentrated in our rural and regional areas, while educational and professional services are predominantly based in the cities. With 15 cents in every international tourism dollar spent in regional Australia, tourism supports jobs across the country⁴.

Although 2020 has been very challenging, Australian businesses have achieved record levels of trade and investment in recent years. In 2019, Australia exported \$493 billion worth of goods and services, a 13 per cent growth in goods exports and 10 per cent growth in services on the previous year. At the end of 2019, total foreign investment in Australia was at a record \$3.8 trillion, led by the United States with \$984 billion and the United Kingdom with \$686 billion.

Australian businesses will continue to rely on strong levels of trade and investment for their future success. Despite COVID-19, Australia’s export sector has held up during the crisis and provided a key

¹ Research prepared by the Office of the Chief Economist of the Department of Industry, Innovation and Science comparing Australian exporters and non-exporters, suggests exporters perform more strongly across a broad range of business performance indicators. Available at: <https://www.industry.gov.au/data-and-publications/staff-research-papers/export-behaviour-and-business-performance-evidence-from-australian-microdata-research>

² Economic activity of foreign-owned businesses in Australia 2014-15. Available at: <https://www.dfat.gov.au/trade/resources/investment-statistics/Pages/economic-activity-of-foreign-owned-businesses-in-australia-2014-15>

³ Lowy Institute, COVIDPOLL: Lowy Institute Polling on Australian Attitudes to the Coronavirus Pandemic, 14 May 2020. Available at: <https://www.lowyinstitute.org/publications/covidpoll-lowy-institute-polling-australian-attitudes-coronavirus-pandemic#sec42561>

⁴ Tourism Research Australia, State of the Industry 2018-19, March 2020. Available at: <https://www.tra.gov.au/economic-analysis/state-of-the-industry/state-of-the-industry>

source of strength. Australia's largest monthly trade surpluses on record, of \$10.4 billion and \$8.0 billion respectively, were for the months of March and May 2020.

Our economy relies on a strong and open global trading system and we continue work to open new trade opportunities to strengthen international economic collaboration, to reduce the risks facing the global economy and to bolster growth.

Australia negotiates multilateral and plurilateral trade agreements in the World Trade Organization (WTO). A multilateral trade agreement in the WTO requires the agreement of all 164 Members. For example, the WTO Agreement on Trade Facilitation, which was concluded in 2013. The only multilateral trade agreement currently under active negotiation in the WTO seeks to discipline fisheries subsidies.

Groups of interested WTO Members, including Australia, are currently participating in a range of plurilateral negotiations, including on e-commerce, domestic regulation of services, and investment facilitation. Australia also continues to press to re-start negotiations to reform agricultural trade.

In recent years, Australia participated in plurilateral negotiations to upgrade the WTO Information Technology Agreement and in May 2019, Australia became the 48th WTO Member to join the WTO Agreement on Government Procurement.

Australia has also negotiated bilateral and regional trade agreements with a wide range of countries. FTAs, BITs and other trade-related agreements, help safeguard and promote Australia's national trade and investment interests in key export markets. FTAs reduce or eliminate barriers to trade in goods, services and investment and enable Australian exporters and investors to benefit from the same or better preferential access that our competitors and their investors enjoy in overseas markets. FTAs also enhance people-to-people links, strengthen bilateral relationships and promote regional economic integration and collaboration. Benefits of FTAs include:

- tariff reductions that provide a competitive edge for our exporters;
- greater certainty and transparency for exporters and investors in overseas markets;
- greater access for Australian consumers and businesses to an increased range of goods and services at more competitive prices; and
- increased beneficial foreign investment in Australia and increased access overseas for Australian investors.

Australia currently has 14 FTAs in force, providing preferential market access to 20 economies. This includes our new FTA with Indonesia, which entered into force in July. In the past six years, FTAs have secured duty free or preferential access for Australian business in markets with 1.8 billion consumers. Over the same time, as more FTAs have entered into force, the share of Australia's trade with our FTA partner countries has grown from 27 per cent to around 70 per cent.

Australia is currently in FTA negotiations with the European Union, the Pacific Alliance (Chile, Colombia, Mexico and Peru), India, Regional Comprehensive Economic Partnership (RCEP) countries, and the United Kingdom. Should all these negotiations result in new FTAs coming into force – along with PACER Plus (an FTA with certain Pacific island countries and New Zealand) – two-way trade with FTA partners will grow to around 87 per cent. More information on Australia’s FTAs can be found on the DFAT website: <https://www.dfat.gov.au/trade/agreements/Pages/trade-agreements>.

BITs are treaties between two economies that include rules to promote and protect two-way investment between them. These investment rules provide protections and greater certainty for Australian investors overseas and foreign investors in Australia.

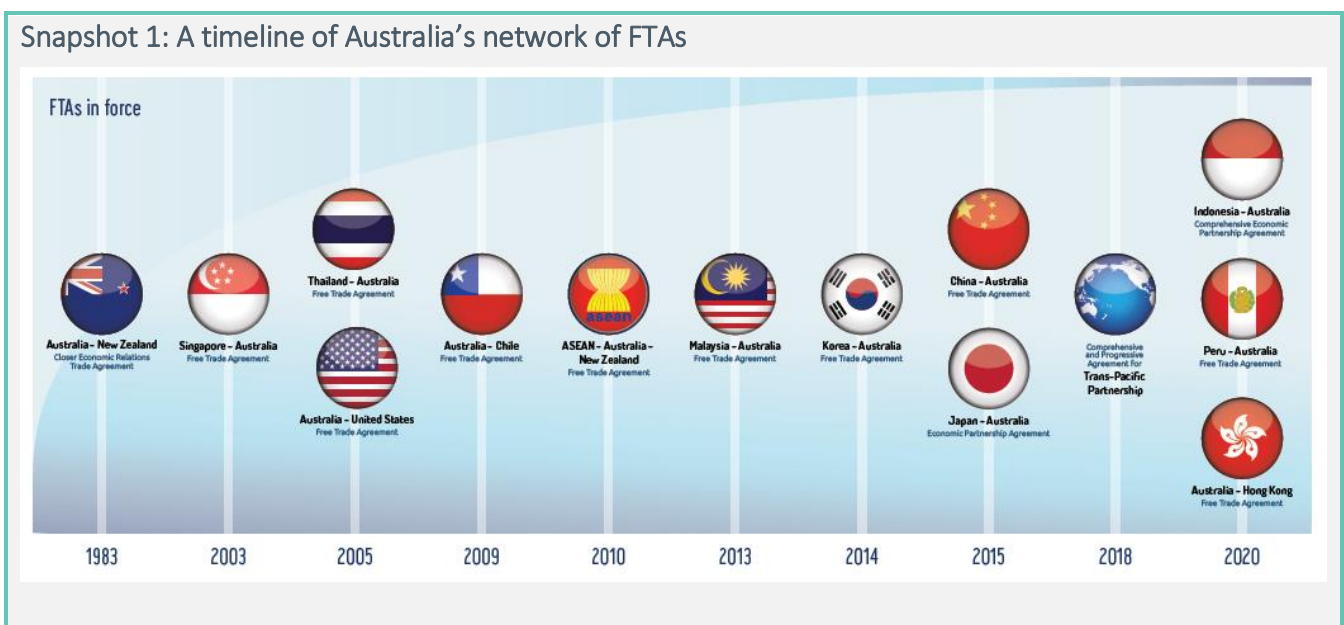
Australia signed the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* on 18 July 2017. The Government is currently finalising its ratification process regarding the Convention, which provides for greater transparency in investor-state arbitration brought under BITs concluded prior to 1 April 2014, and reflects the approach in Australia’s more recent FTAs.

DFAT has worked to upgrade existing BITs where appropriate, including the negotiation of a new Australia-Uruguay BIT signed in 2019, which upon entry into force will replace the older 2002 BIT. Australia also agreed to terminate the Australia-Hong Kong BIT and the Indonesia-Australia BIT, which have been upgraded through the entry into force of the Australia-Hong Kong FTA (A-HKFTA) and the Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA), respectively. A list of Australia’s BITs can be found on the DFAT website:

<https://www.dfat.gov.au/trade/investment/Pages/australias-bilateral-investment-treaties>.

Australia’s approach to engaging the Parliament and stakeholders on trade negotiations seeks to balance the need for confidentiality during the negotiations, the respective roles of the Executive and Parliament, and the interests of the range of stakeholders.

Snapshot 1: A timeline of Australia’s network of FTAs



4. The role of JSCOT in respect of trade-related agreements, including during the negotiation phase

DFAT is the lead agency in negotiating Australia's multilateral, plurilateral and bilateral trade-related treaties, including FTAs and BITs.

The power to enter into treaties is an Executive power within Section 61 of the Australian Constitution. While the Executive alone has the constitutional power to enter into treaties, Government practice since 1996 has provided the Commonwealth Parliament, through JSCOT, with an active role in treaty scrutiny.

JSCOT's resolution of appointment, which was passed by the House of Representatives on 4 July 2019 and the Senate on 22 July 2019, empowers it to inquire into and report upon:

- matters arising from treaties and related NIAs and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - i. either House of the Parliament; or
 - ii. a Minister; and
- such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

The Government submits all FTAs and BITs to Parliamentary scrutiny by JSCOT prior to entry into force.

Major treaty actions, such as FTAs and BITs, are tabled in Parliament with a NIA. FTAs are Category 1⁵ treaty actions and are tabled for 20 joint sitting days. BITs are Category 2 treaty actions and are tabled for 15 joint sitting days. The NIA outlines why it is in Australia's national interest to enter into the proposed treaty action and includes:

- foreseeable economic, environmental, social and cultural effects of the treaty action;
- the obligations imposed by the treaty;
- its direct financial costs to Australia;
- how the treaty will be implemented domestically;
- what consultation has occurred in relation to the treaty; and
- whether or not the treaty provides for withdrawal or denunciation.

⁵ See Section 7 'The process around the categorisation of treaty actions'.

The NIA attaches a copy of the Regulation Impact Statement regarding the treaty action, where one is required. The NIAs for FTAs and BITs are prepared by DFAT on a whole-of-government basis in consultation with other agencies that have taken part in the negotiations.

Minor treaty actions are not tabled in Parliament, but are referred directly to JSCOT for consideration and accompanied by an Explanatory Statement in lieu of a NIA. Examples of trade-related minor treaty actions include minor amendments to the annexes of FTAs.

JSCOT considers tabled treaties, inquires into whether the proposed treaty action is in Australia's national interest, and reports to Parliament. In its report, JSCOT will make recommendations to the Government on taking binding treaty action. In general, the Government does not take binding treaty action, or introduce legislation to give legal effect in Australia to treaty provisions, until after JSCOT has reviewed and reported on the treaty and its report has been considered.

JSCOT advertises its inquiries, including on its website, and invites interested persons and organisations to make submissions. JSCOT routinely takes evidence at public hearings from Government agencies and may invite people who have made written submissions to appear.

JSCOT's recent reports include:

- Indonesia-Australia Comprehensive Economic Partnership Agreement;
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/A-HKFTA/Report_186
- Australia-Hong Kong FTA;
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/A-HKFTA/Report_186
- Australia-Uruguay BIT; and
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/InvestmentsUruguay/Report_188
- UN Convention on Transparency in Treaty-based Investor-State Arbitration.
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/InvestmentsUruguay/Report_188

Other Parliamentary committees may also consider specific treaty actions. For example, the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* was the subject of separate

inquiries by JSCOT⁶, the Senate Foreign Affairs, Defence and Trade References Committee⁷, and the Senate Legal and Constitutional Affairs Legislation Committee⁸.

The Australian Government has recently introduced two additional measures to enhance Parliamentary and public engagement for trade negotiations.

A Ministerial Advisory Council (MAC) was established in June 2020 to help inform the Government's ongoing FTA agenda. Trade, Tourism and Investment Minister, Senator the Hon Simon Birmingham's media release, *Enhanced transparency for free trade agreement negotiations*, is available here: <https://www.trademinister.gov.au/minister/simon-birmingham/media-release/enhanced-transparency-free-trade-agreement-negotiations>.

The MAC is expected to convene at least twice a year, bringing together a broad cross-section of business, industry and community representatives with trade expertise to help inform Australia's negotiations and policies going forward. A summary of its first meeting held on 9 July 2020 is available on the DFAT website:

<https://www.dfat.gov.au/trade/agreements/negotiations/Pages/trade-and-investment/ministerial-advisory-council-fta-negotiations>.

Commencing in June 2020, DFAT began a pilot involving biannual briefings on FTA negotiations for the Trade Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT). This began with a briefing on the Australia-European Union FTA (A-EUFTA). The results of this pilot program will help inform transparency measures in relation to other FTA negotiations. The Government has also agreed to make the A-EUFTA text available to interested Members of Parliament, around the time of conclusion, under strict confidentiality conditions.

⁶ Joint Standing Committee on Treaties, Report 181: Inquiry into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (22 August 2018). Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11/Report_181

⁷ Senate Foreign Affairs, Defence and Trade References Committee, Proposed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (18 September 2018). Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP-11/Report

⁸ Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Customs Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Bill 2018 [Provisions], Customs Tariff Amendment (Comprehensive Agreement for Trans-Pacific Implementation) Bill 2018 [Provisions] (10 October 2018). Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CustomsAmendment/Report

5. The consultation process undertaken by DFAT before and during the negotiation of trade agreements

Trade negotiations, whether they are multilateral, plurilateral, regional or bilateral, are complex and differ from treaty to treaty. Timeframes will vary widely and reflect the unique demands and circumstances of one or more negotiating partners and negotiating contexts.

DFAT is committed to effective consultations with all interested stakeholders throughout the negotiation of trade agreements, beginning with the development of a mandate and continuing throughout the negotiations and after entry into force.

Relevant Commonwealth Departments, informed by the views of stakeholders and States and Territories, work with DFAT in a rigorous whole-of-government process to develop the Government's negotiating position. Throughout the negotiations, DFAT maintains close and ongoing contact with all stakeholders, including civil society and consumer groups.

The Government's consultations and stakeholder engagement process on trade agreements generally includes:

- open-ended calls on the DFAT website for written submissions from stakeholders and the general public for the duration of the negotiations;
- formal stakeholder consultation meetings, involving community groups, NGOs, trade unions, academics, peak industry bodies and business representatives; and
- consultation with State and Territory governments through regular meetings of the:
 - Commonwealth-State-Territory Standing Committee on Treaties (SCOT);
 - Senior Officials' Trade and Investment Group (Commonwealth and State and Territory officials); and
 - Trade and Investment Ministers' Meeting (Commonwealth, State and Territory Ministers).

Stakeholders are encouraged to lodge written submissions on the commercial, economic, regional and other impacts that could be expected to arise from an agreement. Submissions can also focus on specific market access challenges or other issues of importance to doing business with FTAs partners, including information on tariff and non-tariff barriers to goods and services trade and barriers to investment. DFAT welcomes the whole range of potential input – from a short email through to comprehensive analytical papers.

All submissions are treated as public and are published on the DFAT website, unless the author specifically requests that the submission, or part thereof, be handled in confidence.

In addition to continuing consultations with individual stakeholders, including civil society and unions, DFAT hosts biannual stakeholder meetings to brief interested groups on the state of play of current negotiations and to seek their views. Time is provided at these meetings for side discussions on particular matters that arise, as well as individual meetings with key negotiators to discuss specific matters of concern. Post-meeting surveys show that a significant majority of participants (90 per cent) see these meetings as useful in improving their understanding of the Government's trade agenda, including on specific FTA negotiations, and as providing an opportunity to put forward their views. The most recent briefing took place virtually in June 2020 due to COVID-19 circumstances.

Our approach to negotiations and stakeholder engagement has been adjusted to take into account the challenges of COVID-19. We held virtual FTA negotiating rounds with the European Union in May and with the United Kingdom in June. We are also continuing to work virtually towards the signature of RCEP in 2020.

Snapshot 2: Regional Comprehensive Economic Partnership (RCEP)

RCEP will be a regional free trade agreement that will deliver substantial new trade and investment opportunities for Australia in the Indo-Pacific region.

DFAT has undertaken regular stakeholder engagement on RCEP since negotiations commenced in 2012, consulting widely with industry and other stakeholders in formulating our positions. In addition to a call for public submissions, negotiators have regularly engaged with the business sector, academia and civil society organisations to seek their views.

At each of the negotiating rounds Australia has hosted, we have held dedicated stakeholder consultation events in the margins of the meetings. Australian stakeholders have also travelled to stakeholder events held during negotiating rounds hosted in other RCEP countries.

Following substantive conclusion of the RCEP negotiations in 2019, DFAT published fact sheets with information about the Agreement on the DFAT website, and will release the full text of the Agreement following signature.

The DFAT website advertises opportunities for stakeholder engagement and social media posts link through to the relevant FTA webpages where contact points for each FTA are listed. In addition, one central webpage advertises trade agreements currently open for consultations or on which we are seeking submissions, including in-force agreements pursuant to in-built review arrangements. These currently include:

- ASEAN-Australia-New Zealand FTA;
- A-EUFTA;
- Australia-Gulf Cooperation Council FTA;

- Australia-India Comprehensive Economic Cooperation Agreement;
- Australia-United Kingdom FTA;
- China-Australia FTA;
- Japan-Australia Economic Partnership Agreement;
- Pacific Alliance FTA; and
- RCEP.⁹

Snapshot 3: Australia-European Union FTA

In addition to providing biannual briefings to the JSCFADT Trade Sub-Committee, and briefing the MAC, DFAT has publicly released fact sheets on our objectives for, and the potential benefits of, the A-EUFTA, as well as a summary of our negotiating aims and approach. We also update stakeholders by publishing summaries after every negotiating round.

DFAT has hosted joint stakeholder briefings during each negotiation round held in Canberra. Over 100 stakeholders from peak bodies, business, industry groups and civil society attended the most recent briefing session.

At the start of negotiations, DFAT issued an invitation seeking public submissions and further submissions are welcome. To date, DFAT has received 89 public submissions and we have held over 640 stakeholder consultations.

DFAT also led a whole-of-government public objections process on the geographical indications the EU has asked Australia to consider protecting as part of the FTA to ensure transparency and to hear directly from Australian industry about their interests and objections.



⁹ See DFAT website: Have your say: public consultations on FTAs: <https://www.dfat.gov.au/trade/engage/public-submissions/Pages/have-your-say-public-consultations-on-ftas>

Snapshot 4: Consultations and stakeholder engagement on Australia’s recently concluded FTAs
Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA)

The public consultation and stakeholder engagement process on IA-CEPA commenced with a joint feasibility study between Australia and Indonesia in August 2007. Negotiations were launched in 2010 and reactivated in March 2016. Throughout the negotiations, DFAT, in conjunction with other government agencies, consulted over 140 stakeholders through consultation events, stakeholder meetings and phone calls. DFAT consulted State and Territory governments through the SCOT. Negotiators also benefited from the participation of the Indonesia-Australia Business Partnership Group (IABPG), a joint business advisory body. Representatives from the Australian Chamber of Commerce and Industry (ACCI), Indonesian Chamber of Commerce (KADIN), Australia-Indonesia Business Council (AIBC) and the Indonesia-Australia Business Council (IABC) established the IABPG. The IABPG produced two reports for consideration by both Australia and Indonesia.

Peru-Australia FTA (PAFTA)

The public consultation and stakeholder engagement process on the PAFTA negotiations commenced with the announcement in May 2017 that Australia and Peru would launch FTA negotiations. DFAT, in conjunction with other government agencies, consulted widely with industry and other stakeholders and welcomed public submissions throughout the negotiations. DFAT consulted 45 businesses and organisations through consultation events, stakeholder meetings, submissions and phone calls. State and Territory governments were also consulted.

Australia-Hong Kong FTA (A-HKFTA)

Stakeholder views were considered throughout negotiations on the A-HKFTA and the Investment Agreement. DFAT commenced stakeholder consultations in 2017 through a call for public submissions. Eleven submissions are published on the DFAT website. Following the launch of negotiations in May 2017, and throughout the negotiations, DFAT received public submissions and correspondence from NGOs, companies, peak industry groups and an individual on a range of issues. DFAT conducted in-person consultations with industry, peak bodies and interested stakeholders across a range of States and Territories during negotiations, as well as with business stakeholders in Hong Kong. State and Territory governments were also consulted.

DFAT has developed an FTA Portal website to assist businesses to understand the benefits and requirements of our FTAs. This free website provides easy-to-access information relating to importing and exporting using all of Australia’s FTAs, including IA-CEPA, PAFTA and A-HKFTA. The Portal can be found at: www.ftaportal.dfat.gov.au.

We regularly publish materials on the DFAT website, and our principal FTA website (www.fta.gov.au), to ensure information on trade negotiations is readily available to the community during negotiations and after entry into force. This includes information on Australia’s existing FTAs and current FTA

negotiations, summaries of negotiating rounds, objectives and benefits fact sheets, outcomes documents and chapter summaries.

In addition, with Australian business specifically in mind, we publish business user guides for each FTA when it enters into force. Examples include:

- *Using IA-CEPA to do business with Indonesia;*
<https://www.dfat.gov.au/trade/agreements/in-force/iacepa/Pages/using-ia-cepa-do-business-indonesia>
- *Using PAFTA to do business with Peru; and*
<https://www.dfat.gov.au/trade/agreements/in-force/pafta/doing-business-with-peru/Pages/default>
- *Guide to using A-HKFTA to export or import.*
<https://www.dfat.gov.au/trade/agreements/in-force/a-hkfta/doing-business-with-hong-kong/Pages/guide-to-using-a-hkfta-to-export-or-import>

To boost business awareness and use of Australia's FTAs, we also:

- participate in industry stakeholder events;
- together with Austrade, deliver FTA seminars or webinars;
- support broad access to the information available on the DFAT website and maintain an active social media presence to raise the profile of our FTAs; and
- respond to queries from businesses and other stakeholders about our FTAs.

As well as this, we understand that problems while trading arrive from time to time that result in non-tariff barriers (NTBs). The Government has developed, with Industry, a whole-of-government NTB Action Plan and NTB Gateway [tradebarriers.gov.au](https://www.tradebarriers.gov.au) for Australian businesses to report their barriers and receive a response to their concerns.

Snapshot 5: FTA Information Seminars



Snapshot 6: Australia-United Kingdom FTA

On 17 June 2020, Trade, Tourism and Investment Minister, Senator the Hon Simon Birmingham announced the commencement of negotiations on an FTA with the United Kingdom (A-UKFTA). On the same day, DFAT published a summary of the negotiating aims and approach, as well as fact sheets on our objectives and the potential benefits of an FTA on the DFAT website. We alerted stakeholders through DFAT’s social media channel and issued an invitation to stakeholders on the DFAT website seeking written submissions. To date, we have received 30 written submissions from organisations and individuals.

We have held a number of stakeholder consultations since the United Kingdom formally left the European Union on 31 January 2020. We have held over 20 consultations to date and more are scheduled.

Following the first round of negotiations, held virtually from 29 June to 10 July 2020, we published a summary of the discussions on the DFAT website. We will continue to publish summaries following future rounds. The A-UKFTA webpage can be found here:

<https://www.dfat.gov.au/trade/agreements/negotiations/aukfta>.

6. The effectiveness of independent analysis to inform negotiation or consideration of trade agreements

An assessment of whether a trade-related agreement is in the national interest is supported by various mechanisms including Parliamentary review, stakeholder engagement and independent analysis.

In addition to JSCOT processes and other forms of Parliamentary review, the Government is informed by the extensive consultations and stakeholder engagement processes set out in section 5, which allow for a wide range of views to inform our approach before and during negotiations.

DFAT takes into account various forms of independent analysis on a case-by-case basis. Independent analysis can take the form of feasibility studies and can also be provided in submissions from stakeholders addressing sectoral issues or the impact an agreement might have on the economy and Australian society. This analysis may include economic modelling by independent researchers.

Some FTA feasibility studies are primarily based on detailed economic analysis and modelling, while others are focused on political economy matters. Typically, feasibility studies look at current trade barriers and the potential for market growth in areas of interest to the parties. All undertake, to varying levels of detail, a cost-benefit analysis of entering into FTA negotiations.

With regard to economic modelling, statistical and methodological limitations affect the accuracy of modelling the total impact of an FTA or other trade agreement on the economy. It is difficult to model precisely the impact of changes to non-tariff barriers, trade facilitation, increased regulatory certainty and other aspects of an FTA such as rules of origin. Statistics on international trade in services and investment flows are also incomplete, which can affect the utility of economic modelling.

Snapshot 7: Pacific Agreement on Closer Economic Relations Plus (PACER Plus)

The PACER Plus is a regional, development-centred and comprehensive FTA covering goods, services and investment. Negotiations on PACER Plus commenced in 2009 and concluded in 2017. When fully implemented, Australian exporters will gain tariff free access to PACER Plus markets for 91.5 per cent of tariff lines, covering 88.5 per cent of Australian exports to the region.

For PACER Plus, the following assessments were prepared:

- In June 2008, the Institute for International Trade (at the University of Adelaide) prepared the *Research Study on the Benefits, Challenges and Ways Forward for PACER Plus*, providing an early assessment of issues for consideration in the negotiations.
- In 2016, the Office of the Chief Trade Adviser (OCTA), an independent advisory body of the Pacific Forum Island, undertook and published its *PACER Plus Sustainability Impact Assessment*. The assessment was prepared independently by the OCTA, with inputs from consultants. It presents an assessment of the potential economic, social and environmental impacts of trade liberalisation under PACER Plus on Pacific island countries.

7. The process around the categorisation of treaty actions

Treaty actions are categorised for the purposes of Parliamentary scrutiny. Major treaty actions are those that will have more than a negligible financial and/or legal effect within Australia. Major treaty actions are tabled in Parliament with a NIA and are divided into two categories:

- Category 1 treaty actions, which are all treaty actions except those identified as being Category 2 or Category 3 treaty actions. Category 1 treaty actions are tabled in both Houses of Parliament for 20 joint sitting days; and
- Category 2 treaty actions, which are treaty actions that are for the most part uncontroversial in nature and relatively routine in form. The treaties are often based on a standard ‘template’ agreement, for example, BITs, air services agreements, double taxation agreements and extradition agreements. They are tabled in both Houses of Parliament for 15 joint sitting days.

Minor treaty actions are Category 3 treaty actions that do not impact significantly on the national interest, and are expected to have negligible financial and legal effect within Australia. These treaty actions are usually technical and administrative amendments to treaties to which Australia is a party. They are not tabled but instead are referred to JSCOT by the Minister for Foreign Affairs, together with a short Explanatory Statement that describes the practical and legal effect of the treaty action and why it is considered likely to have a negligible impact.

JSCOT considers minor treaty actions in its private meetings and is not normally expected to hold hearings on minor treaty actions. It may, however, request that a treaty action referred to JSCOT as a minor treaty action be treated instead as a major treaty action (Category 1 or Category 2), where it considers that a full inquiry process is warranted.

The process of categorising treaty actions has evolved over time. With the introduction of the treaty-making reforms in 1996, all treaties were required to be tabled in Parliament with an accompanying NIA for at least 15 joint sitting days. In 2002, the then Minister for Foreign Affairs announced the division of treaties into two categories: Category A (routine treaties) and Category B (more significant or sensitive treaties).¹⁰ Category A continued to be dealt with within 15 joint sitting days, but Category B treaty actions were extended to 20 joint sitting days.

In 2003, a third category, Category C, was introduced for minor amendments that did not require any inquiry. The processes for the treatment of minor treaty actions were formalised in 2008 and 2009 in correspondence between the then JSCOT Chair and the then Minister for Foreign Affairs.

¹⁰ Category A treaty actions are now referred to as Category 2 treaty actions, Category B treaty actions are now referred to as Category 1 treaty actions, and Category C treaty actions are now referred to as Category 3 treaty actions.

This reform was intended to improve the efficiency of the treaty-making system by streamlining the process for treaty actions that did not impact significantly on Australia's national interest. It also allowed for expedited consideration by JSCOT of minor treaty actions that are due to come automatically into force.

In DFAT's view, the categorising of treaty actions is valuable as it ensures that the efforts and resources of the Government and the Parliament are appropriately directed to those treaty actions with substantive implications for Australia's national interest.

Snapshot 8: Minor treaty actions

JSCOT has considered over 100 minor treaty actions since 2007.¹¹ Amongst these, there are some clear patterns in the minor treaty actions that are referred to JSCOT.

1. Regular amendments to multilateral treaties

Certain multilateral treaties are amended at regular intervals by the relevant body. The amendments are typically of a technical nature.

An example is the regular amendments to the *International Convention for the Safety of Life at Sea* (SOLAS)¹². SOLAS is administered by the International Maritime Organization, a specialised agency of the United Nations. Since 2007, JSCOT has considered nine minor treaty actions relating to amendments to SOLAS. The most recent amendments considered by JSCOT related to technical specifications for the construction and operation of ships.¹³

2. 'Deemed acceptance' of amendments to multilateral treaties

'Deemed acceptance' provisions in treaties enable amendments of a technical nature to be made which then enter into force on a certain date for all parties to the treaty, except for those parties which have objected to the amendment. The streamlined process for minor treaty actions helps facilitate parliamentary scrutiny in the (often short) period of time between notification of an amendment of this type and its entry into force.

An example is the amendments to Annex I of the *United Nations Education, Scientific and Cultural Organisation International Convention against Doping in Sport*.¹⁴ This annex identifies the substances and methods that are prohibited in sport, and is regularly amended to reflect the Prohibited List adopted by the World Anti-Doping Agency (WADA) (which is reviewed annually). Since 2007, JSCOT has considered 14 minor treaty actions relating to amendments to this annex. The most recent amendments considered by JSCOT were notified by the Director-General of UNESCO on 1 October 2019 and automatically entered into force on 1 January 2020.¹⁵

¹¹ See: Joint Standing Committee on Treaties, 'Minor treaty actions'. Available at: https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JSCT/minor_treaty_actions.pdf?la=en&hash=3E2E748B677282726AEB7614AE4FA1251759A3FF

¹² [1983] ATS 22.

¹³ [2020] ATS 3.

¹⁴ [2007] ATS 10.

¹⁵ [2020] ATS 8.

3. Updates to technical annexes of treaties

Multilateral treaties dealing with technical issues often include detailed specifications, such as lists of articles regulated by the treaty, in annexes to the treaty. Such treaties often provide simplified processes for updating annexes to enable the treaty to remain current.

An example is the regular amendments to Annex III of the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*.¹⁶ Annex III lists the chemicals that are subject to the Convention's Prior Informed Consent (PIC) Procedure. The PIC Procedure provides for information exchange regarding the import and export of listed chemicals. Since 2007, JSCOT has considered six minor treaty actions relating to amendments to this Convention. The most recent amendment considered by JSCOT was the listing of two new chemicals, phorate and hexabromocyclododecane.¹⁷

¹⁶ [2004] ATS 22.

¹⁷ [2019] ATNIF 29.