



Australian Fair Trade and Investment Network (AFTINET) Submission to the China-Australia Free Trade Agreement (ChAFTA) ten-year review March 2026

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Introduction

AFTINET is a national network of 60 community organisations and many more individuals supporting fair regulation of trade consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair trading relationships with all countries based on these principles. We recognise the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent and democratically accountable framework that recognises the special needs of developing countries.

These principles are especially important in the current context when urgent multilateral action is required to address the climate crisis. However, both cooperative multilateral action on trade and climate action are under challenge. The fragility of bilateral free trade agreement commitments with major economies like China and the US has been demonstrated by the unilateral export product bans imposed then lifted by China from 2021 to 2024 and the unilateral tariffs currently being applied by the US government.

We welcome the opportunity to make a submission to the DFAT ten-year review of the China-Australia Free Trade Agreement (ChAFTA).

When Trade Minister Farrell announced the government's trade policy on November 13, 2022, he recognised the environmental necessity and the economic development opportunities in "the transition to low-carbon, low-cost and reliable energy generation, storage and transmission." He also stated that "the benefits of trade must be shared among the community." This includes "rules in trade agreements that commit to maintaining high labour standards" and ensuring that "traditionally marginalised voices are amplified including those of First Nations Australians and women." The policy also recognised that Investor-State Dispute Settlement (ISDS) in trade agreements, which enables international corporations to sue governments over policy changes, reduces the right of governments to regulate in the public interest. The policy pledged to exclude ISDS from new trade agreements and review ISDS in existing agreements.¹

The Review of ChAFTA is an opportunity to implement these policies.

Summary

This submission provides a review of the China-Australia Free Trade Agreement a decade after its entry into force. It recommends the government implement its policy to include commitments on environmental protection and climate action, labour rights, and the rights of women and Indigenous peoples.

It then presents the latest evidence for the exclusion of certain provisions from ChAFTA because they reduce the right of governments to regulate in the public interest in a rapidly changing international environment. These include removing ISDS, removing provisions that expand the number of temporary overseas workers without labour market testing or labour rights, removing provisions

¹ Farrell, D., (2022) Trading our way to greater prosperity and security, November 13, <https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security>.

which would prevent the public interest regulation of the digital domain, removing provisions that restrict the regulation of essential services and provisions that could weaken product standards. Specific recommendations about the text of ChAFTA are made at the end of each section.

Recommendations on climate action and the environment:

That the government seek to ensure that ChAFTA is aligned with its policies to protect the environment and achieve net zero carbon emissions targets through commitments to the adoption and implementation of UN International Environment Agreements, enforced through the government-to-government dispute processes contained in the agreement, including:

- ***the UN Framework Convention on Climate Change 1992, the Paris Agreement 2015, and Implementation Agreements at subsequent COP meetings***
- ***the Montréal Protocol on Hydrofluorocarbons***
- ***the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978***
- ***the UN Convention on International Trade in Endangered Species***
- ***the UN Convention on Biological Diversity***
- ***the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001).***

Recommendations on labour rights:

The ChAFTA should include commitments to adopt, develop and implement international standards on labour rights, including the International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work and the Fundamental Conventions. These include:

- ***The right of workers to freedom of association and the effective right to collective bargaining (ILO Conventions 87 and 98)***
- ***The elimination of all forms of forced or compulsory labour (ILO Conventions 29 and 105)***
- ***The effective abolition of child labour (ILO Conventions 138 and 182), and***
- ***The elimination of discrimination in respect of employment and occupation (ILO Conventions 100 and 111)***
- ***A safe and healthy working environment (ILO Conventions 185 and 187).***

Recommendations on women's rights and rights of Indigenous peoples:

The ChAFTA should include commitments to progressively adopt, develop and implement international standards based on

- ***the UN Convention on the Elimination of All Forms of Discrimination Against Women***
- ***the UN Declaration on the Rights of Indigenous Peoples***

Recommendation on ISDS:

- ***Recognising the emergence of even more evidence of the harmful impacts of ISDS since ChAFTA was negotiated the Investor-State Dispute Settlement (ISDS) provisions in Chapter 9 Section B should be removed.***
- ***That the 1988 Australia-China Bilateral Investment Treaty should be terminated together with its sunset clause.***

Recommendations on temporary workers' rights:

- *The government should review movement of people Chapter 10 to ensure that it is consistent with current policy to protect the rights of temporary workers*
- *The government should implement its policy of labour market testing to ensure that temporary workers meet specific labour shortages, and are not vulnerable to exploitation*
- *Commitments to remove labour market testing for skilled or semi-skilled workers in Article 10.3 should be removed from ChAFTA.*
- *The side letter removing mandatory skills assessment should be cancelled*
- *The MoUs on Investment Facilitation and on Work and Holiday visas should be cancelled.*

Recommendations on the digital economy:

The ChAFTA should not include provisions that:

- *Prevent governments from regulating the cross-border flow of data*
- *Prevent regulation to address market power imbalances*
- *Prevent governments from accessing source code and algorithms and from regulating to prevent the misuse of algorithms to reduce competition and to prevent class, gender, race and other forms of discrimination*
- *Prevent governments from setting standards for the security of electronic transactions and preventing cybercrime*
- *Prevent governments from regulating the abuse of Artificial Intelligence*
- *Prevent governments from regulating to ensure that digital platform workers have access to the same minimum standards for wages and working conditions as other workers*
- *Prevent governments from regulating to protect workers' privacy, prevent intrusive surveillance and ensure that workers have access to data collected about them.*

The ChAFTA should include:

- *Full exemptions for tax policy to ensure that digital companies do not evade tax.*
- *Mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.*

Recommendation on trade in services provisions:

- *That the government ensure that public services are clearly defined and clearly excluded from ChAFTA services commitments*
- *That the government review the reservations in the ChAFTA services chapter to ensure that governments retain the right to regulate and reregulate all government-funded and other essential services in the public interest, and to introduce new regulation as circumstances change.*
- *That aged care services be listed as a specific reservation in Annex III Section 1 Part B of the ChAFTA*

Recommendation on product standards:

- *That the relevant ChAFTA clauses in chapter 6, Technical Barriers to Trade be clarified to ensure that products exported to Australia meet Australian standards. Border inspection*

resources should also be increased to detect products which do not meet Australian standards.

Inclusion of environmental standards, workers' rights, women's rights and indigenous rights

Australian bilateral and regional agreements have included chapters and/or commitments on environmental standards and labour rights. However, the strength of the commitments and their enforceability has varied widely. There are commitments not to reduce labour and environmental standards in bilateral agreements with the US and the Republic of Korea.² The Australia-UK Free Trade Agreement has chapters with more detailed commitments on United Nations (UN) environmental agreements and net zero emissions, labour rights and on women's rights.³ The Australia-UAE agreement also includes chapters on the environment and climate change, labour rights, women's rights and indigenous rights⁴. However, none of these commitments are enforceable through the same state-to-state dispute processes that apply to other chapters in the agreement.

The current review of ChAFTA is an opportunity for the Australian government to implement its policy of more consistent and enforceable commitments on environmental standards and net zero emissions based on United Nations (UN) agreements, cooperation on reducing carbon emissions and the development of renewable energy industries, and commitments to labour rights, women's rights and rights of Indigenous peoples.

Commitments to UN Environment agreements and net zero emissions

Trade agreements should include commitments by governments to implement international environmental agreements which should be enforced by the government-to-government disputes process of the agreement.

Australia's recent experience of increasingly extreme cyclones and floods demonstrate that climate change and environmental degradation present systemic risks to economic stability, public health and sustainable development. Trade agreements play an increasingly important role in shaping how countries respond to these challenges, particularly through their influence on investment, production patterns and energy systems.

The Australian Government has recognised the serious climate crisis by adopting a target of net zero emissions by 2050 and interim targets by 2030 and 2035. The government is also committed to the development of national and regional renewable energy initiatives in cooperation with trading partners.

Trade policy should be aligned with these commitments. This includes ensuring that trade and investment rules facilitate, rather than constrain, climate action, including the deployment of

² Department of Foreign Affairs and Trade (2004) *Text of the Australia-United States Free Trade Agreement*, Chapter 18, March 6) <https://www.dfat.gov.au/trade/agreements/in-force/ausfta/official-documents/Pages/official-documents>.

Department of Foreign Affairs and Trade (2014) *Text of the Korea-Australia Free Trade Agreement*, Chapter 17, <https://www.dfat.gov.au/trade/agreements/in-force/kafta/official-documents/Pages/full-text-of-kafta>

³ Department of Foreign Affairs and Trade (2021) *Australia-UK Free Trade Agreement text* Chapters 21, 22 and 24 <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/aukfta/official-text>

⁴ Department of Foreign Affairs and Trade (2023) *Text of the Australia-UAE Comprehensive Economic Partnership Agreement (CEPA)*, Chapters 17-20 <https://www.dfat.gov.au/trade/agreements/in-force/australia-uae-comprehensive-economic-partnership-agreement-cepa/australia-uae-cepa-official-text>

renewable energy, development of low-emissions technologies, and implementation of domestic climate policies.

Meeting the challenge of climate change is also interlinked with other forms of environmental protection, such as the protection of the marine environment, biodiversity conservation, combating wildlife trafficking, and illegal logging.

Recommendations:

That the government seek to ensure that ChAFTA is aligned with its policies to protect the environment and achieve net zero carbon emissions targets through commitments to the adoption and implementation of UN International Environment Agreements, enforced through the government-to-government dispute processes contained in the agreement, including:

- ***the UN Framework Convention on Climate Change 1992, the Paris Agreement 2015, and Implementation Agreements at subsequent COP meetings***
- ***the Montréal Protocol on Hydrofluorocarbons***
- ***the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978***
- ***the UN Convention on International Trade in Endangered Species***
- ***the UN Convention on Biological Diversity***
- ***the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001).***

Labour Rights

Increased trade and investment can improve most peoples' lives if the benefits of trade and investment are shared equitably. This will not happen automatically but requires active policies to adopt and progressively implement internationally recognised standards for labour rights.

Global production chains encourage competition to provide the lowest labour and environmental costs for exports, which can erode workers' rights. This often occurs in export processing zones or export industries where the workers have little or no effective labour rights to join a union or engage in collective bargaining. This model of global production chains suits the needs of global corporations but can have negative impacts on workers.

Many workers face precarious temporary employment, long hours of work and unsafe working conditions. These conditions occur not only in locally-owned enterprises, but in those under contract to global corporations like Apple, Mattel and Disney. Reports include underpayment, excessive work hours, and unsafe working conditions, including exposure to toxic chemicals⁵. These risks highlight the importance of including commitments to labour rights in trade agreements.

Recommendations

The ChAFTA should include enforceable commitments to adopt, develop and implement international standards on labour rights, including the International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work and the Fundamental Conventions.

⁵ Lazarus, C., (2018), 'Nightmare' conditions at Chinese factories where Hasbro and Disney toys are made, *CNBC Business News*, December 7, <https://www.cnbc.com/2018/12/07/nightmare-at-chinese-factories-making-hasbro-and-disney-toys.html>

These include:

- ***The right of workers to freedom of association and the effective right to collective bargaining (ILO Conventions 87 and 98)***
- ***The elimination of all forms of forced or compulsory labour (ILO Conventions 29 and 105)***
- ***The effective abolition of child labour (ILO Conventions 138 and 182), and***
- ***The elimination of discrimination in respect of employment and occupation (ILO Conventions 100 and 111)***
- ***A safe and healthy working environment (ILO Conventions 185 and 187).***

Women's rights

Women form half the population, and the economy relies on their paid and unpaid work caring for children and elders. However, because of historic discrimination, this work is often unrecognised and under-rewarded, resulting in higher rates of poverty. Changes in trade policy can have disproportionate impacts on women's economic participation. Gender analysis is required to assess and mitigate those impacts. For example, tariff changes can disproportionately impact female dominated industries like the garment industry. In developing countries many small farmers are women and changes to agricultural trade policies can disproportionately impact them. We note that Article 7 of the International Covenant on Economic, Social and Cultural Rights of which Australia is a signatory speaks of ensuring equal pay for work of equal value free of assumptions of gender.

The UN Convention on the elimination of all forms of discrimination which many countries have ratified shows how discrimination can be removed to increase women's social and economic participation. This is essential for women's full participation in both policy and in economic and trade activities and sharing the benefits of those activities.

In recent years, some trade agreements have included gender equality provisions that recognise the importance of women's economic empowerment and typically include commitments to cooperation, capacity building and gender-responsive policy. However, these provisions are often not legally enforceable and lack effective monitoring mechanisms.

Recommendation:

The ChAFTA should include enforceable commitments to progressively adopt, develop and implement international standards based on the UN Convention on the Elimination of All Forms of Discrimination Against Women

Rights of Indigenous peoples

Australian Indigenous peoples live with the legacy of colonial dispossession and discrimination, with basic civil rights and land rights only recognised by Australian governments and courts over the last 60 years.

Indigenous peoples are rights-holders with jurisdictional authority over Country, not merely stakeholders to be consulted. In particular, free prior and informed consent is required for activities on Indigenous Country. Trade agreements that constrain environmental regulation, land governance, or climate action on Indigenous Country also undermine indigenous rights, even if those rights are referenced formally.

In addition, trade agreements can affect the protection of Indigenous knowledge and cultural heritage, particularly through intellectual property provisions. Strong safeguards are needed to

prevent misappropriation and to ensure that Indigenous communities retain control over the use of their knowledge and cultural expressions.

The government should implement its commitments to the inclusion of Indigenous peoples and sharing benefits of trade through supporting the following recommendation:

The ChAFTA should include enforceable commitments to progressively adopt, develop and implement international standards based on the UN Declaration on the Rights of Indigenous Peoples

Consistency with Australia's migration policy and protection of rights of temporary workers

AFTINET supports Australia's permanent migration system which has contributed to our vibrant multicultural society and economy. Permanent migrants have the same rights as other workers in Australia because they cannot be deported if they lose their employment.

The government's 2023 report on Migration Strategy⁶ acknowledged that temporary migrant workers tied to one employer are more vulnerable to exploitation than permanent migrant workers. The fact that they are tied to one employer and face deportation if they lose their job means that these workers have no effective rights in the workplace. The expansion of numbers of temporary migrant workers through trade agreements treats workers as commodities without protection of their human and labour rights in fixed agreements which are difficult to change.

Arrangements with specific countries to address genuine labour market shortages or seasonal needs should be made through diplomatic agreements which can include specific protections for workers' rights and specific obligations on employers to implement those protections. Such arrangements are more flexible than trade agreements and can be more easily evaluated and varied to ensure they meet their goals. The PALM scheme with Pacific Island and Timor Leste governments is intended to be such an agreement but has also faced complaints about worker exploitation. The scheme was evaluated and revised to improve worker protections in 2024⁷.

There is widespread evidence of the exploitation of temporary overseas workers in the absence of such protections. A survey of temporary overseas workers in Australia published in 2017 by University of New South Wales academics found temporary overseas workers experienced widespread wage theft.⁸ Similar evidence was provided in 2017 to the Joint Parliamentary Committee Inquiry into the Modern Slavery Act and by a 2019 study of the horticultural industry.⁹ Those on temporary working holiday maker visas were also vulnerable. The evidence from these studies shows gross violations of Australian minimum work standards including failure to pay even minimum wages, long hours of work, and lack of health and safety training leading to workplace injuries, as well as lack of effective freedom of association and collective bargaining rights. During the COVID pandemic temporary workers who lost their employment were also denied payments available to other workers and were expected to return to their home countries when many had no

⁶ Commonwealth of Australia (2023) Migration Strategy December 11, <https://immi.homeaffairs.gov.au/programs-subsite/migration-strategy/Documents/migration-strategy.pdf>

⁷ DFAT (2024) Expanding and improving the PALM scheme – recent reforms. <https://www.dfat.gov.au/geo/pacific/engagement/pacific-labour-mobility>

⁸ Berg et al. (2017) Wage Theft in Australia, <https://apo.org.au/sites/default/files/resource-files/2017-11/apo-nid120406.pdf>

⁹ Howe et al. (2019) Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry, www.sydney.edu.au/Content/Dam/Corporate/Documents/Business-School/Research/Work-And-Organisational-Studies/Towards-a-Durable-Future-Report.pdf

means to do so¹⁰.

Based on this evidence AFTINET does not support expansion of the numbers of vulnerable temporary workers and removal of labour market testing requirements in ChAFTA or other trade agreements.

The ChAFTA Chapter 10 provisions on Temporary Movement of People contained in the text, side letters and Memoranda of Understanding, are more extensive than any other Australian trade agreement.

Removal of Labour market testing and skills assessment

a) Chapter 10, Movement of Natural Persons: removal of local labour market testing

There is an explicit commitment that there will be no labour market testing for any categories of temporary skilled workers in Chapter 10, Movement of Natural Persons¹¹. These provisions are contrary to current government policy and should be cancelled.

b) Side letters removing mandatory skills assessment for 10 key skilled occupations, including licensed occupations like electricians.

There is a separate exchange of side letters in which the parties agree to “streamline relevant skills assessment processes for temporary skilled labour visas, including through reducing the number of occupations currently subject to mandatory skills assessment for applicants for an Australian Temporary Work (Skilled) Visa”¹² This would apply to electricians, carpenters and mechanics.

This could lead to a situation where there is no guarantee that temporary workers will have the same level of skills, health and safety knowledge and qualifications as are required for local workers, potentially endangering themselves, other workers and the public. This is also contrary to current government policy and should be cancelled.

Memorandum of Understanding (MoU) on Investment Facilitation

The Investment Facilitation MoU is not part of the trade agreement but a diplomatic agreement which removes local labour market testing, skills assessment, and limits on numbers and occupations of temporary workers for infrastructure projects with a relatively low investment threshold of \$150 million, and which have between 15% and 50% of Chinese investment¹³. This would include most building and infrastructure projects in a wide range of industries.

The minimum wage to be paid to the temporary workers would be the subject of negotiation between the project company and the Department of Immigration and Border Protection before the workers arrive in Australia. This means the workers would be excluded from the basic right to collective bargaining under the Fair Work Act. The rate paid may not be equivalent to the rates paid to local workers in the industry (MoU Clause 4).

In summary, the MoU enables investment projects meeting the low threshold of \$150 million to bypass the local workforce and employ unlimited numbers of temporary workers who will be tied to

¹⁰ Maritn, S. and Doherby B (2020) Morrison government urged to help temporary visa holders 'trapped' in Australia. *The Guardian*. 21 March. <https://www.theguardian.com/world/2020/mar/21/morrison-government-urged-to-help-temporary-visa-holders-trapped-in-australia>

¹¹ DFAT (2015) Text of the ChAFTA, Chapter 10, p. 113, Article 10.4.3b. <https://www.dfat.gov.au/sites/default/files/chafta-chapter-10-movement-of-natural-persons.pdf>

¹² ¹² DFAT (2015) Text of the ChAFTA, Chapter 10 Side Letter on Skills Assessment: 1-2). <https://www.dfat.gov.au/sites/default/files/chafta-side-letter-on-skills-assessment-and-licensing.pdf>

¹³ DFAT (2015) Text of the ChAFTA MoU on Investment Facilitation <https://www.dfat.gov.au/sites/default/files/chafta-mou-on-an-investment-facilitation-arrangement.pdf>

one employer, with no clear means of skills assessment, including health and safety skills, and who may be paid a minimum rate below the rates of equivalent local workers. They will not have the right to collective bargaining under the Fair Work Act, will be isolated from the local workforce and extremely vulnerable to exploitation.

We are not aware that any investment facilitation agreements have been approved since ChAFTA came into force in December 2015. The MoU is clearly contrary to government policy and should be cancelled .

The Memorandum of Understanding on Work and Holiday Visa Arrangements

This document commits Australia to grant annually up to 5,000 multiple entry “Work and Holiday” visas for young people with tertiary education and a level of proficiency in English, to stay in Australia for a period of 12 months for the purposes of a working holiday¹⁴ There is no equivalent commitment for work and holiday arrangements for Australians in China.

The work is supposed to be incidental to the holiday, and visa holders are not supposed to work for the full 12 months, but there is no upper limit on the total period of employment. Again this creates opportunities for exploitation and should be cancelled.

Recommendations

- ***The government should review the ChAFTA movement of people Chapter 10 to ensure that it is consistent with current policy to protect the rights of temporary workers***
- ***The government should implement its policy of labour market testing to ensure that temporary workers meet specific labour shortages , and are not vulnerable to exploitation***
- ***Commitments to remove labour market testing for skilled or semi-skilled workers in Article 10.3 should be removed from the text.***
- ***The side letter removing mandatory skills assessment should be cancelled***
- ***The MoUs on Investment Facilitation and on Work and Holiday visas should be cancelled.***

Investor-State Dispute Settlement (ISDS) threatens climate action and other public interest regulation

ChAFTA Investment Chapter 9 includes ISDS. There is also a separate 1988 Bilateral Investment Treaty with China with ISDS which was not terminated when ChAFTA was negotiated in 2015 and has a sunset clause which preserves investor rights for 10 years after termination. ¹⁵

ISDS is a mechanism in some trade and investment agreements that allows foreign (but not local) investors to claim billions from governments in compensation for law or policy changes if they can convince an international tribunal that the change will reduce their expected future profits, even if the change is for health, environmental reasons or other public interest reasons.

Australian government policy recognises that ISDS reduces the right of governments to regulate in the public interest. The policy excludes ISDS from new trade agreements and pledges to review ISDS

¹⁴ DFAT (2015) Text of the ChAFTA MoU on work and Holiday Visa Arrangement

<https://www.dfat.gov.au/sites/default/files/chafta-mou-on-a-work-and-holiday-visa-arrangement.pdf>

¹⁵ DFAT (1988) Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments [1988]

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/dfat/treaties/1988/14.html>

in existing agreements.¹⁶ Since the ChAFTA was ratified, even more evidence has emerged to reinforce this policy.

ISDS provisions originally developed in the post-colonial period after World War II to compensate international investors for the direct expropriation or taking of property by governments. However, over the past 60 years, they have expanded to include “indirect expropriation”¹⁷ and “legitimate expectations”,¹⁸ which do not exist in national legal systems. Investors can claim that they deserve compensation if they can argue that a change in law or policy reduces the value of their investment and/or expected future profits and/or that they were not consulted fairly about the change and did not expect the change to occur when they made the investment. Most ISDS cases are against developing countries.

ISDS *ad hoc* tribunals are staffed by investment lawyers who continue to practice as advocates and the tribunals lack the protections of national legal systems. Flaws include the lack of independent judges, arbitrator conflict of interest, lack of transparency, lengthy proceedings, high legal and arbitration costs, forum-shopping by investors, inconsistent decisions caused by the lack of precedents and appeals, third-party funding for claims as speculative investments, and excessively high awards based on dubious and inconsistent calculations of expected future profits.¹⁹ The Clive Palmer cases show how these flaws can be manipulated to maximise time and costs to governments.

Clive Palmer and other fossil fuel companies use ISDS to challenge democratic decisions on climate action

Since the ratification of ChAFTA, there have been many ISDS cases which challenge the urgent need for government climate action. Australian billionaire Clive Palmer has registered his company Zeph Investments in Singapore, claimed to be a Singaporean investor and used ISDS in the ASEAN-Australia-New Zealand free trade to claim a total of \$420 billion from the Australian government. The first claim in 2023 was for \$300 billion after he lost a High Court appeal against a Western Australian government decision to refuse an iron ore mining license.²⁰ The other three claims, which total \$120 billion, are for the refusal of permits for a coal mine and coal-fired power station in

¹⁶ Farrell, D., (2022) Trading our way to greater prosperity and security, November 13,

<https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security>

¹⁷ Malakotipour, M (2020) The chilling effect of indirect expropriation clauses on host states public policies: A call for a legislative response. *International Community Law Review*. 29 May. https://brill.com/view/journals/iclr/22/2/article-p235_5.xml?language=en

¹⁸ Levashova, Y (2022) The role of investors’ due diligence in international investment law: legitimate expectations of investors. 22 April. *Kluwer Investment Blog*. <https://arbitrationblog.kluwerarbitration.com/2020/04/22/the-role-of-investors-due-diligence-in-international-investment-law-legitimate-expectations-of-investors/>

¹⁹ Langford, M, Potesta, M and Kaufman, G (2020) UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions. *Journal of World Investment and Trade*. 22 June. https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml?language=en

²⁰ Ranald, P. (2023) How Clive Palmer is suing Australia for 300 billion with the help of an obscure legal clause and Christian Porter 4 April.

<https://theconversation.com/how-clive-palmer-is-suing-australia-for-300-billion-with-the-help-of-an-obscure-legal-clause-and-christian-porter-203111>

Queensland.²¹ The refusals were for environmental reasons, including contributions to increased carbon emissions.²²

In September 2025, an ISDS tribunal dismissed Palmer's claim to be a Singaporean investor in the first WA iron ore case and ordered him to pay the Australian government legal costs of \$13.6 million²³. The Attorney-General commented that "Australia should never have had to spend two years and over AU \$13 million defending an investor-State claim brought by an Australian national. The Albanese Government remains committed to actively engaging in processes to remove or reform existing investor-State dispute settlement mechanisms."²⁴

The government hoped that Palmer would withdraw his remaining cases following the tribunal decision.²⁵ However, Palmer then announced²⁶ that his legal team will challenge the tribunal's decision in the Federal Supreme Court of Switzerland as one of the seats of the international tribunal process. The Swiss court is not an appeal mechanism for the tribunal and cannot consider the broad merits of the case, only technical legal issues, so the action may not succeed. This is a delaying tactic. In the meantime, his other three coal-related cases can proceed in 2026. ISDS tribunals have no precedents, so there is no guarantee that the other three tribunal decisions will be consistent with the first decision, including on the awarding of costs, which are at the discretion of the tribunal. This means the Australian government could face the time and costs associated with each individual case, amounting to multiples of tens of millions of dollars, even if Palmer loses.

The Palmer cases demonstrate how the ISDS system can be manipulated to maximise time and costs for governments. Palmer's cases join a growing global list of fossil fuel company cases against government action to address climate change, documented in the prestigious *Journal Science* in 2023.²⁷

In Europe, German energy companies RWE and Uniper used ISDS in the Energy Charter Treaty (ECT) against the Netherlands over its moves to phase out coal-powered energy by 2030.²⁸ These and other cases spurred public debate and after a comprehensive review, the EU Commission in July 2023 proposed a coordinated withdrawal of all EU states from the Energy Charter Treaty (ECT) because its ISDS provisions were being used against government policies to reduce carbon emissions.²⁹

²¹ Attorney General's Department. Investor-State Dispute Settlement. Zeph Investments Pte Ltd. [https://www.ag.gov.au/international-relations/international-law/international-trade-and-investment-law#:~:text=The%20Jericho%20Power%20Station%20Claim%20\(PCA%20Case%20No%202024-48,Waratah%20Coal's%20Galilee%20Coal%20Project](https://www.ag.gov.au/international-relations/international-law/international-trade-and-investment-law#:~:text=The%20Jericho%20Power%20Station%20Claim%20(PCA%20Case%20No%202024-48,Waratah%20Coal's%20Galilee%20Coal%20Project)

²² Queensland Department of Environment and Science (2023) Waratah Galilee Coal Mine EA refused, www.des.qld.gov.au/our-department/news-media/mediareleases/waratah-galilee-coal-mine-ea-refused

²³ Permanent Court of Arbitration (2025) Zeph Investment vs Australia PCA Case No. 2023-40 Award, September 26 <https://pcacases.com/web/sendAttach/90853>

²⁴ Attorney-General Michelle Rowland (2025) International tribunal rejects Clive Palmer's claim against Australia, Media Release September 27, <https://ministers.ag.gov.au/media-centre/international-tribunal-rejects-clive-palmers-claim-against-australia-27-09-2025>

²⁵ Attorney-General Michelle Rowland (2025).

²⁶ Palmer, C. (2025) Clive Palmer to challenge tribunal decision, media release September 28, <https://x.com/CliveFPalmer/status/1972085296138498546>

²⁷ Tienhaara *et al.* (2022) Investor-State disputes threaten the global green energy transition, *Science*, 5 May 2022 Vol 376, Issue 6594 pp. 701-70 <https://www.science.org/doi/10.1126/science.abo4637>

²⁸ Kluwer Arbitration (2021) <http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/>

²⁹ European Commission (2023), 7 July, https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en

The UK has also announced its withdrawal from the ECT.³⁰ However it still faces ISDS claims under other treaties. In 2025 the UK faced its first ISDS claim under the bilateral Singapore UK investment agreement from Singapore-based Woodhouse Investment Pte Ltd against a High Court decision to deny a permit for a coal mine in Cumbria³¹. The claim has provoked widespread public opposition as it is seen as a challenge to government policy to phase out fossil fuels³².

After facing billions in ISDS claims many developing country Governments have withdrawn from ISDS arrangements. South Africa, India and Indonesia have terminated Bilateral Investment Treaties. Australia is also reviewing its bilateral treaties with ISDS.

Australia is at risk of ISDS claims from Chinese companies. The bipartisan proposal to end the lease of the Port of Darwin held by Chinese-owned Landbridge Group has been the source of speculation of a potential ISDS claim³³. The Chinese Ambassador to Australia has also warned of economic retaliation from China if the Australian Government forced Landbridge to sell the port³⁴. The company would have the choice of using ISDS in ChAFTA or may prefer to use ISDS in the Bilateral Investment Treaty which has even less protections for public interest regulation. While Australia could attempt to shield itself using national security exceptions, there is no guarantee that this will be successful, since ISDS tribunals do not have to make consistent decisions and some have granted claims against governments which claimed security concerns³⁵.

The inclusion of ISDS in ChAFTA is inconsistent with emerging international practice and the Australian government's own policy. The Australian government should seek to remove ISDS provisions from ChAFTA and terminate the Bilateral Investment Treaty.

Recommendation

- ***Recognising the emergence of even more evidence of the harmful impacts of ISDS since ChAFTA was negotiated the Investor-State Dispute Settlement (ISDS) provisions in Chapter 9 Section B should be removed.***
- ***That the 1988 Australia-China Bilateral Investment Treaty should be terminated together with its sunset clause.***

ChAFTA must ensure that governments retain the right to regulate the digital domain

Digital trade is a complex area of trade law that is directly tied to provisions relating to financial services and broader trade in services. The digital trade agenda is highly influenced by the US digital industry lobby, which seeks to codify rules that suit the dominant digital industry companies.

The aim of this digital trade agenda is to secure the cross-border free flow of data and to establish an international regulatory framework that prevents governments from regulating the digital domain

³⁰ UK government (2024) UK departs Energy Charter Treaty, 22 February, <https://www.gov.uk/government/news/uk-departs-energy-charter-treaty>

³¹ Investment Treaty News (2026) The United Kingdom faces its First ISDS Arbitration. January 19. <https://www.iisd.org/itn/2026/01/19/the-united-kingdom-faces-its-first-isds-arbitration/>

³² ABColombia (2026) ISDS a threat to global security. February 4. Report of a conference sponsored by Christian Aid, CAFOD, SCIAF, Oxfam and Trocaire. <https://www.abcolombia.org.uk/isds-a-threat-to-global-security/>

³³ Gu, T. and Nottage, L. (2025), Australia's Port of Darwin move risks ISDS arbitration with China, *East Asia Forum*, 19 May, <https://eastasiaforum.org/2025/05/19/australias-port-of-darwin-move-risks-isds-arbitration-with-china/>

³⁴ Read, M. (2026), Chinese envoy warns trade ties at risk over Darwin Port, *Australian Financial Review*, 28 January, <https://www.afr.com/policy/foreign-affairs/chinese-envoy-warns-trade-ties-at-risk-over-darwin-port-20260128-p5nxkc>

³⁵ Henckels, C. (2025), General and security exceptions and the question of compensation in international investment law, *Journal of International Economic Law*, Volume 28, Issue 1, 6 March, <https://academic.oup.com/jiel/article/28/1/63/8058729?login=false>

and the operations of digital companies. This is particularly concerning given the recent issues arising from the lack of regulation of digital platforms and the business practices of digital companies including:

- Facebook and Google’s data privacy abuse scandals³⁶
- Uber classifying itself as a technological platform, not an employer, to avoid labour regulation and enable the exploitation of workers³⁷
- tax avoidance³⁸
- abuse of market power and anti-competitive practices by Facebook, Google and Amazon³⁹
- use of algorithms which enable anti-competitive conduct or result in discrimination based on class, gender or race
- The abuse of facial recognition technology and Artificial Intelligence.

The 2019 Australian Competition and Consumer Commission’s (ACCC) digital platforms report identified the need for regulatory reform in Australia to address concerns about the market power of big tech companies, the inadequacy of consumer protections and laws governing data collection, and the lack of regulation of digital platforms.⁴⁰ Successive governments, including the current government, have developed regulation to address these concerns.

One example is the News Media Bargaining Code, a mandatory code of conduct that governs commercial relationships between Australian news businesses and digital platforms that benefit from a significant bargaining power imbalance. The code enables news media companies to reach agreements for payment from digital platforms for their use of news media information.⁴¹ Addressing this imbalance was seen as necessary to support the sustainability of the Australian news media sector, which is essential to a well-functioning democracy. The code was reviewed in 2022⁴² and is still in place, but technology companies have been resisting it⁴³. Another example is the development of Online Safety Codes and Standards and age-related restrictions on use of social media.⁴⁴ There has also been legislation to improve the rights of digital platform workers. There is

³⁶ Waterson, J. (2018) UK fines Facebook £500,000 for failing to protect user data, *The Guardian*, October 25, via:

<https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica>.

³⁷ Bowcott, O. (2017) Uber to face stricter EU regulation after ECJ rules it is transport firm, *The Guardian*, December 21, via:

<https://www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu>.

³⁸ Drucker, J. and Bowers, S. (2017) After a Tax Crackdown, Apple Found a New Shelter for Its Profits, *The New York Times*, November 7, via: <https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html>.

³⁹ Ho, V. (2019) Tech monopoly? Facebook, Google and Amazon face increased scrutiny, *The Guardian*, June 4, via:

<https://www.theguardian.com/technology/2019/jun/03/tech-monopoly-congress-increases-antitrust-scrutiny-on-facebook-google-amazon>.

⁴⁰ Australian Competition and Consumer Commission (2019) Digital Platforms Inquiry final report, June 2019, via:

<https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

⁴¹ Australian Competition and Consumer Commission (2021) News Media Bargaining Code, <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/news-media-bargaining-code>.

⁴² Australian Competition and Consumer Commission (2022) Review of the Code

<https://www.accc.gov.au/by-industry/digital-platforms-and-services/news-media-bargaining-code/news-media-bargaining-code>

⁴³ McIlroy, T. (2025) Meta could face millions in fines for not signing content deals in Australia. *The Guardian*. November 13. <https://www.theguardian.com/technology/2025/nov/12/meta-could-face-millions-in-fines-for-not-signing-content-deals-in-australia>

⁴⁴ Australian e- safety Commissioner (2025) online safety codes and standards

ongoing consideration of the public interest in the regulation of the expansion of cybercrime and some aspects of Artificial Intelligence.

Some of these forms of regulation have been identified by the US digital trade lobby as barriers to trade in the US' America First trade policy agenda. The US government is pressuring governments to remove them under the threat of increased tariffs.⁴⁵ Australia should cooperate with other governments to resist such pressure.

Digital trade provisions should not prevent governments from regulating all aspects of the digital domain that require regulation in the public interest.

Recommendations:

The ChAFTA should not include provisions that:

- **Prevent governments from regulating the cross-border flow of data**
- **Prevent regulation to address market power imbalances**
- **Prevent governments from accessing source code and algorithms and from regulating to prevent the misuse of algorithms to reduce competition and to prevent class, gender, race and other forms of discrimination**
- **Prevent governments from regulating the abuse of Artificial Intelligence**
- **Prevent governments from setting standards for the security of electronic transactions and preventing cybercrime**
- **Prevent governments from regulating to ensure that digital platform workers have access to the same minimum standards for wages and working conditions as other workers**
- **Prevent governments from regulating to protect workers' privacy, prevent intrusive surveillance and ensure that workers have access to data collected about them.**

ChAFTA should include:

- **Full exemptions for tax policy to ensure that digital companies do not evade tax.**
- **Mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.**
-

Trade in Services provisions should not restrict the right of governments to regulate essential services in the public interest

Trade agreements should not undermine the ability of governments to regulate in the public interest, especially for essential services like health, education, social services, water and energy.

Exclusion of Public services is ambiguous

Public services are notionally excluded from the ChAFTA services chapter. However, the exclusion of public services in Chapter 8, Article 8.2 t) is ambiguous because a public service is defined as "a service supplied in the exercise of governmental authority [which] means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers"⁴⁶. In

<https://www.esafety.gov.au/industry/codes#about-the-phase-2-industry-codes>

⁴⁵ Tommaso Giardini (2025) Is US Pressure Against Foreign Digital Policy Working? An Investigation of US Tariff Deal Priorities and Government Responses, including an Annex with Annotated Tariff Deal Texts, December 2,

<https://digitalpolicyalert.org/report/reactions-to-tensions>

⁴⁶ DFAT 2019 Text of the ChAFTA Chapter 8, Article 8.2 t) p.59

<https://www.dfat.gov.au/sites/default/files/chafta-chapter-8-trade-in-services.pdf>

Australia, as in many other countries, many public and private services are provided side-by-side, meaning few public services are covered by this definition.

The negative list and ratchet structure restricts public interest regulation if circumstances change

Australia's commitments in the ChAFTA services Chapter 8 use a negative list structure, which means that all services are included unless specifically exempted. Annex III Section 1 Part A lists current non-conforming laws and policies that can be maintained, but they cannot be changed in ways which would make them more "trade restrictive" in future, and new restrictions cannot be introduced. Annex III Section 1 Part B lists non-conforming laws and policies that can be both maintained and changed in future. However, the aim is to reduce over time the measures listed in both Annexes.

The negative list and ratchet structure are specifically intended to prevent governments from introducing new forms of regulation, which are seen as potential barriers to trade. But this structure limits policy space available to respond to changed circumstances or to implement alternative policy proposals. The negative list also means that new services that may be developed in the future are automatically covered by the agreement and their regulation is restricted.

These rules do not compel privatisation of public services but they can prevent re-regulation to address the failures of privatisation. For example, the failure of deregulation and privatisation of Australian vocational education services resulted in government reregulation of those services late in 2016⁴⁷. The increased regulation of vocational education could have been contrary to trade-in-services rules in the Trans-Pacific Partnership which was then still under negotiation. The government responded to this unintended consequence and the need for re-regulation in the CPTPP and subsequent agreements like the IA-CEPA, by including a new reservation in Annex II of those agreements which retained the right to regulate the funding and standards of education services.⁴⁸This reservation is not in CHAFTA Annex III, Section 1 Part B which was negotiated before 2016⁴⁹. This reservation should be included.

Without very specific reservations, trade-in-services rules can also restrict new forms of regulation needed when circumstances change, as has occurred with the need for increased financial regulation following the Global Financial Crisis the Royal Commission into the Banking and Financial Services Industry,⁵⁰ the Royal Commission into Aged Care Quality and Safety discussed below, and governments' responses to climate change through regulation of energy services' carbon emissions.

Other restrictions on regulatory space: market access and domestic Regulation provisions

Market access provisions in Chapter 8 Article 8.6 prevent governments from regulating the number of service suppliers, the number of service operations and number of people employed in a particular service sector or by a service supplier

⁴⁷ Conifer, D., (2016) "Parliament Passes Bill to Overhaul Vocational Education Sector", *ABC News*, December 1, 2016, <https://www.abc.net.au/news/2016-12-02/parliament-passes-bill-to-scrap-troubled-vet-loans/8085860>.

⁴⁸ See DFAT (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) Annex II, p. 1. <https://www.dfat.gov.au/sites/default/files/annex-ii-australia.pdf>.

⁴⁹ DFAT (2015) Text of the ChAFTA. Annex II, p.1028.

⁵⁰ United Nations (2009) Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System, https://www.un.org/en/ga/econcrisissummit/docs/FinalReport_CoE.pdf.

Domestic Regulation and Recognition provisions in Article 8.13.4 create obligations for governments on the domestic regulation of services to ensure that regulations for licensing, qualifications and technical standards are “not more burdensome than necessary” and “do not constitute unnecessary barriers to trade”

The possible impacts of these provisions emerged in 2021 when a debate took place about whether aged care services were specifically excluded from trade-in-services rules in the Regional Comprehensive Economic Partnership (RCEP) and other trade agreements. Aged care is funded by the federal government but managed largely by private providers. The 2021 Report of the Royal Commission into Aged Care Quality and Safety⁵¹ exposed multiple scandals caused by a lack of qualified staff and poor-quality care, and recommended increases in staffing levels, increases in qualifications of staff and changes to licensing arrangements. Many of these recommendations have now been implemented, including measures to increase staffing levels through legislation requiring a registered nurse to be on site in residential aged care at all times and mandated minimum care minutes. Reform of the aged care sector is ongoing.

These increases in regulation could have been prevented by the market access and national treatment rules listed above, unless aged care was specifically reserved from the agreement in. Aged care is not listed in the specific reservation with other specific services like childcare in the RCEP, the CPTPP and ChAFTA.⁵² The government argued that aged care was excluded under the more general category of social services, but the Joint Standing Committee on Treaties noted the ambiguity and recommended that ‘such inconsistencies give rise to public concern, and it would be better if they were avoided’.⁵³ To ensure that there is no potential threat to ongoing reform of the aged care sector in line with the Royal Commission recommendations, aged care should be listed as a specific reservation in Annex III Section 1 Part B of the ChAFTA.

Services exclusions do not exclude ISDS cases

The exclusions for public interest legislation in the Annexes of non-conforming measures do not prevent foreign corporations from suing governments over changes in these forms of regulation under the separate ISDS provisions in the Investment Chapter for measures introduced at national, state or local government level. Annexes I and II only exclude government-to-government claims relating to certain clauses in Section A of the investment chapter, and do not exclude ISDS claims in Section B. As explained in the ISDS section above, there are increasing numbers of ISDS claims against government actions to address the climate crisis by reducing carbon emissions. This threat can only be addressed by removing Section B on ISDS from the agreement.

Recommendations

- ***That the government ensure that public services are clearly defined and clearly excluded from services commitments***
- ***That the government review the reservations in the ChAFTA services chapter to ensure that governments retain the right to regulate and reregulate all government-funded and other***

⁵¹ Royal Commission into Aged Care Quality and Safety (2021) Summary of the Final Report, <https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf>.

⁵² DFAT (2015) DFAT (2015) Text of the ChAFTA. Annex II. P. 1038

⁵³ Joint Standing Committee on Treaties (2022) Report 196 on the Regional Comprehensive Economic Partnership, p.27, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Report_196/section?id=committees%2Freport%2F024720%2F76916.

essential services in the public interest, and to introduce new regulation as circumstances change

- *That aged care services be listed as a specific reservation in Annex III Section 1 Part B of the ChAFTA*

Product Standards must be guaranteed and enforced

The ChAFTA Technical Barriers to Trade (TBT) Chapter, dealing with product standards and labelling, commits to World Trade Organisation obligations and dispute settlement. It intends to facilitate trade by reducing unnecessary technical barriers while maintaining WTO commitments. However, these provisions must be balanced with the need to ensure that all imported goods meet Australia's safety, quality and labelling standards.

ChAFTA appears to reduce the possibility of strengthening the process of assessing the conformity of imports with Australian safety and quality standards by accepting mutual recognition of existing Chinese technical regulations and conformity assessment bodies.

This raises concerns about regulatory clarity and consistency. Where conformity assessment processes rely on overseas bodies, it is essential that Australian authorities retain the ability to verify compliance with domestic standards. Ambiguities in the agreement regarding the recognition of conformity assessment bodies should be clarified to ensure that Australian regulators can apply appropriate scrutiny where necessary.

These irregularities have led to trade dilemmas for the Australian Government. Late in 2015 the Australian steel industry issued a warning about the safety standards of steel products being imported from China. The Australian Steel Institute and the Welding Technology Institute of Australia said some of the fabricated steel entering the country had serious quality defects⁵⁴. More recently, Australian manufacturers have again claimed that Chinese steel imports do not meet the higher quality specifications of Australian steel⁵⁵.

To address these issues, trade agreements should ensure that regulatory cooperation provisions do not limit the ability of governments to enforce domestic standards. This includes maintaining robust inspection regimes, strengthening information-sharing between regulators, and ensuring that conformity assessment processes are transparent and accountable.

Recommendation:

- *That the relevant ChAFTA clauses in chapter 6, Technical Barriers to Trade should be clarified to ensure that products exported to Australia meet Australian standards. Border inspection resources should also be increased to detect products which do not meet Australian standards.*

⁵⁴ Cooper H., (2015) Safety concerns over fabricated Chinese steel flooding Australian market, *ABC News*, 17 November, <https://www.abc.net.au/news/2015-11-17/safety-warning-over-fabricated-chinese-steel/6949506>

⁵⁵ Read, M., (2026), Government weighs emergency tariffs on Chinese steel imports, *Australian Financial Review*, 21 January, <https://www.afr.com/policy/foreign-affairs/government-weighs-emergency-tariffs-on-chinese-steel-imports-20260121-p5nvqf>