

NZ'S COMMITMENTS ON TRADE IN SERVICES & LABOUR MOBILITY SUMMARY DOCUMENT

New Zealand's existing commitments on mode 4 and labour mobility show there are very limited precedents for binding and enforceable rights of access from the Pacific Islands, and none for workers with low skills or education.

ANZCERTA is not a binding and enforceable commitment on labour mobility between Australia and NZ, but rather an arrangement that depends on political will and is periodically reviewed.

The **GATS 1994** text defines 'trade' to include the supply of a service through the presence of natural persons of one member in the territory of another. It does not restrict this 'mode 4' to particular kinds of service, qualifications of natural persons, or duration of the presence of the service supplier. However, members can apply restrictions to any mode 4 commitments they make in their schedule. Mode 4 excludes persons who are seeking to access the employment market of a member, and measures regarding citizenship, residence or permanent employment. WTO members can also apply measures regulating entry or temporary stay in their territory, so long as these are consistent with their commitments to allow entry under mode 4.

NZ's original **GATS 1994 schedule** made horizontal market access and national commitments on 5 categories of natural persons (executives and senior managers, specialist and/or senior personnel, specialists, installers and servicers, and service sellers) for varying entry periods.

NZ's **initial GATS 2000 offer** in 2003 covered the same categories as the GATS 1994 schedule, with longer entry periods. The **revised offer in 2005** reorganised the horizontal entry under 4 headings: intra-corporate transferees, independent service suppliers, business visitors, and installers and servicers. NZ neither made nor received the plurilateral request on mode 4.

Four of NZ's **MFN exemptions to the GATS** relate to mode 4: 1) Japanese interpreters; 2) Officers providing maritime services in specified (non-Pacific) countries; 3) up to 20 nationals a year from *Kiribati* and 4) 80 nationals of *Tuvalu* for *employment purposes*. The justification for 3) and 4) was 'New Zealand's Development Assistance policies aimed at providing income, job skills, on the job training and work experience'. In 1994 NZ apparently believed that mode 4 extended to entry to NZ for employment purposes, despite the wording of the Annex. The revised offer proposes to withdraw all mode 4 exemptions from the MFN schedule.

In the **Trans-Pacific Strategic Economic Partnership Agreement (P4)** [Chile, Singapore, Brunei Darussalam and NZ] NZ's schedule freezes its market access commitments at the level of its existing GATS commitments in all sectors, including mode 4. The treaty proposes a review of rules and conditions that apply to movement of natural persons with a view to developing a comprehensive chapter.

The **NZ Thai FTA** has no substantive chapter on trade in services, only a promise to begin negotiations within 3 years. An interim arrangement allows entry for Thai chefs with a bona fide job offer, a national certificate in Thai cooking and a requisite level of experience. This is done through an exchange of letters on temporary employment and is not enforceable.

The **NZ China FTA** is complicated. It has separate chapters on trade in services, including mode 4; non-services investment; and additional (mainly procedural) rights and obligations relating to movement of 5 categories of natural persons: 1) business visitors; 2) contractual service suppliers; 3) intra-corporate transferees; 4) Installers and servicers; and 5) skilled workers.

The services and investment schedules do not include mode 4, which is covered in two separate schedules. NZ's schedule on *Temporary entry by business persons* sets out lengths of stay for categories 1) to 4). Only specialists with trade, technical or professional skills within those categories are subjected to labour market tests.

The schedule on *Temporary employment entry by skilled workers* (category 5) applies to small numbers of traditional Chinese medicine practitioners, Chinese chefs, Mandarin teaching aids, martial arts coaches and Chinese tour guides. It also covers up to 1000 workers at any one time with skills on NZ's identified skills shortage list, which are nominated in an exchange of letters, with a maximum of 100 workers in a single skill category. There are some protections for situations where the required qualifications change or a skill is no longer in short supply. All workers in category 5 must have a genuine employment offer. They cannot be subject to a labour market or economic needs test, but there can be a quota and/or a labour certification test. Length of stay is subject to immigration rules. If a dispute cannot be resolved by agreement it can be taken to the dispute settlement process.

An 'understanding' on an 'arrangement' for a working holiday scheme allows up to 1000 Chinese nationals a year, aged between 18 and 30, a 12 month temporary visa that allows them to undertake paid work for up to 12 months – provided they show their main purpose for visiting is a holiday! Strict criteria include a senior high school qualification and enough funds for upkeep in NZ. Either NZ or China can suspend the arrangement temporarily for reasons of public security, public order, public health or immigration risk (not explicitly in their own country), and can terminate it on 3 months' notice. A dispute is subject to consultation, but there are no other dispute or enforcement mechanisms. The arrangement will be reviewed after 2 years and periodically.

The **ANZ ASEAN FTA** has a similar structure to the NZ China FTA, but only one schedule for movement of natural persons. That schedule largely reflects NZ's GATS 2000 offer and is limited to business personnel. The chapter on procedural rights for natural persons is not subject to the dispute process.

Side letters promise the Philippines and Vietnam *negotiations* temporary employment for 100 nurses, 20 engineering professionals and 20 farm managers (Philippines); and 100 engineers and 100 chefs (Vietnam). They must have bona fide job offers and meet strict qualification requirements. Similar negotiations for a working holiday scheme would allow entry for 100 people from each country with a 3 year university qualification, functional English proficiency, and enough funds for upkeep in NZ. Both schemes are expected to be on similar terms to the China arrangement.

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DETAILED ANALYSIS

This paper examines New Zealand's commitments on the temporary movement of labour in the trade in services agreements to which it is a party.

The key reference points are: the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA); the GATS 1994 schedule; the GATS2000 offers; the Trans-Pacific Economic Partnership Agreement (P4); and the Free Trade Agreements (FTAs) with Thailand, China and ASEAN.

1. Australia NZ Closer Economic Relations Trade Agreement (ANZCERTA)

The ANZCERTA (commonly called CER) on goods came into force in 1983 and the services protocol in 1989. The CER protocol and the Canada US FTA were the first free trade in services agreements. CER is a short legal text with a negative list of services that are not subject to its rules and contains no enforcement mechanism. It did not explicitly deal with the movement of labour as a mode of trade.

A Trans-Tasman Travel Arrangement 1973 pre-dates CER and has been periodically revised. It is not a binding treaty, but relies on mutual political commitment. The arrangement allows almost all Australians and NZers to travel to and live and work in one another's country indefinitely and largely without restriction, under a 'special category' visa.

CER is also supplemented by a Trans-Tasman Mutual Recognition Arrangement 1998 that entitles people registered to practise an occupation in one country to register to practise the equivalent occupation in the other country without the need to undergo further testing or examination.

2. The General Agreement on Trade in Services (GATS)

The GATS is the first and only multilateral agreement on trade in services. Article 1:2 defines 'trade' in services to include the supply of a service through the presence of natural persons of one member in the territory of another member. The definition does not restrict this 'mode 4' of supplying a service to particular kinds of service, qualifications of natural persons, or duration of the presence of the service supplier.

The Annex to the GATS on Movement of Natural Persons Supplying Services excludes from coverage of the agreement measures that affect natural persons who are seeking to access the employment market of a member, or to measures regarding citizenship, residence or employment on a permanent basis. Again there is no restriction on the kind of service provided, qualifications of the person or duration of a presence that is not 'permanent'.

Paragraph 3 of the Annex says explicitly that commitments in a member's schedule on market access, national treatment and other commitments may apply to all categories of natural persons supplying services under the GATS.

Paragraph 4 reserves the right of a member to apply measures regulating entry or temporary stay in its territory, provided these do not nullify or impair its commitments.

3. NZ's GATS Schedule of Specific Commitments 1994

New Zealand's GATS 1994 schedule of specific commitments deals with mode 4 in its horizontal section.

In relation to market access and national treatment, NZ specifies five categories of natural persons on whom it made commitments, for different time periods:

- *executives and senior managers* as intra-corporate transferees for up to 3 years;
- *specialist and/or senior personnel* as intra-corporate transferees for up to 12 months;
- *specialists* as intra-corporate transferees who are responsible for an aspect of their company's operations in NZ, for up to 3 years subject to labour market tests that demonstrate an unmet local need;
- *installers and servicers* as intra-corporate transferees to service equipment supplied by their company, for up to 3 months in any year;
- *service sellers* who are representatives of a foreign service supplier and negotiating wholesale agreements for services, for up to 3 months in any year.

These commitments do not apply where there is a labour/ management dispute (ie for strike breaking).

4. NZ's GATS 2000 Offers

A new round of GATS negotiations began in 2000 and was integrated into the Doha round that was launched in 2001.

A number of members requested specific commitments on mode 4 that extend beyond business personnel to cover lower skilled service providers.

NZ's initial offer in 2003 covered the same categories as its GATS 1994 schedule, with longer periods of time. It updated the reference to immigration law with reference to categories of specialist personnel who would be exempt from labour market tests if they came within the occupational shortages list.

NZ's revised offer in 2005 reorganised coverage of mode 4 in the horizontal section under four headings:

- *intra-corporate transferees*, being executives and senior managers, or specialist and/or senior personnel; and
- *independent service suppliers*, being independent professionals for a maximum 12 months who have
 - a recognized degree or diploma following 3 or more years of post-secondary education;
 - six or more years of experience;
 - a valid contract in NZ; and
 and are subject to an economic needs test,
- *business visitors* coming to NZ to negotiate a contract, set up a foreign investment or buy NZ goods and services, for up to 3 months a year.
- *Installers and servicers*, as in GATS 1994, for up to 3 months a year.

NZ was neither a maker nor a recipient of the plurilateral request on mode 4 submitted by a number of members in 2006.

5. NZ's Schedule of MFN Exemptions 1994

NZ's 1994 schedule of exemptions to most favoured nation treatment includes four that relate to the movement of natural persons:

- right of entry for up to two years for people from Japan (and potentially other countries) who supply *interpretation services* in tourism-related industries;
- officers who supply *maritime services* from a small number of specified countries (none are Pacific Islands);
- favourable entry for up to 20 nationals a year from *Kiribati*. The justification for this is 'New Zealand's Development Assistance policies aimed at providing income, job skills, on the job training and work experience'; and
- possibility of favourable entry for up to 80 nationals of *Tuvalu* for *employment purposes*, on the same Development Assistance rationale.

So in 1994 NZ apparently believed that mode 4 was not restricted to professionals, executives and other 'business personnel', *and* that it extended to entry to New Zealand for employment purposes, despite the wording of the Annex.

Although these exemptions were 'in principle' meant to remain for only 10 years, NZ initially indicated that they were indefinite.

NZ's revised GATS offer proposes to remove all the mode 4 exemptions from its MFN schedule.

6. The Trans-Pacific Strategic Economic Partnership Agreement (P4) 2006

This agreement builds on the NZ Singapore FTA (not discussed here) and brings together Chile, Singapore, Brunei Darussalam and NZ.

Chapter 12 defines trade in services to include mode 4, excluding measures affecting people seeking to access NZ's employment market and regarding citizenship, nationality, residence or permanent employment.

Chapter 13 contains soft provisions that aim to streamline procedures for the temporary entry of 'business persons' engaged in trade in goods or supply of services.

Unlike the GATS, NZ's trade in services commitments are through negative lists of measures or sectors that are not currently subject to the P4 rules.

Specifically on mode 4, all P4 parties affirm their rights and obligations under the GATS, especially the Annex on Movement of Natural Persons. NZ's schedule explicitly freezes its market access commitments at the level of its existing GATS commitments in all sectors, including mode 4.

There is a commitment to review the rules and conditions that apply to movement of natural persons with a view to developing a comprehensive chapter.

The P-4 now forms part of a larger proposed negotiation with the US, Australia, Peru and possibly Vietnam. US President Obama suspended the start of those negotiations in March 2009 and there is currently no date for them to begin.

7. NZ Thailand FTA 2005

This agreement is unusual because, at Thailand's insistence, it does not include a substantive chapter on trade in services, but rather a promise to begin negotiations within three years.

However, an interim arrangement regarding the movement of natural persons was agreed through an exchange of letters on temporary employment.

In return for temporary access for certain NZ business personnel, NZ agreed to allow entry for Thai chefs with a bona fide job offer, a national certificate in Thai cooking and a requisite level of experience.

NZ will also examine ways to recognize qualifications that would enable entry by Thai massage therapists.

These arrangements are not subject to any enforcement mechanisms.

8. The NZ-CHINA FTA 2008

This FTA has separate chapters on

- trade in services (chapter 9), which includes mode 4,
- non-services investment (chapter 11) and
- additional rights and obligations relating to movement of natural persons (chapter 10).

The focus of Chapter 10 is mainly procedural, such as reasonable fees, prompt processing and transparency of criteria. It applies only to 5 possible categories, each with very specific definitions:

1. *Business visitors* (a sales rep, investor or goods seller)
2. *Contractual service suppliers* (employed by Chinese company with a contract to perform a service in NZ)
3. *Intra-corporate transferees* (manager, executive or specialist)
4. *Installers and servicers* (provided as a condition of purchase of equipment) ; and
5. *Skilled workers*.

Both chapters 9 and 10 reiterate the GATS Annex that excludes measures affecting citizenship, nationality, residence or permanent employment.

A unique feature of this agreement is the distinction between *temporary entry by business personnel* (categories 1-4) and *temporary employment entry* for skilled workers (category 5).

NZ and China have schedules for commitments on modes 1-3 (Annex 8) and separate schedules for *temporary entry by business personnel* and *temporary employment entry*.

Temporary entry by business personnel

All NZ's existing mode 4 commitments to China in the GATS are reiterated, even though that is not necessary.

Commitments under categories 1-4 apply to the service sectors NZ and China have committed in their trade in services schedules. However, the schedule can introduce limitations on the extent of those obligations.

There is a legal presumption that labour certification tests, quotas and labour market or economic needs tests will not be used where a commitment is made, unless they are expressly reserved in the schedule.

NZ's schedule sets out the length of stay for business visitors, intra-corporate transferees, and installers and servicers. There are rights of renewal executives and managers in some specific services categories (eg computer related) if there is still a need for them. All specialists with trade, technical or professional skills are subject to labour market tests.

Temporary Employment Entry by Skilled workers

Category 5 (skilled workers) must have a genuine employment offer from a NZ employer. While they cannot be subject to a labour market or economic needs test, there can be a quota and/or a labour certification test.

NZ has specified 6 occupational groups of 'skilled workers' and conditions for their entry for up to 3 years. Five of these occupations are China specific:

- *Traditional Chinese Medicine Practitioners* (max 200) with a higher education degree from a Chinese government recognized institution;
- *Chinese chefs* (max 200) with the requisite level qualification;
- *Mandarin Teaching Aids* (max 150) with a higher education degree requiring at least 3 years of study;
- *Chinese Wushu Martial Arts Coaches* (max 150) with a post-compulsory education qualification and/or certification;
- *Chinese Tour Guides* (max 100) who hold a licence in China, IELTS level 5 in English, and a demonstrated knowledge of NZ.

The 6th category applies to occupations in which NZ has an *identified skills shortage*. These skills are notified through an exchange of letters and reviewed by both parties every 5 years. How long they can stay in NZ is set out in immigration policy. There is a cap of 1000 Chinese workers in NZ under this provision at any one time, with 100 in any specific skill category.

NZ's retains its flexibility while promising China some stability:

- If NZ lowers its standards for a skill shortage category, that will apply under the FTA.
- If NZ raises the qualification or work experience requirements, the existing FTA arrangement remains in place, provided no more than 100 people come into NZ on those terms at any one time.
- If an occupation on the FTA list is removed from NZ's skills shortage list, it will not be subject to labour market testing so long as no more than 100 people enter NZ on those terms at any one time.

If a dispute cannot be resolved through mutual agreement it can be taken to the dispute settlement procedures under the FTA.

Annex 12 promises expeditious processing of student visas.

Working Holiday Scheme

Beyond the FTA text itself, there is an 'understanding' on an 'arrangement' for a working holiday scheme. Each year, up to 1000 Chinese nationals aged between 18 and 30 can be granted a 12 month temporary visa that also allows them to undertake paid work for up to 12 months. In a seeming

contradiction, they must show that their primary intention is to come to NZ for a holiday. They must also have

- a return ticket or enough money to buy one,
- enough funds to live on in NZ,
- a functional level of English,
- a senior high school qualification,
- not be bringing any dependents, and
- meet NZ's other immigration requirements.

Although they can work for up to 12 months, this cannot be for a single employer for more than 3 months.

Either NZ or China can suspend the working holiday arrangement temporarily for reasons of public security, public order, public health or immigration risk (this is not explicitly tied to public security or order in their own country).

Either party can terminate the scheme by giving three months' notice.

Disputes are subject to consultation, with a requirement on the other party to respond. But there is no enforcement mechanism and the arrangement is not subject to the FTA dispute process. The arrangement is subject to a review after 2 years and periodically thereafter.

10. ANZ - ASEAN FTA 2009

This agreement has a similar structure to the NZ China FTA. Chapter 8 defines trade in services in terms of the four GATS modes. There are separate annexes for NZ's commitments on trade in services for modes 1-3 (Annex 3) and investment (Annex 5), but unlike China only one for movement of natural persons or mode 4 (Annex 4).

NZ's commitments on natural persons are similar to its GATS2000 offer and apply only to:

- Business visitors
- Intra-corporate transferees, being an executive, manager or specialist;
- Installers/servicers
- Independent service suppliers, being independent professionals

These commitments do not cover labour disputes or ships crewing.

Chapter 9 specifies largely procedural rights of natural persons covered by NZ's schedule, including reasonable fees, prompt processing and transparency of criteria. It is restricted to 5 possible categories that are similar, but not identical, to the China agreement:

- Business visitors
- Installers and servicers
- Executives of a foreign investment
- Intra-corporate transferees; and
- Contractual service suppliers.

There is no recourse to the dispute settlement process for rights under chapter 9 unless there is an alleged pattern of practice and all domestic remedies have been exhausted.

Both chapters 8 and 9 reiterate the GATS Annex that excludes measures affecting people seeking access to the employment market, residence or permanent employment.

Special visa procedures for entertainers, artists and support personnel workers are noted.

Side letters

The Philippines and Vietnam are promised *negotiations* for side agreements on working holiday schemes and temporary employment through an exchange of letters. These letters fall outside the FTA and are not subject to its institutional and enforcement mechanisms.

The Philippines **temporary employment arrangement** would be for:

- Up to 100 *nurses*. They must have a bona fide job offer as a registered nurse, have a qualification assessed as equivalent to the NZ Bachelor of Nursing or Diploma in Comprehensive Nursing, diploma or hospital based certificate; and hold NZ registration. Applicants may be allowed to spend 3 months in NZ to study a 6-8 weeks bridging course and sit the registration exam.
- Up to 20 *farm managers* to be in NZ for up to 3 years if they have a bona fide job at ANZSCO Skill Level 1, and a relevant qualification or experience.
- Up to 20 *engineering professionals* to be in NZ for up to 3 years if they have a bona fide job at ANZSCO Skill Level 1, an internationally registered or accredited degree qualification, and have NZ registration where required.

The similar scheme for Vietnam would cover up to 100 engineering professionals and up to 100 chefs at least at ANZSCO Skill Level 3.

In all cases there is a three year stand down before someone can apply for entry under the scheme again.

The promised **working holiday scheme** is for 100 citizens of each country each year. Vietnamese and Philippines citizens would only be eligible if they have a university qualification that took at least three years' study, functional English proficiency, and enough funds to maintain them while in NZ (estimated at \$4200).