

Australia India Business Council



Submission to

Department of Foreign Affairs and Trade

**Australia-India Comprehensive Economic
Cooperation Agreement (AICECA)
Negotiations**

March 2015

**‘Our next priority is an economic partnership agreement with India’
*Hon Tony Abbott MP, Prime Minister of Australia***

**‘I see Australia as a major partner in every area of our national priority’
*Shri Narendra Modi, Prime Minister of India***

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Introduction

The Australia India Business Council (AIBC) welcomes the opportunity to contribute further to the Comprehensive Economic Cooperation Agreement between India and Australia (AI-CECA). This submission follows the AIBC's two previous submissions to both the Australian government in September 2011, and the Indian government in January 2012 that helped to set a basis for the current negotiations, the last rounds of which occurred in December 2104.

Members of the AIBC come from a diverse range of sectors and organisations and span in size from small business to multinational corporations both in Australia and India. AIBC members continue to be at the forefront of the rapidly developing bilateral trade between India and Australia, and are therefore in an ideal position to identify issues or challenges which arise from this trade.

This submission seeks to highlight some of the issues and challenges which members have encountered as they build service and investment links between the two countries, particularly in the focus areas of:

- Education
- Mining/Resources/Energy
- Engineering/Transport/Infrastructure
- Other Relevant Feedback

The AIBC has focused its feedback in these three key industry sectors, as these not only represent the main industries where Australia's current trade with India occurs, but along with food & water security and health services, are the industries which India most need in order to continue its strong economic development and growth.

Education is the backbone of the current Australia – India trade relationship, and with India setting the ambitious goal of skilled workforce of 500 million by 2020¹ there remains a significant opportunity for the entire Australian education sector to deepen its engagement.

India is the fourth largest consumer of energy in the world, and the second largest importer of coal despite having the fifth largest reserves of coal in the world². Australia is not only well placed to increase its supply of coal, but also other energy, including uranium, and minerals such as iron ore and copper. Furthermore, Australian mining and resources companies are considered among the world's leaders in mining technology and extraction services which could be employed by Indian organisations to efficiently extract their minerals and energy resources.

The Indian Prime Minister has been dubbed the 'Infrastructure Prime Minister' and his government's most recent budget has earmarked an additional \$11.3 Billion in 2015/16 to rebuild roads, railways and ports³. Australia's infrastructure and engineering capabilities are already contributing to the building of India, but a great deal of potential exists for Australian engineering organisation to grow their involvement.

¹ Australia India Institute (2014) :*The Australia – India Trade Relationship: Past, Present and Future*: , 7 August, 2014 (<http://www.aii.unimelb.edu.au/sites/default/files/AII%20WHITE%20PAPER%20alter.pdf>)

² ebid.

³ Bhuvan Bagga (2014): *India pledges infrastructure spending to help economy 'fly'*; AFP; 28 Feb, 2014 (<http://news.yahoo.com/india-unveils-budget-under-pressure-deliver-reforms-222526257--finance.html>)

However, although significant potential exists for Australian organisations in India, bureaucratic, regulatory and governance challenges remain a significant roadblock to expanded trade.

Feedback from Industry

Education Services

With over 50% of the Indian population under 25 years of age, and by 2020 India will outpace China as the largest tertiary aged population in the world. Despite this, only 18% of the current tertiary aged population is enrolled in higher education, but the government is aiming to achieve 30% enrolment by 2020.⁴

Austrade estimates that Australia only has a 5% market share of the Indian international student market⁵, with most students preferring to go to institutions in the US and UK. Awareness of the quality and types of degrees and courses in Australia by Indian corporates and tertiary institutions is also quite low.

Additionally, Indian tertiary institutions are more likely to develop academic partnerships with US and UK institutions than Australian, as much as a result of their awareness of their institutions, as the support and assistance they and their governments provide to facilitate this.

However, there has been a growing amount of committed activity by Australian institutions in India, especially with recently increased support from the Federal Government. As they seek to engage and develop learning, teaching and academic initiatives in India, they have encountered key challenges and issues as outlined below

Visa Challenges: This is an issue spans the breadth of the Australian higher education sector as it engages with India, and concerns both the Australian and Indian systems. The application for and granting of visas, whether for students or academics is still seen as bureaucratic, expensive and inconsistent.

Feedback from members representing this sector indicate that the Australian Streamlined Visa process is still quite inconsistent and subjective, with several key areas still open for interpretation. This view appears to come more from the non-university sector where students are often somewhat closer to the thresholds of acceptance than otherwise, however there will be a need for the Australian and Indian governments to further clarify the mutually acceptable criteria for Indian students to study in Australia, with a view to facilitating or even encouraging students to consider Australia as a study destination due to ease of visa application.

Similarly, feedback from members, this time in the university sector, suggests that visas for the purposes of academic mobility are also quite cumbersome and require further clarity. It is customary for visiting academics to India to undertake both research and teaching activity. The Indian institution will pay the academic for their teaching activity. However in Australia, visiting Indian academics appear to either require a '402' visa for visiting research (for which they are not paid) or the more expensive '400' visa (approximately \$560) if they are to be paid. Aside from the visa cost being sometimes prohibitively expensive, this process can be cumbersome for the academic.

⁴ British Council (2014): *Understanding India: The Future of Higher Education and Opportunities for International Collaboration*

⁵ Austrade: *Indian Education Market Profile* (<http://www.austrade.gov.au/Education/Countries/India/Market-profile#.VQ9jgUJ6Nbp>)

Therefore, there is a need for clarification of the current visa process for academics travelling to India and vice versa, as well as an agreed process of granting visas for each country's academics that facilitate, if not encourages, two-way academic mobility.

Revenue or Funding Repatriation: Education in India is deemed a not-for-profit sector of the economy, which therefore means that almost any on-shore activity attracting remuneration paid in India precludes repatriation of these funds, either for the purposes of covering expenses incurred in Australia, or as a profit for services rendered in India.

Therefore, Australian education institutions have thus far limited or avoided any on-shore educational activities, and would find it difficult to attract research funding for collaborative projects where the research is conducted in Australia.

Even under the proposed Foreign Education Regulatory Bill (2010) should an institution set up in India, they will need to maintain a corpus fund of around \$4.5m invest 75% of income into developing the Indian campus, and the rest back into the fund itself⁶.

These limitations and lack of clear pathways for repatriating funds from India limit Australian institutions from either setting up physical presences in India, or delivering courses in India for profit or to generate revenue.

There is a need to negotiate pathways for funding to flow from India, the results of which will encourage Australian institutions to either invest in facilities in India, or to help their government meet the shortfall in education that is looming for India.

Recognition of accreditation: As with the issues of visas, both India and Australia must develop a streamlined process for recognition of each countries academic and professional accreditation. This includes not only the process of recognition for the purposes of study, but also mutual recognition of professional qualifications, either by statutory or industry bodies.

Whilst members have indicated that a number of recognition initiatives exist, many are mutually exclusive of each other and are considered difficult to navigate, and in some cases, expensive to obtain (in the case of Indians seeking recognition in Australia).

A specific example of the need for alignment of recognition is the understanding that the Association of Indian Universities (AIU) currently does not recognise an international degree unless it has been obtained from one institution only. Therefore should an Indian student enrol at a 'feeder college' such as ones operated by Navitas, which offer two year diplomas where upon completion, the student can automatically enter the second year of a university degree, their degree upon completion will not be officially recognised in India, and therefore is of limited value.

Similarly, it is understood that the AIU will not recognise Masters degrees of less than two years in length, which precludes students studying Australian Masters degrees of 18 months using this qualification for entry into the Indian public service, and could jeopardise their employment opportunities with other institutions.

Intellectual Property (IP) Protection: Members have raised the concern that IP recognition and protection in India is less than ideal and requires significant improvement. This creates concerns for the purposes of co-developing research, or contributing pre-existing IP to new projects for fear of it being inappropriately used or leveraged.

⁶ Gauri Pane (2014): *The Foreign Education Regulatory Bill has been a hot topic of discussion*; DNA; 27 May, 2014 (<http://www.dnaindia.com/academy/report-the-foreign-education-regulatory-bill-has-been-a-hot-topic-of-discussion-1991460>)

This applies not only to research, but also in the case of teaching materials and methods where reproduction can often occur without adequate approvals, and worse still could occur at a lower quality level than originally intended.

Mining/Resources/Energy

As China begins to slowdown in its rate of growth and seeks to supply more of its energy and resources internally, India looms as the next key market for the export of Australian resources and well as for Australian Mining and Mining services companies to help India extract its resource and energy wealth.

India has the fifth largest reserve of coal in the world⁷ however state monopolistic conditions and challenges with contracts and legal processes seem to be the primary challenges which face Australian companies operating in India. These are outlined below in more detail.

Contractual Interpretation: This appears to be a significant issue when receiving feedback from both Australian Mining and Engineering organisations operating in India. Although contracts between Australian organisations and India entities (whether private or public) are agreed and signed, at various stages in the process of delivering either a mine or an infrastructure project, the project is delayed significantly due to concerns about the interpretation of a clause in the contract, whether payment should be made or the granting of a licence.

This appears to be the result of either:

- The black-and-white nature of the bureaucracy in India that inhibits decision makers from agreeing on an interpretation of contractual clauses unless supported by a superior or the legal process.
- Anti-corruption concerns that the payment of an amount may in some way be interpreted as a form of bribery
- Bureaucrats seeking to leverage the approval of a stage or process for their personal advantage.

Ultimately, decision makers in the previous government were afraid to make decisions and prevented from acting in good faith. Consequently, an Australian company that is one of the only international companies to develop and operate a mine in India faces yearly losses domestically, despite contributing tens of millions of dollars in profit and taxes to their Indian partners and the governments of India. We hope the new government will allow for autonomy in decision making within its bureaucracy.

In order for Australian mining companies, considered some of the most advanced in the world, to feel confident in commencing operations in India, there must be a process instituted that will give the companies or it's investors the confidence that contracts will be honoured and disputes resolved in a timely manner.

Compounding the challenge of contractual interpretation issues is that significant delays in reaching and achieving resolution through external arbitration, especially through the Indian legal system.

Arbitration and Court Delays: Australian companies are experiencing frustratingly long delays of more than two years for any contractual or legal dispute they encounter with their Indian partners or clients. This delay is compounded further in that delays such as this will

⁷ The Economist (2012): *The Future is Black*; 21 Jan, 2102 (<http://www.economist.com/node/21543138>)

occur at each stage of dispute resolution, so that if after waiting two years to commence arbitration there is not an outcome from this, they will then need to wait more than two years to commence proceedings in an Indian court of law.

This can lead to individual disputes taking a number of years to reach resolution, and when there are multiple disputes under consideration, this can leave the Australian company with significant shortfall in revenues as the payments associated with these disputes are inevitably delayed.

The consequences of these delays then lead to erosion of the Australian companies market capitalisation and investors discouraged from investing with the company.

Australian companies would seek access to an international level legal system that would determine fair outcomes in a timely basis. Whilst the culture of potential excessive scrutiny and decision avoidance in Indian bureaucracy may take time to change, at least if disputes are able to be heard and resolved in a timely way by international standard courts, confidence in investing and operating in the Indian mining industry would improve.

Security of Tenement: A very specific issue to the mining exploration sector for Australian miners is security of tenement whilst the lengthy process of securing a minerals lease is undertaken.

An example of this is an Australian mining and resources company, who applied for a minerals lease over seven years ago following a significant discovery in a particular Indian State through their \$20m investment in minerals exploration. Only through political pressure at the top of Indian government during the recent visit by Prime Minister Modi was their application finally converted to a lease, but there is still an estimated three or more years before the mining project can commence.

This equates to around a decade for an Australian company to progress from mineral discovery to extraction, in which time to security of their tenement is not guaranteed.

Therefore, a transparent system that expedites the granting of mineral leases is required, again in order to attract investment and operations by Australian mining companies in India.

Any discussions in this area will need to be on the basis of the impact that the proposed *Mining and Minerals (Development and Regulation) Amendment Bill, 2015* and the *Coal Mines (Special Provisions) Bill, 2015* currently before the Lok Sabha and Rajya Sabha may have on existing and future leases, and how this might impact Australian companies.

Engineering/Transport/Infrastructure

In its 12th 5 year plan, between 2012 and 2017, the Indian government has purported to require over \$US 1 Trillion in infrastructure in order to meet the current needs of its rapid development. India is ranked 85th out of 148 nations in the World Economic Forum's most recent Global Competitiveness Report.

Yet despite the very attractive opportunities for partnering with India to develop their infrastructure, the experiences of Australian companies operating engineering and infrastructure services and projects in India have been frustrating and cumbersome. Below are some of the key issues they have faced.

Bureaucratic Delays: As with the above examples for the mining industry, the bureaucracy involved in each stage of developing and operating a project in India is cumbersome and extremely slow by Australian standards and international experience.

One example given was the need to acquire drivers licences for some of their employees which required 6 copies of the same form hand-filled out, of which four were then immediately discarded.

Similarly, licences and approvals at each stage of a projects development required complex and lengthy applications processes which discourage future bidding for projects, or limit bidding only to those projects where experience or concessions have been achieved, leaving other much-needed projects untendered for.

Delayed payments: Australian engineering companies also experience very long lead times when it comes to being paid for the work they have done, either in terms of progress payments or the final payment. One organisation accepts that they must maintain 6 – 12 months in debtors or work-in-progress payments.

Some of the reasons for these payments being held up include:

- Clients accepting the outcomes or results of reports, but not satisfied with the way the report was written
- Government bureaucratic delays used as an excuse for delays in payments.
- All payments, progressive or otherwise, held up because 99% of the work completed with 1% in dispute.

Unlike with the mining examples, there is also the belief that if disputes for payment are referred to arbitration, that they will almost certainly not be paid and can be written off due to the excessive time taken to achieve a fair and equitable outcome.

Having said this, it is acknowledged that India has a Rule of Law, which is not as apparent in jurisdictions such as China, therefore whilst Australian companies feel a sense of frustration regarding delays and bureaucracy, there is still an underlying faith that eventually an outcome will be determined and the various legislations and regulations will not be summarily changed to suit a specific circumstance.

Uncompetitive Bidding and Tendering: There is a sense that the tendering process has not yet reached a fair and equitable level. Due to the strength and importance of relationships and the preference for domestic rather than international operators, that the bids of some Australian companies may fail due to being an international company, or not having a strength of relationship, rather than be judged on the merits of the bid itself.

Facilitation Payments: These small payments, considered legal under Australian and international laws to ‘facilitate’ the approval or progress of licences and other bureaucratic criteria, are seen as a regrettable both nonetheless necessary part of the process of ensuring projects continue and develop in a timely fashion.

Australian companies would feel more comfortable if they were not confronted with the request to provide such payments and had greater guidance on the alternative channels to take whilst still being able to expedite any approvals or licences required when progressing projects.

Other Relevant Feedback

Other feedback relevant to the negotiations of the AI-CECA was received from AIBC members that would benefit the negotiating team, but does not necessary fit into industry categories.

Taxation: The Reserve Bank of India (RBI) imposes a higher rate of company tax on foreign companies or foreign owned entities registered in India than applies to local companies. This provides an effective competitive advantage to local Indian companies.

The RBI imposes a higher rate of withholding tax on foreign (Australian) companies doing business in India than applies to local companies. This acts as a disincentive for Indian clients to enter into contracts with foreign (Australian) companies. A recent case involving an Australian TAFE college, illustrates this.

The Indian client had awarded the contract to the Australian TAFE but withdrew because the Australian company (a non-for profit) could not meet the client's Indian registered business requirements, even though they wished to import foreign knowledge. Despite the taxation agreement between Australia and India, the TAFE would have suffered a deduction from its contract value for taxation purposes and been unable to recover this in Australia because of its not-for-profit tax status.

Professional Qualification recognition: India does not recognise the Australian qualifications of our Architects and Lawyers. This can prevent or dissuade construction and legal work being conducted by Australians with Indian companies and needs to be considered in the negotiations.

Similarly, the need for medical staff in rural and regional centres of Australia may be the opportunity for more formal recognition of Indian medical and paramedical qualifications in order to fill this gap, either via direct recognition from specifically recognised institutions in India, or an assessment structure into which Indian medical staff can submit their qualifications or be assessed.

Director Identification Numbers (DIN): It appears that the issues surrounding the acquisition of DINs in India remains to be rectified with regards to replicating the need for notarisation of documents in both Australia and India.

Doing Business in India: Much of the feedback highlighted the need for greater support and guidance from government authorities around navigating the business and bureaucratic environment of India. The regulatory and governance environment appears to be only part of the challenge for Australian businesses in India.

A significant initiative that could be developed and implemented via the negotiations could be a mutually resourced training and in-depth guidance for the cultural, financial, promotional and legal aspects of business ventures in India as well as regulations and restrictions. This type of deeper support exists currently for business seeking to engage with China, but is not currently available for those engaging with India.

One member discussed their comfort with business dealing and consulting in India, but only after 15 years of experience and learnings from their operations. If Australian businesses could be supported to successfully do business in less than this length of time, both here in Australia and in India, then trade growth could be significantly improved.

Conclusion

AIBC is committed to supporting the negotiations between Australia and India to achieve deeper a stronger business and economic partnership and facilitate increased trade between our two countries.

Although the feedback of AIBC members and key supporters does highlight key challenges and issues experienced whilst building business engagement with India, our members and supporters are positive about the opportunities and potential for increased trade links, and look forward to the successful outcomes from the CECA negotiations.

Key to the realisation of the estimated \$40 billion+ benefit⁸ to each economy from this proposed agreement will be encouraging and enabling Australian business to invest and operate in India. Whilst there remains a significant number of regulatory and legal challenges which will require alignment through the negotiation process, Australia and India should consider developing well resourced initiatives which help the companies of each others' countries to navigate the unique business, government and cultural landscapes they will encounter.

Should the Department of Foreign Affairs and Trade seek further consultation with AIBC members, the Council remains willing to facilitate contact and discussions where possible.

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⁸ Centre for International Economics (2008): *Economic Modelling for the Australia-India FTA Feasibility Study*