Indonesia Australia Comprehensive Economic Partnership Agreement

ACTU submission to the JSCOT Indonesia Australia Comprehensive Economic Partnership Agreement

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Introduction

The ACTU welcomes the opportunity to make a submission to this inquiry into the Indonesian Australia Comprehensive Economic Partnership Agreement (IACEPA).

The ACTU is the peak body for Australian unions. The ACTU and affiliated unions have had a long and significant interest in the trade agenda on behalf of our members and workers generally.

The IACEPA is a major undertaking with profound implications for the economies and societies concerned. Yet, as appears to be the way with all trade agreements Australia is involved in, the IACEPA has been negotiated and entered into with very little public scrutiny up to this point.

We should expect that trade agreements are subject to proper scrutiny and that unions and others in civil society, as well as business, have the opportunity for genuine input into the negotiations on behalf of those they represent. To date trade agreement negotiations are conducted behind closed doors and Australia lags behind other countries and institutions when it comes to public scrutiny. This whole process in Australia contrasts with the experience in the European Union, for example. The EU has recognised legitimate community demand for the negotiating papers and final text to be exposed to public debate.

Unions have concerns with a number of elements of the IACEPA but in this submission we will focus on key problems.

- The inclusion of increased number of temporary workers who are vulnerable to exploitation
- The inclusion of Investor-State Dispute Settlement provisions and the failure to cancel the previous Indonesia-Australia investment Agreement
- Lack of compliance with International human rights and labour rights law and environmental standards
- The lack of transparency and accountability in negotiations

This is not an exhaustive list. We share the concerns expressed about the impact of the IACEPA in a range of other areas.

We endorse and refer the inquiry to the submissions of our affiliated unions, as well as AFTINET, for further treatment of these and other matters.

Background

Australian unions are not anti-trade. We recognise the value of increased exports and greater access to overseas markets for Australian businesses. We welcome the opportunities for workers that come from participating in the 21st century global economy. The ACTU is a supporter of trade as a vehicle for economic growth, job creation and rising living standards. Having a strong export sector is imperative for Australia's prosperity.

We can believe in all these benefits of trade agreements, and at the same time have a rock-solid commitment to ensuring that other provisions of trade agreements do not jeopardise Australian jobs, undermine working conditions or compromise the ability of current and future Australian governments to exercise their sovereign rights to regulate in the public interest.

We should also expect that trade agreements are subject to proper scrutiny and that citizens and their representative bodies such as unions and others in civil society, as well as business, have the opportunity for genuine input into the negotiations on behalf of those they represent.

Unions should not be expected to be 'cheerleaders' for a trade agenda that does not deliver for Australian workers or the broader community. Where proposed free trade agreements, or provisions of those agreements, are not in the national interest and the interests of our members and workers generally, we will make the case for change. Parliament also should not simply be a rubber-stamp for agreements already entered into and negotiated by the executive arm of Government. Unions are only in favour of trade agreements if there are overall benefits for all Australians.

Too often in our experience, the overall benefits of trade agreements are over-sold by governments and the downsides are dismissed.

For example:

- The Productivity Commission has found that predicted economic benefits from bilateral and regional agreements are often exaggerated and the actual economic benefits are likely to be modest, while such preferential trading arrangements 'add to the cost and complexity of international trade… with an emerging and growing potential for trade preferences to impose net costs on the community.'

Provisions on Temporary workers

Free trade agreements that deal with the movement of temporary overseas workers into Australia are critical issues for Australian unions and our members. Quite simply, this is because the fundamental issues at stake are about support for Australian jobs, support for Australian training opportunities, and support for fair treatment and decent wages and conditions for all workers wherever they are from.

Article 12.9 in the IACEPA commits to negotiate arrangements over the next three years for increased numbers of contractual service providers. These workers would enter under the Temporary Skill Shortage visa which covers over 400 skilled occupations.

The occupations include nurses, engineers, electricians, plumbers, carpenters, bricklayers, tilers, mechanics and chefs. We are concerned there has been no independent analysis on the potential effects on the labour market and Australian workers.

We accept there is a role for some level of temporary migration where critical short-term skill shortages are proven to exist, provided there is a proper, rigorous process for determining areas of genuine need ensuring workers receive fair wages and conditions. But the priority must always be on maximising jobs and training opportunities for Australians – that is, citizens and permanent residents, regardless of their background or country of origin. Whether it is young Australians looking for their first job or older Australians looking to get back into the workforce or change careers, they deserve an assurance that they will have first access to Australian jobs. This is more important than ever at a time when unemployment remains stubbornly at the 5.3% mark, youth unemployment is in double digits and some regional youth unemployment levels are above 25%. Some regional youth unemployment hotspots include the following[1];

- 25.7% in the Queensland — Outback region, including Cape York, Weipa, Mount Isa, Longreach
- 23.3% in the Coffs Harbour — Grafton region (NSW), including Bellingen, Yamba, Dorrigo
- 19.8% in the Wide Bay region (Qld), including Bundaberg, Maryborough, Kingaroy, Gympie
- 18.8 % in the Moreton Bay — North (Qld) region, including Caboolture, Woodford, Kilcoy

[1] https://www.bsl.org.au/media/media-releases/australias-latest-20-youth-unemployment-hotspots-ranked/

There is also a separate side letter that commits Australia upon ratification of the agreement to an additional 4,000 temporary Working Holiday Maker (increasing to 5,000) visas per year, and a Memorandum of Understanding that provides up to 200 training visas per year.

We know that the WHM visa is riddled with exploitation. According to the National Temporary Migrant Work Survey entitled '*Wage Theft in Australia'* by University of New South Wales[2];

- Almost a third (28%) of the workers surveyed were paid $12 per hour or less. Half (49%) were paid $15 per hour or less.

- Large-scale wage theft was prevalent across a range of industries, but the worst paid jobs were in fruit- and vegetable-picking and farm work.

- Almost one in seven participants working in fruit- and vegetable-picking and farm work (15%) earned $5 per hour or less. Almost a third (31%) earned $10 per hour or less.

The necessary skills assessments are simply not being performed

Not only will this agreement facilitate the exploitation of migrant workers when it comes to skilled workers, the necessary skills assessments are simply not being performed, putting workers lives at risk and creating the potential for harm to the Australian community.

As has been noted by our affiliates in the case of electrical trades, the experience of the electrical industry is that trade agreements are facilitating unlicensed, unqualified workers being granted visas and performing high risk electrical work contrary to Australian law. Often the worker is also being paid their originating country wages and not Australian wages under the visas which have been created to satisfy the movement of natural person's chapters of trade agreements.

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[2] 'Wage Theft in Australia' Findings of the National Temporary Migrant Work Survey Laurie Berg and Bassina Farbenblum November 201

Investor-State Dispute Settlement Provisions

The ACTU believes that trade agreements should retain or enhance the autonomy of the Australian Government to design and implement policies in the public interest across a range of areas that many trade agreements now encroach on. These include: the regulation of financial institutions and international financial transactions, climate change, government procurement, import regulation, quarantine and inspection regulations, biodiversity, food quality and security, media content and cultural industries, public ownership, public services, foreign ownership, research and development, transportation services, indigenous organisations and enterprises, the provision and regulation of essential services such as health, education, water, electricity, telecommunications and postal services, and the movement and employment of temporary migrant workers.

We therefore do not support trade agreements that lock member countries into investor-state dispute settlement (ISDS) provisions. These provisions mean that when Australian governments make new laws or policy in the interests of Australian people, foreign investors can sue our government in international tribunals if they consider those laws harm their investment or disadvantage them in some way.

These are the type of provisions that allowed Veolia to sue the Egyptian Government for increasing its minimum wage, and Phillip Morris sue over Australia's plain cigarette packaging laws (under the terms of an old FTA with Hong Kong), among a host of other examples. By 2015, there had been almost 700 ISDS cases reported and that number has increased significantly since the 1990's[3].

There is mounting evidence and alarm from many experts, including Australia's former High Court Chief Justice French[4], that ISDS tribunals lack the basic principles of fairness and consistency found in domestic legal systems. There is no independent judiciary, and no appeal mechanisms or system of precedent. 'Judges' can preside over one case while acting as a paid advocate in another, even if claimants and clients overlap between the two cases – a clear conflict of interest. In Australia, as in most national legal systems, judges cannot continue to be practising lawyers because of the obvious conflict of interest.

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[3] United Nations Conference on Trade and Development, "Record Number of Investor-State Arbitrations Filed in 2015," Geneva, 2 February 2016. http://investmentpolicyhub.unctad.org/News/Hub/Home/458

[4] French, R.F Chief Justice (2014), "Investor-State Dispute Settlement-a cut above the courts?" Paper delivered at the Supreme and Federal Courts Judges conference, July 9, 2014, Darwin http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf

The fact ISDS provisions are restricted to foreign investors means these clauses also discriminate against local businesses which can only access our domestic court system for any claims for compensation. This could then have an impact on relative access to finance and certainly violates basic principles of national treatment and competitive neutrality.

The myriad problems identified with ISDS provisions were well set out again in the JSCOT report into the China Australia Free Trade Agreement[5]. For example, the JSCOT report cited a now oft-quoted speech where former Australian High Court Chief Justice French expressed concerns about the impact of ISDS on domestic court systems.

In his speech, Justice French referred to the case of Eli Lilly, the US pharmaceutical giant that sued Canada under ISDS provisions after the Canadian Supreme Court ruled two of its medicine patents invalid. The Chief Justice quoted Professor Brook Baker of North Eastern University Law School's assessment of that case:

> *'After losing two cases before the appellate courts of a western democracy should a disgruntled foreign multinational pharmaceutical company be free to take that country to private arbitration claiming that its expectation of monopoly profits had been thwarted by the court's decision? Should governments continue to negotiate treaty agreements where expansive intellectual property-related investor rights and investor-state dispute settlement are enshrined into hard law?'*

The JSCOT report for TPP12 also highlighted the concerns raised by the United Nations Independent Expert, Alfred de Zayas, about the inclusion of ISDS clauses in free trade and investment agreements, where he said:

> *"In the light of widespread abuse over the past decades, the Investor-State Dispute Settlement mechanism which accompanies most free trade and investment agreements must be abolished because it encroaches on the regulatory space of states and suffers from fundamental flaws including lack of independence, transparency, accountability and predictability."*

[5] http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/17_June_2015/Report_154

There is no immutable law that says ISDS provisions must be included in trade agreements. The Howard Coalition Government did not agree to include ISDS in the AUSFTA in 2004, and the Productivity Commission recommended against them in 2010, stating:

> *' In relation specifically to investor-state dispute settlement provisions, the government should seek to avoid accepting provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system. Nor is it advisable in trade negotiations for Australia to expend bargaining coin to seek such rights over foreign governments, as a means of managing investment risks inherent in investing in foreign countries. Other options are available to investors.*[6]'

Similarly, in 2015 the Productivity Commission found that:

> *"The possible inclusion of an ISDS mechanism could similarly allow investors to bring claims for private arbitration directly against governments and potentially undermine the role of domestic courts and freedom of governments to regulate in the public interest.'*

Again, the Productivity Commission emphasised its previous recommendation in 2010 that the Australian Government seek to avoid the inclusion of ISDS provisions that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors. It concluded once more that there was an absence of an identifiable, underlying economic problem on market failure grounds that necessitates the inclusion of ISDS provisions.

Many other countries have begun to question the use of ISDS provisions, including Germany, France, Brazil, India, South Africa and Indonesia. Both Germany and France are known to oppose the inclusion of such provisions in the TTIP, and Germany indicated it would not ratify the recently signed European Union-Canada agreement which contains ISDS clauses reportedly on the grounds that:

> "*It must not be that international investors have rights and influence before arbitration tribunals which national enterprises don't have in their own country*[7]"

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[6] Op. cit, pp. xxxii,, xxxxviii, 271.
[7] See Productivity Commission, Trade and Assistance Review 2013-14, Productivity Commission, Canberra, 2015, p. 80

Against all this evidence, this agreement contains an investor-state dispute settlement (ISDS) clause that will allow foreign investors to sue the Australian Government if changes to domestic law and regulations harm their investment. The ISDS clause does provide a specific safeguard in regard to tobacco regulation to avoid a repeat of the Phillip Morris ISDS saga, but this still leaves a wide range of policy areas open to challenge. The fact tobacco regulation had to be specifically excluded indicates that general safeguards for other health, environment, labour rights and public interest regulation are ineffective. They have not prevented past ISDS cases and are unlikely to do so in future[8]. Neither do claimed procedural improvements address the fundamental flaws that ISDS tribunals have no independent judiciary and no precedents or appeals.

Canada is an excellent comparator to Australia due to significant political, social and economic parallels between the two countries. A report published by the Canadian Centre for Policy Alternatives (CCPA) has revealed that Canada has paid out nearly $220 million in losses under the NAFTA investor-state dispute settlement mechanism (ISDS), and $95 million in legal fees defending against ISDS claims[9].

There have been 41 ISDS claims made against Canada, 23 ISDS claims made against Mexico and 21 made against the US. Canada has been sued 15 times since 2010. In the report, CCPA suggests that the Canadian Government's commitment to ISDS and compliance with the scheme 'encourages' investor-state claims against itself[10].

Furthermore in November last year an international investment tribunal has compensated a mining company that ignored Indigenous land rights in a case heard under the Investor-State Dispute Settlement provisions of the Canada-Peru Free Trade Agreement[11].

The tribunal ordered the government of Peru to pay Bear Creek Canadian mining company $18.2 million in compensation and $6 million in legal costs because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous land owners about the mine, leading to mass protests. A dissenting minority judgement about the costs noted that

[8] For more on this, see (http://www.abc.net.au/news/2015-11-06/tienhaara-ttp-investment/6918810), and the AFTINET submission.
[9] https://www.policyalternatives.ca/nafta2018
[10] http://aftinet.org.au/cms/node/1528
[11] http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf

Bear Creek had failed to implement provisions of the ILO Convention on Indigenous Peoples to which Peru is a party, and which it had implemented through national laws.

This is a very dangerous precedent which may encourage other mining companies to use ISDS provisions in agreements like the IACEPA the Australian context. The only total exclusion is for tobacco regulation.

The ACTU has a consistent position that ISDS clauses are a restriction on national sovereignty and the ability of governments to regulate to regulate in the public interest and impose an unnecessary cost burden on Australian taxpayers. They should not be included in any trade agreement that Australia enters into, including in this case, the IACEPA.

ILO Conventions must be included in trade agreements

The Australian Government should ensure that trade agreements include commitments by all parties to implement agreed international standards on labour rights, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work and the associated 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)
- the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111)

We know there have been significant issues surrounding freedom of association in Indonesia in recent years. The International Trade Union Confederation (ITUC) has consistently ranked Indonesia among the worst countries in the world for labour rights, concluding that there is 'no guarantee of rights' for workers in Indonesia.[12]

[12] https://www.ituc-csi.org/annual-survey-of-violations-of,271

In June 2016 at the International Labour Conference in Geneva, the Committee on the Application of Standards, composed of Government representatives, employer representatives and trade unions from all around the world, decided that recent developments related to the treatment of striking workers were of such significance that they included Indonesia in a small select list of countries in which they called for significant changes to labour laws and practices. During this discussion the Workers' group of the ILO argued that:

"In the name of attracting investment, anti-union violence by police or with the acquiescence of police is once again on the rise, and public demonstrations and strikes are being suppressed[13]"

Examples of violence against striking workers cited by the ILO Workers' Group at the ILO in June 2016

In their submissions to the Committee on the Application of Standards, the Workers' group of the ILO drew attention to the following examples of violence against workers:-

- On 31 October 2013 an attack by "para-military" organisations on a peaceful demonstration demanding an increase in the minimum wage and elimination of outsourcing in Bekasi. It was claimed that police deployed to the site of the demonstration had not prevented the attacks by thugs armed with knives, iron rods and machetes. This attack resulted in injuries to 28 workers.
- In November 2014 workers on strike over the minimum wage had been severely beaten by police in Bekasi.
- In November 2014 workers in Bataam had been dispersed by tear gas and water cannons that had been positioned in advance by police. In Bintam, police attacked and injured several workers who were meeting in order to march to the local government employment office.
- On 30 October 2015, a lawful protest by 35.000 workers in front of the Presidential palace was dispersed by police with water cannons and tear gas. It was claimed that 23 workers were arrested. Heavily armed thugs were hired by employers' organisations to intimidate workers in the Medan North Sumatra region. In Jawa Timur members of the Federation of Indonesian Metalworkers were beaten unconscious by police. In the lead up to the national strike planned for 24-27 November, police had occupied offices of the

[13] A joint ILO – World Bank paper entitled 'Labour reforms in Indonesia: An agenda for greater equity and efficiency', November 2016

KSPI union in North Jakarta and put KSPI and the metal workers union branch offices under surveillance.

- On 25 November 2015 police had arrested five union leaders in the Bakasi Industrial Estates.
- In early 2016 rallies and demonstrations had been banned in several regions by local authorities.

Source: ILO Report of the Committee on the Application of Standards, (Part 2), May-June 2016. As reported in a joint ILO – World Bank paper entitled 'Labour reforms in Indonesia: An agenda for greater equity and efficiency', November 2016

Violations of workers' rights in Indonesia have continued since the 2016 case at the International Labour Conference:

- in 2017, 4,200 striking workers of PT Freeport at Grasberg Mine were laid off for taking strike action.

General Secretary of the Confederation of Indonesia Prosperity Trade Union (KSBSI), Eduard Marpaung, was charged for comments he made on the KSBSI Facebook page. Marpaung was summoned for interrogation on a systematic basis but was repeatedly denied access to the content of the complaint; in November 2017 he was sentenced to two years in prison and a fine of USD$7,345.A Memorandum of Understanding between the National Army of Indonesia and the Indonesian Police signed on 23 January 2018 made official the role of the army in suppressing labour disputes. Under the MoU, the scope of cooperation between the two forces included 'handling protests, labour strikes, unrest, social conflict, securing citizens and/or government activities that had conflict potential, and other situations that needed assistance.'[14]

Cost Benefit Analysis – The need for independent assessment

There is a lack of economic modelling and analysis concerning the impacts of these agreements on Australia's economy. The government has clearly not conducted a full independent empirical assessment of the economic impacts. Unions are concerned that the appropriate cost benefit analysis and impacts are just not being done.

DFAT is essentially 'marking their own homework' – this is not acceptable.

[14] https://www.ituc-csi.org/IMG/pdf/ituc-global-rights-index-2018-en-final-2.pdf

We have seen in other trade agreements the economic costs outweigh the benefits with significant effects on labour including job losses in certain sectors. It is important to carry out this analysis.

Charting a new course for Transparent and inclusive trade agreements

The IACEPA is a major undertaking with profound implications for both the Australian and Indonesian economy and society. It deals with a wide range of matters that are traditionally the preserve of national governments to determine through their own domestic, democratic parliamentary processes.

Yet the process to get to this point with a signed agreement being presented to the Australian Parliament for ratification leaves a lot to be desired. As appears to be the way with all trade agreements Australia is involved in, the IACEPA has been negotiated and finalised largely in secret and signed with very little, if any, public and parliamentary scrutiny up to this point.

The secrecy of the detail of these negotiations has meant that the occasional unauthorised leaking of text documents has been the only way stakeholders have gained access to documents that should have been the subject of open debate in the parliament and in the community throughout negotiations.

Only now, after the IACEPA agreement has been signed, does this Inquiry provide an opportunity for Parliament to properly scrutinise an agreement that has been years in the making.
If the experience of past trade agreements is any guide, the scope from here on for meaningful changes to be made to deficiencies with this agreement is limited. In the end, Parliament only votes on the implementing legislation, not the whole text. Essentially, it becomes an all or nothing proposition at that point in terms of ratification of the agreement.

The negotiating process for an agreement that Australia has already signed up to cannot be undone. What is done in that sense is done. However, the fact the IACEPA has been put together without a proper transparent and inclusive process for public input into negotiations should give this Inquiry and Parliament even greater cause to ensure the agreement is now subject to comprehensive scrutiny.

To this end, we call for an independent, external inquiry into the costs and benefits of the IACEPA. This inquiry should also take a lead role in advocating for reforms to the treaty-making process and future trade agreement negotiations to set a new standard both for the conduct of negotiations and for the process by which Australia enters into such agreements. The existing, flawed and inadequate process that we have seen with the IACEPA and other agreements does not have to be set in stone forever more.

The need for a more open and democratic process for trade agreements is more important than ever now because they are no longer simply tariff deals; increasingly they deal with an expanding range of other regulatory issues which would normally be debated and legislated through the democratic parliamentary process, and which have deep impacts on workers' lives.

In summary, we submit the following recommendations should be made for all future trade agreement processes:

- Prior to commencing negotiations for bilateral or regional trade agreements, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.

- There should be regular public consultation during negotiations, including submissions and meetings with stakeholders. The Australian government should follow the example of the European Union and release proposals and discussion papers during trade negotiations.

- The Australian Government should follow the example of the European Union and release the final text of agreements for public and parliamentary debate, and parliamentary approval before they are authorised for signing by Cabinet.

- After the text is completed but before it is signed, comprehensive, independent assessments of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation and review by parliamentary committees.

- An inquiry should review the text of a trade agreement which has been released before signing with the independent assessment of its costs and benefits, and make a recommendation to Parliament.

- Legal experts agree that the Executive power to enter into treaties is a prerogative power which can be abrogated or controlled by legislation. There is no constitutional barrier to Parliament playing a greater role in the treaty decision-making process. After release of the text and before signing, and after a review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should decide whether the Cabinet should approve the agreement for signing.

- If the agreement is approved by Parliament, and approved for signing by Cabinet, Parliament should then vote on the implementing legislation

Conclusion

The ACTU believes that trade agreements should have a rock-solid commitment to ensuring that provisions of trade agreements do not jeopardise Australian jobs, undermine working conditions, allow for exploitation or compromise the ability of current and future Australian governments to exercise their sovereign rights to regulate in the public interest.

Furthermore, there has been no independent Australian economic modelling of the specific costs and benefits of the IACEPA on the Australian economy. Nor have there been any independent studies of the health, environmental and gender impacts of the IACEPA in Australia.

There are also no commitments at all to implement internationally-agreed labour rights despite Indonesia's Governments checkered history in this area.

As a consequence, the ACTU recommends that the enabling legislation for the Indonesia-Australia Comprehensive Economic Partnership Agreement not be passed.

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