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Submission to the Joint Standing Committee on Treaties on the Indonesia-Australia Comprehensive Economic Partnership Agreement (IACEPA)

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1. Introduction and summary of recommendations

The Australian Fair Trade and Investment Network (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 and recognises 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 framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental protection.

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

AFTINET welcomes the opportunity to make this submission on the Indonesia-Australia Comprehensive Economic Partnership Agreement (IACEPA).

This submission will address our concerns relating to:

a) The lack of transparency and accountability in negotiations
b) The inclusion of Investor-State Dispute Settlement provisions and the failure to cancel the previous Indonesia-Australia investment Agreement
c) The inclusion of increased number of temporary workers who are vulnerable to exploitation
d) Lack of compliance with International human rights and labour rights law and environmental standards
e) The potential impact of the trade in services chapter on essential services
f) The potential risks of the electronic commerce chapter
g) The lack of independent evaluation of the economic and social impacts of the agreement

2. Summary of recommendations

2.1 The Committee should investigate why the old Indonesia-Australia Bilateral Investment Treaty has not been cancelled and insist on its cancellation before parliament votes on the implementing legislation.

2.2 Given the risks of ISDS to government policy and revenue, the IACEPA should not include ISDS.

2.3 The IACEPA should not include expansion of the numbers of temporary workers who are vulnerable to exploitation.

2.4 The IACEPA should include commitments from both governments to enforceable labour rights and environmental standards.

2.5 Given the risks of ISDS, increased numbers of temporary workers and lack of any commitment to labour rights and environmental standards, and in the absence of independent modelling of costs and benefits, the implementing legislation for the IAECEPA should not be approved.

3. The trade agreement process should be transparent, democratic and accountable

Australia's current procedure for negotiating and ratifying trade agreements is highly secretive and is not compliant with the basic democratic principles that underpin our domestic policy making processes. Trade negotiations are conducted in secret and neither the Parliament nor the wider public had input into, or oversight over, the development of Australia's negotiation mandate.

Negotiation texts are confidential throughout the negotiations and the final text of the agreements are not made public until after the government has made the decision to sign them. The decision to sign trade agreements lies with the Cabinet and is made before the text is tabled in Parliament. It is only after they have been tabled in Parliament that they are examined by the Joint Standing Committee on Treaties.

The National Interest Analysis (NIA) presented to the Committee is not independent but is conducted by the same department that negotiated the agreement. There are no independent human rights or environmental impact assessments. Parliament has no ability to change the agreement and can only vote on the implementing legislation.

A Senate Inquiry in 2015 entitled *Blind Agreement* criticised this process and made some recommendations for change. The Productivity Commission has made recommendations for the public release of the final text and independent assessments of the costs and benefits of trade agreements before they are authorised for signing by Cabinet. The EU has developed a more open process, including public release of documents and text during negotiations and release of texts before they are signed (Senate Foreign Affairs, Defence and Trade Committee 2015, EU 2015b, Productivity Commission 2010).

AFTINET's recommendations which support these and other changes were summarised in our submission to the Senate Inquiry. We support publication of negotiating texts, publication of the final text of agreements and independent evaluation of the economic, health, gender and environmental impacts of agreements before the decision is made to sign them. Parliament should vote on the whole text of the agreement, not just the implementing legislation (AFTINET 2015).

4. Investor-State Dispute Settlement process (ISDS)

The IACEPA includes Investor-state dispute settlement (ISDS) provisions that enable international investors to sue governments for compensation over changes to policy decisions that they can argue harms their investment.

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS gives additional legal rights to a single foreign investor (rights not available to local investors) to sue governments for damages in an international tribunal if they can claim that a change in national law or policy will harm their investment. Because ISDS cases are very costly, they are mostly used by large global companies that already have enormous market power, including tobacco, pharmaceutical, agribusiness, mining and energy companies.

In recent years, number of ISDS cases has increased to 942 reported cases in 2018 (United Nations Conference on Trade and Development (UNCTAD) 2019a) and more evidence has come to light about the flaws in the ISDS system. The critical debate has affected all sides of politics, more governments are withdrawing from ISDS arrangements, and the EU and the US are now negotiating agreements without ISDS.

3.1 Background and history

ISDS originated in the post-World War Two decolonisation period and was originally designed to compensate for nationalisation or expropriation of actual property, through bilateral investment treaties between industrialised and developing countries.

But over the last half century, the ISDS system has developed concepts like "indirect" expropriation, "minimum standard of treatment" and "legitimate expectations" which do not involve taking of property and do not exist in most national legal systems. These concepts enable foreign investors to sue governments for millions and even billions of dollars of compensation if they can argue that a change in domestic law or policy has reduced the value of their investment, and/or that they were not consulted fairly about the change, and/or that it did not meet their expectations of the regulatory environment at the time of their investment.

The World Trade Organisation does not recognise or include ISDS in its trade agreements, and it has only become a feature of other regional and bilateral trade agreements since the North American Free Trade Agreement in 1994.

There have been increasing numbers of cases against health, environment other public interest laws and policies.

3.2 ISDS Tribunals not independent, no precedents or appeals

Many experts including Australia's former High Court Chief Justice French and investment law experts have noted that ISDS tribunals are not independent or impartial and lack the basic standards of national legal systems (French 2014, Kahale 2014, Kahale 2018).

ISDS has no independent judiciary. Tribunals are organised by one of two institutions, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID). Tribunals for each case are chosen by investors and governments from a pool of investment lawyers who can continue to practice as advocates, sitting on a tribunal one month and practising as an advocate the next. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest. ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider, and appeal mechanisms to ensure consistency of decisions.

Leading international investment law expert and practitioner George Kahale has recently criticized ISDS in an April 2018 lecture at the Brooklyn Law School titled **"**The wild, wild west of international arbitration law" (Kahale 2018).

Kahale uses examples from his own experience representing governments in ISDS cases to argue that the ISDS system based on commercial arbitration principles is not fit to arbitrate cases in which international companies seek compensation from governments for changes in health, environment or other public interest laws.

Kahale says, "It's one thing to have party-appointed arbitrators negotiate a decision to settle a commercial dispute having no particular significance beyond the case at hand ... it is quite another to decide fundamental issues of international law and policy that affect an entire society" (Kahale 2018: 7).

Adding "there really are no hard and fast rules" in ISDS, he cites examples of claims of billions of dollars based on false documents, methodologies for calculations of future corporate income which are unacceptable in World Bank accounting practice, and similar claims before different tribunals resulting in inconsistent decisions (Kahale 2018: 14).

He notes the growth of third-party funding of ISDS cases, in which speculative investors fund cases in return for a share of the claimed compensation, and argues they fuel the growth of “surrealistic” claims and are "more about making money than obtaining justice" (Kahale 2018:17).

3.3 Recent ISDS cases on medicines, environment, carbon emissions reduction, Indigenous land rights, minimum wage

The most comprehensive figures on known cases, compiled by the United Nations Conference on Trade and Development (UNCTAD), show that there has been an explosion of known ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 to 942 in 2018. Most cases are won by investors or settled with concessions from governments (UNCTAD 2019a and UNCTAD 2019b).

There are growing numbers of cases against health, environment (including laws to address climate change), Indigenous land rights and other public interest laws. Recent cases include the following:

- The US Philip Morris tobacco company shifted assets to Hong Kong and used ISDS in a Hong Kong investment agreement to claim billions in compensation for Australia’s plain packaging law. It took over 4 years and $24 million in legal costs for the tribunal to decide that Philip Morris was not a Hong Kong company, and the case was an abuse of process, and the government only recovered half the costs (Ranald 2019).
- US Pharmaceutical company Eli Lilley used the ISDS provisions of NAFTA to claim compensation for a Supreme Court decision that found a medicine was not sufficiently different from existing medicines to deserve a patent, which gives monopoly rights for at least 20 years. Canada has a higher standard of patentability than the US and some other countries. The Canadian government won the case after six years and $15 million in costs, but the tribunal decision was ambiguous on some key points about Canada’s right to have distinctive patent laws (Baker 2017).
- The US Bilcon mining company won US$7million plus compound interest from 2007 in compensation from Canada because its application for a quarry development was refused for environmental reasons (Withers 2019, Permanent Court of Arbitration, 2019) The Canadian Federal Court found that this impinged on Canada’s “ability to regulate environmental matters” but could do nothing to change the decision (Mann 2018).
- The US Westmoreland mining company is suing the Canadian government over the decision by the Alberta province to phase out coal-powered energy as part of its emission reduction strategy (UNCTAD 2019d).
- The Canadian Bear Creek mining company recently won $26 million in compensation from the government of Peru 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. The tribunal essentially rewarded the company despite the fact that it had violated its obligations in the ILO Convention on Indigenous Peoples to which Peru is a party (International Centre for Settlement of Investment Disputes (ICSID) 2017)
- The French Veolia Company sued the Egyptian Government over a local government contract dispute in which they claimed compensation for a rise in the minimum wage. This claim eventually failed but it took seven years and the costs to the Egyptian government have not been made public (Breville and Bulard 2014, UNCTAD 2019 e).

Note that these examples include cases against court decisions and government laws and policies at national, state and local levels.

3.4 ISDS cases cost governments millions to defend, even if they win

Companies and governments fund the arbitration costs and their own legal costs. ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. A 2012 OECD Study found ISDS cases last for three to five years and the average cost to governments for defending cases was US$8 million per case, with some cases costing up to US$30 million. A more recent UNCITRAL paper indicated that ISDS costs are still a major concern (Gaukrodger and Gordon 2012, UNCITRAL 2018).

ISDS tribunals have discretion about whether they decide to award some or all costs to the winning party, and applying for costs to be awarded prolongs the duration and costs of the case.

This differs from national systems. The Australian Government defeated the Philip Morris tobacco company's High Court claim for billions in compensation, and the High Court ordered the company to pay all of Australia's costs. The case and costs decision took less than a year.

Contrast this with the ISDS experience. Australia also won the 2011 Philip Morris ISDS case against our plain packaging law in 2015, but the costs were not awarded until 2017. Only half of Australia's almost A$24 million in legal and arbitration costs were awarded to Australia, despite the fact that the tribunal found that Philip Morris had abused the process (Ranald, 2019).

3.5 United Nations criticism of ISDS: not compatible with human rights

In September 2015, United Nations Human Rights independent expert Alfred de Zayas launched a damning Report which argued strongly that trade agreements should **not** include ISDS (DeZayas 2015).

The Report says ISDS is incompatible with human rights principles because it "encroaches on the regulatory space of States and suffers from fundamental flaws including lack of independence, transparency, accountability and predictability".

In April 2019, six UN special rapporteurs on human rights wrote an open letter identifying similar fundamental flaws in the ISDS system, and arguing for systemic change (Deva et al, 2019).

3.6 The Australian experience of ISDS and previous Australian policy

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico in the North American Free Trade Agreement, the Howard Coalition government did not include ISDS in the US-Australia Free Trade Agreement in 2004.

In 2010 a Productivity Commission study found that ISDS gives additional legal rights to foreign investors not available to domestic investors and lacked evidence of economic benefits. The study recommended against the inclusion of ISDS in trade or investment agreements on the grounds that it poses "considerable policy and financial risks" to governments (Productivity Commission 2010:276-277). The then ALP government developed a policy against ISDS during the years 2011-2013 and did not include it in trade negotiations (Tienhaara and Ranald, 2011).

A June 2015 Productivity Commission study of ISDS confirmed the findings of its 2010 study (Productivity Commission 2015).

3.7 The Philip Morris case against Australia's tobacco plain packaging law

in 2012 the US Philip Morris tobacco company lost its claim for compensation for Australia's 2011 plain packaging legislation in the Australian High Court and was ordered to pay all of the government's costs.

The company could not sue under the Australia-US Free Trade Agreement because the Howard government had not agreed to include ISDS in that agreement. The company moved some assets to

Hong Kong, claimed to be a Hong Kong company and used the 1993 Hong Kong-Australia Investment Agreement to sue the Australian government. It took over four years for the ISDS tribunal to decide in December 2015 that Philip Morris was not a Hong Kong company and that its case was an "abuse of process" (Tienhaara 2015).

The Australian government applied for costs, but was only awarded a proportion of the costs by the tribunal in 2017. However, the total costs and proportion awarded to Australia were blacked out of the tribunal decision. It took another two years and two FOI cases to reveal that the legal and arbitration costs were almost A$24 million, but Australia was awarded only half of its costs, with the cost to taxpayers remaining at almost A$12 million (Ranald 2019).

The substantive issue of whether the company deserved billions of dollars of compensation because of the legislation was not tested.

Even so, the case had a freezing effect on other governments' introduction of plain packaging legislation. The New Zealand government delayed introducing its own legislation pending the tribunal decision (Johnstone 2015).

International corporations are well aware of this freezing effect and use ISDS to attempt to prevent public interest regulation. The Canadian Chevron Company has lobbied for ISDS to be included in EU trade agreements as a deterrent against environmental protection laws (Nelson 2016).

In short, ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors. They have been used to claim compensation for new public interest regulation and to deter governments from introducing such regulation, including regulation to address climate change and to improve the minimum wage. Many developing country governments, including Brazil, India, South Africa and Indonesia have reviewed and/or cancelled their ISDS commitments (Filho 2007, Biron 2013, Uribe 2013, Mehdudia 2013, Bland and Donnan 2014).

3.8 EU and US governments are retreating from ISDS

Both the EU and the US governments have in the past been major proponents of ISDS. However, recently there have been increasing numbers of cases taken against changes to EU and US government laws and policy decisions, and there has been an enormous growth in public opposition to ISDS. Opposition has been expressed by legal experts, state and provincial governments, court decisions and the general public**.** Both the EU and the US are now retreating from ISDS in trade negotiations.

The EU

The use of ISDS by the Swedish company Vattenfall to sue the German government over the phasing out of nuclear energy, and the inclusion of ISDS in proposed trade agreements with Singapore, Canada and the US prompted fierce public debate. In 2014, the European Commission launched an online public consultation on ISDS. The consultation received over 150,000 submissions, the majority of which were critical of ISDS. (Donnan and Wagstyl 2014, European Union 2015a).

The ongoing debate about ISDS has led to several EU court cases in which national governments have challenged the ability of the EU to make collective commitments on ISDS on behalf of national governments without such commitments being subject to democratic processes in each country.

On 16 May 2017, the Court of Justice of the European Union issued a landmark opinion on the investment and ISDS clauses in the EU-Singapore free trade agreement. It found that most of the agreement fell under the EU's powers, and that the EU could ratify it on behalf of member countries, except for some investment provisions, including ISDS. The court found that EU Member States'

national and regional parliaments and the European Parliament must vote on provisions regarding investors, particularly ISDS (Court of Justice of the European Union 2017).

In March 2018, in a separate case brought by the government of Slovakia, the Court of Justice found that ISDS between EU governments is incompatible with EU law. The Court found that damages awarded to a Dutch private health insurance company against Slovakia by an ISDS tribunal breached EU law (Court of Justice of the European Union 2018).

The 28 EU member states decided in January 2019 to terminate all Bilateral Investment Treaties between themselves by December 6, 2019 (EU Member States 2019).

Following the court decisions, the European Commission has developed a "fast track" process for agreements without ISDS for non-EU countries, which would enable them to be approved by the European Commission alone, without seeking approval from national parliaments. Such agreements cannot include ISDS (Von der Burchard 2017).

The EU-Australia FTA now being negotiated does not include ISDS.

The EU is pursuing longer-term but equally controversial proposals for a Multilateral Investment Court (Van Harten 2016).

The US

Over the last three years, there has also been strong public opposition expressed in the US to the inclusion of ISDS in trade agreements from state governments and legal experts, which has influenced state and national governments.

In February 2016 the National Conference of State Legislatures declared that it "will not support Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters that provide greater substantive or procedural rights to foreign companies than U.S. companies enjoy under the U.S. Constitution. Specifically, NCSL will not support any BIT or FTA that provides for investor/state dispute resolution. NCSL firmly believes that when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors' previous expectations" (National Conference of State Legislatures 2016).

In October 2017, more than 200 prominent law professors and economists signed an open letter arguing that ISDS undermines the rule of law and urging the US government to oppose ISDS in its renegotiation of the North American Free Trade Agreement (NAFTA). Signatories included Nobel laureate Joseph Stiglitz, former Labor Secretary Robert Reich, former California Supreme Court Justice Cruz Reynoso and Columbia University professor and UN Senior Advisor Jeffrey Sachs (Public Citizen 2017).

The US and Canada have since excluded ISDS from the revised US Mexico Canada Agreement (International Institute for Sustainable Development 2018).

3.9 Ongoing reviews conducted by ISDS institutions reflect community concerns about ISDS

Growing community concern about ISDS has also had an impact on the two institutions that oversee ISDS arbitration systems, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID), both of which are conducting ongoing reviews of the system.

The November 2017 discussion paper for the UNCITRAL review involving member states, identified the following issues:

> "(i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties ("party-

> appointment"), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns … have been said to undermine the legitimacy of the ISDS regime and its democratic accountability" (UNCITRAL 2017:6).

UN Human Rights Rapporteurs and hundreds of civil society groups have made submission to the UNCITRAL review criticising the fundamental imbalance of power in the ISDS system, as have sixty-five academics from around the globe (Deva *et al* 2019, Civil Society Groups 2019, Academics 2019).

A recent paper from the South Centre says there is a growing international consensus to fundamentally reform ISDS, and that developing countries are under-represented in the UNCITRAL process (South Centre 2019).

The UN Conference on Trade and Development also recognises that there is a new trend to limit companies' access to ISDS, by omitting ISDS from trade and investment treaties altogether, limiting treaty provisions subject to ISDS and excluding policy areas from ISDS coverage (UNCTAD 2019b).

In October 2016, the Secretariat of ICSID initiated a consultation with its Member States, which identified some similar areas of concern to the UNCTAD review. The review is ongoing (ICSID 2016).

3.10 ISDS in the IACEPA and failure to cancel old ISDS agreement

The DFAT NIA claims that IACEPA includes "modern ISDS provisions" which have more exclusions and safeguards and more transparent procedures than previous versions of ISDS (DFAT 2019b: 17).

There is such a version of ISDS in the IACEPA.

However, the only clear exclusions which prohibit ISDS cases are in some specific areas of health regulation. These relate to Medicare, the Pharmaceutical Benefits Scheme, the Therapeutic goods Authority and the Office of the Gene Technology Regulator (DFAT 2019a, Article 14.21: 152).

Tobacco regulation is **not** specifically excluded. This is not consistent with the TPP-11, the revised Singapore- Australia FTA and the recent Hong Kong agreement, which do exclude tobacco regulation. We note that Indonesia has a tobacco industry and was a party to the government-to-government WTO dispute against Australia's plain packaging legislation (WTO 2018). It therefore seems extraordinary that Australia would not have sought to exclude cases against future tobacco regulation, as it has done in the Hong Kong and other Agreements.

Other more general safeguards in IACEPA will not actually prevent ISDS cases against changes in other public interest regulation, like environmental laws to address climate change or new industrial laws. They may provide governments with more defensive arguments, but governments will still have to spend years and millions of dollars defending cases.

Old Investment agreement not cancelled

However regardless of the ISDS provisions in the IACEPA, the biggest risk of ISDS cases comes from the fact that there are no provisions to cancel the old 1993 Indonesia-Australia bilateral investment agreement, which will remain in force alongside the new agreement (DFAT 1993).

The DFAT NIA is misleading, because it does not mention this fact, but claims credit for more public interest safeguards in the new agreement.

The older versions of ISDS in bilateral investment agreements had no exceptions or safeguards at all for public interest laws. That is why the Philip Morris tobacco company chose the 1993 Australia-Hong Kong investment agreement when it sued Australia over our 2011 plain packaging law.

In other recent trade deals, like the TPP-11, the Hong Kong FTA, and the Uruguay Investment Agreement the government has cancelled these old investment agreements, claiming that the new

deals have more safeguards and exclusions for specific public health regulation, including tobacco regulation. The claim is that cancelling the old agreements in favour of the new ones would make it more difficult for corporations to claim compensation for these laws.

But the 1993 Indonesia agreement has no exclusions or safeguards at all. This means that corporations will have a choice of using ISDS in the old agreement, which has no exclusions, rather than ISDS in the new agreement, which has some exclusions. Obviously they are likely to choose to use the old agreement, which has less defences for government. This makes a nonsense of the exclusions the government is claiming credit for.

Recommendations

- **The Committee should investigate why the old Indonesia-Australia Bilateral Investment Treaty has not been cancelled and insist on its cancellation before parliament votes on the implementing legislation.**
- **Given the risks of ISDS to government policy and revenue, the IACEPA should not include ISDS.**

5. Movement of natural persons (temporary workers)

Australia is a nation built on immigration and has a permanent migration scheme which has created our vibrant multicultural society. AFTINET strongly support the permanent migration scheme. Permanent migrants have the same rights as other Australians. Their employment is not dependent on the sponsorship of one employer and they cannot be deported if they lose their employment.

Temporary work visas for overseas workers were originally designed to address specific skills shortages, and were subject to local labour market testing to establish whether there was a skills shortage. However, there are now many different forms of temporary work visas, including the Temporary Skill Shortage (TSS) Visa, training visas, working holiday visas, seasonal work visas and student visas (the latter permit a limited number of working hours).

The number of temporary workers utilizing these visas has greatly increased. There were over 800,000 temporary visa workers in Australia in 2018 (Mares, 2018).

Temporary workers are in a far weaker bargaining position than permanent migrants because they are sponsored by a single employer and loss of their employment can lead to deportation. This leaves them vulnerable to exploitation.

Increases in numbers of temporary migrant workers are now being included in trade negotiations.

AFTINET opposes the inclusion of temporary worker provisions in trade agreements because it treats workers as if they were commodities and removes policy flexibility. Governments should always retain their ability to regulate labour market policies, which need constant adjustment to ensure workers are not exploited. The inclusion of these provisions in legally binding trade agreements removes such flexibility.

Academic studies comparing various recent trade agreements have demonstrated that a range of governments are using temporary work visas as a means of deregulating labour markets. Such arrangements create groups of workers with less bargaining power who are more vulnerable to exploitation because loss of their employment can lead to deportation (Rosewarne 2015, Howe 2015).

Recent Australian studies have provided more evidence of the exploitation of temporary workers. The Fair Work Ombudsman reported that temporary visa holders accounted for one in 10 complaints to

the agency in 2015. In the three years from 2012, the agency dealt with 6,000 complaints and recovered more than $4 million in outstanding wages (Toscano 2015).

The Senate inquiry into temporary work visas also provided similar evidence (Senate Standing Committee on Education and Employment 2015).

More recent evidence was provided to the Joint Parliamentary Committee Inquiry into a Modern Slavery Act (Joint Committee on Foreign Affairs, Defence and Trade 2017).

A survey by UNSW academics found temporary migrant workers experienced widespread wage theft (Berg and Farbenblum 2017).

A study published this year, by Professor Joanna Howe and others commissioned by the horticultural industry showed widespread exploitation and wage theft in the horticultural industry, which is entirely dependent on temporary workers, the majority on working holiday visas (Howe *et al*, 2019).

The evidence from all 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.

4.1 IACEPA Provisions on Temporary Workers

The DFAT NIA states that the agreement only removes labour market testing for business visitors, intra-corporate transferees and independent executives, and does not contain such arrangements for contractual service providers, which is a much larger group of skilled workers (DFAT 2019b:14). This is an incomplete summary of the current commitments in the chapter text on the Movement of Natural Persons

The summary is incomplete because the NIA fails to mention that Article 12.9 commits to negotiate arrangements over the next three years for increased numbers of contractual service providers (DFAT 2019a:112). These workers would enter under the Temporary Skill Shortage visa which covers over 400 skilled occupations.

The NIA also fails to mention a separate side letter that commits Australia upon ratification of the agreement to an additional 4,000-5000 temporary Working Holiday Maker visas per year, and a Memorandum of understanding that provides up to 200 training visas per year (DFAT 2019a, Side Letter on Working Holiday Maker visas).

The research studies quoted above found all of these three categories of temporary workers have been highly exploited, because they are dependent on a single employer and can be deported if they lose the job.

For example, the horticulture industry commissioned a study of horticultural workers by Professor Joanna Howe and other academics because of widespread reports of exploitation in the industry. The study found that that the Working Holiday Maker (WHM) 417 visa program, which supplies the majority of horticultural workers, has been associated with a significant incidence of horticultural worker exploitation, including underpayment of wages and poor conditions of work, and workers being overcharged for accommodation, food or transport (Howe *et al* 2019: 96-98).

The study quotes a workplace Ombudsman inquiry into the industry which found that

> "Amongst the many instances of non-payment and underpayment of wages found in the course of the Inquiry, of greatest concern is the disclosure of a cultural mindset amongst many employers wherein the engagement of 417 visa holders is considered a license to determine the status, conditions and remuneration levels of workers without reference to Australian workplace laws." (Howe *et al*, 2019: 98).

This study cautions against proposals for expansion of the existing scheme

> "Given the inherent existing vulnerability of these migrant workers, and the absence of any dedicated labour market protections for WHMs, it is likely that these changes [expansion of the scheme] will lead to an increased incidence of non-compliance in relation to wages and conditions of work ."(Howe *et al*, 2019: 100).

The study makes a series of recommendations for change, including changes to the visa conditions, and for specific regulation and inspection resources to expose and reduce exploitation of workers (Howe *et al*, 2019: 114-6).

Given these findings, the Australian government should not be making commitments in IACEPA to increase the numbers of vulnerable working holiday visa workers which will be difficult to change. Governments should retain the flexibility to respond to the demands from both reputable employers and unions for appropriate regulation and inspection regimes to stop wage theft and exploitation in the industry.

Recommendation

- **The IACEPA should not include expansion of the numbers of temporary workers who are vulnerable to exploitation.**

6. Lack of compliance with international human rights and labour rights law and environmental standards

There are no commitments in the agreement relating to international laws and standards relating to human rights, labour rights, women's rights, the right to health, the right to privacy and the environment.

The NIA does not include an assessment of the potential impacts on human rights and the environment and no independent human rights and environment impact assessment has publicly released.

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)

There should also be national standards for maximum hours of work and health and safety standards based on ILO standards.

The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement.

Trade agreements should also require full compliance with an agreed-upon set of Multilateral Environmental Agreements, including the Paris Agreement, with effective sanctions for non-compliance.

At the same time, trade agreements must ensure that other provisions, such as investor-state dispute processes, do not undermine the ability of governments to regulate in the interest of protecting the environment.

Trade policy must also work cohesively with measures to address climate change. Trade agreements should not restrict governments' ability to adopt measures to address climate change.

The implementation of environmental standards should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation

- **The IACEPA should include commitments from both governments to enforceable labour rights and environmental standards.**

7. Trade-in-Services Chapter: negative list and ratchet structure restrict future government regulation

The trade in services chapter includes a number of provisions that open up services to international investment and that can restrict regulation of services. The chapter does not require privatisation of public services but can make it more difficult to re-regulate or re-establish public provision if privatisation fails.

The negative list and ratchet structure

The chapter uses a negative list structure, which means that all services are covered by the agreement unless they are specifically excluded in Annexes I and II. It also follows a "ratchet" structure, which means that regulation of services is treated as if it were a tariff and is frozen at existing levels or reduced over time. Regulation cannot be increased in future unless it is excluded under Annex II of the agreement.

Under the negative list governments must specifically exclude service sectors, laws and regulation that they do not want to be covered by the agreement. Annex I 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 II 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.

Restrictions on regulatory space

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 erodes governments regulatory power, limiting policy space available to respond to changed circumstances or to implement alternative policy proposals. The adoption of a 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.

For example, the recent failure of deregulation and privatisation of Australian vocational education services resulted in government reregulation of those services late in 2016 (Conifer 2016). Without

very specific exclusions for specific services, the ratchet structure in this agreement could prevent such reregulation in the future.

Governments are also responding to the need for new forms of regulation of energy markets and carbon emissions to respond to climate change. Future governments will need to have the flexibility to adjust such policies as new evidence emerges. This flexibility should not be reduced by restrictions on new regulation.

The inclusion of the negative list may mean that Governments may not be aware of the implications of the inclusion of all services in the agreement, or of the need to specify very detailed exclusions if they want to maintain policy flexibility for particular services or respond to new developments.

Market access provisions

Market access provisions in Article 9.5 prevents 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 (DFAT 2019a:68).

This may limit planning for the distribution of services and staffing levels in services like childcare and aged care.

Domestic Regulation and Recognition provisions

Domestic Regulation and Recognition provisions in Article 9.7-8 create obligations for governments on the domestic regulation of services to ensure that regulations for licensing, qualifications and technical standards are "reasonable" (Article 9.8.1) and do not constitute "a restriction on the supply of the service" (Article 9.8.4b) (DFAT 2019a:68-70)

This could have an impact on future government action to regulate to lift qualifications in areas like childcare and aged care, if suppliers can argue that the standards are unreasonable or restrictive.

6.1 Exclusion for Public services is inadequate

The exclusion of public services in Article 9.2.2(c) 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" (DFAT 2019a Article 9.1:65-66). In 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.

6.2 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 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 the investment chapter, and do not exclude ISDS claims.

What this means in practice is a potential double whammy of state-to-state and ISDS disputes. This is demonstrated by the example of the need to re-regulate Australian vocational education services after the failure of deregulation and privatisation in 2016 described above. If an agreement with similar provisions had already been in place, and private vocational education services were not fully covered by an Annex ll exception, the partner government could have invoked the state-to-state dispute mechanism to prevent reregulation.

Even if there were an effective exclusion from state-to-state disputes, this would not prevent the possibility of an ISDS dispute. This is demonstrated by the example of the need to re-regulate Australian vocational education services after the failure of deregulation and privatisation in 2016 described above. If an agreement with ISDS provisions had already been in place, and there had been

a foreign provider from one of the partner countries, the provider could have used ISDS provisions to claim compensation for alleged loss of the value of its investment.

8. Electronic commerce

Electronic commerce is a complex area of trade law that is directly tied with provisions relating to financial services and broader trade in services. The e-commerce agenda is highly influenced by the US tech industry lobby and e-commerce rules seek to codify the tech industry wish list known as the Digital2Dozen principles (Office of the United States Trade Representative 2016).

Australia is increasingly including more extensive provisions on e-commerce in recent trade agreements. There is significant concern about the lack of analysis undertaken by the Australian government regarding the impact that these rules could have on a human rights and our ability to govern the digital economy (Greenleaf 2018).

The aim of e-commerce rules is to secure the free flow of cross-border data and to establish an international regulatory framework that prevents governments from regulating the digital domain and the operations of big tech companies. This is particularly concerning given the recent issues arising from the lack of regulation of digital platforms and the business practices of big tech companies including:

- Facebook and Google's data abuse scandals (Waterson 2018, MacMillan and McMillan 2018);
- Uber classifying itself as as a technological platform to avoid regulation and enable its exploitation of workers (Bowcott 2017);
- Apple's tax avoidance (Drucker and Bowers 2017);
- Anti-competitive practices by Facebook, Google and Amazon (Ho 2019).

The Australian Competition and Consumer Commission (ACCC) completed its inquiry into the impact of digital platforms in July this year. The report made 23 recommendation for government action, including regulatory change, 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 (ACCC 2019).

Some provisions in the IACEPA appear could come not conflict with the ACCC findings and could restrict the government's ability to implement the recommendations from the report.

The NIA notes that the Electronic Commerce chapter commits parties to the free flow of data across borders and not to make more restrictive any current measures that require data to be stored locally (DFAT 2019b: 14).

These provisions could undermine the government's future ability to protect privacy if companies move personal data to jurisdictions where privacy laws are more limited, as privacy requirements are determined by the country where the data is stored not the country where it originated.

Article13.7.2 requires a "legal framework that provides for the protection of the personal information" but there are no minimum standards for this legislation (DFAT 2019a:133).

Article 13.13 prevents governments from requiring companies to transfer or give access to their source code (DFAT 2019a: 136). This can prevent governments from reviewing source code or algorithms in response to potential race, gender, class or other biases. This is of particular concern given the growing evidence that algorithms "are inescapably value-laden. Operational parameters are specified by developers and configured by users with desired outcomes in mind that privilege some values and interests over others" (Mittelstadt et al 2016: 1).

9. Conclusion

There has been no independent Australian economic modelling of the specific costs and benefits of the IACEPA on the Australian economy as a whole measured by GDP despite advice from key bodies like the Productivity Commission and the Australian Competition and Consumer Commission that such studies should be done.

Nor have there been any independent studies of the health, environmental and gender impacts of the IACEPA in Australia.

This submission has documented the risks to Australia of the inclusion of ISDS provisions and the failure to commit to the cancellation of the old Indonesia-Australia Bilateral Investment Treaty.

We have also documented the risks of expansion of the numbers of temporary workers who are vulnerable to exploitation, particularly the expansion of numbers of working holiday visas in the horticultural industry required by IACEPA.

There are no commitments at all to implement internationally-agreed labour rights and environmental standards.

There are also risks in Trade in Services chapter which restricts future government regulation of essential services, and in the Electronic Commerce Chapter which could restrict future government regulation of large technology companies recommended by the ACCC.

Recommendation:

- **Given the risks of ISDS, increased numbers of temporary workers and lack of any commitment to labour rights and environmental standards, and in the absence independent modelling of costs and benefits, the implementing legislation for the IAECEPA should not be approved.**

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